CMS Newsletter Italia

Work during the COVID 19 emergency

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The new Decree-Law no. 18 of 2020, in force since 17 March 2020, named the "Cure Italy decree" and enacted by the Council of Ministers on 17 March 2020, aims to take action in various areas, directly overwhelmed by the implications of the COVID-19 emergency, including, of course, the workplace, for which it introduces measures aimed at guaranteeing support for employment to defend people's jobs and income.

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This decree is part of a rapidly evolving context in which authoritative sources such as the Protocol signed by the Government and trade unions on 14 March must be taken into account as well as the decrees issued by the Italian Prime Minister.

In order to provide guidance in this complex framework, we will discuss the specific new features that we consider the most relevant here below.

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1. Suspension of dismissals

Art. 46 (Suspension of dismissal appeals) *1. Starting from the date of entry into force of this decree, the initiation of the procedures referred to in Articles 4, 5 and 24 of Law no. 223 of 23 July 1991 is precluded for 60 days and pending procedures initiated after 23 February 2020 are suspended for the same period. Until the aforementioned deadline expires, the employer cannot withdraw from the contract for justified objective reasons pursuant to Article 3 of Law no. 604 of 15 July 1966 regardless of the number of employees.*

1.1. General considerations

The decree is related to the "political" statements that can be summed up in the slogan "no one will be left alone, and no one will lose their job."

The rule strongly limits, albeit temporarily, the "economic freedom" of entrepreneurs, by modifying the collective dismissal procedures and those concerning individual dismissals for justified objective reasons. It does not, however, affect dismissals for disciplinary reasons or the termination of employment at the natural expiry of a contract.

The dismissal of managers is also excluded in that, according to established case law, the provisions of Law 604/1966 do not apply to this category of workers.

The nature and rationale of the provisions contained in Article 46, determined by the present and, more particularly, future situation of the country's economy, in "sterilizing" the employer's termination power, tend to impose the adoption of alternative measures to dismissal and, in particular, to make use of the organizational and contractual instruments at the employer's disposal, such as the use of unused holidays, the adoption of smart working where possible, the use of permits, and access to the redundancy fund (known as the Cassa Integrazione), extended to all sectors without limits to the number of employees supported.

1.2. Collective staff reduction procedures.

Starting from the date of entry into force of the Decree and for a period of sixty days, an absolute ban is established for the initiation of the procedures in question, as well as the suspension, for the same period, of the "procedures" already initiated, and therefore "pending", after 23 February 2020.

1.2.1. Doubts regarding application

By virtue of the rule suspending collective staff reduction procedures, its application may lead to situations even contrary to the spirit of the general law governing collective layoffs. It seems that the people who drew up the rule have little knowledge of trade union procedures and how they are put into practice. Firstly, most of the procedures could have been implemented regardless of the health and therefore economic emergency caused by Coronavirus, limiting the employers' power and right to decide upon their own organization and workforce, in compliance with the law. Moreover, it is not taken into account that the formal initiation of the procedures in question is often preceded by substantial agreements "prior to formal initiation", where the trade union discussions held after the beginning of the formal procedure serve simply to formalize agreements between the employer and the trade union representatives. In this case, as already pointed out earlier, the delay caused by the suspension may even be detrimental to the workers themselves: a voluntary redundancy plan frozen in the name of an ephemeral and populist provision that appears to be an attempt to seek a political consensus without any substantial effect.

1.3. Individual dismissals for objective justified reasons (dismissal for organisational reasons and economic reasons).

The provisions are applicable regardless of the number of employees working for the company and a total ban on termination is imposed during the sixty days following the entry into force of the decree.

1.3.1. Doubts regarding interpretation and application.

A first question arises with regard to dismissals made after 23 February and therefore before the Decree came into effect (18 March). It concerns dismissals at companies with fewer than 15 employees per production unit and fewer than 60 in the whole of Italy: what will happen to such terminations? Will the rule have a retroactive effect? And what would the legal consequences be for any such cases? In the author's opinion, these dismissals should not be revolutionized by the new provisions.

A similar question arises for dismissal procedures initiated pursuant to Article 7, of Law 604/1966, and therefore before the entry into force of the decree for workers recruited before 7 March 2015 by employers that meet the dimensional requirements for application of the protection pursuant to Article 18 of Law 300/1970. In fact, in these cases, dismissal for objective justified reasons is obligatorily preceded by an administrative conciliation procedure at the Department of Labour and, in particular, in accordance with the provisions of the Fornero Law (L. 92/2012), the termination ordered at the end of the procedure has effect starting from the day of the communication with which the procedure was initiated, and therefore before the entry into force of the Cure Italy decree

Also in this case, what will happen to these procedures initiated before the Decree came into force and concluded afterwards? Will the ban be applied? And what will the legal consequences of the termination be?

1.4. Constitutional (il)legitimacy profiles

Limitation of the employer's power to withdraw from the employment relationship, even if temporary (but in the current situation, an extension of the provisions under examination to future emergency legislative measures cannot be ruled out), at first reading appears likely to be constitutionally illegitimate. Apart from the limitation of the economic freedom protected by Article 41 of the Constitution, it appears unreasonable due to its evident inconsistencies: it does not seem to be justified by any identifiable higher interests. In particular, it is not clear that a carefully considered comparison of interests concerned has been made, and above all that it has been guided by an adequate, well-proportioned assessment; even considering the general objective pursued (protection of all jobs) and the measure taken, the employer's constraint appears to be disproportionate to the general regulatory framework and unreasonable. If, in the end, the balancing of numerous economic and social interests, even if strongly influenced by an exceptional situation, does not justify this disproportionate and unreasonable legislative choice.

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2. Temporary unemployment benefits

Companies can apply for access to the Ordinary Redundancy Fund (CIG) if its work activities are suspended or reduced due to events related to the COVID-19 epidemiological emergency by August 2020. Redundancy payments will be made for a period of up to nine weeks.

The collective bargaining phase, which consists of information, consultation and joint examination, can be carried out even on line within three days of the notification.

The application will not be subjected to verification of the existence of the legal grounds, and the period used will not be counted in the maximum overall duration for companies that have had to apply to the fund for reasons other than this emergency.

All workers will be eligible for redundancy payments even if they do not meet the age-related requirements laid down in the law.

Comparable measures have been adopted for access to the Solidarity Fund, the temporary unemployment benefit for companies that employ on average more than 5 employees operating outside the scope of the Redundancy Fund.

Companies that already have extraordinary redundancy fund procedures (or solidarity benefits for those registered on the salary supplementation fund) in progress can suspend these benefits and replace them with the ordinary redundancy fund benefits for nine weeks. The period used is not counted towards the limits of the extraordinary redundancy fund.

For companies operating in sectors not covered by the temporary unemployment benefits referred to in brief (e.g. employers in the agricultural and services sectors), the autonomous Regions and Provinces will be allowed to make exceptional salary supplementation payments as a result of the COVID-19 epidemiological emergency.

The payments made in this form will last for the period in which the employment relationship is suspended and, in any case, for no more than 9 weeks. Workers will also be entitled to imputed social security contributions and related ancillary expenses.

The benefit requires an agreement with the most representative national trade unions for employers, which can also be stipulated electronically.

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3. Extraordinary parental leave

Article 23 of the Decree introduces the option for working parents to take a total parental leave of 15 days, which can be taken by either parent, in addition to the leave normally granted by the law.

Alternatively, the couple can opt for a bonus for the purchase of baby-sitting services of up to €600.00, increased by Article 24 of the Decree to €1,000.00 for NHS operators and police officers.

Extraordinary leave can be taken starting from 5 March 2020, with the natural consequence that periods of parental leave already taken before the publication of Decree 18/2020 are automatically converted into extraordinary leave with the right to compensation and not counted or compensated as ordinary parental leave.

This right is available to employees in the private sector (Article 23 of Decree-Law 18/2020) and the public sector (Article 25 of Decree-Law 18/2020), as well as to employees registered on the separate management scheme pursuant to Article 2), paragraph 26 of Law no. 335/1995, who are parents, including foster parents, of children aged up to 16 years.

The age limit does not apply to workers with seriously disabled children as established by Article 4(1) of Law 104/92.

The compensation paid during the extraordinary leave period is equal to 50% of the salary, calculated according to the provisions of art.23 of Legislative Decree 151/2001[1][1] and is covered by imputed social security contributions, but the regulatory provision is limited to employees with children aged 0 to 12 years who are not registered on the Separate INPS Management scheme.

For employees registered on the separate INPS Management scheme, the amount is equal to 1/365 of the income.

For workers with children aged between 12 and 16, the maximum of 15 days of absence from work will not be paid and the imputed social security contributions will not be applicable. The period may, however, be taken freely without any risk of dismissal and the worker's job will be maintained.

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4. MONTHLY PAID LEAVE FOR THOSE ENTITLED TO IT UNDER ARTICLE 33 Law 104/92

Decree-Law 18/2020 guarantees an increase of 12 days for each of the months of March and April 2020 in the total number of days of monthly paid leave covered by imputed social security contributions provided for by Article 33 of Law 104/92

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5. Protection of workers during active monitoring in the private sector

Also with regard to protection of workers and the safeguarding of their jobs, Decree-Law 18/2020 expressly specifies that the period spent in quarantine by a private sector worker due to the risk of a COVID-2019 infection **is given the same economic treatment as for infected individuals but cannot be counted in the calculation of the reporting period**.

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6. Extension of the deadline for submitting applications for NASpI and DIS-COLL unemployment benefits.

In addressing the COVID-19 emergency, the Decree also introduces unemployment measures.

To facilitate the submission of NASpI [2][2]and DIS-COLL[3][3] unemployment benefit applications due to the involuntary cessation of work activities from 1 January 2020 to 31 December 2020, the expiry period is extended from sixty-eight days to one hundred and twenty-eight days starting from the date of termination of the employment contract.

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7. Extension of the deadlines for social security and welfare payments

The Decree provides for the automatic suspension with retroactive effect of the expiry of the deadline for social security, welfare and insurance benefits paid by INPS and INAIL. The suspension period is extended from 23 March 2020 to 01 January 2020

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8. Suspension of the terms for the payment of social security and welfare contributions and premiums for compulsory home help and caregiver insurance

The Decree introduces a suspension measure that gives individuals and families more time to pay social security and welfare contributions, as well as the premiums for compulsory insurance of home helps and caregivers, extending the deadline to 31 May 2020.

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9. Additional income support measures

9.1. Bonus for company employees

Finally, a bonus of €100 will be paid to both public and private sector employees with a gross income of less than €40,000, which will be excluded from the income tax base and related to the days when the work remained at the ordinary place or work; it will be paid by employers in April.

9.2. *One-off* allowance for professionals and workers on a contract for continuative and coordinated services

For professionals with a VAT registration number (active on 23 February 2020) who are not members of a compulsory social security fund (such as lawyers, accountants etc.) and workers on contracts for continuative and coordinated services ("co.co.co.") active on 23 February 2020, craftsmen and tradesmen who have been forced to close some or all of their activities in order to contain the spread of the COVID-19 epidemic, seasonal workers in certain sectors particularly badly struck by the crisis (tourism and agriculture) and entertainment workers, will receive a *one-off* gross payment of €600 from the National Social Security Institute, at their request. The allowance is not counted in the income tax base and will be paid within the limits established.

It is hoped that such a measure will also be adopted as soon as possible by the social security funds of professionals not covered by this law.

9.3. Initial observations

All these measures were taken to support the community as a whole but, if the situation is not resolved by the end of March, they are unlikely to be sufficient to meet the demands of businesses and to offer adequate protection to self-employed workers and professionals.

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10. *SMART WORKING*

Article 39 (Smart working provisions) *1. Until 30 April 2020, disabled employees under the conditions referred to in Article 3, paragraph 3 of Law no. 104 of 5 February 1992 or persons whose families include a disabled person under the conditions referred to in Article 3, paragraph 3 of Law No. 104 of 5 February 1992 will be entitled to carry out smart working pursuant to Articles 18 to 23 of Law no. 81 of 22 May 2017, provided that this method of work is compatible with their jobs.*

2. Private sector workers suffering from proven serious illnesses with reduced working capabilities are given priority in the acceptance of applications for smart working pursuant to Articles 18 to 23 of Law No. 81 of 22 May 2017.

With reference to the methods of performance of the employment relationship, Article 39 of Decree-Law No. 18 of 2020 must be coordinated with Article 3 of the Prime Minister's decree of 23 February 2020, which stipulated that companies can apply to every employee the "smart" method of work for the entire duration of the emergency (six months starting from the Council of Ministers' decree of 31 January 2020).

In this case, the employer will not have to stipulate an agreement in writing, but will still be required to comply with the provisions of Articles 18 to 23 of Law no. 81 of 22 May 2017 (working hours, right to disconnect, use of IT tools, exercise of organizational and control powers, etc.).

Smart working can therefore be activated through this simplified procedure, by sending the occupational safety information (provided for by art. 22 of Law 81/2017) by e-mail to the employee, using the documentation available on the INAIL website.

In addition, companies will have to notify the offices responsible for activating the smart work, electronically and in a simplified form (with a simple self-certification). Such notification is not mandatory for a simple extension of an existing smart working agreement.

Finally, the law seems to exclude the possibility for an employee to decide for himself to adopt smart working, since this is a way of performing the work relationship, which, as there is no need for agreement, remains a prerogative of the employer.

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11. *Privacy* of employees

In a communication of 2 March 2020, the Italian Data Protection Authority clarified that employers will not be allowed to collect information about any flu symptoms of the worker and his closest contacts or, in any case, outside the work sphere, a priori, systematically and in a generalized way, also through specific requests to the individual worker or illegitimate investigations.

The assessment and collection of information regarding the typical symptoms of Coronavirus and information on the recent movements of each individual are the responsibility of health professionals and the system activated by civil protection.

The worker's obligation to notify the employer of any health and safety hazards at the workplace remains.

In this regard, the emergency regulations specify that anyone who has stayed in the areas with an epidemiological risk during the last 14 days, or in the municipalities identified in the latest regulatory provisions, must notify the local health authority, including through their GP, who will make the relevant investigations such as, for example, compulsory self-isolation.

On his part, the employer can instruct his employees to report the fact they are coming from an area at risk, thus facilitating the transmission of this information, also by preparing dedicated communication channels; the obligations of the employer as to the need to notify the authorities of any change in the "biological" risk due to Coronavirus for health at work and other obligations related to the health monitoring of workers through the company doctor, such as, for example, the possibility of subjecting the most exposed workers to an extraordinary medical examination, remain applicable.

In the event that, during the course of his or her work, an employee performing work in contact with the public (e.g. public relations offices, desk services) comes into contact with a suspected case of Coronavirus, he or she, including through his or her employer, will communicate this to the local health authorities and follow the prevention instructions provided by the health professionals contacted.

The Data Protection Authority therefore requests all data controllers to refrain from conducting their own investigations that involve the collection of data concerning the health of users and workers without being requested or ordered to do so by the competent bodies.

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12. Brief Considerations

It is well known that the total allocation made by the Government is €25 billion and that it will not be enough to cover the support required for the entire duration of the COVID-19 emergency.

Another decree is therefore expected to be approved in April to provide more economic support in April.

An expectation also supported by the words of the Minister of Labour, Nunzia Catalfo, who announced in a press conference that the resources allocated in DL 18/2020 **represent a first tranche of an overall allocation quantified at €3 billion for the self-employed and professionals, which will be renewed in a subsequent DL if the coronavirus emergency continues.**

[1] The calculation is based on the global average daily pay referring to the completed four-weekly or monthly period of remuneration immediately before the one during which the leave began.

[2] Monthly unemployment allowance for employed persons who have involuntarily lost their jobs.

[3] Unemployment benefits in support of workers on contracts for continuative and coordinated services, including project workers, research fellows and PhD students with grants who have unintentionally lost their jobs (Article 15, Legislative Decree no. 22 of 4 March 2015).

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