COVID-19: TOOLS FOR ITALIAN EMPLOYERS IN FACING THE EMERGENCY

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Labor, Employment and Workplace Safety Alert

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The COVID-19 emergency led the Italian Government to adopt on an urgent basis a number of measures aimed at protecting the health of Italian citizens and ensuring the survival of businesses.

Specifically, measures were first identified for highly contagious areas (so-called "red" and "yellow" areas); subsequently, when the Decree dated 8 March 2020 was enforced, these areas were replaced by "forced containment" areas, within which certain restrictive safety measures are applied; overnight between 9 and 10 March, the restrictive measures that were being applied in Lombardy and 14 other Italian districts were extended to the entire national territory; lastly, on 11 March the Italian Government implemented a new Decree to order the suspension of all retail and wholesale commercial activities, with the sole exception of basic public services and including bars and restaurants.

This alert discusses the tools made available to Italian employers to handle the current "COVID-19 emergency" in light of the "emergency legislation." Since the COVID-19 scenario is constantly evolving, further updates may follow soon concerning new measures that are supposed to be implemented in the next few days.

REMOTE AND SMART WORKING

Article 4 of the Decree of 1 March 2020, as subsequently amended and supplemented (lately by the Decree of 11 March 2020 - collectively, the "**Decrees**"), provides for a simplified procedure to implement smart working in the Italian territory.

In particular, all over the "COVID-19 emergency" (i.e., at least for a period of 6 months starting from 31 January 2020), employers are strongly encouraged to enable their employees to participate in smart working by benefiting from the following simplified procedures:

No Prior Written Agreement with the Employee

Under normal circumstances, smart working may be carried out through a special agreement entered into by the employer and the employee.

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Under the "COVID-19 emergency," a formal and special agreement to implement smart working is no longer required and the employer shall merely inform the employee in writing on how smart working has to be performed by the latter, with a particular focus on:

- ways under which the employer may exercise hierarchical and supervisory powers;
- the employee's resting time;
- the technological and organizational measures put in place to ensure compliance with laws regarding resting hours--including "right to disconnect" from remote working;
- the employee's misconduct subject to disciplinary sanctions;
- the employee's right to be appropriately trained, if needed.

Information on General Risks Regarding Health and safety

Information on risks is usually delivered via paper copy and identifies the general and specific risks connected with specific working activities.

Employers are required to protect the health and safety of their employees even when they are working remotely. To this end, employers are required to deliver information on risks regarding health and safety at work to employees working remotely.

Under the current health emergency, the above information should be implemented with a provision stating that the employee should refrain from carrying out his/her working activity in places where there is a risk of infection (e.g., public or crowded places). This additional information is available on the website of the Italian National Institute for Insurance Against Occupational Accidents ("INAIL") at the following link: https://www.inail.it/cs/internet/comunicazione/avvisi-e-scadenze/avviso-coronavirus-informativa.html

Information may be sent via e-mail to employees and to the employees' safety representative in the workplace.

Self-Certificate Regarding Employees Enabled for Smart Working

A simplified procedure to comply with the obligation to notify the Italian Labor Authorities about employees enabled for smart working has been launched on the website of the Italian Ministry of Labor, which is meant to replace the mandatory information that should be usually filed. In particular, this simplified procedure requires that the following files be uploaded:

- a self-certificate (PDF/A file) listing the employees for whom smart working has been triggered and stating a declaration by the employer according to which smart working has been put in place in compliance with the provisions set forth by articles from 18 to 23 of Law no. 81/2017 (as amended by the Decrees).
- an Excel file (in xlsx format), made available in the platform of the Ministry of Labor's website, including all the relevant information regarding the "smart working employees" and the effective date for which smart working has been triggered.

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Please note that this simplified procedure can be applied on a temporary basis up to 31 July 2020 (unless extended). After that date, the special agreement mentioned previously shall be entered into.

Because of the implementation of the Decrees, which severely restricted individuals from moving all over the Italian territory, it is highly recommended that Italian employers adopt smart working to the maximum extent possible and suspend operations in those units which are not strictly necessary for their business.

In particular, pursuant to Section 2087 of the Italian Civil Code and Legislative Decree. no. 81/2008--whose objective is to safeguard health and safety in the workplace (which is applicable to all kind of employees, including the self-employed)--smart working may be regarded as mandatory in order to lock down protection of all employees under the circumstances.

In light of the foregoing, as long as the "COVID-19 emergency" remains, we would suggest that smart working be granted to all employees who apply for it and want to work remotely. Indeed, in case of virus dissemination, an unjustified employer refusal to grant smart working to its employees may expose the company to claims for damages for having failed to adopt any required measures to safeguard employees' health and safety.

In this respect, for all employees who may carry out their working activities remotely and/or from home, smart working is undoubtedly a necessary, proportionate, and appropriate measure to be adopted while experiencing the "COVID-19 emergency."

HEALTH AND SAFETY

In order to defeat the virus and avoid its dissemination, on 3 February 2020, the Ministry of Health published Note No. 3190, whose focus is the precautionary measures to be adopted to prevent Coronavirus infections in the workplace.

The Note states that the main employer duty is to protect the health and safety of employees in the workplace from biological risks by adopting, with the assistance of the Company's Doctor and other professionals involved in the management of health and safety within the company, all appropriate measures related to that.

The Note recommends the adoption of the following measures:

- wash hands frequently;
- disinfect surfaces carefully;
- avoid any contact with people with suspicious symptoms;
- take all measures that the employer may deem appropriate to adopt.

The measure listed under the last bullet–which encourages the employer (and, consequently, the Company's Doctor) to adopt all means necessary to avoid the risk of dissemination of the virus–requires a preliminary analysis to make sure that all the measures supposed to be adopted are appropriate to handle the risk at stake.

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Furthermore, the Decrees provide for the adoption of additional hygienic measures, including the following:

- make available hand-washing hydro-alcoholic measures in all public places and all other places of aggregation;
- avoid physical contact, such as hugs and handshakes;
- maintain a distance between people of at least 1 meter.

In light of the foregoing, the employer is required to take the following steps.

1. Update the Risk Assessment Document ("Documento Valutazione Rischi") (the "RAD"), if needed.

Implementation of the RAD to detect all the risks connected with biological agents is required. For instance, review of relevant procedures with an intensification of cleaning activities may be necessary. Please note that the RAD should be updated from time to time, given the rapid change of the current situation.

2. Adopt preventive measures aimed at increasing the level of safety within the companies' premises.

The employer may evaluate the use of new Devices for Individual Protection, such as (by way of example) single-use gloves, certified masks, and hand-washing hydro-alcoholic measures.

3. Draft a specific emergency plan in case of risk of dissemination of the virus.

4. Inform and instruct employees about the new biologic agent-related risk.

The employer could provide employees with documentation concerning the more appropriate hygienic-sanitary behaviors to be adopted, adequate information on the main symptoms of the virus, and all the official communications issued by the Competent Public Bodies.

5. Grant the employees with holidays and permits to leave.

6. Limit as much as possible the employees' movements within the company's premises and their access to common spaces.

Furthermore, we strongly recommend smart working, as described previously, as a measure to safeguard the employees' psycho-physical integrity.

ABSENCES AT WORK

Measures to be adopted by Italian employers in case of absences at work due to the "COVID-19 emergency" can vary, depending on the following different circumstances.

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Mandatory Suspension of Business Activities

The suspension of several business activities is one of the measures the Government implemented to deal with the emergency situation. In this regard, please note that, if the mandatory suspension of the company's activities has been ordered by the Public Authorities, the employee's absence appears to be justified, since it is completely independent of his/her will.

On the other hand, suspension of business activities due to an order issued by the Public Authorities is out of the employer's control as well. In such an event, we are of the opinion that the employer should not be obligated to pay remuneration to its employees, since the employer's inability to run its operations is not the employer's fault.

In such an event, employment relationships shall be suspended until operations are restored. The employer may consider applying for certain public schemes for integration of the salary or enter into collective agreements at a company level with the company's works council to regulate the use of holidays and permits to leave.

Please also note that the national collective bargaining agreement applied by the company could provide for *ad hoc* disciplines in case of suspension of the employment relationship.

Absence Due to Temporary Suspension of Business Activities by the Employer

If employee absences are caused by an employer's decision to suspend its operations temporarily due to the "COVID-19 emergency," and not by an order issued by the Public Authority, employees remain entitled to receive their remuneration.

Compulsory Quarantine

If an employee is prevented from working due to a medical quarantine or mandatory quarantine, he/she shall be put under sick leave. For employees other than executives, sick leave is paid by the Italian National Social Security Institute (with the exception of the first three days of sick leave, usually paid by the employer). Once sick leave has come to an end, the employee is required to return to work. If the employee fails to do so, further absences may be considered unjustified, and the employer may be entitled not to pay the relevant salary and to even issue a disciplinary sanction against the employee.

Absence for Fear of Being Infected

If an employee unilaterally decides, even in the absence of an order issued by the Public Authorities, not to go to work due to his/her fear of being infected, the absence may be considered unjustified.

As a consequence, the employer in this scenario would be entitled to trigger a disciplinary procedure against the employee and issue a disciplinary sanction, which (depending on the national collective bargaining agreement

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applied) might also entail dismissal in the event of unauthorized absence longer than 3 days. Nonetheless, nothing would prevent the employer from agreeing to provide a period of unpaid leave to its employees who are fearful of becoming infected.

PUBLIC SCHEMES AND SOCIAL MEASURES

Decree no. 9 of 2 March 2020 (as amended by the Decree lately issued on 11 March 2020) contemplates "*urgent support measures for families, employees and businesses related to the COVID-19 epidemiological emergency*," and put at the disposal of employers operating in those areas of the Italian territory touched by the "COVID-19" risk special social measures.

Measures Made Available in the Whole Italian Territory

As a general rule, when an employer decides to temporarily suspend its operations or temporarily close down a unit due to the "COVID-19 emergency," it may apply for the ordinary public scheme for integration of the salary ("*Cassa Integrazione Guadagni Ordinaria*") upon certain terms and conditions, for example, in case of (1) a temporary market crisis, or (2) reduction of orders determined by the "COVID-19" health emergency.

Depending on the circumstances, access to the *Cassa Integrazione Guadagni Ordinaria* may enable the employer to have its employees' salary (or at least a part of it) paid by the Italian National Social Security Institute for a maximum period of 13 continuous weeks (which may be extended on a quarterly basis up to 52 weeks).

Companies operating in those market sectors excluded from the *Cassa Integrazione Guadagni Ordinaria* may benefit from the so-called "Solidarity Fund" or from the "Wage Supplementary Fund, depending on the circumstances.

In the event of a company's crisis or need to reorganize operations, the employer may also consider applying for an extraordinary public scheme for the integration of the salary ("*Cassa Integrazione Guadagni Straordinaria*"), whereby the Italian National Social Security Institute may pay its employees' salary (or at least a part of it) for a maximum period of 24/36 months, depending on the circumstances.

Unfortunately, companies operating in certain market sectors are not admitted to these public schemes. According to certain rumors, the Italian Government is considering creation of a sort of "catch-all" public scheme/social measure to meet employers' needs under the current "COVID-19 emergency" and to grant all entrepreneurs operating within the Italian territory (including self-employees) with the right to access these public schemes/social measures as long as the health emergency remains.

Employers Whose Operations Are Suspended

Employers whose operations are suspended due to the Decrees can apply directly for the *Cassa Integrazione Guadagni Ordinaria* without informing and consulting works council/trade unions in advance.

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From 23 February, employers operating in market sectors to which the *Cassa Integrazione Guadagni Ordinaria* cannot be applied are entitled to apply for a special public scheme for integration of the salary ("*Cassa Integrazione in deroga*") with a maximum duration of 3 months.

Employers Operating in Emilia-Romagna, Lombardy, and Veneto

Employers having business units in Emilia-Romagna, Lombardy, and Veneto, or employing employees resident or domiciled in such regions, that cannot apply for *Cassa Integrazione Guadagni Ordinaria* or for *Cassa Integrazione Guadagni Straordinaria* are entitled to apply for the *Cassa Integrazione in deroga* in case they are seriously affected by the "COVID-19 emergency," provided that they are able to reach an agreement with the company's works council/trade unions. In such an event, integration of the salary may be granted for a period no longer than 1 month.

HOLIDAYS AND PERMITS TO LEAVE

As a general rule, employers are entitled to unilaterally determine the period during which their employees may enjoy holidays, taking into account both the organizational needs of the company and the employees' need to recover their psycho-physical energy.

Nonetheless, where provided for by the applicable national collective bargaining agreement, employers shall agree upon the holiday period with the company's works council; failing to do so may be considered unlawful conduct by the employer.

Under the "COVID-19 emergency," the Decree dated 8 March 2020 (as subsequently amended by the Decree dated 11 March 2020) recommends to employers that employees are granted with holidays and permits to leave to the maximum extent possible. With further respect to this, employers are encouraged to execute with works council/trade unions specific collective agreements at a company level aimed at planning use of holidays and permits to leave throughout the "COVID-19 emergency."

The opportunity offered by the execution of an *ad hoc* collective agreement at a company level could even allow companies to meet employees' needs during the emergency and grant them, for example, additional and special parental leaves or special measures for working mothers.

In addition, should an employer apply for *Cassa Integrazione Guadagni Ordinaria*, employees may be required to immediately join all the remaining holidays and permits to leave accrued *pro rata temporis* and still not spent in advance of entering into force of the public scheme.

TRANSFERS

Italian Legislative Decree no. 81/2008 requires employers to assess all health and safety risks connected with working activity. This implies that employers must safeguard the health and safety of employees even when on business travel. Should an employer not adequately handle risks that employees may incur while travelling on

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business, it may be liable for any resulting harm to its employees.

In light of the above, according to the Decree dated 8 March 2020, employers are strictly encouraged to minimize transfers and travels over the course of the "COVID-19 emergency," in order to provide their employees with a proper level of protection from Coronavirus infection.

Therefore, employers should consider the following steps:

- prevent employees from travelling on business throughout the course of the "COVID-19 emergency" period; and
- evaluate alternatives to physical meetings by using digital tools such as conference calls or videoconferences.

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