Texas Wesleyan Law Review

Volume 19 | Issue 3 Article 6

3-1-2013

The Texas "Parking Lot" Law: Why Overbroad Legislative Drafting Makes Chapter 52 of the Texas Labor Code Uniquely Susceptible to Constitutional Challenges After the New OSHA Workplace Violence Regulations

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NOTES & COMMENTS

THE TEXAS "PARKING LOT" LAW: WHY OVERBROAD LEGISLATIVE DRAFTING MAKES CHAPTER 52 OF THE TEXAS LABOR CODE UNIQUELY SUSCEPTIBLE TO CONSTITUTIONAL CHALLENGES AFTER THE NEW OSHA WORKPLACE VIOLENCE REGULATIONS

*By: Brian G. Redburn**

ABSTRACT

Texas is now one of eighteen states to enact a so-called "parking lot" law,[1] *which prohibits most employers from banning firearm storage in employee-owned vehicles parked on employer campuses. Because of the legislation's broad drafting, most Texas employers must now extend firearm storage privileges to a surprisingly wide range of citizens, many of whom are potentially unfit to possess firearms in public. Among the people now authorized to bring their guns to work are unlicensed handgun owners and people with significant criminal histories who have evaded common-sense gun possession restrictions through the state's deferred adjudication sentencing practices.*

This Note examines litigation over similar laws in Florida and Oklahoma, and why, in light of new Occupational Safety & Health Administration regulations, the mostly approving outcomes in those states could nonetheless signal constitutional challenges on the horizon for the Texas law. This Note explores how the Texas parking lot law's overbroad construction and built-in incentives for employers to adopt lax safety practices could lead to both constitutional due process claims and preemption challenges by way of the federal Occupational Safety & Health Act's general duty clause. Finally, this Note proposes some legislative amendments to avoid these constitutional problems, as well as some suggested employer practices to mitigate the potential for general duty clause violations and gross negligence liability in certain high-risk workplaces.

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* J.D. Candidate, Texas Wesleyan University School of Law, May 2013. Dedicated to my wife, Maria, and my children, Katie, Aly, Bryson, and Lily in recognition of their loving support and remarkable patience, without which my academic pursuits would not have been possible.

1. WILLIAM E. HARTSFIELD, INVESTIGATING EMPLOYEE CONDUCT I22 app. (Westlaw 2012) (Weapons in the Workplace).

DOI: https://doi.org/10.37419/TWLR.V19.I3.4

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I. INTRODUCTION

In 2011, The Texas Legislature enacted Senate Bill 321, later codified in chapter 52 of the Texas Labor Code, which prohibits most employers from making policies that ban employees from storing

firearms on the employer's campus, provided that any firearm stored on an employer's property remains in a locked vehicle.[2] Observing that the right to self-defense does not end at an employer's parking lot, proponents of the legislation argued that the change in law was necessary to preserve the citizens' right to be free from violent attack while commuting to and from work.[3] Significantly, the law, which went into effect September 1, 2011, allows not only those persons licensed to carry concealed handguns under chapter 411 of the Texas Government Code to store guns on an employer's campus, but also those "who otherwise lawfully [possess] a firearm."[4]

This Note discusses the reasons why the Texas Legislature, in its haste to expand citizen gun rights, failed to adequately safeguard Texas workplaces against certain unlicensed employees who may be unsuitable to possess firearms away from their homes. This suspect segment of the workforce includes individuals unlicensed to carry a concealed firearm, and who, despite having one or more impediments that would disqualify them from receiving a concealed handgun license, may nevertheless "otherwise lawfully possess" a firearm and store it on their employer's property. The new law severely limits an employer's ability to protect itself from workplace gun access by employees who would not qualify for a concealed handgun license, including criminals who have served deferred adjudication sentences for felonies and persons with violent misdemeanor convictions.[5]

Although self-preservation is an appealing policy justification for this enactment, it does not necessarily follow that the right to self-defense encompasses the unrestricted right to bear arms on the private property of another.[6] Traditionally, property owners in this nation have enjoyed extensive authority to control not only who may enter upon private property, but also the activities of those granted permission to enter.[7] For example, one of the most fundamental of the "Bundle of Sticks" rights enjoyed by property owners is the power to exclude unwanted people and activities.[8] In this sense, the 2011

2. TEX. LAB. CODE ANN. § 52.061 (West 2011).

3. *Texas Employee/Parking Lot Protection Bill Takes Effect September 1!*, NAT'L RIFLE ASS'N-INST. FOR LEGISLATIVE ACTION (Aug. 30, 2011), www.nraila.org/legislation/state-legislation/2011/8/texas-employeeparking-lot-protection-b.aspx?s=&st=10507&ps=.

4. § 52.061.

5. *Compare* qualifications for concealed handgun licensees in TEX. GOV'T CODE ANN. § 411.172 (West 2011), *with* the broad range of persons impliedly authorized to transport concealed guns in vehicles under TEX. PENAL CODE ANN. § 46.02 (West 2011).

6. District of Columbia v. Heller, 554 U.S. 570, 626 (2008) (observing that the right to bear arms does not include the right to bear any kind of arms, in any manner, and for any purpose).

7. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982).

8. *Id.*

Texas Labor Code amendments directly infringe on the private property rights of most employers, implicating the need for a careful balancing of interests between employees who wish to keep firearms for self-defense and their employers that have a paramount concern for workplace safety.

Moreover, because the statute unreasonably extends firearm storage privileges to high-risk individuals, both the limitations on employer liability provisions in section 52.064 of the Texas Labor Code and the "otherwise lawfully possesses" clause in section 52.061 are arguably preempted by the Occupational Safety & Health Act's ("OSH Act") general duty clause, which requires employers to "furnish a workplace free from recognized hazards."[9] Although general duty clause preemption challenges to similar "parking lot" statutes have been rejected in Oklahoma and Florida,[10] the rationale for upholding those states' parking lot laws would not apply to similar challenges to the Texas statute.

Part II of this Article provides a snapshot view of the recent workplace violence trends in America. Part III examines the Texas statutory landscape that gives rise to the widespread, yet lawful, unlicensed possession of firearms in vehicles. Part IV analyzes the litigation over the Florida and Oklahoma parking lot laws and explains why most of the provisions in those states' statutes were ultimately upheld. Part V contrasts the Texas parking lot law with the rationale of those court decisions, and it identifies the law's susceptibility to constitutional challenges of substantive due process and federal preemption by the OSH Act. Finally, Part VI concludes with proposed legislative and employer-enacted remedies to resolve the dilemma created for employers by this legislation, and it makes the case that firearm storage privileges on employers' campuses should be limited strictly to concealed handgun licensees.

II. WORKPLACE VIOLENCE IN AMERICA

Violence in the American workplace has been trending downward in recent years.[11] In fact, non-fatal workplace violence declined 35% between 2002 and 2009, and 62% between 1993 and 2002.[12] This decline is attributable in part to widespread, comprehensive workplace anti-violence policies instituted by employers in the 1990's.[13] In spite

9. 29 U.S.C. § 654(a) (2006).

10. Ramsey Winch, Inc. v. Henry, 555 F.3d 1199 (10th Cir. 2009); Fla. Retail Fed'n, Inc. v. Attorney Gen. of Fla., 576 F. Supp. 2d 1281 (N.D. Fla. 2008).

11. Erika Harrell, *Special Report, Workplace Violence, 1993-2009, National Crime Victimization Survey and the Census of Fatal Occupational Injuries*, U.S. DEP'T OF JUSTICE, 1 (Mar. 2011), http://bjs.ojp.usdoj.gov/content/pub/pdf/wv09.pdf.

12. *Id.* at 1–2.

13. Roberto Ceniceros, *Stricter Company Policies Help Lower Number of Homicides in Workplace; Training, Early Intervention Can Keep Violence From Escalating*,

of this positive trend, workplace violence nevertheless remains a significant concern for employers. In 2009, there were 521 workplace homicides in the United States.[14] Eighty percent of workplace murders involved firearms, and 21% of the perpetrators were co-workers or former co-workers of the victims.[15]

Workplace violence in Texas has generally followed the overall national trend in the same period; however, the state's workplace homicide rate in the last five years has been erratic, unpredictable, and, at times, not necessarily representative of the national downward trend.[16] For example, there were seventy workplace homicides in 2007, fifty-five in 2008, sixty-nine in 2009, followed by only forty-eight in 2010.[17] Time will tell whether the Texas parking lot statute will have any discernible effect on the state's workplace homicide rate. However, one study found that employers who allow employees access to firearms at work were five to seven times more likely to have a workplace homicide on their premises.[18]

III. THE NATURE OF TEXAS CONCEALED CARRY LAWS AND THE LEGALITY OF UNLICENSED POSSESSION OF CONCEALED FIREARMS IN VEHICLES

In assessing the operative effect of the Texas parking lot law on Texas employers, it is important to understand the law's relationship to Texas's other firearm statutes and to article 42 of the Code of Criminal of Procedure, which authorizes the imposition of deferred adjudication sentencing for criminal defendants.[19] A state resident's authority to carry a firearm concealed in a vehicle arises from a patchwork of statutes in the Penal Code, Administrative Code, Health & Safety Code, and the Government Code.[20] Collectively, these statutes define who may carry a firearm and under what circumstances.[21] Much of this body of law is negatively defined—that is, the statutes more often inform citizens as to the places firearms are prohibited, rather than where they are allowed.[22]

BUS. INS. (June 15, 2008), http://www.businessinsurance.com/apps/pbcs.dll/article?AID=9999100025191.

14. Harrell, *supra* note 11, at 1, 9.

15. *Id.* at 1, 11.

16. *See Workplace Fatalities in Texas – 2010*, U.S. DEP'T OF LABOR, http://www.bls.gov/ro6/fax/cfoi_tx.htm (last modified Oct. 3, 2011).

17. *Id.*

18. Dana Loomis, Stephen W. Marshall & Myduc L. Ta, *Employer Policies Toward Guns and the Risk of Homicide in the Workplace*, 95 AM. J. PUB. HEALTH 830, 831 (2005).

19. TEX. CODE CRIM. PROC. ANN. art. 42.12 (West & Supp. 2011).

20. Riley C. Massey, Comment, *Bull's Eye: How the 81st Texas Legislature Nearly Got it Right on Campus Carry, and the 82nd Should Still Hit the X-Ring*, 17 TEX. WESLEYAN L. REV. 199, 208 (2011).

21. *Id.*

22. *Id.*

Likewise, for a majority of the non-licensed Texas populace, the personal right to carry a firearm concealed in a vehicle arises from the criminal weapons statutes and the lack of any restrictions on carrying firearms in vehicles for all but a few categories of specifically defined persons. The people barred from carrying firearms in public places include convicted felons, identified gang members, persons engaged in criminal activity while carrying a firearm in a vehicle, and people with family violence assault convictions.[23] As the following statutory analysis reveals, these narrowly defined groups of people prohibited from carrying concealed firearms in public leaves unencumbered eligibility for a variety of criminal offenders to transport firearms in vehicles—even violent felony offenders who are ineligible for a concealed handgun license.

A. *Chapter 52 Texas Labor Code (The Texas "Parking Lot" Law)*

The recently enacted section 52.061 of the Texas Labor Code provides as follows:

> A public or private employer may not prohibit an employee who holds a license to carry a concealed handgun under Subchapter H, Chapter 411, Government Code, who otherwise lawfully possesses a firearm, or who lawfully possesses ammunition from transporting or storing a firearm or ammunition the employee is authorized by law to possess in a locked, privately owned motor vehicle in a parking lot, parking garage or other parking area the employer provides for employees.[24]

Section 52.062 outlines a number of exceptions to the statute.[25] The restriction on employer policies related to firearms stored in employer parking lots does not apply to a vehicle owned or leased by the employer, nor on the property of a school district, charter school or private school. This section further allows for limited employer restrictions on property subject to petroleum and mineral leases, and property owned by certain chemical manufacturers, oil and gas refiners, and producers of explosive materials.[26] At these locations, employees who hold valid concealed handgun licenses under chapter 411 of the Government Code may keep firearms in a locked vehicle on the employer's property, outside of restricted areas, if security personnel constantly monitor the ingress into those areas.[27]

Section 52.063 of the Texas Labor Code immunizes employers and their "principal[s], officer[s], director[s], employee[s], or agent[s]" from liability for property damage, personal injury, or death, except

23. TEX. PENAL CODE ANN. § 46.02 (West 2011).
24. TEX. LAB. CODE ANN. § 52.061 (West 2011).
25. TEX. LAB. CODE ANN. § 52.062 (West 2011).
26. § 52.062(2)(E)–(F).
27. § 52.062(2)(F).

for instances of gross negligence.[28] Further, the statute purports to relieve employers of any duty to inspect or provide security in parking areas where firearms are stored, or to investigate or determine an employee's legal qualifications to possess a firearm on the employer's property.[29]

B. *Texas Penal Code*

Section 46.02 of the Texas Penal Code permits possession of a firearm inside the passenger compartment of a motor vehicle, provided that the person in possession of the firearm is not a convicted felon, a gang member as defined by section 71.01, or otherwise engaged in criminal activity constituting a class 'B' misdemeanor or greater.[30] Moreover, the statute authorizes concealed possession of a firearm for a person "directly en route" to or from the vehicle or watercraft owned by or under the person's control.[31] Thus, under current state law, a person without a concealed handgun license may lawfully carry a handgun both in the passenger compartment of a vehicle and on his or her person while directly en route to and from a vehicle under the person's control, as long as the person is not a convicted felon, a gang member, or otherwise engaged in criminal activity constituting a class 'B' or greater offense.

Section 46.04 of the Texas Penal Code addresses the offense of felon in possession of a firearm:

> A person who has been convicted of a felony commits an offense if he possesses a firearm: (1) after conviction and before the fifth anniversary of the person's release from confinement following conviction of the felony or the person's release from community supervision, parole, or mandatory supervision, whichever date is later or (2) after the period described by Subdivision (1) at any location other than a premises at which the person lives.[32]

The statute further provides that persons convicted of a class 'A' misdemeanor family violence assault commit the offense by possessing a firearm before the fifth anniversary of the later of that person's release from confinement or release from community supervision following conviction.[33] Thus, a person convicted of a felony or class 'A' family violence assault is prohibited from possessing a firearm for five years after release from confinement or community supervision, and thereafter prohibited from possessing a firearm anywhere but his or her residence. These offenders are obviously excluded from carrying a firearm onto an employer's property. However, because these re-

28. TEX. LAB. CODE ANN. § 52.063 (West 2011).
29. § 52.063(c).
30. TEX. PENAL CODE ANN. § 46.02 (West 2011).
31. § 46.02(a)(2).
32. TEX. PENAL CODE ANN. § 46.04 (West 2011).
33. *Id.*

strictions apply only to persons "convicted" of the specified offenses, it is necessary to explore what constitutes a conviction in Texas.

C. *Article 42 Texas Code of Criminal Procedure*

"Convicted" is not defined in the penal statutes, and in Texas, the meaning of what constitutes a criminal conviction is unclear when the offender pleads "no contest" and receives deferred adjudication community supervision.[34] Article 42 of the Texas Code of Criminal Procedure outlines the circumstances under which a defendant may be placed on deferred adjudication:

> (a) Except as provided by Subsection (d) of this section, when in the judge's opinion the best interest of society and the defendant will be served, the judge may, after receiving a plea of guilty or plea of nolo contendere, hearing the evidence, and finding that it substantiates the defendant's guilt, defer further proceedings without entering an adjudication of guilt, and place the defendant on community supervision. A judge may place on community supervision under this section a defendant charged with an offense under Section 21.11, 22.011, or 22.021, Penal Code, regardless of the age of the victim, or a defendant charged with a felony described by Section 13B(b) of this article, only if the judge makes a finding in open court that placing the defendant on community supervision is in the best interest of the victim.[35]

Significantly, a judge considering deferred adjudication community supervision is required to find that the evidence "substantiates the defendant's guilt."[36] In spite of such substantial finding of guilt, judges have broad authority to grant deferred adjudication to a wide array of offenders, including sex offenders and violent criminals, provided merely that the sentencing judge determines that deferred adjudication is also in the best interest of the victim.[37] Although nothing in article 42.12 prevents a judge from considering criminal history in deciding whether to grant deferred adjudication, it is evident that an offender's subsequent right to lawfully carry a firearm in a vehicle may turn on the judge's subjective willingness to defer adjudication, rather than objective criteria related to the severity of the defendant's crime.

So far, Texas courts have been reluctant to resolve this ambiguity. For example, in *Ex parte Smith*, the Texas Court of Criminal Appeals recently had the opportunity to consider whether a deferred adjudication sentence constitutes a conviction for purposes of the felon in possession of a firearm statute.[38] Smith alleged that he received ineffective assistance of counsel in a felon in possession of a firearm

34. *Ex parte* Smith, 296 S.W.3d 78, 81 (Tex. Crim. App. 2009).
35. TEX. CODE CRIM. PROC. ANN. art. 42.12 (West 2011).
36. *Id.*
37. *Id.*
38. *Ex parte Smith*, 296 S.W.3d at 80.

case where he was caught with a firearm away from his residence before the fifth anniversary of his release from community supervision.[39] At the time of his arrest for the firearm charge, Smith was under community supervision for a deferred adjudication felony drug offense.[40] Smith's ineffective assistance of counsel claim arose from his attorney's alleged bad advice to plead guilty to the felon in possession of a firearm charge.[41]

Smith argued that the deferred adjudication sentence he received for a drug conviction constituted insufficient evidence that he was a "convicted" felon within the meaning of the unlawful possession of firearm statute.[42] The Court acknowledged that a deferred adjudication felony with no period of confinement imposed presents a legitimate question as to whether such a defendant is "convicted" for purposes of the unlawful possession of a firearm statute.[43] The Court denied relief to Smith on his ineffective assistance of counsel claim, and it failed to reach the issue of whether he was "convicted" in the deferred adjudication case.[44]

Because of the large number of offenders benefiting from deferred adjudication, any uncertainty of conviction is cause for significant concern. For example, in 2010, 38,441 of 59,983 felony community supervision defendants in Texas received deferred adjudication.[45] Further, of the community supervision placements statewide in 2010, a majority of defendants received deferred adjudication.[46] This large class of offenders—effectively deemed guilty of misdemeanor and felony crimes but who may validly retain post-community supervision rights to "otherwise lawfully possess" a firearm in a vehicle—is now potentially very problematic for Texas employers.

D. *Chapter 411 Texas Government Code*

Chapter 411 of the Texas Government Code outlines the conditions under which citizens qualify for a concealed handgun license.[47] Section 411.172 provides, "a person is eligible to carry a concealed handgun if the person is at least twenty-one years of age, has not been convicted of a felony, is not chemically dependent, and has not within the last ten years been adjudicated as having engaged in felony delinquent conduct as a juvenile."[48] Moreover, the statute provides that a

39. *Id.* at 79.
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at 81.
44. *Id.*
45. *Statistical Report Fiscal Year 2010*, TEX. DEP'T OF CRIMINAL JUSTICE, 7 (2010), http://www.tdcj.state.tx.us/documents/Statistical_Report_2010.pdf.
46. *Id.*
47. TEX. GOV'T CODE ANN. § 411.172 (West 2011).
48. *Id.*

person convicted twice within ten years preceding the application date of certain misdemeanor or other alcohol related offenses is deemed "chemically dependent" for licensing purposes.[49] Finally, a person diagnosed with certain mental disorders is deemed ineligible for licensure.[50]

The concealed handgun license statute also allows for suspension or revocation of a licensee's privilege if the licensee commits certain acts.[51] Specifically, arrests for felony grade offenses or class 'A' or 'B' misdemeanors, acts of family violence, or issuance of a protective order against the license holder are grounds for suspension.[52] Revocation is also authorized if a licensee is found to have made material misrepresentations on the application for the license, a licensee commits the offense of unlawful carrying of weapons by a license holder, or a licensee otherwise becomes ineligible by committing some other disqualifying offense.[53] The statute also requires a licensee to undergo firearms training by a certified firearms instructor and to demonstrate proficiency in use of the firearm.[54]

Notably, for purposes of chapter 411 licensee eligibility *only*, courts have determined that the definition of "convicted" includes deferred adjudication community supervision sentences under article 42.12 of the Texas Code of Criminal Procedure.[55] For example, in *Texas Department of Public Safety v. Loeb,* the Austin court of appeals held that dismissal of proceedings pursuant to article 42.12 constituted a "conviction" for purposes of administrative denial of a concealed handgun license.[56] Paradoxically, a deferred adjudication offender ineligible for a concealed handgun license may nevertheless lawfully transport a firearm in a vehicle upon expiration of the deferred adjudication sentence.

IV. PARKING LOT LAW LITIGATION IN FLORIDA AND OKLAHOMA

A. Florida Retail Federation v. Attorney General of Florida

In 2008, the Florida Legislature passed its version of a parking lot law.[57] The statute's legislative intent statement specified that the Act was intended to codify the "long-standing legislative policy of the state that individual citizens have a constitutional right to keep and bear

49. *Id.*
50. *Id.*
51. TEX. GOV'T CODE ANN. § 411.187 (West 2011).
52. *Id.*
53. TEX. GOV'T CODE ANN. § 411.186 (West 2011).
54. TEX. GOV'T CODE ANN. § 411.188 (West 2011).
55. *See* TEX. GOV'T CODE ANN. § 411.172 (West 2011); Tune v. Tex. Dep't of Pub. Safety, 23 S.W.3d 358, 363 (Tex. 2000) (holding that applicant's deferred adjudication felony constituted grounds for denial of license).
56. Tex. Dep't of Pub. Safety v. Loeb, 149 S.W.3d 741, 742 (Tex. App.—Austin 2004, no pet.).
57. FLA. STAT. ANN. § 790.251 (West Supp. 2008).

arms," and to preserve the citizens' right to keep firearms in vehicles for self-defense.[58] However, in Florida, the right to keep a firearm locked in a vehicle on an employer's premises was extended only to persons licensed to carry a concealed firearm.[59] The Florida Legislature selected concealed handgun licensees for this privilege even though, like Texas, the state allows unlicensed persons to keep firearms concealed in vehicles.[60]

A group of Florida businesses challenged the statute on the constitutional grounds that it violated the Due Process Clause to compel property owners to avail their campuses for activities they do not support and further, that the statute was preempted because the state law prevented employers from providing a workplace free of known hazards, as required by the federal OSH Act's general duty clause.[61]

The statute was struck down on other constitutional grounds because it contained a provision, deemed an "irrational distinction," that allowed business invitees the same privilege of storing handguns in locked vehicles on a business's premises but made the privilege contingent upon whether or not the business had any employees with a concealed handgun license.[62] However, the court upheld the constitutionality of all other aspects of the statute,[63] and its reasoning for upholding most of Florida's parking lot law is instructive for predicting how a viable constitutional challenge might arise in Texas.

1. The Florida Legislature's Rational Distinction Between Concealed Handgun Licensees and Unlicensed Citizens

The court held, first, that the statute was valid to the extent that it compelled business owners to allow concealed handgun licensees to store guns on their employer's property.[64] Critical to the court's ruling was that Florida's Legislature limited the privilege of vehicle handgun storage only to concealed handgun licensees.[65] The court noted, "The permit process provides some check on the person's qualification to have a weapon in particular circumstances."[66] The court further found that the statute was likely otherwise constitutional because it drew rational distinctions between individuals who obtained concealed handgun licenses and those who did not.[67] The court

58. *Id.*
59. *Id.*
60. *See* FLA. STAT. ANN. § 790.25 (West 2008); Dixon v. State, 831 So. 2d 775, 775–76 (Fla. Dist. Ct. App. 2002).
61. Fla. Retail Fed'n, Inc. v. Attorney Gen. of Fla., 576 F. Supp. 2d 1281, 1284 (N.D. Fla. 2008).
62. *Id.* at 1292–93, 1300.
63. *Id.* at 1300.
64. *Id.*
65. *Id.*
66. *Id.* at 1289.
67. *Id.*

opined that this rationale was valid just as the same rationale is valid for allowing concealed handgun licensees the privilege of carrying concealed handguns in public.[68] The decision did not speculate, however, on the constitutionality of a parking lot statute that would extend the same storage privilege to unlicensed citizens.

2. The Plaintiffs' Due Process Challenge

The plaintiffs additionally challenged the Florida statute on the ground that it required businesses to allow unwanted activities on private property in violation of the Fourteenth Amendment Due Process Clause.[69] The rationality of the Florida Legislature's express limitation of storage privileges to concealed handgun license holders turned out to be dispositive on the plaintiffs' due process challenge.[70] Noting first that substantive due process commands substantial deference to legislation where the legislation is "rationally related to a legitimate end,"[71] the court upheld the constitutionality of this part of the statute because its provisions affected all businesses in the same manner and, as noted above, concealed handgun licensees must undergo background checks to obtain a license. The court was convinced that the licensure requirement provided a rational and qualifying basis on which to assign the privilege to this select group of Florida workers.[72]

Second, in analyzing whether the Due Process Clause prohibited the legislature from requiring businesses to allow employees to store guns on private property, the court sought to determine the statute's "likely real-world effect" on business owners.[73] The court noted that a gun stored in a locked vehicle would have little deterrent effect against workplace violence because it would almost always be inaccessible.[74]

Additionally, the court pointed out that the statute did not interfere with a business's right to ban non-licensed gun owners from bringing their guns to work.[75] Observing that the statute's only effect would arise from employees who have concealed handgun permits, the court predicted that any increase in the number of guns on an employer's property would be marginal.[76] The court further found that a variety of unlikely factors—including employee defensive use of a firearm, crimes committed by employees, and firearm thefts—contributed to the "common sense" conclusion that the legislation would net a slight

68. *Id.*
69. *Id.* at 1284.
70. *See id.* at 1288, 1289.
71. *Id.* (citing Schwarz v. Kogan, 132 F.3d 1387, 1390 (11th Cir. 1998)).
72. *Id.* at 1289.
73. *Id.* at 1290.
74. *Id.*
75. *Id.*
76. *Id.*

positive effect or a slight negative effect on employers.[77] Therefore, the court reasoned, the legislature could have rationally chosen to give Florida workers with concealed handgun permits the right to bring guns onto their employers' property.[78]

3. Constitutional Preemption by the Federal Occupational Safety and Health Act's General Duty Clause

The plaintiffs further argued that the federal OSH Act's general duty clause preempted the Florida statute.[79] The OSH Act's general duty clause mandates that all employers "(1) shall furnish to each of his employees a place free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees; and (2) shall comply with occupational safety and health standards promulgated under [the] statute."[80] The general duty clause was drafted as a "catch-all" provision to cover instances of recognized hazards for which no specific regulations have been issued.[81] The plaintiffs relied on the general duty clause to challenge the state statute because, at the time, there were no specific federal regulations pertaining to workplace violence.[82]

Federal law preempts state law in three circumstances: (1) when Congress enacts legislation that explicitly preempts state legislation; (2) when federal regulations exclusively occupy a particular, pervasively regulated field; and (3) when state law "stands as an obstacle" to the full objectives of a Congressional enactment.[83] Obstacle preemption occurs when "state law is naturally preempted to the extent of conflict with any federal statute."[84] A state statute conflicts with a federal statute when the state statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," making it impossible to comply with both the state statute and the federal statute.[85] Moreover, obstacle preemption extends to state enacted obstacles that inhibit or frustrate objectives of the executive branch through the power conferred upon it by Congress.[86] Such preemption includes not only express objectives of Congress, but also those that are implied and have the effect of "naturally undermining" an objective within the "sphere of its delegated power."[87]

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77. *Id.*
78. *Id.* at 1291.
79. *Id.* at 1297.
80. 29 U.S.C. § 654(a) (2006).
81. ConocoPhillips Co. v. Henry, 520 F. Supp. 2d 1282, 1324 (N.D. Okla. 2007), *rev'd sub nom.* Ramsey Winch Inc. v. Henry, 555 F.3d 1199 (10th Cir. 2009).
82. *Fla. Retail Fed'n, Inc.*, 576 F. Supp. 2d at 1298.
83. Choate v. Champion Home Builders Co., 222 F.3d 788, 792 (10th Cir. 2000) (quoting English v. Gen. Electric Co., 496 U.S. 72 (1990)).
84. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 372 (2000).
85. *Id.* at 373–74.
86. *Id.* (citing Savage v. Jones, 225 U.S. 501, 533 (1912)).
87. *Id.*

The plaintiffs asserted that the Florida statute stood as an obstacle to Congress's intent as expressed in the general duty clause of the OSH Act.[88] The court rejected the plaintiffs' argument on two grounds. First, the OSH Act explicitly authorizes states to submit approved regulations on workplace matters that fall within the state's authority over the health and safety of its citizens.[89] Second, because there was a complete absence of federal standards relating to workplace violence, the court found that the legislature was free to implement rationally based regulations that, in its judgment, enhanced worker safety.[90] Significantly, the court did not address whether subsequent Occupational Safety & Health Administration ("OSHA") regulations could preempt the statute if the state law stood as an obstacle to *later identified* objectives "promulgated" to address workplace violence. On the other hand, nothing in the court's rationale precludes constitutional preemption if the state legislature's judgment was later found to conflict with subsequent workplace regulations enacted by OSHA.

B. *Challenges to the Oklahoma Parking Lot Law in* ConocoPhillips Co. v. Henry *and* Ramsey Winch, Inc. v. Henry

In 2004, Oklahoma was the first state to enact a parking lot law.[91] Oklahoma's statute prohibits any "property owner, tenant, employer, or business entity" from enforcing a policy that banned anyone, except a convicted felon, from storing firearms in a locked vehicle on the third party's premises.[92] Like the Texas parking lot statute, Oklahoma's law is more permissive than Florida's, in that it allows citizens other than concealed handgun license holders to maintain firearms in locked vehicles on the property of most employers.[93]

Several businesses brought suit challenging the restrictions as unconstitutional under the Fifth Amendment Takings Clause, the Fourteenth Amendment Due Process Clause, and by way of the OSH Act's general duty clause preemption.[94] The Federal District Court for the Northern District of Oklahoma rejected the plaintiffs' Takings Clause argument for want of the requisite "permanent ouster" or "continuous physical occupation" of land by employees who bring

88. Fla. Retail Fed'n, Inc. v. Attorney Gen. of Fla., 576 F. Supp. 2d 1281, 1298 (N.D. Fla. 2008).

89. *Id.*

90. *Id.*

91. Marka Fleming & Angela K. Miles, *Legal Illustrations of Workplace Gun Laws and Their Implications on Employers and Human Resource Managers*, 11 ACAD. LEGAL STUD. BUS. J. EMP. & LAB. L. 104, 105 (2009).

92. OKLA. STAT. ANN. tit. 21, § 1289.7a (West Supp. 2012).

93. *Id.*

94. ConocoPhillips Co. v. Henry, 520 F. Supp. 2d 1282 (N.D. Okla. 2007), *rev'd sub nom.* Ramsey Winch Inc. v. Henry, 555 F.3d 1199 (10th Cir. 2009).

their guns to work.[95] Additionally, applying a rational basis standard to the due process claim that the plaintiffs were deprived of their right to exclude unwanted activities from their property, the court held that, "although it is a close case and the rationality of the Amendments is questionable, the Court cannot conclude that the Amendments are 'wholly irrational' or 'arbitrary' methods of accomplishing the objectives identified . . . ."[96] The due process challenge was rejected because the statute withstood the court's rational basis scrutiny.[97]

However, the court held that the OSH Act's general duty clause preempted the statute because the state law "stood as an obstacle" to accomplishing the goal of workplace safety, and it served to frustrate the federal purpose of encouraging employers to promote workplace safety.[98] Although there were no specific federal workplace violence regulations in place at the time of the court's decision, the court relied on other circumstantial evidence of congressional intent to find preemption of the Oklahoma statute.[99] First, the court noted that a state administrative law judge held in *Megawest Financial, Inc.*, that despite the lack of federal regulation, failure to provide a workplace free of violence *could* constitute a general duty clause violation.[100] Further, the court cited as evidence of OSHA's intent to regulate workplace violence the fact that OSHA devoted a webpage to the topic, OSHA's published voluntary guidelines for abating workplace violence in retail establishments, and the agency's practice of issuing "standard interpretation" letters informative on its jurisdictional reach to investigate workplace violence.[101]

The following year, in *Ramsey Winch, Inc. v. Henry*, the United States Court of Appeals for the Tenth Circuit overturned the general duty clause preemption holding of *Connocophillips*.[102] The court initially noted that its decision was guided by the presumption that the "historic police powers of the state are not to be superseded by a federal act unless it was the clear and manifest purpose of Congress to do so."[103] In finding that the general duty clause did not preempt the Oklahoma statute, the court relied heavily on the fact that there were no OSHA regulations in the area of workplace violence.[104] The Tenth Circuit found the lower court's reliance on the voluntary standards

95. *Id.* at 1311.
96. *Id.* at 1322.
97. *Id.*
98. *Id.* at 1337–38.
99. *Id.* at 1330–32.
100. *Id.* at 1330 (citing Sec'y of Labor v. Megawest Fin., Inc., 17 BNA OSHC 1337 (No. 93-2879, 1995)).
101. *Id.* at 1331.
102. Ramsey Winch Inc. v. Henry, 555 F.3d 1199, 1200 (10th Cir. 2009), *rev'g ConocoPhillips Co.*, 520 F. Supp. 2d 1282.
103. *Id.* at 1204 (citing Altria Grp., Inc. v. Good, 555 U.S. 70 (2008)).
104. *Id.* at 1205.

and the other circumstantial evidence of regulatory intent to be misplaced and incapable of overcoming the presumption that Congress did not intend to preempt the Oklahoma statute.[105] The court concluded that the purpose of the general duty clause was to address unanticipated hazards that were not the subject matter of any regulation[106] and that the OSH Act only requires employers to "guard against significant risks, not ephemeral possibilities."[107]

V. THE "OTHERWISE LAWFULLY POSSESSES" CLAUSE AND THE IMMUNITY FROM CIVIL LIABILITY PROVISION IN CHAPTER 52 OF THE TEXAS LABOR CODE ARE SUBJECT TO CONSTITUTIONAL CHALLENGES

A. *Substantive Due Process and Texas's Expanded Parking Lot Privilege*

As the Florida and Oklahoma parking lot law litigation demonstrates, when a substantive due process challenge involves a non-fundamental right, the standard of review is rational basis.[108] Legislative enactments are accorded substantial deference, and legislation will generally be upheld when its provisions are rationally related to a legitimate end.[109] Conversely, a state may not impose a restriction that is "wholly irrational."[110] Using this deferential standard, the Oklahoma statute, and most of the Florida statute, was upheld because the reviewing courts found them to be rationally related to a legitimate purpose.[111]

However, there are significant distinctions between the Texas parking lot statute and the Florida and Oklahoma statutes. First, the *Florida Retail Federation* court relied greatly on the rationality of the statute's exclusive application to concealed handgun licensees and the attendant "qualification check" that gives employers some assurances about the character and abilities of employees storing guns on their premises.[112] By contrast, because of the expansive Texas statutory language and the uncertain "conviction" status of deferred adjudication offenders, there are no such assurances in Texas.[113] Instead, Texas employers can expect, without recourse, that their employees, including those with felony and misdemeanor criminal histories, may

105. *Id.* at 1206.
106. *Id.* (citing Teal v. E.I. DuPont de Nemours & Co., 728 F.2d 799, 804 (6th Cir. 1984)).
107. *Id.* (quoting Nat'l Realty & Constr. Co. v. Occupational Safety & Health Review Comm'n, 489 F.2d 1257, 1266 (D.C. Cir. 1973)).
108. *See, e.g.*, Schwarz v. Kogan, 132 F.3d 1387, 1390 (11th Cir. 1998).
109. *Id.*
110. Fla. Retail Fed'n, Inc. v. Attorney Gen. of Fla., 576 F. Supp. 2d 1281, 1287 (N.D. Fla. 2008).
111. *See id.* at 1289; *Ramsey Winch Inc.*, 555 F.3d at 1210–11.
112. *Fla. Retail Fed'n, Inc.*, 576 F. Supp. 2d at 1290.
113. *Ex parte* Smith, 296 S.W.3d 78, 81 (Tex. Crim. App. 2009).

store guns on their property and that these employees will have ready access to firearms while at work.

Second, the Texas statute would fail the *Florida Retail Federation's* "likely real-world effect" test because the more expansive Texas statute has a much greater potential to increase the overall number of guns being stored on most employers' property. Unlike the comparatively limited number of concealed handgun licensees covered by the Florida law, the Texas statute extends gun storage rights to any Texan in the general public who is not legally encumbered by a felony conviction or other statutorily imposed impediment.

Finally, when a regulation restricts private property rights without any legitimate governmental objective, it may be deemed so arbitrary or irrational that it runs afoul of the Due Process Clause.[114] Unlike the "common sense" conclusions on which the Florida Legislature presumably relied, there is no rational justification for extending handgun storage rights to criminal offenders against the wishes of private property owners. Therefore, a targeted substantive due process challenge aimed specifically at the "otherwise lawfully possesses" clause in chapter 52 of the Texas Labor Code would likely prevail.

B. *The Objectionable Provisions of the Texas Statute are Preempted by the OSH Act's General Duty Clause*

1. The Groundwork for Preemption has Been Laid: OSHA Now Regulates Workplace Violence

On September 8, 2011—just one week after Texas's parking lot law took effect—OSHA issued directive number CPL 02-01-252 entitled, *Investigation Procedures for Investigating or Inspecting Workplace Violence.*[115] The directive was issued nationwide to all OSHA field offices.[116] Under a section entitled "Significant Changes," the manual proclaims the following:

> This is the first instruction on the enforcement procedures for investigations and inspections that occur as a result of workplace violence incident(s) and specifically at worksites in industries that OSHA has identified as susceptible to workplace violence. It clarifies and expands the Agency's policies and procedures in this area.[117]

Although the manual is intended to govern workplace violence in all American workplaces, it names as "OSHA-Identified High Risk Industries," healthcare providers, social service settings, and late-night

114. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 544 (2005).

115. OCCUPATIONAL SAFETY & HEALTH ADMIN., U.S. DEP'T OF LABOR, ENFORCEMENT PROCEDURES FOR INVESTIGATING OR INSPECTING WORKPLACE VIOLENCE, Abstract-1 (2011).

116. *Id.*

117. *Id.* at Abstract-3.

retail settings.[118] The directive further mandates that OSHA will investigate all workplace homicides, regardless of the type of business,[119] and it provides specific guidance on known violence risk factors in identified high-risk industries.[120]

While the new OSHA directive is aimed primarily at preventing general criminal violence against employees in high-risk work areas, the directive makes clear that OSHA maintains its general authority to investigate workplace violence instigated by co-workers in any workplace setting.[121] Moreover, OSHA's workplace violence investigative authority now covers a variety of circumstances, including complaints and referrals from workers, homicides, and "catastrophic events,"[122] defined as three or more employees hospitalized as a result of a workplace violence incident.[123]

2. The "Otherwise Lawfully Possesses" Clause in Chapter 52 of the Texas Labor Code is Preempted by the OSH Act's General Duty Clause

In both the *Ramsey Winch* and *Florida Retail Federation* decisions, the courts inferred a lack of congressional intent to regulate workplace violence from the non-existence of pertinent OSHA regulations.[124] Neither decision foreclosed the possibility of future OSHA regulations, and neither court discussed the effect of subsequently imposed federal workplace violence regulations on existing statutes.[125] Future obstacle preemption challenges are presumably strengthened by the existence of the new OSHA workplace violence regulations because courts are more likely to infer congressional intent to regulate employers through the agency's regulatory authority delegated to it by Congress.

As mentioned, obstacle preemption analysis entails a particularized showing that a statutory provision "stands as an obstacle" to a stated congressional objective.[126] Thus, it is instructive to analyze the "otherwise lawfully possesses" clause in chapter 52 of the Texas Labor Code in light of its effect on the average Texas employer's ability to satisfy OSHA's new workplace violence regulatory scheme. An em-

118. *Id.* at 5–6.
119. *Id.* at 6.
120. *Id.* at 6–7.
121. *Id.* at 5 (classifying co-worker violence as a type of violence covered by the directive).
122. *Id.* at 7.
123. *Id.* at 6.
124. Fla. Retail Fed'n, Inc. v. Attorney Gen. of Fla., 576 F. Supp. 2d 1281, 1298 (N.D. Fla. 2008); Ramsey Winch Inc. v. Henry, 555 F.3d 1199, 1205 (10th Cir. 2009), *rev'g* ConocoPhillips Co. v. Henry, 520 F. Supp. 2d 1282 (N.D. Okla. 2007).
125. *Fla. Retail Fed'n, Inc.*, 576 F. Supp. 2d at 1298; *Ramsey Winch Inc.*, 555 F.3d at 1205.
126. Altria Grp., Inc. v. Good, 55 U.S. 70, 75–76 (2008).

ployer violation of the general duty clause requires a showing that "(1) a hazard likely to cause death or serious bodily harm existed at a citable workplace; (2) the hazard was recognized either by the particular employer or generally within the industry; and (3) there were feasible methods to abate the recognized hazard."[127]

The first requirement—that an existing hazard is likely to cause death or serious bodily harm—is easily satisfied by the very nature of storing a firearm in close proximity to the workplace.[128] This danger is logically heightened when employees with access include unlicensed and untrained firearms handlers, and persons with violent criminal histories. Such accessibility to firearms by violent-prone employees presents a hazard likely to cause death or serious bodily injury because it substantially reduces a valuable "cooling off period" for workers engaged in confrontations with co-workers.[129]

Second, employers generally would recognize this hazard, but recognition is now arguably presumed, especially for employers in the OSHA-identified high-risk industries, which have been placed on notice of their special propensity for workplace violence incidents.[130] The OSHA directive establishes new expectations that employers will anticipate and actively seek to reduce workplace violence, which changes the character of the perceived risk from an "ephemeral possibility," to one that employers are expected to continually address.

Finally, obvious feasible methods of abating this recognized hazard through employer policies that prohibit unlicensed weapon possession on company property exist, but the ability to implement them has been substantially removed by chapter 52 of the Texas Labor Code.[131] Thus, while employers are provided with safety assurances that concealed handgun licensees are subject to background checks and must satisfy other standards that qualify them to possess firearms in public,[132] there are no such qualification checks on the unlicensed populace that makes up the rest of the Texas workforce. The absence of these built-in assurances, coupled with the average Texas employer's lack of control over who may store firearms at work, makes the "otherwise lawfully possesses" clause in chapter 52 of the Labor Code an obstacle to the manifest congressional purpose of workplace violence

127. Baroid Div. of NL Indus., Inc. v. Occupational Safety & Health Review Comm'n, 660 F.2d 439, 444 (10th Cir. 1981).

128. *ConocoPhillips Co.*, 520 F. Supp. 2d at 1335–36 (referencing the testimony of former Tulsa Police Chief Dave Been who asserted that a vehicle is not a secure place to keep a firearm, and a firearm in a locked car on company property brings it that much closer to the inside workplace, subjecting guests and workers to the risks of violence).

129. Fleming & Miles, *supra* note 91, at 111.

130. *See* U.S. DEP'T OF LABOR, *supra* note 115, at 3.

131. *See* TEX. LAB. CODE ANN. § 52.061 (West 2011).

132. *See* TEX. GOV'T CODE ANN. § 411.172 (West 2009).

prevention, as reflected in OSHA's new workplace violence regulations.

3. The Immunity From Civil Liability Provision is Preempted Because it Frustrates the Congressional Intent of the OSHA Regulations

With the exception of gross negligence, section 52.063 of the Texas Labor Code immunizes employers from civil liability for incidents arising from the presence of firearms or ammunition that an employer is required to allow on its property.[133] This section further specifies that employers have no duty to inspect or secure any parking area where firearms are stored, nor to "investigate, confirm or determine an employee's compliance with laws related to the ownership or possession of a firearm or ammunition or the transportation and storage of a firearm or ammunition."[134] Yet, the OSHA directive on investigating workplace violence warns as follows:

> Employers may be found in violation of the general duty clause if they fail to reduce or eliminate serious recognized hazards. Under this directive, inspectors should therefore gather evidence to demonstrate whether an employer recognized, either individually or through its industry, the existence of a potential workplace violence hazard affecting his or her employees. Furthermore, investigations should focus on the availability to employers of feasible means of preventing or minimizing such hazards.[135]

In addition, the OSHA directive advises its investigators to conduct interviews and review the employer's policies and procedures to "determine whether the employer has considered or implemented a hierarchy of controls for worker protection against potential acts of workplace violence."[136]

The OSHA workplace violence directive places the onus on employers to enact policies and security measures to address both hazards and potential hazards that could lead to workplace violence. One of the obvious "feasible means" to abate co-worker violence is an emphasis on workplace security,[137] which naturally includes strong personnel policies that ban certain employees from storing weapons on the employer's property. Yet, the immunity from civil liability provision in section 52.063 discourages employers from securing parking areas where weapons are known to be stored or to conduct any inquiries into employee qualifications and suitability to maintain ready-ac-

133. TEX. LAB. CODE ANN. § 52.063 (West 2011).
134. *Id.*
135. U.S. DEP'T OF LABOR, *supra* note 115, at 3.
136. *Id.* at 13.
137. Ceniceros, *supra* note 13 (quoting JoAnn M. Sullivan, risk consulting manager for Marsh, Inc., who observed that declining workplace homicides reflect company adoption of strict anti-violence policies during the 1990s).

cess to firearms while at work.[138] As a result, Texas employers are faced with a dilemma: on one hand, the possibility of violating the OSH Act's general duty clause by failing to enact feasible methods to abate workplace violence, or on the other hand, doing more than the Texas parking lot law requires, placing them at risk of assuming duties and liability not required by the state statute. The immunity from civil liability provision tends to frustrate a congressional purpose, as delegated through OSHA's regulatory powers,[139] because it provides a disincentive to enact policies and security measures to abate workplace violence.

VI. Recommended Employer Actions

Ideally, the Texas Legislature should repeal both the "otherwise lawfully possesses" clause and the immunity from civil liability provision in chapter 52 of the Labor Code. Additionally, the statute should be amended to allow only concealed handgun licensees to override employer policies against storing weapons on an employer's campus. Limiting the privilege in this way provides built-in administrative protections for employers because licensees are required to pass a criminal background check, demonstrate other indicia of responsibility, and show proficiency with the weapon they are licensed to carry. Most importantly, the licensing process excludes people with deferred adjudication felonies[140] and provides a mechanism to revoke the privilege whenever a licensee violates the standards set forth in the statute.[141]

These restrictions on the privilege would survive rational basis scrutiny for purposes of Due Process Clause challenges because they rationally relate to the legitimate legislative purpose of effectuating self-defense for Texas commuters who have demonstrated the requisite qualifications and character to carry firearms in public. Moreover, limiting eligibility would enable employers to reinstate vigorous anti-weapons policies that would reduce the likelihood of a general duty clause violation, should an employer become the target of a federal workplace violence investigation.

But while waiting for the legislature to act, what should employers do in the meantime? The OSHA workplace violence directive was a game-changer for Texas employers and particularly for those businesses engaged in an OSHA-identified high-risk industry. One question that arises is whether an OSHA investigation's finding of a willful failure to enact feasible methods to abate violence in an identified high-risk industry context could constitute "gross negligence" for purposes of the Texas Labor Code's immunity from civil liability provi-

138. Tex. Lab. Code Ann. § 52.063 (West Supp. 2012).
139. Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 373 (2000).
140. Tex. Gov't Code Ann. § 411.171 (West 2009).
141. Tex. Gov't Code Ann. § 411.176 (West 2009).

sion. Admittedly, answering this question would likely entail a fact-specific analysis. But suppose, for example, that a late-night retailer knows it has at least one employee with a violent felony conviction. The Labor Code immunity from civil liability provision makes no distinction regarding an employer's duties as they relate to different classes of employees.[142] It appears to excuse employers from making inquiries of *any* of its employees' qualifications to possess guns on its property, including, apparently, those employees the employer knows to have felony convictions.[143]

Although seemingly permitted by section 52.063, willful failure to make gun possession qualification inquiries of high-risk or violence-prone employees—particularly in a high-risk industry—is arguably gross negligence.[144] In the event this hypothetical high-risk employee used a handgun retrieved from the employer's parking lot, the employer who failed to make a compliance inquiry with the offending employee could be subject to a general duty clause violation—a finding which could then be used against the employer to demonstrate gross negligence, thereby removing the employer's general immunity granted under state law.

Every Texas employer should evaluate its workplace violence policies in light of the nature its business, known security risks, and character traits of its employees. Employers should not necessarily rely on the immunity from civil liability provision to guide policy development. While the statute appears to broadly exculpate employers that choose *not* to make inquiries about an employee's compliance with weapons laws, it also appears that the employer behaviors encouraged by the immunity from civil liability provision leaves the door open for gross negligence claims against Texas employers. Employers are thus left to decide whether their particular circumstances could subject them to a general duty clause violation or even a gross negligence claim for failing to undertake the security and inquiry duties the statute purportedly removes.

In order to avoid this undesirable circumstance, Texas employers should not treat the civil immunity provision as a safe harbor, and they should opt instead for a self-imposed standard of care tailored to the characteristics of the individual workplace. The standards adopted would inevitably vary depending on the workplace, but when necessary, they should be as strict as the statute allows. Employers should maintain policies on parking lot security, employee reporting of suspicious circumstances, and conducting inquiries into individual employee compliance with state and federal gun laws. In addition, an

142. TEX. LAB. CODE ANN. § 52.063(c)(2) (West Supp. 2012).

143. *Id.*

144. *See, e.g.*, City of Plano v Homoky, 294 S.W.3d 809, 817 (Tex. App.—Dallas 2009, no pet.) (defining gross negligence as a defendant's knowledge of peril, but the defendant's acts or omissions demonstrate the defendant did not care).

employee's ability to "lawfully" possess a firearm should be strictly construed. For example, employees on deferred adjudication probation should be precluded by policy from bringing guns onto the employer's campus.

VII. CONCLUSION

Although similar parking lot statutes in Oklahoma and Florida have been upheld despite due process and federal preemption challenges, the Texas parking lot law is susceptible to like challenges because of the state's unique statutory scheme and the uncertain legal status of thousands of Texans who have received deferred adjudication sentences. Moreover, OSH Act general duty clause preemption is much more likely now that OSHA has decided to formally regulate workplace violence. A preemption argument is especially viable in the OSHA-identified high-risk industries context, where congressional intent to regulate is now likely to be construed as "clear and manifest." Employers in this category are in a difficult position because complying with the Texas statute could place them at odds with OSHA regulators.

Ideally, the Texas Legislature should limit the privilege of storing firearms on an employer's campus to concealed handgun licensees and repeal the statute's "otherwise lawfully possesses" clause and immunity from civil liability provision. In the meantime, however, employers should proactively implement policies to protect themselves from general duty clause violations and gross negligence claims. Such policies would provide Texas employers with a measure of protection against general duty clause violations and gross negligence liability while the collective Texas workforce waits for the legislature to amend the parking lot law in accord with the sensible parameters set forth in the concealed handgun licensing statute.