U.S. Department of Labor

Solicitor of Labor
Washington, D.C. 20210

OCT 18 2011

Steven H. Wodka, Esq.
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Dear Mr. Wodka:

Thank you for your letter of March 2, 2011, asking the Occupational Safety and Health Administration to issue an official interpretation of 29 C.F.R. § 1910.1200(a)(2), the preemption provision in OSHA's Hazard Communication ("Hazcom") standard, 29 C.F.R. § 1910.1200. You request that OSHA clarify that the provision "was intended to preempt conflicting state regulatory actions, but not tort claims." Because this is primarily a legal question, OSHA referred your letter to my office. For the reasons that follow, the Department agrees that, as a general matter, the Hazcom standard does not preempt state tort failure to warn suits. For your information, we recently addressed a similar issue relating to OSHA's respirator standard, and came to the same conclusion. A copy of that letter is attached for your information.

Preemption Basics

It is a fundamental principle that preemption is ultimately a question of congressional intent. *Wyeth v. Levine*, 129 S.Ct. 1187, 1194 (2009). Analysis begins with the presumption that Congress did not intend to displace state and local law, especially when a statute operates in an area within the states' traditional powers. *See Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Providing tort remedies to its citizens is one such traditional power. *E.g.*, *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Thus, preemption will be found only where that is the clear and manifest purpose of Congress. *Medtronic, Inc.*, 518 U.S. at 485.

Statutory Framework

Nothing in the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.*, evinces a congressional intent for OSHA standards to preempt state tort actions. To the contrary, section 4(b)(4) of the OSH Act, 29 U.S.C. § 653(b)(4), explicitly states that "[n]othing in this Act shall . . . enlarge or diminish or affect in any other manner the common law or statutory rights, duties, or liabilities of employers and employees under any law with respect to injuries, diseases, or death arising out of, or in the course of, employment." This provision is the Act's sole reference to state tort law, and it is, significantly, a savings clause. *See Lindsey v. Caterpillar*, 480 F.3d 202 (3rd Cir. 2007) (allowing product liability action against tractor manufacturer); *Pedraza v. Shell Oil Co.*, 942 F.2d 48, 53-54 (1st Cir. 1991) (holding that 4(b)(4) saves suits by employees seeking compensation for injuries, whether brought against employers or third-party suppliers);

United Steelworkers of America, AFL-CIO v. Marshall, 647 F.2d 1189, 1235-1236 (D.C. Cir.1980) ("when a worker actually asserts a claim under workmen's compensation law *or some other state law*, neither the worker *nor the party against whom the claim is made* can assert that any OSHA regulation or the OSH Act itself preempts any element of the state law") (emphasis supplied). Both the *Pedraza* and *Lindsey* decisions also pointed out that this result is consistent with the provision's legislative history, citing a statement by then-Solicitor of Labor Lawrence Silberman during consideration of the legislation that it "would in no way affect the present status of the law with regard to workmen's compensation legislation *or private tort actions*." *Pedraza*, supra at 54 (emphasis by court); *Lindsey*, supra at 207-208.[1]

By contrast, under certain circumstances, the OSH Act and the standards promulgated pursuant to it do preempt other types of State law regulating occupational safety and health issues. In *Gade v. National Solid Waste Management Ass'n*, 505 U.S. 88 (1992), the Supreme Court made this clear in a case involving a challenge to an Illinois state law imposing training and licensing requirements more stringent than those contained in an analogous OSHA standard. The Court construed section 18 of the OSH Act, 29 U.S.C. § 667, which allows states to assume responsibility for their own occupational safety and health programs if those programs meet certain criteria, and are approved by the Secretary, to indicate a congressional intent to preempt a state occupational safety and health standard relating to an issue for which a federal standard is in effect, where there is not an approved state plan. 505 U.S. at 102.[2]

The *Gade* Court also recognized the limits of its decision, however, pointing out that "state laws of general applicability (such as laws regarding traffic safety or fire safety) that do not conflict with OSHA standards and that regulate the conduct of workers and nonworkers alike would generally not be preempted. Although some laws of general applicability may have a 'direct and substantial effect' on worker safety, they cannot fairly be characterized as 'occupational' standards, because they regulate workers simply as members of the general public." 505 U.S. at 107. Moreover, the Court subsequently made clear that failure to warn state tort claims, which are based on "the general duty to inform users and purchasers of potentially dangerous items of the risks involved in their use . . . are no more a threat to federal requirements than would be a state-law duty to

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[1] It is significant that Congress did not include in the Act any private right of action or other remedy for workplaces injuries, disease, or death. *United Steelworkers, supra*, at 1236; *Pedraza, supra*, at 54. It is unlikely that Congress, having found occupational safety and health legislation necessary because "personal injuries and illnesses rising out of work situations impose a substantial burden ... in terms of lost production, wage loss, medical expenses, and disability compensation payments," 29 U.S.C. 651(a), would in that same legislation remove the means of judicial recourse for those injuries. Instead, the lack of any private remedy under the federal OSH Act strongly suggests Congress believed that "widely available state rights of action provided appropriate relief" for workplace injuries. *Wyeth, supra*, at 1199.

[2] Where no federal standard is in effect, the States are free to assert jurisdiction under State law. 29 U.S.C. § 667(a).

comply with local fire prevention regulations and zoning codes, or to use due care in the training and supervision of a work force." *Medtronic Inc. v. Lohr*, 518 U.S. 470, 501-02 (1996).

In short, the OSH Act's terms do not show a "clear and manifest purpose of Congress" to preempt tort actions under state law. *Wyeth, supra,* at 1194 (internal quotes and citations omitted). All indications are to the contrary. And, as shown below, the hazcom standard is no more preemptive of state tort law than any other OSHA standard.

The Hazard Communication Standard

The Hazard Communication standard was promulgated because millions of American workers work with and are potentially exposed to hazardous chemicals, but many employers and employees know little or nothing about the often serious hazards of those chemicals. 59 Fed. Reg. 6126 (Feb. 9, 1994); 48 Fed. Reg. 53280, 53282-83 (Nov. 25, 1983). Chemical exposure may cause or contribute to many serious health effects such as heart ailments, central nervous system, kidney and lung damage, sterility, cancer, burns, and rashes. *Id.* Some chemicals also have the potential to cause fires, explosions and other serious accidents. *Id.* There are an estimated 650,000 existing chemical products, and many new ones introduced annually. *Id.*

The standard establishes uniform requirements to make sure that the hazards of all chemicals produced or used in U.S. workplaces are evaluated, and that this hazard information is transmitted to affected employers and exposed employees. 29 C.F.R. § 1910.1200(a)(1). It sets up a "downstream flow of information" requirement, whereby manufacturers of chemicals have the primary responsibility for generating and disseminating information about chemical hazards. 29 C.F.R. § 1910.1200(b)(1). Employers using the chemicals must obtain this information and inform their employees of the hazards and the identities of workplace chemicals to which they are exposed. 29 C.F.R. § 1910.1200(b)(2).

In general, responsibilities are allocated as follows: Chemical manufacturers and importers must determine the hazards of each product they produce or import. Then they, as well as intermediate distributors of the chemicals, must communicate the hazard information and associated protective measures downstream to customers through labels (which include appropriate hazard warnings) and material safety data sheets (MSDSs).[3]

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[3] An MSDS is a detailed information bulletin describing the physical and chemical properties of a hazardous chemical, its physical and health hazards, routes of exposure, precautions for safe handling and use, emergency and first-aid procedures, and control measures. Chemical manufacturers and importers must develop an MSDS for each hazardous chemical they produce or import, and must provide the MSDS at the time of the initial shipment of a hazardous chemical to a downstream distributor or user. Distributors similarly must ensure that downstream employers are provided MSDSs. 29 C.F.R. § 1910.1200(g).

In addition to these workplace protections, the standard had a secondary purpose: it sought to "reduce the burden on interstate commerce produced by conflicting state and local regulations" relating to the identification of hazardous chemicals. 48 Fed. Reg. at 53334; *id.* at 53283 (noting "recent proliferation of state and local right-to-know laws," which subjected chemical manufacturers to "numerous different and potentially conflicting regulations"); *id.* at 53284 (explaining that twelve states and six local governments had enacted differing hazard communication laws and thirteen other states and three local governments were considering such enactments); *id.* ("The potential for conflicting or cumulatively burdensome State and local laws has been acknowledged by industry representatives to be immense").

The standard thus includes a preemption provision, § 1910.1200(a)(2), which provides in pertinent part

> [t]his occupational safety and health standard [the Hazcom standard] is intended to address comprehensively the issue of evaluating the potential hazards of chemicals, and communicating information concerning hazards and protective measures to employees, and to preempt any legal requirements of a state, or political subdivision of a state, pertaining to this subject.

As explained more fully below, these "legal requirements of a state . . ." were limited to positive enactments of laws and regulations, and do not include the duties and remedies recognized only by tort law.

Analysis: Preemptive Effect of § 1910.1200(a)(2)

A typical failure to warn tort claim involves an allegation that a manufacturer (or employer) failed to provide adequate warning about the risk of harm associated with a chemical or other product or its use. All reported decisions we have found have held that § 1910.1200(a)(2) does not preempt state tort claims alleging inadequate warnings of chemical hazards. *See, e.g., In re Welding Fume Prods. Liab. Litig.*, 364 F.Supp.2d 669, 693 (N.D.Ohio 2005); *Anderson v. Airco, Inc.*, 2003 U.S. Dist. LEXIS 13765, 2003 WL 21842085 (D.Del. July 28, 2003) *York v. Union Carbide Corp.*, 586 N.E.2d 861, 866 (Ind. Ct. App. 1992); *Fullen v. Philips Electronics North Am. Corp.*, 266 F.Supp.2d 471, 476 (N.D.W.Va. 2002). However, your letter referred to two unpublished cases that held that the standard preempts such state tort law claims. *Bass v. Air Products*, 2006 WL 1419375 (N.J. Super. A.D. 2006); *Vettrus v. Ashland*, No. C9-04-817 (Minn. 3d Jud. Dist. 2008).

It is the Department of Labor's position that the latter cases were decided incorrectly, and that section 1910.1200(a)(2) does not preempt a failure-to-warn state tort claim. The decisions finding preemption are inconsistent with the savings clause discussed above, because OSHA does not have the authority to broadly preempt any state tort law claim. *Cf. Wyeth v. Levine*, 129 S.Ct. at 1201 (FDA labeling requirement not necessarily preemptive of state tort failure to warn claim where Congress did not authorize the FDA to directly preempt state tort law). OSHA therefore intended the provision to preempt

only state and local laws and regulations, *i.e.*, positive enactments, and the use of the word "requirements" is properly understood as limited to such law. This was also the common understanding of the word when the standard was promulgated in 1983. The regulatory history makes this limitation clear. Moreover, there does not appear to be a direct conflict between the requirements of the Hazcom standard, *i.e.*, adequate warning, and the duty underlying a failure to warn tort claim.[4]

First, although the meaning or scope of the regulatory term "legal requirements" is on its face ambiguous, its intended meaning in the hazcom standard is clearly explained in the preamble. There, the Secretary describes the burden on interstate commerce arising from the recent proliferation of state and local *legislative enactments* that contain differing and conflicting hazard reporting requirements. 48 Fed. Reg. at 53283-84. Nowhere in that discussion is there any complaint regarding the availability of state tort remedies. *Id.* This is not surprising in light of the savings clause making clear that the Secretary has no authority to "enlarge or diminish or affect in any other manner the common law . . . duties . . . of employers." 29 U.S.C. 653(b)(4). Indeed, one commenter, apparently recognizing the limits of OSHA's authority to provide uniformity, stated:

> *While we recognize statutory limitations in this area*, we believe every effort should be made to see that such a Federal standard preempts State and local efforts.

48 Fed. Reg. at 53283-84 (emphasis added). Had the Secretary believed the savings clause was inapplicable or superseded, she would have provided an explanation. But there is none.[5]

Moreover, both the Hazcom standard and its preamble state that in order for a state to regulate in this area, it must submit "its intended requirements" to OSHA for approval under section 18 of the OSH Act, 29 U.S.C. § 667. 48 Fed. Reg. at 53284, 53322-23; 29 C.F.R. § 1910.1200(a)(2) (no state may adopt or enforce "any requirement" except through state plan approval process). And section 18 governs only positive enactments of state law. *Gade*, 505 U.S. 103-04 ("If a State wishes to regulate an issue of worker safety for which a federal standard is in effect, its only option is to obtain the prior approval of the Secretary of Labor."). State laws submitted under section 18 must be part of a state plan meeting requirements that are wholly inapposite to tort remedies. Thus, by requiring section 18 approval, Congress made clear that it did not intend for the OSH Act's preemptive effect to extend to the case-by-case judicial development of the common law,

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[4] Of course, a definitive determination of conflict can only be made based on the particulars of each case.

[5] The standard's statement that a state may not "adopt or enforce, through any court or agency, any requirement relating to the issue addressed by this Federal standard" was relied on by the *Bass* court. But read in context, the reference to "any court" clearly refers to the enforcement, not the adoption, of a requirement. Even if there were ambiguity in the term, the interpretation of the Secretary would be entitled to deference from state as well as federal courts. *Martin v. OSHRC*, 499 U.S. 144, 158 (1991).

and by referring to that provision, OSHA made clear that it understood that the preemption provision in the Hazcom standard could not preempt such common law.

We note that nine years after OSHA promulgated the Hazcom Standard, in *Cipollone v. Liggett Croup, Inc.*, 505 U.S. 504 (1992), a plurality of the Supreme Court ruled that the statutory term "requirement or prohibition" in a broad preemption provision in a different statute precluded certain common law claims. However, that ruling sheds no light on the Secretary's intent in the Hazcom standard, nor could it enlarge the Secretary's statutory authority by allowing her to "diminish . . . the common law rights" of parties asserting a right in tort. In any event, later Supreme Court cases clarify that the scope of the term "requirement" in a preemption provision depends on its particular statutory context, use and intent. For example, in *Medtronic Inc. v. Lohr*, 518 U.S. 470 (1996), the Court stated that the term "was not intended to pre-empt most, let alone all, general common-law duties enforced by damages actions." 518 U.S. at 491. Among other reasons, the Court explained that in the statute at issue there, Congress (like OSHA here) "was primarily concerned with the problem of specific, conflicting state statutes and regulations rather than the general duties enforced by common-law actions." *Id. Cf. Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 443 (2005) (observing that the term "requirements" in a preemption clause does not "invariably" extend beyond positive enactments, such as statutes and regulations, and embrace common-law duties).[6]

The above analysis reveals that neither the OSH Act nor the Hazcom standard expressly preempts state tort actions. Nor do they contain any indication of Congressional or agency intent to preempt such actions. This conclusion does not mean that a state tort suit could never be preempted on conflict grounds. If the Hazcom standard requires (or prohibits) a specific action that must be specifically performed (or avoided), a state could not make that action (or omission) a tort. Our review of the Hazcom standard and a typical failure to warn claim, however, reveals no such conflict. The underlying duty (allegedly breached) of such a tort claim – the provision of an adequate hazard warning – is not inconsistent with the Hazcom standard. *See In re Welding Fume Products Litigation*, 364 F. Supp. 2d 669, 694 (N.D. Ohio 2005) (finding "no substantial, clear, or direct conflict between the HazCom Standard and the common law duty to warn invoked by plaintiffs"); *Wyeth*,129 S.Ct. at 1197-1199 (no conflict between FDA's label requirements and the common law duty to warn at issue in that case). Therefore, it is the Department of Labor's position that the Hazcom standard, as a general matter, does not preempt state tort failure to warn suits.[7]

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[6] *Bates* also noted the "groundswell" of decisions finding preemption of tort claims under federal pesticide law following *Cipollone* where before *Cipollone* such suits had not been preempted). 544 U.S. at 441.

[7] This conclusion is also consistent with the President's May 20, 2009 Memorandum, which directed that Federal preemptive authority be exercised only where "justified under legal principles governing preemption, including the principles outlined in Executive Order 13132." Section 4(a) of Executive Order 13132 provides:

I hope this letter responds to your concerns. If you have additional questions, please contact Joseph M. Woodward, Associate Solicitor for Occupational Safety and Health.

Sincerely,

M. Patricia Smith
Solicitor of Labor

cc: Jordan Barab, Deputy Assistant Secretary for Occupational Safety and Health

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Agencies shall construe, in regulations and otherwise, a Federal statute to preempt State law only where the statute contains an express preemption provision or there is some other clear evidence that the Congress intended preemption of State law, or where the exercise of State authority conflicts with the exercise of Federal authority under the Federal statute.