

COVID-19: Protection of employees' health and other impacts on businesses

The sudden rise in the number **Covid-19** ("**Coronavirus**") cases in Lombardy and other Italian Regions has prompted the relevant governmental authorities to adopt urgent measures to prevent and limit the spread of the virus, and this is starting to have an impact on the economy. In connection with these measures, on 31 January Italian government has declared a six-month state of emergency, which expires on 31 July 2020 (unless it is extended).

It is, therefore, necessary to examine the scope of these measures and the possible legal effects for businesses and their operators.

Labour law issues: occupational health and safety

The exceptional circumstances require employers to adopt special measures in the workplace to counter the Coronavirus.

Indeed, Article 2087 of the Italian Civil Code and the Consolidation Act on Safety generally obliges employers to safeguard the **physical integrity** of their workers and secure a **salubrious and risk-free working environment**, which includes the duty to safeguard the workers against biohazard exposure.

When adopting any appropriate prevention and protection measures, employers must observe principles of utmost caution and prudence and apply best practices, also to prevent that acts are committed that would trigger administrative liability for criminal offences under Legislative Decree 231/2001 in case of a breach of health and safety regulations at work.

The employers' general safety obligation under Article 2087 of the Italian Civil Code has a **broad** and **extensive** scope, justified both by the constitutional importance of the right to health and by the fact that private business initiatives may not prejudice workers' health.

As a result, employers are obliged to adopt not only the prevention and protection measures mandatorily required by law, but also any measures that are necessary and appropriate in their specific working environment, having regard to the particular nature of the work involved, past experience and available technical knowledge.

Against this background, to comply with the special measures that are now adopted by the Italian authorities (including Law Decree 6/2020, the Order issued by the Ministry for Health of 25 February 2020, Law Decree 9 of 2 March 2020 ("**LD 9/2020**") and the implementing Decrees issued by the Prime Minister, most recently on 4 March 2020), we set out below certain operational recommendations to be implemented under the current circumstances, distinguishing between legal obligations and voluntary precautions/practices:

- identify workers from contagion clusters (which currently include 11 municipalities, possibly to be extended in the future) and require them to observe the restriction on their movements imposed by the ban on leaving the affected areas (**legal obligation**);

- in consultation with the company doctor and the prevention and protection service, prepare information statements for all workers on the Coronavirus and on the prevention and protection measures adopted to prevent or limit the risk of spread. The information statement must include a warning to all employees presenting symptoms compatible with the Coronavirus, to promptly contact their doctor or health care provider or call the regional or national emergency number and strictly observe the instructions provided by the health care authorities (*i.e.* self-isolation or self-quarantine etc.) (**legal obligation and practice**);
- prefer/promote recourse to **smart working** or **teleworking** to reduce workers' business travel.

In this regard, the Decree of the Prime Minister of 1 March 2020 allows employers in the entire Italian territory and for the entire duration of the state of emergency declared on 31 January 2020 (therefore, until 31 July 2020 for the time being) to introduce smart working immediately **even without an individual agreement with the workers (legal obligation for red areas, practice for others)**;
- cancel workers' business trips or travel in the areas considered at risk (**obligation and, also for travel in areas other than the red area, practice**);
- reinforce filters for entering the company, preventing/limiting access of external persons (consultants, visitors, suppliers, customers, etc.). If this is not possible, assess to make available a self-declaration form to record any movements to foreign countries/Italy/municipalities included in the contagion cluster and/or any close contacts with persons who have been infected or coming from areas at risk during the previous 14 days (**practice**);
- assess to update the risk valuation document (DVR), in case it does not include an assessment of biological risks or a specific assessment of the Coronavirus (**obligation and practice**);
- introduce, in consultation with the company doctor and the prevention and protection service officer, personal protective equipment (*i.e.* gloves, sanitising dispenser, masks etc.) (**obligation and practice**);
- prohibit or limit access to particularly crowded places (*e.g.* company canteens, indoor auditoriums, indoor libraries, gathering places, etc.) (**practice**);
- create a dedicated free phone number or email address to provide information and support to workers, preferably with the support of the company doctor and the prevention and protection service officer (**practice**).

Obviously, any operational measures adopted must be promptly amended and updated if the relevant Authorities issue further measures.

Moreover, especially in complex organisations and considering the exceptional circumstances, the top management and key functions (*i.e.* the "employer"/*datore di lavoro* interpreted broadly) must be involved in decisions concerning precautionary measures and practices adopted to comply with the safety obligations under Article 2087 of the Italian Civil Code, as these decisions - at least those concerning best practices - are corporate policy matters, which, as such, should be generally agreed and consistent.

Therefore, the involvement of the company doctor and the prevention and protection service officer in defining these practices and setting out and adopting prevention and protection measures is essential.

Finally, LD 9/2020 introduces a first set of special rules concerning recourse to social shock absorbers (*Cassa Integrazione*) and measures to support revenues to companies and workers in the areas most severely affected by the Coronavirus.

Tax Implications

LD 9/2020 also contains certain tax provisions which mainly concern formal compliance obligations.

More in detail, according to Article 1 of LD 9/2020:

- for those taxpayers who are obliged to submit the 730/2020 tax form, the deadline for the e-filing to the Italian tax authorities (“ITA”) of the “Wage and Tax Statement” (*Certificazione Unica*) related to the fiscal year 2019 is postponed from 9 March 2020 to 31 March 2020;
- the new deadline for the hand-out of the “Wage and Tax Statement” (*Certificazione Unica*) to the employees is 31 March 2020;
- the new deadline for the submission to ITA of the data relating to deductible expenses to be used for the pre-filled Italian tax returns for fiscal year 2019 is deferred from 29 February to 31 March 2020;
- the deadline for ITA to provide the Italian individual taxpayers with the pre-filled Italian tax returns for fiscal year 2019 is deferred from 15 April 2020 to 5 May 2020;
- the effective date for the reshaping of the terms related to the tax assistance and the pre-filing of the tax returns has been anticipated to 2020;
- the deadline for the submission of 730/2020 Tax Form related to fiscal year 2019 is postponed from 23 July 2020 to 30 September 2020 regardless of the filing method adopted (*i.e.* sent either directly by the taxpayer or through withholding agent, Tax Assistant Centers - “*CaF*” or qualified intermediaries).

In addition, according to Article 2 of LD 9/2020, taxpayers which are tax resident or have the legal seats / place of effective management as at 21 February 2020 in the municipalities where the spread of Coronavirus was more severe (the so-called “red zone”, namely: Bertinico, Casalpusterlengo, Castelgerundo, Castiglione D’Adda, Codogno, Fombio, Maleo, San Fiorano, Somaglia, Terranova dei Passerini, Vò) may benefit from a suspension of the terms related to the payment of notices of assessment which would have otherwise expired between 21 February 2020 and 30 April 2020.

The payments postponed under the above suspension must be made in a single installment during the month following the end of the suspension period and no refund will be made of any amounts which already have been paid.

The deadline for the payment of the installments related to the so-called “*definizione agevolata*” (*i.e.* an instalment plan agreed with the ITA) set forth in Article 3(2)(b) and Paragraph 23 of the Law Decree 23 October 2018, No. 119 (“**LD 119/2018**”) is deferred from 28 February 2020 to 31 May 2020. The same applies to the payment of the installments related to the “*definizione agevolata*” set forth in Article 5(1)(d) of the LD 119/2018.

Finally, according to Article 5 of LD 9/2020, the terms related to the obligations and payments of social security and welfare contributions and the premiums for compulsory insurance expiring in the period from 23 February 2020 to 30 April 2020 are suspended in the municipalities of the so-called "red zone".

There is no refund for social security contributions and welfare/compulsory insurance premiums already paid.

The compliance duties and payments for social security charges are postponed until 30 April 2020 and the payments may be deferred up to a maximum of five monthly installments of the same amount, without application of penalties and interests.

Privacy law

The possible measures to prevent and limit the risk of spread adopted by employers must in any event comply with the **limits set out in the laws on personal data protection**, amended in 2018 when EU Regulation 679/2016 (the General Data Protection Regulation or "**GDPR**") came into force.

In this regard, on 2 March 2020 the Privacy Authority (*Garante Privacy*) has issued a press release concerning the data that may be collected on the Coronavirus symptoms and the most recent travel activities of visitors, users and employees.

The Privacy Authority recommends to **limit as much as possible the systematic and non-discriminated collection of data** in this respect. As the Privacy Authority clarifies in the press release, activities aimed at preventing the spread of the Coronavirus must be conducted by the organisations who are legally in charge of guaranteeing the respect of public health rules, such as health care operators and the civil protection service.

In line with the position assumed in the press release, containment measures must be implemented in compliance with the principle of minimizing privacy data treatment. Therefore, collection must be limited to data that are strictly necessary to give effect to these measures.

In any event, the urgent measures adopted during the last weeks already provide that persons who have resided during the last 14 days in the areas at epidemiological risk or in the "red zone" areas, or who have had close contacts with persons who have been infected, must inform the local health agency (ASL), also through their own doctor, who will prescribe the necessary measures such as, for example, self-isolation.

Therefore, **the duty of the workers to inform the employer of any situation that puts safety and health at the workplace at risk**, remains intact.

Further issues: commercial contracts

The global spread of the Coronavirus already affected many Italian companies during the past weeks, specifically certain activities (such as manufacturing activities, transports and sales) mainly (but not only) involving businesses active internationally and, more in general, businesses that involve Chinese partners, either directly or indirectly.

Now, with the appearance of the first large Italian contagion clusters in Lombardy and other Italian regions, these negative effects will likely become more prejudicial, and spread out to the entire national or local economic territories, which are (or could become) affected, in any manner, by the emergency situation and the measures adopted by the government to limit and manage the Coronavirus epidemic

(such as the Law Decree 6/2020 and the Prime Minister's Decree of 1 March 2020), notwithstanding the support measures adopted in connection with the emergency.

Even more than before, many businesses are now exposed to the risk that, as a result of the exceptional circumstances and the measures that are or have to be adopted, obligations entered into under binding commercial contracts can either not be performed according to the agreed terms or cannot be performed at all. For example, the Prime Minister's Decree of 1 March 2020 has established certain "red zone" areas (i.e. areas in which there was a more severe Coronavirus outbreak) and imposed strict containment measures in these areas. These include, for example, the closure of all retail shops (except for public utility services and primary necessity goods) and the suspension of all work activities for companies (excluding public utility and essential services) located in these areas. For other areas less severely affected by the Coronavirus spread - and in general for the entire national territory - significant containment measures were introduced, although less severe than those applicable in the "red zone".

It is therefore essential to determine whether, in light of the exceptional nature of the situation, an entity can be held liable for a possible delay in performance or default, or if the exceptional circumstances may somehow be considered as events of Force Majeure, which by their nature automatically exonerate the non-performing party from liability.

In this respect, under Italian law a defaulting party is exonerated from liability (i) if the service to be rendered under the contract becomes **excessively onerous** due to "extraordinary or unforeseeable events" that allow the non-performing party to ask for termination of the contract; or (ii) if the non-performance or delay in performance is due to the **subsequent impossibility to render the service**, which is not attributable to the non-performing party.

Although there is no precise Force Majeure definition under Italian law, the concept includes all natural and/or human events which, due to their unforeseeable and extraordinary nature, are, in practice, impossible to prevent or resist as they are beyond the control of the parties, causing the service to become completely impossible or excessively onerous. In international (and contract) practice, examples of "extraordinary and unforeseeable" events falling within the definition of Force Majeure are, for example, earthquakes, hurricanes, wars, rebellion, etc..

We can say in light of the above that:

- in all cases in which economic operators cannot correctly perform their obligations (either because of a delay or default), as a result of, for example, an order by an Authority (the so-called "*factum principis*", i.e. the act of State), this circumstance may be deemed to constitute an exemption from the defaulting party's liability, regardless of the contract terms in place. Obviously, it will be necessary to distinguish any non-performance directly affected by the special measures from any non-performance that is not directly or immediately affected by these measures;
- if a contract includes a specific Force Majeure clause, the clause should be examined to assess its scope, enforceability and related effects, always bearing in mind any conflict of law rules and any rules of mandatory public order which may apply;
- if a contract does not include any Force Majeure clause then, assuming that the contract is governed by Italian law, the rules and principles summarized above apply. However, in this case the burden of proving any lack of negligence will be on the party invoking the exoneration from liability under the Force Majeure.

It is difficult for the time being to assess whether the spread of the Coronavirus in Italy, coupled with the current (and future) measures that have (or may have to be) adopted could have the effect of exonerating parties from liability for any delay or failure to perform their contractual obligations, also because the future course of events is totally unpredictable. Undoubtedly, certain of the most severe measures adopted have an immediate and direct impact on the activity of the businesses concerned. In any event, an assessment must necessarily be conducted for each specific case and must consider various elements, such as, for example, the reasons for the delay and/or non-performance; the effective materiality of these reasons for the service to be rendered under the contract and the absence (or excessive cost) of alternative ways to perform.

To conclude, also considering the effects that are produced globally, we cannot rule out that the spread of the Coronavirus (and all effects associated with it) will be considered a ground for exemption from liability for a delayed performance or failure to perform, especially if the current situation is maintained for a long time or deteriorates.

Further analysis of the impact of the spread of the Coronavirus is also required for so-called MAC/MAE (Material Adverse Change/Material Adverse Effect) clauses, which are developed in Anglo-Saxon practise and frequently used in agreements for the acquisition of shareholdings and/or corporate groups and in more complex loan agreements. Under these clauses, potential buyers or banks may choose not to proceed with the completion of the transaction or refuse the actual grant of the loan if circumstances arise that have a substantial impact on the results of operations or financial position of the company concerned before the transaction is carried out or the loan is disbursed. Obviously, also in this case a detailed analysis of the clauses is required, in addition to any effective impact that the Coronavirus has on the results of operations and financial position of the company concerned.

Gianni, Origoni, Grippo, Cappelli & Partners has set up an in-house **Task Force** to constantly monitor the evolution of legislation in the regions affected by the Coronavirus and is at your entire disposal to support you in defining, drafting and implementing the most advisable strategies to limit the impact of the spread of the Coronavirus on the operations of your business and the management of your existing commercial relations.

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