



SMART Working - Italy: New Flexible Working Opportunity

Insights

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The International Employers Forum welcomed Anna Cozzi, Esquire, from Daverio & Florio law firm, to join a panel of international lawyers, including my colleague William Wright, to speak about changes in employment law around the world. Fisher Phillips thanks Anna for kindly accepting our invitation to answer a few questions about the new smart working arrangements in Italy for the Cross Border Blog. In June, Law N. 81/2017, the new labor and employment legislation, came into effect in Italy. This new law expanded the protections of self-employed workers and introduced a new flexible working framework. “Smart working” is an agreement reached between an employer and employee which allows the employee to complete the work he or she is contracted to perform without the constraints of a fixed location or fixed working hours.

Anna, welcome to the Cross Border Blog. We are anxious to learn more about the new smart working provisions and the ramifications for employers in Italy.

Q.: What are the traditional working arrangements in Italy and what are the new flexible working options introduced by Law N. 81/2017?

A.: Italy is traditionally a very conservative country with regard to the modalities of carrying out the working activity.

According to research undertaken by the Polytechnic of Milan, there are about 250,000 workers in Italy who use the smart working modalities of performing their duties; mainly women, located mainly in the north of Italy, with an average age of 40. That number only represents about 7% of the national workforce.

According to that figures, Italy is the tail-end in Europe - both in terms of employees who choose to work from home (teleworking) and smart workers who work anywhere by using new technologies. The European countries that currently make the greatest use of these types of flexible working are Denmark, Sweden, the Netherlands, the United Kingdom, Luxembourg, and France. The fact that the percentage of workers teleworking and smart working in Italy is amongst the lowest is probably due to its traditions and the strong presence of Trade Unions in the country.

This seems to be regrettable since the utilisation of flexible working modalities would be of great importance in a country such as Italy, not only because “family” is an extremely important concept

for the Italian people, but also because Italy has a rapidly ageing population and the number of workers needing to take care of elderly parents is increasing considerably.

In fact, a flexible working modality like smart working is aimed at not only (i) innovate and increase efficiency, competitiveness and work rate and (ii) reduce costs (in terms of workstations, lighting, heating, canteens, cleaning, commuting, etc.), allowing companies to enter the market with their services at an ever lower and more competitive cost; it is also aimed at reconciling the individual needs of the workers with those of the companies.

Smart working is characterised by a very flexible nature (both in terms of workplace and in terms of working hours) and it gives the workers the opportunity to organise their working hours in conjunction with their private life, family and friend relationships.

Q.: What are the main provisions of Law N. 81/2017 on Smart Working of which we should be aware?

A.: Law N. 81/2017 entered into force on 14 June 2017 and concerns independent workers and smart workers.

As for Smart Working, the new law provides for some mandatory requirements.

First of all, a written agreement between employer and employee is required prior to the adoption of smart working. The agreement must have the following contents:

- **Remuneration:** equality of treatment compared to other colleagues.
- **Modalities of carrying out of the working activities** out of the Company premises.
- **Hours of work:** equality of treatment compared to other colleagues and application of working hour limits as provided for by current law provisions and collective contract. The agreement must define which days of the week are to be worked in a smart way, and can also state various periods of availability or the need for the worker to at least be contactable (while not guaranteeing actual performance) during normal opening hours of the company's office. Overtime work should be always forbidden in that it can be difficult to measure the amount of it and it is a contradiction in terms as far as smart working, a by-word for flexibility, is concerned.
- **Technologies:** the agreement must indicate the technologies to be used and the "the worker's right of disconnection" (that is the right of the employee at the end of the day to disconnect without the employer being able oppose or object to this in any way). Every smart working programme must in fact provide for a fair balance between the work life and private life of the employee.
- **Controlling and disciplinary powers:** it must state the modalities of exercising the employer controlling and disciplinary powers on working activities outside the office, and what smart worker conduct would give rise to the application of disciplinary measures.

The agreement can be on a fixed term or a permanent (non-fixed term) basis and can be terminated on justified grounds or with at least 30 days' notice (90 days for disabled workers) in case of permanent agreements. Fixed-term agreements may be terminated before their natural expiry but only if based on justified grounds.

It is important that the smart working agreement also provides for:

1. Training:

- In the correct utilisation of work time;
- On how working activities outside the office can impact on the private life,
- On security at work and collaboration with the employer on this.

2. Incentives: provision for a proper system of incentives to reward performance measured via a Performance Appraisal System is fundamental.

Q.: Do employers have to consult with Trade Unions before an employer adopts a smart working program?

A.: The involvement of Trade Unions is not required by the law.

However, though not a strict requirement, the adoption of smart working is often preceded by the signing of agreements with Trade Unions on the issue.

The involvement of Trade Unions, also through their workplace representatives (termed RSAs), can in fact prove useful in guaranteeing smart workers further and more detailed rules than those conditions (which in truth are minimal) set out by Italian law, and establish objective methods and procedures of selection of personnel allowed the chance to choose a smart working option.

The biggest companies that have set up a smart working programme up to now (Bayer, Siemens, Ferrovie dello Stato, Enel, TIM, Vodafone, Ferrero, Barilla, etc.) have involved Trade Unions, by signing union agreements on the issue to establish more detailed rules on the way to best achieve this mode of work.

Q.: Employers will need to monitor their smart workers: are there any privacy and laws relating to the control of remote workers of which employers should also be aware?

A.: Yes, an efficient monitoring system of the productivity the smart worker is fundamental. This monitoring activity involves privacy and remote control aspects.

First of all, for the purpose of validly effecting such monitoring without violating the Italian legislation on the remote control of workers (Article 4 of Italian Law 300/70 as recently amended), smart workers must be given a specific document indicating which technological devices will be at their disposition for the performance of their working activity, what controls the employer will be able to make on these devices and what the consequences could be for the employees, even from a disciplinary stand point, of the inspections made by the employer.

As for the protection of privacy aspects (Italian Legislative Decree n. 196/2003), the Italian Data Protection Authority sets forth specific obligations and limitations on an employer, some of which are:

- An obligation to provide the worker with detailed information on the modalities of use of the internet and email and the possibility that controls on these will be carried out;
- A ban on the systematic reading and monitoring of email and web pages visited by the employees;
- The adoption of specific measures aimed at preventing the risk of improper use, thus reducing subsequent monitoring (for example prohibiting the access to sites on a blacklist, without registering attempts at access);
- With regards to email, in case of prolonged and planned absences (e.g. holidays), the provision of automatic replies to clients with an indication as to the period of absence and a colleague who may be referred to, or, in the case of unplanned absences (e.g. illness), the designation of a colleague authorized to access the relevant email account.

It goes without saying that, in the case of smart working, which involves the possibility of working anywhere, employees will be required to have a particularly diligent conduct, both in terms of custody of technological devices and in the retention and confidentiality of data.

Q.: What are the main provisions of Law N. 81/2017 pertaining to independent contractors?

A.: Law N. 81/2017 also sets forth some new provisions for independent contractors.

In particular, the new main provisions on independent contractors (entrepreneurs are excluded) are as follows:

- The customer may not give itself unilateral rights to amend the contract or withdraw from a contract of successive performance without prior notice. In case of violation, the independent contractor is entitled to ask for damage compensation;
- The contract may not include an agreement to permit payment more than 60 days after receipt of the respective invoice, or from the date of request of payment. In case of violation, the independent contractor is entitled to ask for damage compensation;
- The contract may not permit the customer to refuse to stipulate the contract in writing. In case of violation, the independent contractor is entitled to ask for damage compensation;
- Independent contractors with at least 3 months of contributions accredited in the previous 12 months, are entitled to an economic treatment for parental leave for a maximum period of 6 months, within the first 3 years of the child's life. The indemnity is equal to 30% of the income for which the

contribution was paid. Should the parental leave be enjoyed within the first year of the child's life, the indemnity is due regardless of the contributory requirement;

- In case of pregnancy, sickness or accident the working activity of the independent contractor who continuously work for a client is suspended, without the right to payment, for a period not exceeding 150 days for each calendar year, except in case of loss of the client's interest. In the event of illness or accident that prevents the performance of work for more than 60 days, the payment of social security contributions and insurance premiums is suspended for the entire leave for sickness or accident and up to a maximum period of 2 years.
- An unemployment allowance is granted to a specific category of independent contractor called "collaboratori coordinati e continuativi".

Thank you very much, Anna. From all you have told us, it appears that international employers with a presence in Italy can seize upon the opportunity to develop a smart workforce, but need to heed the requirement for a written agreement with the inclusion of mandated terms, provide adequate and regular training to smart workers and management, and ensure compliance with Italian laws relating to control of remote workers and privacy protection. Also, when engaging independent contractors, international employers should be cognizant of the new protections afforded to these workers in Italy, paying attention to avoid abusive clauses and conduct defined under the new law.