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8 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

10 FLOWER WORLD, INC.,

11 Plaintiff,

12 v.

13 JOEL SACKS, Director, and CRAIG
14 BLACKWOOD, Acting Assistant Director
of the Washington Department of Labor
and Industries in their official capacities,

15 Defendants.
16

CASE NO. 3:21-cv-05305-RJB

ORDER GRANTING
DEFENDANTS' SECOND
MOTION TO DISMISS (DKT. 17)

17 This matter comes before the Court on Defendants' Second Motion to Dismiss Under
18 Fed. R. Civ. P. 12(b)(6). Dkt. 17. The Court has considered the pleadings filed in support of and
19 in opposition to the motions and the file herein.

20 Plaintiff, Flower World, Inc. ("Flower World"), alleges that the Washington State
21 Department of Labor & Industries lacked the authority to issue Flower World a citation for
22 failure to require masking, social distancing, and temperature checks during the COVID-19
23 pandemic because federal law preempts the regulation at issue.

24 For the following reasons, Defendants' motion to dismiss should be granted.

1 I. FACTS AND PROCEDURAL HISTORY

2 A. FACTS

3 Flower World is a horticultural enterprise in Snohomish County. Dkt. 22. On July 28,
4 2020, the Washington State Department of Labor and Industries (“WDOL”) issued Flower
5 World the following citation pursuant to WAC 29-307-045(1), which is the general duty clause
6 of the Washington Industrial Safety and Health Act (“WISHA”).

7 The employer did not ensure to furnish to each employee a place of employment
8 free from recognized hazards that are causing or likely to cause serious injury or
9 death to employees.

10 In this instance, the employer did not ensure that the addendum to the Governor’s
11 Proclamation 20-57 (5/28/20) was met. The addendum discusses the requirements
12 concerning the Health of Agricultural Workers.

13 The following instances were not met:

- 14 -Social Distancing of six (6) feet at all times by all employees.
- 15 -Masks/Face coverings were not worn at all times by all employees.
- 16 -Temperature checks at the beginning of each work day are not being conducted.

17 ...

18 NOTE: Employers must comply with all conditions for operation required by
19 emergency proclamation issued under RCW 43.06.220, including Safe Start phased
20 reopening requirements for all businesses and any industry specific requirements.

21 *Id.* at 3–4.

22 Flower World does not dispute the facts listed in this citation. *See* Dkt. 22. Instead,
23 Flower World argues that the WDOL is prohibited from issuing this citation because the
24 regulations cited are preempted by the federal Occupational Safety and Health Act (“OSH Act”).

Id. at 2. The Occupational Safety and Health Administration (“OSHA”) administers the OSH
Act.

Flower World requests a declaratory judgment that Proclamation 20-57 and WAC 2960307-
045(1) are preempted by federal law and are in violation of the Supremacy Clause in Article XI,
Clause 2 of the United States Constitution.

1 congressional intent.” *Gade v. Nat’l Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 96 (1992) (quoting
2 *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985)). Though there are three types of
3 federal preemption, conflict, express, and field, they operate in the same way: Congress enacts a
4 law that imposes restrictions or confers rights; a state law regulates the same restrictions or
5 rights; and, if the federal law clearly intended to preempt the state law, then the federal law takes
6 precedence and the state law is preempted. *See id.*; *Murphy v. Nat’l Collegiate Athletic Ass’n*,
7 138 S.Ct. 1461, 1480 (2018).

8 By enacting OSH Act, Congress sought “to assure so far as possible ever working man
9 and woman in the Nation safe and healthful working conditions.” 29 U.S.C. § 651(b). To that
10 end, “the Osh Act pre-empts all state ‘occupational safety and health standards relating to any
11 occupational safety or health issue with respect to which a federal standard has been
12 promulgated.’” *Gade*, 505 U.S. at 102 (quoting 29 U.S.C. § 667(b)). This intent is clear from
13 its statutory language. Section 18 of the OSH Act, which is codified as 29 U.S.C. § 667,
14 includes two clear directives. First, § 667(a) states, “Nothing in this chapter shall prevent any
15 State agency or court from asserting jurisdiction under State law over any occupational safety or
16 health issue with respect to which no standard is in effect under section 655 of this title.”
17 Second, § 667(b) allows states to promulgate standards for which there is a standard in effect, if
18 the state submits a plan to OSHA, and OSHA approves it.

19 Both the OSH Act and the WISHA include a general duty clause. Under the OSH Act,
20 each employer must “furnish to each of his employees employment and a place of employment
21 which are free from recognized hazards that are causing or are likely to cause death or serious
22 physical harm.” 29 U.S.C. § 654(a)(2). The WISHA is virtually identical and reads, “Each
23 employer: [] Shall furnish to each of his or her employees a place of employment free from
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1 recognized hazards that are causing or are likely to cause serious injury or death to his or her
2 employees[.]”

3 Therefore, the OSH Act would preempt the WISHA citation either if there is a specific
4 standard OSHA standard in effect regulating COVID-19 health and safety standards, or if the
5 OSH Act general duty clause is considered a standard that preempts the WISHA general duty
6 clause. If neither condition applies, then the citation is allowed under 29 U.S.C. § 667(a).
7 Before reaching these questions, however, the Court will discuss why there is federal jurisdiction
8 to bring this claim.

9 1. Federal Jurisdiction Exists

10 Defendants argue that there is no federal jurisdiction because Washington has an
11 approved state plan under 29 U.S.C. § 667(b). Therefore, the only question is whether there is a
12 violation of WISHA is a question of state law.

13 While it is true that the question of whether there is a WISHA violation is a question of
14 state law, federal jurisdiction exists because Flower World contends that the OSH Act preempts
15 the citation at issue. The existence of a state plan does not preclude federal jurisdiction. *See*
16 *Industrial Truck Ass’n, Inc. v. Henry*, 125 F.3d 1305, 1306 (9th Cir. 1997). Theoretically, states
17 could enact new standards not approved by the plan or interpret an approved standard in a way
18 that conflicts with an existing OSH Act standard. Both could comply with state law but could
19 require federal preemption. The issue in this case presents an example of that: the OSH Act
20 could preempt WISHA citations for violating COVID-19 health and safety measures under the
21 general duties clause are if there are OSH Act COVID-19 health and safety standards in place.

22 Therefore, jurisdiction exists despite the existence of an approved state plan.
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1 2. No Specific OSH Act Standard in Place Regulating COVID -19 Health and Safety

2 Plaintiff vaguely references OSH Act standards regulating respiratory hazards. Dkt. 22 at
3 15. The most applicable standard appears to be 29 C.F.R. 1910.134 (Respiratory protection), but
4 that standard is to “control those occupational diseases caused by breathing air contaminated
5 with harmful dusts, fogs, fumes, mists, gases, smokes, sprays, or vapors[.]” It does not apply to
6 protection from airborne viruses. Plaintiffs provide any other specific OSH Act standard, nor is
7 the Court aware of any other relevant standard.

8 Therefore, there is no specific standard OSH Act standard in place for the regulating
9 health and safety standards related to COVID-19.


10 3. OSH Act General Duty Clause Does Not Preempt WISHA General Duty Clause

11 The OSH Act general duty clause does not preempt the WISHA general duty clause both
12 because the WISHA general duty clause was approved by OSHA under § 667 and because it is
13 not a specific standard to which preemption would apply.

14 To the extent that the WISHA general duty clause does conflict with the OSH Act
15 general duty clause, it was approved by OSHA in 1973. 38 FR 2321 (Jan. 26, 1973). The
16 general duties clause has long been recognized as a means by which safety violations for which
17 there is no specific standard in place may be cited. *See Briston Steel & Iron Works, Inc. v.*
18 *Occupational Safety & Health Review Comm’n*, 601 F.2d 717, 721 (1979). By approving the
19 WISHA general duties clause, OSHA approved of WDOL using its general duties clause for the
20 same reason.

21 In addition, the general duty clause is not a standard. It is not found in the “Standards”
22 Section of the OSH Act. 29 U.S.C. § 655. It is in Section 5, “Duties.” 29 U.S.C. § 654.

1 Dated this 3rd day of August, 2021.

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4 ROBERT J. BRYAN
United States District Judge

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