

## Fuzzy green lines

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**Gabrielle Saulsbery**

Employers and the courts are wrestling with the implications of an expanding medical cannabis program

Adam Gersh was tapped by *NJBiz* reporter Gabrielle Saulsbery in response to employers and the courts wrestling with the implications of an expanding medical cannabis program.

The rapid growth of New Jersey's medical cannabis patient population, which the Department of Health currently counts at 70,201, has presented employers with a new reality: some of their employees might be consuming cannabis, and they're allowed to by law. But what's an employer to do when they worry their employee might be impaired at work?

"It's clear that if someone tests positive in New Jersey and they are a cardholder, they have the right to offer an explanation, but the statute, as written, does not require the employer to accept it," explained Adam Gersh, cannabis law attorney and member of Flaster Greenberg PC's labor and employment and litigation practice groups.

"Is someone impaired or were they just sleepy from being up all night?" said Gersh. "You can discipline them for being impaired, whether they're just sleepy or using illegal or legal drugs. It's messier than an objective test."

If an employer does want to dismiss or terminate an employee for impairment, Gersh recommends providing articulable reasons for suspicion of impairment. This might include that the employee couldn't follow instructions, couldn't keep their eyes open, or any physical or intellectual deficiencies, and they should be noted to protect the employer from a claim that he or she is being unfair with that interpretation.

"Employers, frankly, they don't like that. They prefer to have a test than to be responsible in those ways," Gersh said. "What I say to employers who are panicked from that is that it's really not that different from what you've had to do for years. You're always on the lookout for impairment. Maybe you would give them a blood-alcohol test, but you're also sending someone home if they appeared to be impaired or smell like alcohol. The same with legal drugs. If someone is impaired at work, you still have to be on top of that. It's not as scary or different as it seems."

Employers should also take a step back to consider whether it really matters to them what an employee does in his or her free time, Gersh suggested.

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“You have to ask yourself, from a practical perspective, do you really want to do random drug screening for cannabis when people aren’t impaired? In other words, is it important for you to catch people who are using cannabis in a way that’s not an impairment to their work? Some employers do, some don’t,” he said.

For some employers, he expects suspicion-based testing to continue. If an employee appears to be intoxicated and a drug test is administered, though it can’t determine current intoxication, a positive test for cannabis would support their suspicion that they were impaired at work.

Gersh recommends that employees exercise caution with discussing their medical condition with others at work to avoid making themselves a target if the use of cannabis is prohibited.

“At the same time, if there is testing, it’s important to educate the employer that they’re using medical marijuana as a part of approved treatment and that it’s legal and they’re not impaired at work. That’s probably the best you can do. Employers still currently have the right to say testing positive is the right to warrant dismissal or discipline. The best you can do is give the employer a reasonable basis not to do that,” Gersh said.

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#### **ATTORNEYS MENTIONED**

Adam Gersh