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Labour and Employment Issues in Italy

A Brief Overview

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Chapter 1

The employment relationship

1.1. SOURCES OF LEGAL RULES

The rules governing employment relations are contained in the Italian Constitution, in some statutes and, for the most part, in the collective agreements.

Article 4 of the Constitution indicates that every citizen has the right to work, and Article 36 provides for the right to be paid an adequate compensation for the work performed and for the right to benefit of weekly rest time and annual holidays. Article 39 and 400 of the Constitution grant union rights and the right to strike.

Labour statutes are mainly oriented towards protecting the worker as the weaker party of the contractual relationship. Employees are guaranteed certain mandatory rights relating to health care, union negotiations, and notice periods for disciplinary actions or dismissals.

The details of the work relationship are dictated by the National Collective Agreements (NCA) entered into by and between the unions and the employers associations. NCAs are, in theory, only binding for the employees and the employers joining the associations which have signed the agreement, however, in practice, they are regarded as generally applicable by the courts, with few exceptions.

Collective agreements are negotiated at national level, and apply for categories of employers (Industrial plants, hotels, airlines, etc). Larger employers may also enter into special collective agreements, for their employees, with additional benefits.

Unions are mostly nationwide or, if local, they all join some type of nationwide organization. Unlike other countries, there may be more than one union in each work place, or representing the same category of workers. Traditionally unions have strong political connections and, as indicated above, the right to form a union, or to join a union, is a constitutional right.

All collective agreement categorize the employee in three different ways, as provided by the civil law sub art 2095:

a) blue or white collar employees

b) quadri

c) dirigenti

Those categories of workers have different benefits and rights. There are not substantial differences between a) and b), while the contractual rules governing the relationship with Dirigenti, i.e. executives, are quite different. Also collective agreement for Dirigenti are separate from the collective agreement for the other categories of employees.

Individual contracts cannot derogate to the provisions of the applicable collective agreement, unless the derogation is in favour of the employee.

1.2 Union rights

Every worker has the constitutional right to join a trade union of its choice. There is no referendum as whether a company is unionized or not. The right to join a union is an individual rights and the unions have the right to operate on the work place and to be consulted on certain issues.

The unions operate within the company through local union representatives who may be appointed at each independent plant or office. Union representatives have the right to meet outside working hours and, within specified limits, during working hours. The employer, in a production unit employing more than 200 workers, must place at the disposal of his workers space for the exercise of union activities, either on the premises of the company or in the immediate vicinity. The employer must also permit, in designated areas, the posting of notices of interest to the workers. Workers joining local unions may pay their union contributions directly to the unions, by means of payroll deductions.

Union representatives have special prerogatives. They cannot be transferred from one production unit to another without a prior indication of no objection by the union to which they belong. They also have the right to both paid and unpaid leave (the permitted frequency of which will depend on the size of the enterprise) for the carrying out of their union duties. Whenever the employer fails to respect, or attempts to inhibit union activities, the law permits the immediate intervention of the labour judge by means of a specifically accelerated procedure which may result in sanctions, including criminal ones, against the employer.

The right to strike is guaranteed by the constitution and there is no nee for vote by the majority of the workers. It is not uncommon that different unions will go on strike at different times within the same workplace.

1.3 Contract of employment

The employment agreement is not usually negotiated between the employer and the individual employee, except for increases to the salary provided for under the collective agreement. As such, the employment agreement is often a one or two page document, which then refers to the applicable collective agreement.

Employment must be communicated to the labour office for social security purposes.

Unless otherwise stipulated, the employee is hired for an indefinite term. Term employment relations are subject to restrictions.

It is possible to have a trial period, the maximum length of which is established by the applicable NCA (usually no more than three months). A trial provision agreement must be evidenced by a written agreement. During such a trial period both parties can terminate the work relationship, without incurring any liability. Once the trial period is over, the labour relationship automatically becomes an indefinite term labour relationship. The trial must be real, as the courts will not uphold the termination if the employee was not given the fair chance to pass the trial.

Salaries are usually paid 14 times a year, with an extra salary being paid in June and December. Social contribution amounts to approximately 40-45% of the gross salary.

The amount of vacation to which Italian workers are entitled is determined by the relevant NCA. Annual vacation is usually approximately 4 weeks. The right to vacation is provided for by Italian Constitution and cannot be waived. The worker that, for any reason, does not use all the vacation entitlement will receive an indemnity payment equal to the salary of the unused vacation days.

1.4 Non competition

During the term of employment, an employee is committed not to compete with the employer and, in most cases, cannot work for any other employer, even in a non competing business.

A covenant not to compete for the period after termination of employment (normally used for executives) is legally possible, subject to severe statutory restrictions. The clause must be in writing, limited in duration and territorial

scope, and a separate, adequate compensation must be provided. A clause indicating that the salary also included a pro-rated compensation for post contract non compete covenant is normally held unenforceable.

The courts will not recognize a non-competition clause if the result of the clause is to make it very difficult for the employee to find another job and exploit his/her skills. As a consequence, a clause preventing the employee from working for all competitors in a large territory is normally invalid.

1.5 Maternity rights

Maternity rights are regulated by Law n. 1204 of 1971. Pursuant to this law a pregnant employee is entitled to a 5 month paid leave, known as "mandatory maternity leave". This leave is usually from the second month before the expected birth to the third month after the birth. The employee will receive full salary and accrue vacation and pension rights. Salary is paid by the employer that has the right to set off almost entirely the amount against the contributions due for other employees .

The employee is also entitled to have an "additional maternity leave", for a maximum period of 6 months commencing immediately after the end of her maternity leave. In this period the employee will receive only 30% of the salary and pension rights, with no accrual of vacation rights.

Most collective agreements provide for additional rights, to include permits for feeding children, sick children leaves, etc.

All the above rights are also available for the father, if not used by the mother.

1.6 Data protection

Italy's new data protection code Legislative Decree n. 196/2003 came into force on January 1st 2004. This legislation strictly regulates the processing of personal data, and severely restricts the type of data that can be obtained.

For the purpose of the Code processing means "*any operation, or set of operations, carried out with or without the help of electronic or automated means, concerning the collection, recording, organisation, keeping, interrogation, elaboration, modification, selection, retrieval, comparison, utilization, interconnection, blocking, communication, dissemination, erasure and destruction of data, whether the latter are contained or not in a data bank*"

The employee shall be informed of the purpose for which the data are collected, the method of processing the data, the mandatory or voluntary nature of the data request (it being understood that only data reasonably linked to the work may be requested) and receive a notice regarding his rights regarding the data (among others: inspect the data, rectify incorrect data, location of data) and provide his consent. The consent is not necessary when the data is required for the performance of the contractual obligations (for example, to make salary payments).

Collection of data regarding to religion, trade union membership, political beliefs, marital status, health status, ethnic origin is prohibited.

The data may be kept for as long as the company may need them. Considering that labour or social security litigation may be initiated for as long as 5 or 10 years after the termination of the employment (depending on the type of claim), that tax related claims basically have a time span of 6 years, the deletion of the data is an hard issue to consider. Article 111 of the Code indicates that The Garante shall sponsor the adoption of a professional code of conduct to deal with the processing of employment related data.

Data cannot be transferred abroad, to a country which does not provide the same level of data protection, without the written consent of the employee. The data must be used only for the purpose for which they were collected, i.e. for the management of the work relationship, unless there is the written agreement of the employee.

Chapter 2

TERMINATION OF EMPLOYMENT

2.1 INTRODUCTION

The general, theoretical principle, dictated by Article 2118 of the civil code, is that each party can terminate the employment agreement with prior notice. In practice, however, this is true only in the event the employee wants to leave.

The statutes distinguish between collective dismissal, where 5 or more employees are dismissed for economic reasons, and individual dismissals. Rules for collective dismissals only apply to regular employees, not executives. With reference to individual dismissals, different rules apply to executives and regular employees.

Upon dismissal or resignation the employee is always entitled to TFR, which is treated as deferred salary accruing during the term of employment at the rate of approximately 1 month for each year of employment. Other indemnities may be due as discussed below.

2.2. COLLECTIVE DISMISSALS

Collective dismissals are governed by Law No. 223 of July 23, 1991 ("Law 223/91"), as amended. Law 223/91 applies when a dismissal involves more than five employees over a period of 120 days in any given operating unit, provided that:

a) the company has at least fifteen employees; and
b) the dismissal is linked to the reduction or transformation of business activities, or of a specific job or assignment.

In order to proceed with the collective dismissal, the company must provide written notice to the major labour unions with a presence on the work place indicating:

a) the causes that require a reduction in the number of employees; the reasons that prevent the business from taking measures other than the dismissal of employees;
b) the number and identity of the employees to be dismissed;
c) the timing of the dismissal program; and
d) the measures taken, if any, to alleviate the social consequences associated with unemployment.

A copy of this notice must be sent to the Labour Office ("DPL"), which is a public employment agency.

After this written notice has been sent to the unions, a meeting between the company and the unions must be held within seven days. At this meeting, the parties examine the causes motivating the reduction and any alternative measures that may be available to avoid or reduce the collective dismissal (such as utilizing the employees for different positions within the company). If no means short of dismissal are available, the company must negotiate with the unions on the terms for implementation of the collective dismissal. This phase must be completed within forty-five days from the date on which the company formally informed the unions of the collective dismissal. The results of the meeting must be communicated to DPL. In the event the company and the unions cannot reach an agreement on the terms of collective dismissal, DPL will call the parties for a second meeting to further examine the situation. This second meeting must be concluded within thirty days of the date on which DPL was informed of the results of the previous meeting.

If the company fails, after negotiations in good faith, to reach an agreement with the unions about the collective dismissal, it may issue written notice of termination to the employees to affected. According to Article 5 of Law 223/91, the company must follow specific selection criteria that are to be used as part of a comprehensive assessment of each individual employee being considered for dismissal. The selection criteria are as follows:

- seniority;
- employer's needs connected with the its production and organization;
- Family situation of the employee.

Collective agreements negotiated in advance may provide different selection criteria. Terminations must also be communicated in writing to DPL.

It should be noted that Law 223/91 requires the company to pay certain indemnities to the unemployment fund. The calculation and description of these indemnities are quite complex and must be prepared on a case-by-case basis. The amount of the indemnity is lower if the company and the union were able to reach some type of agreement on the dismissal plan.

The procedure outlined above is mandatory. The dismissed employees are entitled to challenge collective dismissals both for non compliance with the above procedural rules and for mistakes in the selection of the employees to be dismissed.

The latter challenge can be made irrespective of whether the dismissal plan was negotiated and agreed with the unions.

2.3 Individual dismissals - Introduction

Employees may be terminated only for just cause and justified motive[1]. A "just cause" is a cause that is so serious to prevent immediately the maintaining of the employment relationship, in practice it is a very serious breach of employee's duties; a justified notice is either a violation of contract duty of a lesser degree or an economic or organizational reason.

From a practical point of view the reason for the distinction is now almost theoretical, due to the very strict interpretation of the courts of the requirement for just cause and to the broadening, always by the court, of the cases requiring the procedure for disciplinary dismissal. For this reason it is probably better to make a distinction between disciplinary termination (for breach of contract) and non disciplinary termination (for causes related to the organization of the employer or economic situation)

The employer bears the duty to prove that the termination is lawful. The employee may limit his challenge to indicate that, in his opinion, the termination is unlawful, thereby leaving the burden of proof entirely upon the employer. Termination must always be in writing and the employee has 60 days to contest it in writing.

If the termination is found to be unjustified, the consequences will depend on the number of employees within the plant. If the employer has 15 or more employees, the employee is entitled to reinstatement, to receive compensation from the date of termination to the date of reinstatement. Te employee may waive the right to reinstatement and obtain damages in the amount of 15 months salary (in addition to the salaries from date of termination to date of decisions). Smaller employers have an easier fate and must only pay damages ranging between 2,5 and 6 months of salary.

2.4 Non disciplinary dismissal

An employee may be terminated when redundant because of plant reorganization, economic crisis, closing of business unit and similar business related reasons. The termination must be in writing and it must state exactly the reasons for the termination.

[1] Law 15th July 1966, no. 604 and Law 20th May 1970, no. 300

In order for the termination to be lawful, the employee being dismissed must be linked directly to the circumstance justifying the termination and it must be impossible to relocate the employee in another position. For example, if the employer decides to restructure the company and outsource certain phases of production, it may terminate the employees working in the unit whose work is being outsourced, not select some other employee.

Non disciplinary dismissals require a prior notice to the affected employees, whose length is dictated by the applicable NCA and depends on rank and seniority. It is important to note that during notice period the employee maintains the usual work benefits and rights, including the right not to be terminated during sick leave. For this reason, it is customary to waive the right to have the employee work during the notice period and pay directly the relevant salary to the employee, although some recent cases indicate that the employee must accept the request of the employer not to work during notice period.

Special rules exist for termination of executives. Executives may always be dismissed, without right to reinstatement, however the termination of an executive is usually a very expensive exercise.

The first item to note is that, the notice period for terminating an executive is between 6 and 12 months of salary, depending on applicable NCA and seniority. Furthermore, if the termination is unjustified (as it is often the case) an additional indemnity ranging between the applicable notice period and 18 months is also due. Finally, most contracts provide that additional payments may be due depending on the age of the executive. The above benefits are always in addition to TFR Overall, the termination package may easily include 3 years of salary plus TFR.

2.5 DISCIPLINARY DISMISSALS

If the employee is in breach of a fundamental provision of the employment contract, the employer may resort to disciplinary termination. The collective agreements often indicate the most common causes for disciplinary termination, however this is not a prerequisite for termination. The code of conduct may also indicate causes of termination and the code must be made known to employees.

The employer wishing to terminate an employee for disciplinary violation must inform in writing the employee, usually by registered letter, of the violation committed and request the employee to provide an explanation within 5 days. The employer may also decide to suspend the employee during this period, provided that there is no suspension from salary. The employee may provide the

explanations in writing or request a meeting and may be counselled by the union. Following the expiration of the 5 days period, the employee may terminate the agreement with a written notice, which must indicate specifically the reason for termination. This is extremely important as any challenge to the termination will involve only a review of the reasons stated. The termination may be challenged by the employee within 6 months.

The above rules were dictated for non executives, however the courts have extended the provisions to the disciplinary dismissal of executives.

2.6 MANAGING TERMINATION

As mentioned above, an employee can challenge termination by written notice to be delivered within 60 days. The law suit may be initiated more calmly and the relevant statute of limitations ranges between 1 and 10 years depending on the claim.

Prior to initiate a lawsuit, the employee must try to settle it and, to this purpose, a request for a settlement hearing must be filed with labour office. The law suit cannot be initiated before the elapse of a 2 month period from such a request..

This period is often used to negotiate a settlement. Terminating employees may be a very expensive exercise, if the termination is found to be unjustified, also taking into account the very heavy social contributions (approximately 40-45%) bearing on salaries and the risk that regular employees be reinstated in the work place after years of litigation (for which all salaries must be paid to employees).

As a further inducement to settlement, it must be considered that it is normally possible to structure termination packages exempt from social contribution and with a lower income tax burden, and the saving is normally split between the parties.

A settlement agreement, even if freely entered into between the parties, may be revoked within 6 months by the employee, unless the agreement is signed during a litigation, under the supervision of the judge, or before Labour Office or before a judge. In order to deal with this issue, settlement are always contingent, and money disbursed, upon the parties re-executing the same settlement agreement before the Labour Office (in large cities it may take a couple of months to get an appointment).

Chapter 3
Employment of foreign nationals

3.1 Immigration issues

The hiring of foreign nationals will pose immigration issues which will largely depend on whether the foreign employee is a national of a country belonging to the European Union, or is a national of a non-EU country. Special interim rules apply to citizens of countries which have recently joined the European Union. Those individuals, for a limited numbers of years, do encounter certain restrictions.

All EU nationals have the right, recognized by the EU Treaty, to live and work in any country of the European Union, without any discrimination (so called principle of freedom of movement). Under Italian immigration rules, the EU national will still be required to apply for a permit of stay (if stay in Italy is for more than 3 months) and for a work permit (if work is being sought), however the relevant permits cannot be denied. Another important issue to consider is that the EU national can obtain a work permit even when looking for a job, while non EU nationals may obtain a work permit only to the extent that a job has already been found.

The above mentioned rights apply only to EU citizens, and not to citizens of non EU countries, irrespective of whether the interested person has been living in another EU member state and has obtained in such a state a valid permit of stay or work visa.

Pursuant to Immigration law n. 286/1998 non EU citizens may obtain a work visa only if they have a job in Italy, and in accordance with certain restrictions. The main procedure provides for the Ministry of Labour to determine every year how many foreign workers may be admitted in that given year to Italy. The number is then allocated to certain foreign countries, depending on bilateral agreements. Italian employers may then seek the employment of citizens of those countries, by requesting the permit to hire a specific person, and supplying information as to salary, housing etc. The permits are released on first come first served basis.

The most important exemption is that permitting the issuance of a work visa to a person who was working abroad for the same company of for another company of the group, provided that the past work relationship has lasted for

at least 6 months. This way, it is possible to relocate employees to Italy, without encountering the usual limits of the quota system. This is the exemption which is normally used by multinational companies to assign foreign managers to Italy.

The application for obtaining a work visa is twofold, as it implies both activities by the individual abroad and by the employer in Italy. In practice, the Italian employer must seek an authorization to hire the foreigner through the police office and the labour office of the place where the work will be carried out. Once this is obtained, the individual may apply for the work visa, through the Italian consulate of his place of residence.

The work visa, once obtained, is strictly linked to the job for which it was sought and obtained. Therefore in case of termination of the contract of work the permit cannot be used for a new labour relationship and cannot be converted.

It is also possible to work in Italy as self-employee, i.e. to exercise a profession, including one of an artistic nature, to work as consultant or agent, to incorporate company or be appointed as director. It is required to apply for a Visa, which must be issued by the competent Embassy within a total number of quota-entry provided by the Government for all extra EU country, that is not allocated to specific countries.

The kind of activity exercised will determine the requirements which must be met in order to obtain the visa. For example, registration with a professional association, authorisation or licensing, registration with a Chamber of Commerce, statement describing the parameters of the economic resources required to carry out a business, commercial or craftsman activity, issued by the Chamber of Commerce as well as the availability of a suitable accommodation and an yearly income. All these requirements will be evaluated by the Embassy during the procedure for the issuing of the Visa.

3.2. Taxation and social security.

Payment of taxes will depend on applicable tax treaty for the avoidance of double taxation. Normally all treaties provide for the payment of taxes in the country where the work is performed, unless the period of stay is less than half year. Italian employers will withhold income taxes and remit the amount to the tax office.

If the employee keeps two contracts, one with a foreign company and one with the Italian subsidiary, salary is nevertheless subject to taxation in Italy, if minimum stay period (half year) is exceeded.

Salary is also subject to social security payments (around 40-45% of gross salary), for the sole circumstance that work is performed in Italy. It is possible to avoid this obligation when the employee is a national of a country which is signatory of a social security treaty with Italy and it is demonstrated that the employee continues to be covered by social security contribution in the foreign country.

There are several social security funds and the main difference is between the funds for executives and the ones for non executives.

Large companies may have supplementary pension contributions through a company pension fund (which will supplement the state funded pension scheme). Employees also have the right to ask that their deferred salary (TFR) be invested into a pension fund, as opposed to being held by the company and then disbursed at the time of termination.

Italian social security contribution may be transferred abroad if the employee then leaves Italy.