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Regulating Medical Marihuana in Your Community and Your Workplace

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Medical Marihuana

First permitted in Michigan by a 2008 voter initiative, the Michigan Medical Marihuana Act ("MMMA") established rules and regulations to permit limited medical cultivation, distribution, and use of marihuana for a debilitating medical condition. Since then, the legislature enacted the Medical Marihuana Facilities Licensing Act ("MMFLA") in September 2016. The MMFLA allows commercial medical marihuana facilities for the first time, but licenses and taxes them. Additionally, the MMFLA clarifies some of the issues that arose under the MMMA, permits townships to choose whether they want commercial medical marihuana businesses within their borders, and gives townships the right to adopt ordinances, levy regulatory fees and receive a share of the taxes.

A. Medical Marihuana Patients and Caregivers

1. *Statutory Authority.* Michigan voters approved the MMMA in 2008. MMMA established rules and regulations to prohibit the prosecution or penalization of a person distributing or using marihuana for debilitating medical conditions. The MMMA also established the terms of use by "qualifying patients" and "primary caregivers."

2. *Debilitating Medical Conditions.* To be eligible for registration as a qualifying patient, an applicant must obtain a written opinion from a primary physician

stating that the applicant is both suffering from a debilitating medical condition and is likely to receive a palliative or therapeutic benefit from the use of marihuana. A qualifying patient may obtain a medical marihuana card for medical conditions such as Alzheimer's, ALS, anxiety, Crohn's, seizure, cancer, glaucoma, HIV, Hepatitis C, severe chronic pain, and nausea. The State of Michigan has issued more than 216,000 of these cards (valid for a year), with the vast majority of patients (93%) qualifying to use medical marihuana based on "severe and chronic pain."

3. *Qualifying Patient.* A qualifying patient is issued an ID card by the State upon successful registration and is allowed to possess not more than 2.5 ounces of usable marihuana and to cultivate up to 12 marihuana plants within an enclosed, locked facility. An enclosed, lock facility could be constructed within a building or even an area surrounded by a slatted chain-length fence preventing observation within the fencing.

4. *Primary Caregiver.* A primary caregiver is issued an ID card by the State, allowing an individual to grow and provide marihuana for five or fewer qualifying patients who designate that person as their primary caregiver. A primary caregiver may provide 2.5 ounces of usable marihuana and grow 12 marihuana plants for each of his qualifying patients. A primary caregiver may also register as a qualifying patient, allowing an additional 12 plants grown for his or her personal use. This means a primary caregiver can grow up to 72 plants if he or she has five qualifying patients and is registered as a qualifying patient).

5. *Uses Permitted.* A qualifying patient or primary caregiver can use medical marihuana as that term is defined in the Michigan Public Health Code. A 2016 amendment to the MMMA permits the use of certain marihuana-infused products, including topical formulas, tinctures, beverages, edible substances and similar products available for human consumption.

6. *Court Decisions Impacting Uses Permitted.* Despite the popular misconception, the MMMA did not authorize dispensaries or provisioning centers, which are still unlawful. Collective or cooperative grow operations, and patient-to-patient transfers are also not permitted under the MMMA. See *Michigan v McQueen*, Michigan Supreme Court (2013); *People v Bylsma*, Michigan Supreme Court (2012).

7. *Issues Related to the Use.* The demands of growing marihuana can require higher-capacity electric circuits and breakers (to operate fans, lights, pumps, etc.), plumbing and a supply of water, odor control, locations for storage of fertilizers, alterations to a structure to avoid space and height limitations, and humidity and mold control.

8. *Township Regulation.* The MMMA is silent regarding Township authority over qualifying patients and primary caregivers. Court decisions have permitted narrow regulation of these uses, if not in conflict with the MMMA.

   a. *Statutory Defense:* The statutory defense provided in Section 4(b) of the MMMA states broadly that "a primary caregiver who has been issued and possesses a registry identification card shall not be subject to . . . prosecution, ***or penalty in any manner, or denied any right or privilege*** . . . for assisting a qualifying patient to whom he or she is connected through the department's registration process with the medical use of marihuana in accordance with this act."

   b. *Complete Ban Prohibited:* The Michigan Supreme Court invalidated a municipality's total ban on medical marihuana. *Ter Beek v City of Wyoming*, Michigan Supreme Court (February 6, 2014). The municipal ordinance banned any use of marihuana that was prohibited by other federal or state laws. The ordinance thus totally banned medical marihuana because the federal controlled substances act prohibits the use, manufacture or cultivation of marihuana. Despite this, however, the MMMA provides state-law immunity from arrest and prosecution for medical marihuana use in compliance with the MMMA.

   c. *Supreme Court's Pronouncement on Scope of Regulation:* The Supreme Court was careful to explain that, although local governments may not totally ban uses permitted by the MMMA, they may still reasonably regulate the use of medical marihuana. The Court stated:

> "Contrary to the City's concern, this outcome does not 'create a situation in the State of Michigan where a person, caregiver or a group of caregivers would be able to operate with no local regulation of their cultivation and distribution of marijuana.' Ter Beek does not argue, and we do not hold, that the MMMA forecloses all local regulation of marijuana . . . ."

B. Commercial Medical Marihuana Facilities

1. *Statutory Authority.* Medical marihuana was recently expanded from a "personal" service to commercial-scale growing and distribution under the Michigan Medical Marihuana Facilities Act. The MMFLA created 5 new license categories for commercial medical marihuana growth, distribution and sale. In passage of the related bills, $8,500,000 was appropriated to the Department of Licensing and Regulatory Affairs for its initial costs of implementing the Act.

2. *License categories*:

   a. *Growers (including classes A, B and C)*: A grower may grow marihuana and sell seeds and plants to another grower, or sell plants to a processor or provisioning center. There are three classes of growers:

      Class A – 500 marihuana plants
      Class B – 1,000 marihuana plants
      Class C – 1,500 marihuana plants

   b. *Processors*. A processor may purchase marihuana from growers and sell marihuana (and marihuana-infused products) to provisioning centers.

   c. *Secure Transporters*. A secure transporter may store and transport marihuana and money associated with the purchase or sale of marihuana. All movement of marihuana or seeds between other licensees must be done by a secure transporter.

   d. *Provisioning Centers*. A provisioning center may purchase or transfer marihuana only from growers and processors and sell or transfer marihuana *only to registered qualifying patients or registered primary caregivers*. Before a provisioning center may sell marihuana, it must transport the marihuana to a safety compliance facility for testing and labeling.

   e. *Safety Compliance Facilities*. A safety compliance facility may receive and test marihuana from another marihuana facility.

3. *Township Choice*. A township is not required to allow commercial medical marihuana facilities within its boundaries. The new facilities licensed under the MMFLA may not operate within a township, unless the township passes an authorizing ordinance. See Section 205(1) of the MMFLA.

4. *Operation Commencement*: Anyone seeking a state license under the MMFLA can submit an application ***beginning on December 15, 2017.*** This timeline does not apply to local ordinances, however. If the township enacts an ordinance before December 2017, it could start processing zoning and other applications for local commercial medical marihuana operations prior to that date. Note that no facility authorized under the MMFLA may commence operation until it is licensed by the State on or after December 2017.

5. *Issuance of License*: In addition to any local regulations, all State applications must be submitted to the Medical Marihuana Licensing Board (the "MMLB"), a State body with rule-making authority created under the MMFLA within the Michigan Department of Licensing and Regulatory Affairs.

A township will receive notification of any applications regarding the intended operation of facilities within its jurisdiction. The township then has 90 days to respond with the required information requested by the MMFLA.

6. State revenue-sharing:
   a. A state tax will be imposed on each provisioning center at the rate of 3% of the provisioning center's gross retail receipts, which will go into the state Medical Marihuana Excise Fund.
   b. All revenue raised from the tax is placed into a separate fund administered by the State Treasurer, with 25% of the taxes returning to municipalities in proportion to the number of commercial medical marihuana facilities located within each.
   c. This suggests that an apportionment will be provided regardless of whether provisions centers are permitted. There also is not language addressing whether the size of a facility changes the tax apportionment.
   d. Since no taxes have been disbursed, many questions remain unanswered.

7. *Reasons Some Township are Considering Permitting Marihuana Facilities.*

   a. Local patient need for marihuana
   b. Safer process and more regulated framework for acquiring marihuana
   c. Employment and economics
   d. Neighboring jurisdictions' authorization of use
   e. Annual administrative fee charged by the township
   f. Property tax revenues from construction and development of commercial and industrial parcels. This is especially true for some rural townships that may not otherwise experience such growth.
   g. State revenue-sharing:

8. *Key Distinctions between the MMMA and MMFLA*

MMMA	*MMFLA*
2 types of licenses	5 types of licenses
Noncommercial	Commercial operations
Cost	Profit
Cannot ban	Complete local control to prohibit
Unclear scope of regulation	Clearer scope of local regulation

C. The regulatory scheme for controlling medical marihuana use and operation in the township can be broken down into the following alternatives:

1. No regulation
2. Zoning Ordinance (authority provided under the Michigan Zoning Enabling Act and Planning Act)

3. Non-Zoning Ordinance (authority provided under MCL 41.181 to protect the public health, safety, general welfare of township residents, and the MMFLA itself)
4. Combined Approach (using both a zoning ordinance and non-zoning ordinance)

D. No Regulation

1. MMMA: If a township imposes no regulation related to MMMA activity, qualifying patients and primary caregivers are still permitted to operate within the parameters of the MMMA.

2. MMFLA: If a township imposes no regulation authorizing MMFLA activity, no commercial facilities may operate within the Township's jurisdiction.

E. Zoning Approach

1. The power to adopt and amend zoning ordinances is governed by the Zoning Act, which was comprehensively amended in 2006. The Zoning Act provides the township authority to regulate land uses and buildings by districts, locations and areas.

2. Townships that choose to regulate marihuana under the zoning approach must have (or create) a planning commission and a zoning ordinance.

F. Non-zoning Approach

1. The power to adopt a non-zoning (police power) ordinance is provided under MCL 41.181, which provides the adoption of ordinances "regulating the public health, safety, and general welfare of persons and property" of the township. The MMFLA also provides express authority to regulate MMFLA facilities through a police power ordinance. The ordinance cannot regulate by districts.

2. Townships that do not currently have a planning commission or zoning ordinance may find that a non-zoning ordinance best suits its needs.

3. Non-zoning medical marihuana ordinances are not subject to referendum and regulate current and future facilities. "Grandfathering" of nonconforming uses does not apply.

4. Non-zoning regulations can be comprehensive, addressing most concerns that may be lawfully addressed under the MMMA and MMFLA.

G. Combined Approach

1. All townships are authorized to adopt non-zoning ordinances under MCL 41.181. Those townships that also have a zoning ordinance may find that a

combined approach of adopting a non-zoning ordinance and medical marihuana provisions in a zoning ordinance provides a flexible and defensible approach.

2. This approach provides a method for a township to address specific concerns that arise in each land use district, but also create general standards that regulate the operation of any medical marihuana use, operation or facility within its boundaries.

H. MMMA Zoning and Non-zoning Considerations:

1. Registered patients as accessory use in residential district.

   Accessory use is a supplemental building or structure on the same lot as the main building occupied by or devoted exclusively to an accessory use, but not for dwelling, lodging, or sleeping purposes. Conditions can be imposed to ensure the use is naturally and normally incidental and subordinate to the main use of the land or building.

2. Primary caregivers as accessory use or home occupation in residential district.

   Home Occupation Ordinance imposes limitations to prevent impact on other neighboring homes from the conduct of a business in a residential area. Treated as an accessory use to the home, which is the principal use.

3. Primary caregivers in other districts (agricultural, commercial, industrial).

4. Conditions for Registered Patient's Use:

   a. Restrict growth by the registered patient to his or her primary residence (or to the residential districts generally)
   b. Amount of marihuana may not exceed State law (12 plants per patient)
   c. Require operations to be conducted indoors in principal residence or secondary accessory structure
   d. Require permitting for any alterations to the property, such as building, electrical, plumbing and mechanical changes

5. Conditions for Primary Caregiver Operation:

   a. Limitations on number of primary caregivers operating in single facility.
   b. Spacing requirements from other operations, facilities, schools, churches, parks, etc.
   c. Amount of marihuana may not exceed State law (60 plants per caregiver/ 12 additional plants if also qualified patient).
   d. Storage requirements and security measures
   e. Limitations on use or transfer of marihuana on site

f. Require operations to be conducted indoors
g. Require permitting for any alterations to the property, such as building, electrical, plumbing and mechanical changes
h. Inspection of the facilities to ensure compliance

I. MMFLA Zoning and Non-zoning Considerations:

1. MMFLA allows growers to *operate only in agricultural or industrial zones, or in unzoned areas.*

2. Use the Zoning Ordinance to define the different licensees permitted to operate within the Township and designate in which districts each specific permitted type of licensee may operate.

3. Use a Non-zoning Ordinance to establish a permitting framework for review and approval of each facility within the Township.

4. Consider the following issues when developing ordinances:

- Types of commercial facilities.
- Number of each type of authorized facility.
- Distances of buffer zones around schools, parks, churches, etc.
- Minimum distances between commercial medical marihuana facilities.
- The amount of the annual fee to be imposed ($5,000.00 or less).
- Minimum security measures.
- Restrictions on how, when and where facilities may operate.
- Restriction on what is visible from the outside of the facility.
- Require operations to be conducted indoors
- Require permitting for any alterations to the property, such as building, electrical, plumbing and mechanical changes
- Inspection of facilities to ensure compliance
- Waste disposal of by-products or other materials created in the facility

J. Laws Impacting Employment Decisions of Public Employers:

1. Michigan

- Wage and Fringe Benefits Act
- Elliott-Larsen Civil Rights Act
- Persons with Disabilities Civil Rights Act
- Michigan Occupational Safety and Health Act
- Public Employment Relations Act
- Compulsory Arbitration of Labor Disputes in Police and Fire Departments ("Act 312").
- Worker's Disability Compensation Act ("WCA")
- Whistleblowers' Protection Act

2. Federal
    - Americans with Disabilities Act ("ADA")
    - Age Discrimination in Employment Act
    - Fair Labor Standards Act
    - Family Medical Leave Act
    - National Labor Relations Act
    - Occupational Safety and Health Act

K. Overview of Workers' Compensation Law

1. "Every employer, *public and private*, and every employee...." MCL 418.11.

    a. Irrespective of the number of employees a municipality might have. MCL 418.115(c).

    b. NOTE: There are special rules for first responders: MCL 418.405.

2. *What does it do*?

    a. Establishes process for handling on-the-job injuries.

    b. Eliminates lawsuits by employees for on-the-job injuries, while requiring employers to provide guaranteed compensation for wages lost due to those injuries.

        i. Excluded: deliberate acts by employer causing injury

3. *When is it triggered*?

    a. Personal injury "arising out of and in the course of employment by an employer."

        i. Includes disabilities and "aging conditions," like arthritis, if work contributes to, aggravates, or accelerates the condition significantly.

        ii. Mental disabilities may also be compensated if arising out of employment.

        iii. Includes traveling to and from work, while at the workplace within a reasonable time before and after work.

    b. Injury must incapacitate an employee from earning full wages for at least 1 week.

4. *What is a disability*?

   a. "[A] limitation of an employee's wage earning capacity in work suitable to his or her qualifications and training resulting from a personal injury or work-related disease." MCL 418.301(4)(a).

   b. Wage earning capacity is "limited" if an employee can't perform all of the jobs that employee is qualified for.

   c. Disability becomes total if the employee can't earn any wages in jobs for which he or she is qualified.

   d. Extremely broad—if it happens on the job, it probably falls within the statute!

5. *What benefits are provided*?

   a. 80% of the difference between the injured employee's after-tax weekly wage before injury and the after-tax weekly wage earned after the date of injury.

   b. Benefits are capped at 90% of the states average weekly wage. In 2017, this is $870.00.

   c. Employer is required to furnish reasonable medical services "recognized by the laws of this state as legal...." MCL 418.315.

6. *Administrative Process* at the Bureau of Workers' Disability Compensation, a State agency, begins early:

   a. Employee provides notice of injury to employer.

      i. Can be oral or written.

      ii. You should provide a form to an employee whenever an injury is reported, or you may otherwise aware of it.

      iii. Insurance carrier should provide a form.

   b. Employer notifies its carrier.

      i. If it appears an employee's disability will last for more than a week, the employer (or the carrier) must also file an Employer's Basic Report of Injury form (available online) with the Bureau of Workers' Disability Compensation.

   c. Request an employee undergo a physical examination when notice of injury is provided. MCL 418.385.

i. Employee must comply within 15 days.

ii. The longer the delay, the greater chance that important medical evidence is lost.

d. If the employee has been off of work for 7 days, the employer's insurance company begins the payment of workers' compensation benefits.

e. Insurance counsel will handle the case and work with the carrier to determine if the benefits should be disputed.

7. *Recordkeeping.* Employers must maintain records of *all* injuries that cause death or disability. MCL 418.805. These include:

   a. Name
   b. Address
   c. Age
   d. Wages of diseased/disabled employee
   e. Time and cause of the accident
   f. Nature and extent of the injury or disability. MCL 418.805

8. *Interaction with Medical Marihuana*

   a. Must the employer pay for an employee's medical marihuana treatments prescribed due to an on-the-job injury?

   b. No. MCL 418.315a expressly excludes medical marihuana treatment from an employer's workers' compensation expenses.

L. Overview of the Americans with Disabilities Act ("ADA")

1. ADA prevents discrimination against individuals with disabilities.

   a. Careful! Discrimination includes not reasonably accommodating an employee's known physical or mental limitations if the employee is a "qualified individual" under the ADA. 42 USC § 12112.

2. No requirement to provide reasonable accommodation if it would impose "an undue hardship on the operation of the business" of the employer. 42 USC § 12112.

   a. This is a hard thing to demonstrate. Typically, this would involve hiring significant additional staff and supervision, at significant cost.

   b. NOTE: "Reasonable Accommodation" does not necessarily mean the employee's preferred accommodation.

3. This applies to job applicants, as well as employees.

4. Definitions Matter

   a. What is a Disability?

      i. "A physical or mental impairment that substantially limits one or more major life activities of [an] individual." 42 USC §12102.

      ii. That means...

- caring for oneself
- performing manual tasks
- seeing
- hearing
- eating
- sleeping
- walking
- standing
- lifting
- bending
- speaking
- breathing
- learning
- reading
- concentrating
- thinking
- communicating
- working
- operations of major bodily functions.

      iii. To qualify for the ADA's protection, an impairment must last for over 6 months.

   b. Who is a Qualified Individual?

      i. Definition: "an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 USC § 12111.

         a. A qualified individual with a disability does NOT include "any employee or applicant who is currently engaging in the illegal use of drugs...." 42 USC § 12114.

   c. What is a Reasonable Accommodation?

      i. Definition: "making existing facilities used by employees readily accessible to and usable by individuals with disabilities" OR any of the following:

ii. Examples provided in the ADA:

- Job restructuring,
- Part-time or modified work schedules,
- Reassignment to a vacant position,
- Acquisition or modification of equipment or devices,
- Appropriate adjustment or modifications of examinations,
- Training materials or policies,
- The provision of qualified readers or interpreters, and
- Other similar accommodations for individuals with disabilities. 42 USC § 12111.

d. What is an Undue Hardship?

i. Definition: "An action requiring significant difficult or expense," when considered in light of certain factors. 42 USC § 12111.

ii. These factors include:

a. The nature and cost of the accommodation;
b. The employers overall financial resources at the particular location in question;
c. The number of employees at the particular location in question;
d. The impact of the accommodation on the operation of the location in question, including the effect on expenses and resources;
e. The overall financial resources of the employer;
f. The size of the employer (i.e. number of employees, type, number, and location of an employer's facilities, etc.); and
g. The type of the employer's operations, including the workforce, the geographic location(s), and the relationship between the location in question and the employer's activities a whole.

5. What are an employee's obligations under the ADA?

a. Prepare written job descriptions for each position, including what functions of each job is considered essential.

b. Grant disabled employees reasonable accommodations allowing them to perform their job duties, unless doing so would be an undue hardship.

6. How does medical marihuana interact with the ADA?

a. The ADA does not protect individuals "currently engaging in the illegal use of drugs," so long as an employer's action is taken based on the use of illegal drugs, as opposed to being based on the disability. 42 USC § 12114.

b. But what does it mean to be engaged in the illegal use of drugs?

    i. Definition of "illegal use of drugs" under the ADA: "the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act (21 USC §801). Such term does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substance Act or other provisions of Federal law." 42 USC § 12210.

c. The Controlled Substance Act divides drugs into schedules, based upon a number of factors, including their potential for abuse, and their medical uses.

    i. The strictest schedule is "Schedule 1." Schedule 1 drugs:

        a. Have a high potential for abuse;

        b. Have no currently accepted medical use in treatment in the United States; and

        c. Lack accepted safety for use, even under medical supervision. 21 USC § 812.

    ii. Marihuana is a Schedule 1 drug. The argument is that because marihuana is unlawful under the Controlled Substances Act," it is therefore " illegal use of drugs under the ADA."

        a. This means the use of marihuana, even medical marihuana, prevents an individual from being a "qualified individual" under the ADA.

        b. This, in turn, means that the ADA does not protect disabled individuals using marihuana as part of the treatment for their disability.

M. Real World Example:

Your municipality has a strict zero-tolerance policy for the use of illegal drugs, including marihuana. After conducting a random drug test pursuant to municipal policy, you discover that one of your employees has tested positive for the use of marihuana. You call the employee into your office in order to

terminate her. As you begin to explain to the employee that she has tested positive for the use of marihuana in violation of municipal policy, the employee explains that she has been diagnosed with an inoperable brain tumor, and has been using medical marihuana, as recommended and prescribed by her doctor, to combat severe headaches and chemo-related nausea. These impairments would leave her unable to perform her duties if left untreated.

The employee goes on to explain that she only uses medical marihuana on days on which she does not work, or in the evenings after work. She states that she has never been high at work, and is responsible with her medical use. You have had no reports that this employee has been acting in a way that suggests impairment, and all of her performance reviews have been positive. The employee asks that she be permitted to continue to use medical marihuana off-duty so that she can perform her job duties.

Would terminating the employee be illegal? Let's Review

1. MMMA does not require an employer to accommodate ingestion of marihuana in the workplace or any employee working while under the influence of marijuana.

2. ADA

    a. Is the employee disabled?

        i. 42 USC §12102: "a physical or mental impairment that substantially limits one or more major life activities of [an] individual."

        ii. The employee has severe headaches and nausea that, without an accommodation, keep her from being able to work.

    b. Is the employee a qualified individual under the ADA?

        i. No, due to current use of illegal drugs

3. Worker's Compensation

    a. Is the employee's disability the result of a workplace injury?

        i. No. Here, she has an inoperable brain tumor not caused by her work. As such, she doesn't qualify for worker's compensation.

    b. What if her injuries were workplace related? Would you be required to pay for medical marijuana treatments?

        i. No, you would not be required to pay for medical marihuana treatments. MCL 418.315a.

ii. You would, however, have to pay for other medical treatments, and be sure that you report the injury to your insurance carrier as previously discussed.

4. To terminate...or not to terminate.

5. Post-Termination: Unemployment Benefits.

   a. Positive marihuana test by a qualifying patient who is terminated for that result is not an automatic disqualification for purposes of unemployment benefit eligibility. This is true even with a zero tolerance policy, unless an employer takes significant other steps.

   b. If an unemployment benefits claimant asserts medical marihuana use to avoid disqualification, the Unemployment Insurance Agency will

      i. request a copy of the registry card

      ii. seek material facts demonstrating whether the claimant's use of medical marihuana put the safety of persons or property at risk.

N. How to manage medical marihuana use in the workplace?

1. Have a policy in place, and apply it uniformly.

   a. This can include a zero-tolerance policy. Be aware, however, that the law in this area is changing rapidly.

   b. If you do not implement a zero-tolerance policy, be aware of the limitations of current drug testing technology and the potential for abuse of your policy.

2. Be aware that allowing for medical, but not recreational marihuana, poses a number of challenges.

   a. How can you distinguish medical use from recreational use based merely on a positive drug test?

   b. Will you require an employee to report medical marihuana use, and provide you a copy of their medical marihuana card, before they are exempted from discipline for marihuana use? (Be careful here!)

   c. How does impairment from alcohol, for instance, vary from impairment by marihuana?

3. Ensure that all employees are aware of your policy, and be sure to explain that it extends to medical marihuana.