

Milan, Rome, Padova, Bolzano
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Coronavirus and restrictions to mobility and to working activities to limit the risk of infection: which are the consequences for the companies?

With the rapid outbreak of the coronavirus disease, uncommon situations concerning employment and commercial relationships have recently arisen.

In particular, in these days the situations concerning the management of employment relationships are the most varied and unusual: does the employer have to pay the quarantined employees? Is it possible to be absent from work for fear of infection? Which duties of care are incumbent on the employer?

The situation affects the punctual fulfilment of contracts, too: cancellation of business trips and of business meetings and conventions, suspensions of events. Is it possible to get a damage compensation? Shall the tickets be reimbursed? May the contract be terminated and with which consequences?

With this article we are trying - as far as possible - to clarify the principal situations that could arise, examining them from labor, privacy and commercial standpoints.

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I. LABOR ASPECTS

WORKING ACTIVITY SUSPENDED BY ORDER OF THE PUBLIC AUTHORITY

With reference to the employees living in the municipalities of the so-called 'red zone' (presently Bertinico; Casalpusterlengo; Castelgerundo; Castiglione D'Adda; Codogno; Fombio; Maleo; San Fiorano; Somaglia; Terranova dei Passerini; Vo'), the Ministry of Health adopted a Decree, which suspends the performance of all working activities (with exclusion of public utility and essential services to be performed in this area and working activities that can be performed from home).

Such suspension has also been extended to employees who carry out their working activities outside the abovementioned municipalities but are their resident inside the red-zone.

This mandatory suspension of the working activities is certainly not attributable to the employer: the employer's obligation to pay salaries and contributions is therefore interrupted.

However, three possible exceptions to this general principle are provided:

1. **Sickness Leave:** the usual treatment must be applied and the employee who has got a medical certificate will continue to receive the salary regularly, partly from the employer and partly from the I.N.P.S. (Italian National Social Welfare Institute);
2. **Holidays/Paid Leaves:** it is possible for the employees to use days of holidays and/or days of paid leave accrued, so as to continue to receive the ordinary salary;
3. **Smart Working:** in the light of the Decree of the President of Council of Ministers of February 25th, 2020, it is possible to carry out the working performance – on an experimental basis until March 15th, 2020 – in smart working (home-office) without any prior written agreements between the Parties, with regards to employers with registered or operational offices in the Regions of Emilia Romagna, Friuli Venezia Giulia, Lombardia, Piemonte, Veneto and Liguria, as well as for employees who are resident or domiciled there and are performing their working activities outside these areas.
In such cases, the individual agreements to be sent to the public Authorities are replaced by a self-certification according to which smart working refers to an employee belonging to one of the areas at risk.

In order to pamper the damages to productivity, the Ministry of Labour has not excluded the possible use of the **Ordinary Furlough** (the so-called 'CIGO'): employers can therefore evaluate, case by case, whether it is reasonable to suspend the production activities and request to the Labour Ministry the granting of the 'CIGO'.

QUARANTINED EMPLOYEES

Employees with symptoms attributable to the Coronavirus disease are placed under observation and in this case, since they are absent from work for medical treatment, their absence is regulated according to the

ordinary legal and contractual provisions (sickness leave). The same applies to the case of an employee quarantined even if without symptoms but with a medical certificate.

WORKING ACTIVITY VOLUNTARILY SUSPENDED BY EMPLOYERS WHO DO NOT FALL WITHIN THE SCOPE OF APPLICATION OF DECREE

Employers who decide to suspend or limit the working activities for precautionary reasons continue to be obliged to pay the salary due to their employees, whether or not they perform their working activities.

In the event that the employer authorizes the employees not to go to their workplace but, at the same time, requires them to carry out their working activities from home, the latter shall - where possible - comply with this directive.

In this case, two scenarios can occur:

1. If the employees perform their working activities in smart working, as requested by their employer, they will receive their ordinary salary;
2. Otherwise, if it is technically possible to work from home but the employees do not comply with this directive, they have to be considered justified absent but they will not receive their salary (without any prejudice to the use of days of holidays or paid leave days or similar, and save for the cases of sickness leave).

VOLUNTARY ABSENCE FROM WORK FOR FEAR OF INFECTION

Except for the cases in which the employer has authorized – if technically possible – the performance of the working activities from home, the employees who decide voluntarily not to go to work and not to carry out their working activities (e.g. for fear of using the public transport and be infected) will not be entitled to their salaries and such absence could be considered unjustified, with possible consequent disciplinary measures.

A disciplinary measure should nonetheless be valued with caution and on a case-by-case basis, since this absence can probably be considered as not guilty (indeed, the conduct can be considered not entirely irrational, especially in the context of the uncertainty of these days) or even an employee's right (when advised by physicians with regards to his/her specific health conditions), eventually implying -according to the National Collective Bargaining Agreement of the relevant sector - the use of days of paid leave for personal reasons or days of paid leave for health reasons.

SAFETY AT WORKPLACE

In any case, if employers do not opt for the suspension of their working activities or do not allow smart-working, it is required to carefully assess the risks to the health and safety of their employees, providing them – whenever the risk assessment shows a concrete risk and on the basis of the indications of the relevant Health and Safety Officer (R.S.P.P.) - with all the necessary personal protective equipment (such as - for example - disposable masks, latex gloves, disinfectants, etc).

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II. PRIVACY ASPECTS

Many companies have taken, or are seriously considering to take, extraordinary and precautionary measures, including the obligation for the employee and the visitor of the company to be inspected through thermal scanner that collects and stores "special categories of personal data" (e.g. body temperature), or to self-certify in writing that they have not recently visited areas at risk, but also that they have not met people from these areas or even that they have not had a temperature equal to or higher than 37.2 in the last two weeks.

If on the one hand, as confirmed by the opinion of Italian Supervisory Authority, the need to safeguard the safety and health of citizens allows a compression of their individual rights by the Public Authorities for extraordinary reasons and public interest, the same cannot be said for companies.

Firstly, private entities, such as companies, are not exempted from the obligation to request the data subject's consent; secondly, the principle of minimisation of processing, that is the collection of the minimum and necessary amount of data, is ignored.

The GDPR regulation requires pursuing a purpose with as little personal data processing as possible, if not even avoiding it. This, in this specific case, could well be done, for instance, by sending a communication to

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the employees or by posting a notice at the entrance of the company inviting anyone who has stayed in areas at risk or present symptoms not to enter the premises, instead of asking for a self-certification.

In short, companies would be required to execute a DPIA (data protection impact assessment) before implementing a measure so strongly impacting individuals' rights.

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III. COMMERCIAL ASPECTS

The main question is whether and to which extent, the Coronavirus can represent a reason that justifies possible contract breaches or difficulties to comply to contractual obligations by companies operating in the areas affected by the virus in relation to their partners, suppliers and clients.

According to the applicable principles of Italian Civil Code, if the performance of a contractual obligation becomes excessively onerous (hardship) due to extraordinary and unforeseeable events beyond his control, the affected party may request the termination of the relevant contract.

An event can be considered as extraordinary if – from an objective point of view – it may be qualified as an anomalous event with respect to its intensity and dimension. Furthermore, the event can be considered as unpredictable if an average person in the same condition as the affected party would not have been able to foresee the same event.

To such purpose, reference is generally made to uncontrollable and unpredictable events at the time the agreement is signed, such as, for example, an epidemic (as Coronavirus outbreak, for example), natural disasters such as earthquakes, floods, hurricanes, acts of terrorism and war.

In addition to the above, the party of a contract is released from its duty to perform the relevant contractual activity, if the latter becomes definitely impossible (for example as a consequence of an authority order, so called *factum principis*) while in case of temporary impossibility, the affected party will **not be responsible for the relevant delay**.

Therefore, in case of **supply contracts of goods or services** that become excessively onerous or impossible for the supplier due to *force majeure*, the supplier may terminate the agreement with effect from the day in which the force majeure has occurred and both parties are released from the respective obligations (i.e. the supplier to supply the good or the service and the customer/client to pay the price). Already supplied goods or services have obviously to be paid while the advanced payment made for goods or services that due to the *force majeure* will not be delivered, has to be returned by the supplier to the client.

In case of **delays** in the supply of goods or services, the supplier will not be responsible in case the delay has been caused by the above described *force majeure* but it has to be considered that the receiving party will be entitled to withdraw from the contract and refuse to receive the goods or services delivered late if he has no interest in receiving them.

In any case, the economic relevance of the delay and the importance of the obligation that has been breached has to be considered and evaluated.

The same applies to **sale contracts with delayed effects** (i.e. obligations to sell and purchase). In these cases, the seller, in case of a *force majeure* having the characteristics described above, the seller may terminate the relevant contract and not transfer the ownership of the goods promised for sale while the purchaser will be released from the correspondent obligation to purchase the same goods and to pay the relevant price, having also the right to receive the reimbursement of any advanced payment already made.

An interesting case is represented by a recent **soccer match** for which the public authorities have ordered that it had to be played behind closed doors, thus preventing spectators – that had already purchased the tickets – from attending. According to the applicable provisions of Italian Civil Code, the spectators are in principle entitled to claim for reimbursement of the price paid for the relevant tickets but the football club's refusal to proceed with such reimbursement has called into question the Italian Competition Authority, which is now examining the matter and opening an investigation.

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This said, it is international trade practice to include specific **force majeure clauses** in the most relevant commercial agreements for the purpose to describe when an event can be considered as *force majeure* or not as well as the relevant consequences. Such provisions, if adopted, prevail with respect to the rules set forth by Italian Civil Code and must be analysed by the contractual parties to assess if and under which circumstances a certain event qualifies as *force majeure* and therefore excludes a liability for breach of contract.

To this extent, most M&A agreements include specific provisions according to which a certain operation (an investment, the sale and purchase of shares etc.) will not be executed in case of occurrence of an event that has a **material adverse effect** on the same transaction and on the balance of the operation.

As a conclusion, the spread of the Coronavirus may, depending from the affected contractual obligation, make the performance of the same definitively impossible due to objective circumstances that could be considered as unpredictable and in no way surmountable, such as the impossibility to access to certain areas of the country (so called red zones) or the impossibility to have the goods delivered due to a general supply chain breakdown, with the consequence to release the affected party from its contractual obligation and the connected liability. In other cases, when the fulfilment of the contractual performance does not become completely impossible but only more onerous, as for example in the case where different forms of delivery have to be used or longer timescales are estimated in order to finalize the production of certain stocks, the affected party is released only in case of excessive onerousness.

Any commercial operator that has suffered an impact from the outbreak of the Coronavirus and its consequences, must consider the applicable provisions of Italian Law as described above and verify the relevant rules of the affected contract in order to assess whether he can be considered as liable or not failing to comply with the said contract.

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