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LABOUR LAW & IR
by Morri Rossetti

HR Tips

The 2023 Full-Year Bundle

A quick look at relevant human resource issues
from our Labour Department

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#1 Delocalizations

Big companies (with at least 250 employees in the previous year) deciding to shut down and, consequently, **dismissing a minimum of 50 employees**, shall:

- **notify the intention to start the business closure within 90 days** to trade union representatives, Ministries of Labour and Economic Development and the National Agency for Active Labour policies (ANPAL);
- within 60 days from such communication, **submit a plan aiming at limiting occupational issue**s.

In case of breach of such provisions, **the employer could be sanctioned**, among other penalties, with a surcharge on social security contributions due for the dismissals thus inflicted.

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#2 Poor Performance

The **employee's poor performance** may constitute just cause for dismissal based on disciplinary violations.

In such cases, the employer is required to prove that the employee's (poor) performance:

- **was not due to the company's organization** or to circumstances not connected with the purpose of work;
- has been significantly **meaningless compared to the performance** of colleagues in equivalent positions;
- **has occurred repeatedly**.

To avoid this risk, as a first step, companies should consider setting common goals for employees in similar/equivalent **roles that are measurable and have a performance monitoring system** that operates continuously.

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#3 Employers of Record (EoR)

Entrepreneurs needing working performances abroad but who do not intend to incorporate legal entities on that territory frequently resort to the so-called **«Employers of Record» (EoR)**, which formally recruit employees with the required skills to bear the relevant burdens, thus allowing their customers to benefit from such resources directly.

In Italy, such an interposition identifies personnel leasing, which – as the Italian law prescribes – may only involve authorised agents (the «employment agencies»).

To be appointed as such, these agencies must meet specific (and strict) requirements, whose **violation exposes the final user of the working performance (i.e., the customer) to criminal and administrative fines**.

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#4 Company Welfare

Company welfare consists of the goods and services that the employer makes available to its employees, involving tax and contribution benefits for the company and the same employees.

Welfare plans are usually implemented through agreements between employers and unions or company policies.

They shall be **addressed to all employees** or specific categories and provide goods and services without any cash payment.

For a successful implementation of a welfare plan, it is **essential to assess the needs of employees** through an analysis aimed at outlining the roll-out strategies and providing flexible plans in terms of the choice of benefits designed for employees.

For this purpose, **employee surveys are handy in identifying the workforce's preferences**.

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#5 Sole centre of interests

It is possible that whenever **two companies** (even belonging to the same company group) **perform their activities in close connection**, so tightly that it becomes unclear which one is *de facto* the employer of the involved employees, a **sole centre of interest may be identified about both**.

Should the case occur, it would entail shared employer liability for both companies concerned.

To correctly identify the sole centre of interests, the case law has outlined some indexes, summarised as follows:

- the **incapacity to distinguish the business structures** of either one of the companies;
- the **shared use of staff and machinery or means** necessary to the production;
- the **overlapping of the executed activities**;
- the **technical and administrative-financial coordination** to the point where a single governing entity is appointed and pursues a common goal for both companies.

Given the significant consequences following the determination of a sole centre of interests, mainly concerning the selection criteria applied in case of dismissal of the employees staffed by the involved companies, **it is advisable to assess carefully that none of the above indexes occurs**.

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#6 Geolocalization

Installing employee geolocation systems requires prior **agreement with the works council** or **authorisation** from Labour Office*.

To this purpose, it is necessary to balance the purposes, consisting of organizational needs, safety and protection of company assets, with the protection of **workers' dignity and rights**.

Systems to provide suitable safeguards must:

1. allow the knowledge of the geographic location of the employee only to **authorised parties** and when consistent with the purposes pursued;
2. allow **deactivation of the device** during breaks and outside working hours to exclude continuous monitoring of the worker;
3. process data using **pseudonyms**, excluding data directly identifying to data subjects;
4. provide **data storage** only when necessary and with retention times proportionate to the purposes pursued.

In any case, the worker must be given adequate information on how to use this GPS and on the monitoring carried out by the employer using them.

*Italian government agency dealing with the protection of labour relations and workplace health and safety

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#7 Risks of interference on working location

When **procurement, services** or **agency** contracts are executed, section 26 of the single text on health and safety within the work premises (Legislative Decree no. 81/2008) prescribes that a specific document (so-called *DUVRI*) defining all the **risks of interference** caused by the presence of several subjects on the exact working location must be drafted (e.g., a construction site, a production plant).

As a precondition for applying the mentioned section 26, the principal – liable for drafting the document at issue – must hold **legal availability** of the working site during the duration of the relevant contracts.

However, there are some exceptions where **the drafting obligation of the DUVRI fails**, depending, for instance, on the actual dangerousness of the activities executed according to the contract at stake.

If defaulting or omissions connected to the DUVRI obligations are reported, the principal could be **sanctioned** with a fine ranging from **EUR 1,500 to EUR 6,000** or the **arrest** from two to four months.

Moreover, **service contracts** that do not show the cost allocated for the health & safety measures are **null and void**.

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#8 Workation

Workation refers to a new form of flexible work that combines work and vacation for a limited period.

In practice, work is performed continuously from a **vacation location** where it is possible to work, carving out leisure moments without the need to resort to a leave or a permit.

Companies considering introducing workation cannot fail to consider the **legal and organisational implications**, especially when cross-border destinations are involved.

In particular, the main ones are:

- the **immigration requirements to enter and work in the destination country**;
- the **tax and social contribution implications** that working in the chosen location may have for the company and the employee;
- compliance with **work safety obligations**.

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#9 European blue card

Foreign highly-skilled **workers residing in non-EU countries can enter Italy** for working purposes outside the yearly quotas set by the so-called «Flows» Decree, provided they have obtained a **specific immigration visa**, the «**European blue card**».

EU Directive no. 1883/2021 recently expanded the scope of the concerned workers and the objective requirements of the working relationships involved (respectively, seasonal workers can now require the blue card and specific references to information and communication technologies were made within the regulatory document).

Furthermore, more **favourable conditions** for the entry of the blue card owner's spouse and relatives were also provided.

However, given that the final term for the transposition of the mentioned Directive is set for next November, **further amendments** may result from the national implementation.

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#10 Labour Intensive Service Contracts

To be **lawful**, service contracts require the following essential features:

- the contractor must have its **organisation of means** and
- it bears the **entrepreneurial risk** of the activity.

In service contracts where the labour is predominant (so-called labour-intensive service contracts), the central issue is the organisation of work and the contractor's exercise of the employer's powers (so-called organisational, managerial and control powers) since it usually does not own any tangible assets.

This makes it necessary to pay attention to the drafting and execution of the contract because there is the risk of:

- workers claim to be **hired by the principal**;
- **unlawful lease of personnel**, entailing, both for the contractor and the principal, the payment of administrative sanctions calculated on the number of employees involved and days of work.

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#11 End-of-Office Severance

If so provided by the relevant by-laws or regulated under a shareholders' resolution, **company directors** have the right to receive **additional compensation when terminating their assignment**: the so-called «End-of-Office Severance» (TFM).

Social contribution-wise, as directors' compensation, the TFM is generally subject to contribution to a special scheme held by the National Social Security Agency (INPS). Therefore, the relevant due contribution sums are paid within the cap thus provided.

When dealing with TFM, identifying the proper taxation regime to apply to these sums can become troublesome. The latter may, in fact, change depending on the date of the deed granting the severance to the director (i.e., if preceding or following the beginning of the relationship).

Therefore, it is crucial to address appropriately the documentation establishing the treatment.

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#12 Retention Agreement

A retention agreement is a **temporary contract** between an employer and an employee that guarantees a minimum period of employment. During this period, neither party can terminate the employment relationship unless there is a just cause for doing so.

The purpose of the agreement is to **retain key employees** who possess skills that are strategically important to the company.

If either party violates the terms of the agreement and terminates the employment relationship without just cause before the agreed-upon period, there will be **compensatory consequences** which can be predetermined in the form of a penalty clause.

If the agreement places the obligation solely on the employee, it is necessary to include provisions for reasonable compensation (not necessarily monetary) to be awarded to the employee in such a scenario.

For further information

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