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Lisa Nagele-Piazza (00:00)

Welcome to the FP5, Five Things for Your 9-to-5. We help employers make sense of the fast-moving world of workplace law and compliance by breaking down topics into five parts. I'm Lisa Nagele-Piazza from the Fisher Phillips Content Team.

Employers are feeling the impact of relaxed laws and attitudes toward cannabis use, and this has been the trend for years, but there have been recent changes at the federal level as well as data showing an increase in positive cannabis test results. Todd Logsdon joins us this week to talk about it. Todd is a partner in Fisher Phillips's Louisville office and co-chair of the firm's Workplace Safety Practice Group. Thanks for being on the show today.

Todd Logsdon (00:45)

Thanks. Thanks for having me.

Lisa Nagele-Piazza (00:46)

And you can probably pronounce Louisville better than me, but I've tried to practice it a few times.

Todd Logsdon (00:52)

You got it pretty close there, Louisville.

Lisa Nagele-Piazza (00:55)

Excellent, excellent. So, Todd, before you became an attorney, you worked in manufacturing with responsibilities for both HR and safety. How did that real world experience shape the way that you advise employers on complex issues like what we'll be talking about today, like cannabis use in the workplace?

Todd Logsdon (01:15)

Well, think it helps me understand what they're dealing with, where they're coming from when they ask the question and the issues they may not raise to me, but I know that they're dealing with. So in manufacturing: production pressure and good attendance from your workforce is always important. And so knowing that, even if they don't state it, is a good background fact to have. When you're dealing with something like marijuana, in manufacturing, a lot of the jobs have safety issues and you'd rather not have anybody impaired doing those jobs.

Lisa Nagele-Piazza (01:50)

Yeah, absolutely.

The first thing that we want to talk about is what's new at the federal level when it comes to rescheduling. A lot of times we're talking about state law changes, but we have some unique news now this year at the federal level. So can you go into a little bit about what happened recently?

Todd Logsdon (02:12)

Yeah, yeah. So in addition to all the states who have, not all of the states, but many of the states have legalized medical or and or recreational, the federal government, had stayed a schedule one and it's still been illegal. It was proposed and first talked about under the Biden administration and then brought up again under the Trump administration. So it seems to have sort of a bipartisan support. And what they've done right now, they've moved for FDA-approved and state-approved medical products related to marijuana have moved from Schedule One to

Schedule Three. That's just for the medical related FDA approved. But that's a big deal because one, that opens up research and it opens up any qualms a state may have had about federal law have certainly been relaxed when it comes to prescriptions.

Lisa Nagele-Piazza (03:01)

Sure, yeah. And just a refresher, or even for some of our listeners who might not be aware, under federal law, there are five schedules. And Schedule One means that there's no accepted medical use for that substance, and that it has a high potential for abuse. So that's like heroin or LSD, and marijuana has been on this list, and now it's being lowered to a Schedule Three. Which means that it has a moderate to low potential for physical and psychological dependence, and also a lower potential for abuse than Schedule One or Schedule Two. And as you said, Todd, this is just for medical and FDA-approved, so state-level medical and then FDA-approved medical, right?

Todd Logsdon (03:52)

Correct. And I you know, I'm not sure how much there is of FDA-approved when it comes to marijuana because it's been Schedule One. I think we'll see that now. That's part of the research that's done. And then, you know, the interesting thing with the state law is for the most part, you know, there's not there's not well, some of the states have very strict requirements where the marijuana has to be grown and processed in that state. I know Alabama, I'm not sure they've quite gotten off the ground yet, but in that state it could only be sold as a gummy and it had to be a peach flavored gummy.

Lisa Nagele-Piazza (04:29)

Oh, okay.

Todd Logsdon (04:30)

So you get a lot of variants across the states about what's going to be approved from the state. But there's still not a your doctor in those states, if you have a medical card, isn't gonna prescribe two joints twice a week or something. I mean it's still sort of as needed. So there's still a lot of uncertainty to be nailed down even with this change from Schedule One to Schedule Three.

Lisa Nagele-Piazza (04:53)

Yeah, absolutely. And you know, it brings up an interesting legal question too, because I know historically we've been following if a job candidate was not considered for a job because of a failed pre-hire cannabis test, they might bring a discrimination claim under state law. Now, how does this rescheduling sort of impact federal law? Because it used to be well, we said, you know, well, cannabis is completely illegal under federal law. So there's no Americans with Disabilities Act claim or anything like that. How do you think this is going to impact those federal claims, particularly under the ADA?

Todd Logsdon (05:35)

I'm aware of at least one federal district court judge who ruled you couldn't have an ADA claim for medical marijuana because it was still illegal. And that's going back a few years, a couple, three years maybe. So it'll be interesting to see if it's considered like any other prescription medication if somebody brings, an employer applicant, brings a federal Americans with Disabilities Act claim or Disability Discrimination Act claim. But what we've been seeing in the states for the last, you know, ten or twelve years since we've started to see some of this get legalized, is there's either claims under the state statute that legalize the marijuana, or maybe a state statute

that says you can't penalize somebody for otherwise lawful off-duty activity, or it's been under a state disability discrimination law, many of the states have something that mirrors or is very close to the ADA.

Lisa Nagele-Piazza (06:33)

Yeah, and that actually brings us to our second thing for today, which is talking about the current legal framework around cannabis use. And I think that's still a really confusing thing for employers, is that, you know, it's been illegal at the federal level, and yet states are passing these laws. And like you said, many states have legalized at least medical and almost half, recreational now too. So how does this patchwork of state laws kind of work? And you mentioned a little bit that they can be very different from each other from state to state.

Todd Logsdon (07:10)

Yeah, that's the headache for employers right now is two states next to each other could have very different laws when it comes to legalized medical marijuana. Some will say there is no private cause of action under this one. Others will have some type of a cause of action that you can have because you didn't follow a certain procedure that's required by the law.

Lisa Nagele-Piazza (07:32)

And that means an employee could sue, right? The cause of action.

Todd Logsdon (07:35)

An employee could sue. Cause of action means they'd have a legal claim to bring. But most of those states, I like to tell clients, when your state legislature passes a law or federal Congress passes a law, they're never in silos. So even though you know, for example, here in Kentucky, our medical marijuana law says there is no private cause of action, an employer can still do certain things, that doesn't impact or negate that we have a state disability discrimination law, and an employee could bring a failure to accommodate or disability discrimination claim under that state disability law that has nothing to do with the legalized marijuana.

Lisa Nagele-Piazza (08:15)

Okay, well that gets really complicated.

Todd Logsdon (08:18)

It can, yeah. You have to sort through state by state. I tell my clients who are in multi state employers that you have to know what you're gonna do in each state or you have to sort of take what's the state with the highest bar and apply that to all of your states. And employers have to make a choice on those things.

Most of the accommodation I think comes into play with your testing. So while an employee has no right. Generally most of the state statutes say the employee doesn't have right to possess it or use it or be under the influence of it while they're at work. But the issue comes down to testing. And testing in marijuana, unlike alcohol, there's not a blood alcohol content similar test yet for marijuana to say this is your level in your body right now at this point in time and get that sort of immediate feedback for the employer.

So what most of the testing does is it detects the presence of and some past used in some period of time. That doesn't mean the person's impaired at the time. So employers may have to look at their accommodating their test procedures to say, well, this person tested positive, but they have a medical marijuana card. So we're gonna have to look further to determine if we think they're impaired or have some understanding with them about we know

they're gonna test positive because they have a recommendation from their doctor to take something, you know, maybe once a week.

Lisa Nagele-Piazza (09:47)

Yeah, that's a really good point. And I, you know, always try to say, 'cause sometimes I think people might misunderstand that whether it's they're a registered medical user, you know, that they don't have the right to be impaired at work, but measuring that impairment with cannabis is an issue.

Todd Logsdon (10:05)

Correct, I tell clients all the time I'm from the great Commonwealth of Kentucky and we make this wonderful brown liquid called bourbon. And it's perfectly legal here in Kentucky, but I'm not permitted to be under the influence and impaired with that at work. So it's a very similar thing. You have to just recognize that it's legalized to a certain extent, but it doesn't mean you're allowed to be at work and be impaired.

Lisa Nagele-Piazza (10:33)

And that brings us to our third thing. Let's talk about the changing attitudes towards cannabis use and how that's impacting the workplace. So I just did some research on this, and there's a recent Pew Research Center study survey that shows that only 11% of US adults say that cannabis should not be legal for any purpose. So that's you know, I think there's about 88, there was like 1% in there that didn't answer the question, but 88% support it to some degree. And I know that's changed a little bit over the last couple of years in terms of supporting recreational or medical only.

But the general trend is that since the first cannabis recreational laws were passed in in 2012, acceptance has just gone up. So how is this? Have you seen this change in attitude generally kind of impact the workplace?

Todd Logsdon (11:29)

We have. I've seen with some clients and it kind of goes by generational lines where some of the management team will be absolutely against it. They want to have a zero tolerance, they want to test, and some of the younger management team maybe or and some it's not always by age, but some of the management team will say it's not that big a deal, everybody's using this, it's illegal and not focusing on it. But one thing I have also seen from clients is that if they use that on pre-employment, post-offer pre-employment testing that they're likely to lose a lot of applicants out of the applicant pool because they're going to test positive. So if they have a zero tolerance for it and if you test at all, you're not going to get hired, it greatly shrinks the applicant pool. And a lot of our clients, already a lot of employers, are already struggling to find good applicants as it is. Yeah. So I tell clients is have an impairment mindset. Focus on impairment.

Lisa Nagele-Piazza (12:26)

Right, absolutely. And that brings up an interesting challenge too for safety sensitive roles, not being able to measure the level of impairment through a cannabis test. How should employers manage that with the rising acceptance and use of cannabis and also making sure that they are proactive about safety in those roles, like your forklift drivers and so on.

Todd Logsdon (12:53)

I think the devil's in the details of how you define what is a safety-sensitive position. As a former safety professional, I could probably come up with an argument about why every job is safety sensitive.

Lisa Nagele-Piazza (13:03)

Yeah, sure.

Todd Logsdon (13:04)

The EEOC takes a very limited view, and they talk about things like police officers and ambulance drivers and the airplane pilots and stuff like that. Well, that's those are clearly safety sensitive. But you can make an argument, for example, in the manufacturing world, anybody who drives something, that's a safety sensitive position. If I'm operating a heavy crane, you know, that's safety sensitive. If I'm there doing operating certain machinery or processes that have chemicals that if you know if I'm impaired could create a lot of problems.

So I tell employers you have to, you know, look individually, make a decision on those jobs and support why that's safety sensitive. Once you do, I think you can take a different approach to your testing. I think you can be a little bit harder about saying we're not going to accept somebody in that role who tests positive even at the pre-employment post-offer and even if they have a medical card. And a lot of the state statutes have a carve out for quote safety sensitive positions. So you can do that.

Lisa Nagele-Piazza (14:10)

You're listening to the FP5. I'm Lisa Nagele-Piazza, and we're here with Todd Logsdon. Todd is a partner in Fisher Phillips Louisville office and co-chair of the firm's Workplace Safety Practice Group. Quick reminder: the insight we've been discussing is linked in this podcast show notes.

Our fourth thing. So employers should be thinking about all of this now, we've talked about a lot of complex issues going on. What should they be thinking about when they're developing their workplace policies? And I know there's a lot to think about and each organization will be different when it comes to how they're going to approach their workplace policies. But what are some of the sort of guidelines that you would recommend?

Todd Logsdon (14:55)

Well I think one is you oughta have a policy. The policy ought to be clear and well-communicated to your employees and your applicants so that everybody knows at least what the deal is. I think you have to, each employer has to assess for their workplace and their types of jobs what they need. For example, if it's safety sensitive, you may continue to do testing for marijuana and other drugs. If it's not safety sensitive, you may decide to opt out of that. If it's the typical applicant pool, you know you're likely to get positive test, and you may, and it's not safety sensitive, you may say, well, I'm just gonna scrap testing for marijuana in the pre-employment stage now. But that doesn't mean you may not test for it anytime. You may still want to test for it post-incident, post-accident, or for reasonable suspicion. There are some things you have to be careful about when you do post-accident. You don't want to have a blanket post-accident drug testing program, OSHA has kind of stated they don't like that. They might consider that a retaliatory, for example ...

Lisa Nagele-Piazza (15:57)

What does that mean, a blanket policy?

Todd Logsdon (15:59)

If anybody has an accident, you get a drug test. Oe anybody who leaves the facility for medical treatment gets a drug test. And the issue there is, for example, let's say Lisa, you're driving a forklift and you hit me with the forklift. I

need medical treatment. I'm leaving the facility for medical treatment. Maybe I got in your way because I was impaired, but maybe not. But you don't get sent out because you don't need medical treatment. You're not going to get the drug test. Maybe you're the person who needed to be drug tested more than me.

Lisa Nagele-Piazza (16:27)

Okay.

Todd Logsdon (16:28)

So some of the guidance from OSHA now is everybody involved in an incident would need to be drug tested, not just a person who got injured. So post-accident might be one that you still want to do. You have to do it right. We've got some alerts on our system. You can look at that to get some more guidance or reach out to us. And then reasonable suspicion. You still certainly want to keep the right to do reasonable suspicion if you suspect somebody is impaired at work.

Lisa Nagele-Piazza (16:54)

And then that just made me think too, in addition to state cannabis laws all being different, state drug testing laws are all different too, right?

Todd Logsdon (17:04)

It is, yeah. Nothing gets easier for the employers. In fact some places, some locations will say you can't do pre-employment marijuana testing. Others really limit when you can do drug testing at work. Generally reasonable suspicion is not prohibited by any of the jurisdictions I'm familiar with. But I always tell employees you still again, you gotta go back to determine if they were impaired. In some states, if even if you had a reasonable suspicion, but you can't prove that they were impaired at the time, then the test doesn't really help you out.

Lisa Nagele-Piazza (17:45)

So that leads us to our fifth and final thing for today. And here at Fisher Phillips, we want to know whether organizations are still testing for cannabis in the pre-hire process. And we actually conducted a survey two years ago of a thousand employers, and we found that 48% were not testing for cannabis in the pre-hire process. And many of them said, like you had mentioned, Todd, that it impacts their talent acquisition and retention goals. And even forty-four percent of the organizations that said they do test for cannabis said they were having challenges in those areas because of it.

So we just finished another flash survey. We just wrapped it up. We don't have the results yet. And we want to see if anything's changed in the last two years. And we'll be sharing these results in our FP weekly newsletter. So our listeners should sign up for that and they can review the results. But before then, Todd, I wanted to ask you, what do you think the results will show? Do you think the numbers are gonna stay about the same or what trends do you think we'll see?

Todd Logsdon (18:50)

I think you'll see fewer employers testing unless they're in an industry that is considered safety sensitive or has a lot of safety sensitive positions.

Lisa Nagele-Piazza (19:00)

Yeah, that makes a lot of sense. Is there anything else, Todd, that you think is important for employers to take away? I know this can be a very complicated subject and sort of difficult for employers to think of like a real game plan because there are so many nuances. So anything that you want to say just to kind of summarize what employers should be doing and how they should be approaching the topic of cannabis and the workplace impact.

Todd Logsdon (19:28)

Yeah, I think regardless of how the individuals and management at a company feel about marijuana and any form of legalization, you just have to recognize the reality that things have changed, things are gonna continue to change, and that you have to be able to adapt your policies to that and recognize you may be operating in a state that has legalized it medically or recreationally, and you're going to have to adjust your policies and proceed accordingly. I think if you sit back and say I'm just gonna have a zero tolerance at all for all things regardless of the job when it comes to marijuana, you're probably gonna struggle against yourself.

Lisa Nagele-Piazza (20:06)

Yeah, and that's a really interesting point too, because I know I've been following these laws for probably about 15 years now. It's you know, well, 14 years since the first laws were passed in Colorado and in Washington for recreational use. And it's amazing how much things have changed since then because I think in the earlier days the advice to employers was generally, well, you can still have a zero-tolerance policy. It's illegal on the federal level. And that's the most important thing. Obviously, you have to balance your risk tolerance within that. But it's really changed since then, hasn't it?

Todd Logsdon (20:43)

It has, very much, very much so.

Lisa Nagele-Piazza (20:50)

Yeah, so Todd, this is the part of the episode where we get to know you a little better in five questions. What are you reading right now?

Todd Logsdon (20:58)

Mostly work related things, case law, you know, proposed regulations, unless I'm on like a beach vacation, then I'll read like Lee Child, you know, the Reacher series or Clive Cussler, something definitely not legal-related.

Lisa Nagele-Piazza (21:13)

You and my husband would get along because those are his favorite authors.

Todd Logsdon (21:18)

With their nice easy fast reads.

Lisa Nagele-Piazza (21:20)

Yeah, exactly, exactly. They're good beach reads. And speaking of beaches, as far as vacations go, what is still one place that's on your bucket list?

Todd Logsdon (21:30)

We'd like to go to Scotland and Ireland, we haven't gotten there yet.

Lisa Nagele-Piazza (21:32)

Nice. Yes, very nice, beautiful there. I highly recommend the Isle of Skye in Scotland, it's absolutely beautiful. So what is your favorite TV show from childhood?

Todd Logsdon (21:48)

Um, 1950s reruns of the Lone Ranger.

Lisa Nagele-Piazza (21:52)

That's great. And so do you prefer texting or calling?

Todd Logsdon (21:58)

It depends on the issue. If it's something quick, a text, or to set up a meeting, a text. If it's something substantive, I usually want to have a call, not text.

Lisa Nagele-Piazza (22:09)

Yep, I hear that. Although I find myself now even texting someone before I call them. Like in the old days you just pick up the phone and call. Now it's like you text first. "Are you free for a call?"

Todd Logsdon (22:19)

Yeah, I think most people hate the cold call anymore. They want the text or email setting up the call, at least for work-related situation.

Lisa Nagele-Piazza (22:27)

And our fifth question, if you can think of one, what is a hidden talent you have that people don't know about?

Todd Logsdon (22:34)

I think I'm pretty boring. I'm not sure it's hidden, I'm pretty good at problem solving. Breaking a problem down into manageable parts and coming up with a plan to attack the problem. But nothing crazy like I don't play an instrument or do something fun or interesting, so.

Lisa Nagele-Piazza (22:50)

Well, it's a perfect skill to have for the role that you're in.

Well that's all the time we have for now. Thanks again for being on the show, Todd.

Todd Logsdon (23:00)

Thanks for having me.

Lisa Nagele-Piazza (23:03)

And thank you for listening to the FP5. One more quick reminder that you can find more information on this topic in our podcast show notes. We'll see you next week.

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