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Employment briefing note June 2012

Labour market reform: relaxation concerning consequences of unlawful dismissal, universal unemployment benefit and a curb on the abusive use of some categories of contracts

The labour market reform bill of law was approved on 27 June 2012. Below are the principal innovations, with an emphasis on the fact that the most significant amendments concern individual dismissals (with the intention of achieving "greater flexibility for dismissals"), reform to unemployment benefits (inspired by principles of fairness and efficiency) and changes to rules governing some categories of contracts (with the intention of curbing improper use of these contracts, while encouraging apprenticeships as a preferred channel for access to the labour market).

Key issues:

- Dismissals regime
- Universal unemployment benefit
- Curb on abusive use of categories of labour contracts
- Requirements for resignations
- Delegation with respect to employee shareholding and participation rights

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1. Dismissals

The novelty which resulted in the greatest objections and discord between the social partners concerns amendments to article 18 of Law 300/1970, the so-called Workers' Statute. It is well-known that this rule governs the consequences of individual unlawful dismissals in large undertakings, providing that workers are entitled not only to compensation, which is not capped in advance and which depends on the length of the process, but also to reinstatement to their jobs.

These consequences have been re-shaped on the basis of a series of specified case scenarios, with the intention of maintaining the right to reinstatement solely in the most insidious cases and of providing compensation alone in all other cases (that are more or less conspicuous according to the various types). This results in a complex system, which will not be examined in detail in this briefing, but which results in the following principal possibilities.

A. Dismissals for economic or other objective reasons

1) In principle, if a court finds that a justified objective reason does not exist, it will award the employee an indemnity ranging from 12 to 24 months pay. For the purposes of establishing the appropriate amount, consideration must be taken of general criteria described in point B.1) below and also of action taken by the worker for the purposes of seeking new employment and the conduct of the parties during conciliation (*conciliazione preventiva*) (see below).

2) There are however certain aggravated events, for which reinstatement is still provided in addition to compensation (which is however capped at 12 months pay): (i) unlawfulness of dismissal due to objective reasons consisting of the physical or mental unsuitability of the worker or notification in violation of regulations governing the protected sick leave entitlement; (ii) events in which the court finds that the objective justified reason for dismissal is "manifestly inexistent" and decides to apply the regime applicable to aggravated dismissal (in this latter case the court chooses between these rules or an indemnity without reinstatement, as mentioned under point A.1) above). The aggravated dismissal regime specifically provides that the employer will be ordered to reinstate the worker and to compensate damages, capped at 12 months pay and with a deduction of not only amounts that the worker has received for other working activities (so-called *aliunde perceptum*) but also any amounts he or she could have received had they diligently sought new employment (so-called *aliunde percipiendum*). The employer will also be ordered to make payment of welfare and social security contributions, minus any amounts covered by other employment contributions possibly made in the meantime. The worker will be entitled to choose a substitutive indemnity in place of reinstatement, equal to 15 months pay.

3) If dismissal is found to have been actually caused by discriminatory or disciplinary factors, during proceedings and on the basis of the claim made by the worker, the court will apply the relative protection described below.

Procedurally the reform introduces an obligation to attempt conciliation prior to notifying dismissal to the worker in case of dismissal for an objective economic reason by large undertakings. In fact, the dismissal must be preceded by notice to the *Direzione Territoriale del Lavoro* (Territorial Employment Office) with copy to the worker. The *Direzione Territoriale del Lavoro* will summon the parties to a meeting, opening a conciliation procedure which should, in principle, conclude within 20 days of the date of transmission of the call to the meeting. In case of a legitimate and documented impediment preventing the worker from attending the meeting, the procedure may only be suspended for a maximum of 15 days. Dismissal notified following attempted conciliation will take effect from the date on which the procedure was commenced (save for certain exceptions, which do not however include illness, in order to curb possible dilatory effects). As previously illustrated, the parties' conduct in the context of conciliation will be assessed by the court for the purposes of determining the compensatory indemnity.

B. Dismissal for subjective or disciplinary reasons

1) In principle, if the court finds that a justified subjective reason or just cause do not exist, it will allocate an indemnity ranging between 12 and 24 months pay, in consideration of the seniority of the worker, the number of employees, the size of the undertaking, the parties' conduct and situation. The court must provide specific reasoning in this regard.

2) There is however an aggravated case, where provision is made for reinstatement in addition to compensation (which is capped at 12 months pay): if the reason does not exist or represents conduct punishable with a lesser sanction according to collective agreements or disciplinary codes applicable, the court will order the employer to reinstate the worker and to compensate damages, capped at 12 months pay (deducting both the so-called *aliunde perceptum* and the so-called *aliunde percipiendum*). The employer will also be ordered to make payment of welfare and social security contributions, minus any amounts covered by other employment contributions possibly made in the meantime. The worker will be entitled to choose a substitutive indemnity in place of reinstatement, equal to 15 months pay.

Procedurally the reform provides that dismissal notified following a disciplinary procedure will take effect from the date on which the procedure was commenced, save for certain exceptions.

C. Void or verbal dismissals

In case of verbal dismissals or null and void dismissals (whether discriminatory or the exclusive result of a prohibited reason or caused by other events that render them statutorily invalid) the consequences remain substantially equivalent to those currently applicable. Irrespective of the size of the undertaking and also with reference to *dirigenti* (executives, top managers), the court will order the employer to reinstate the worker to his position and to compensate damages incurred as a result of the dismissal and pending reinstatement (with a minimum of 5 months pay, deducting only the so-called *aliunde pereptum*) and to pay social security and welfare contributions in full. The employee will retain the right choose a substitutive indemnity in place of reinstatement, equal to 15 months pay.

D. Formal violations

1) In case the dismissal is declared ineffective due to violation of the required written specification of reasons or of procedural requirements (disciplinary procedure or conciliation procedure, as the case may be) the worker will be owed an indemnity ranging between 6 and 12 months pay, according to the gravity of the violation.

2) However, if the court finds not only a formal violation but also no substantial justification for the dismissal, the applicable consequences will apply as described above.

Certain novelties also concern collective dismissals. The most relevant include the possibility of rectifying possible flaws in notification of commencement of the procedure by way of trade union agreement, and adjustment of the consequences of unlawful dismissal according to various different case scenarios. These case scenarios can be summarised (although their formulation in the law is unclear) as follows: (i) in case of dismissal notified in the absence of written communication, reinstatement in accordance with the rules under point C) above; (ii) in case of violation of choice criteria, reinstatement and indemnity capped at 12 months pay; (iii) in case of violation of the collective dismissal procedure, indemnity ranging from 12 to 24 months pay.

In addition, novelties have been introduced with respect to formal and procedural requisites and terms:

- communication of an individual dismissal must always contain a written specification of the reasons that led to that dismissal;
- in case of retraction of the dismissal, provided that this occurs within 15 days of the date of receipt of any employee's challenge, the employment relationship shall be considered as restored without interruption and the worker will only be entitled to pay accrued in the period prior to the retraction;
- the reform reduces the term for bringing a dismissal judicial action from 270 to 180 days, whilst the term for notice of challenging the dismissal remains unaltered at 60 days (save for fixed-term contracts, in respect of which a 120-day term applies);
- for judicial disputes concerning dismissals and in events governed by article 18 of Law 300/1970 as newly formulated, the reform introduces a specifically dedicated fast-track procedure: the writ of summons can only concern claims relating to the above-mentioned events, unless they are grounded on identical facts; the defendant can file its defence brief up to 5 days prior to the hearing (fixed by way of an order no later than 40 days after filing the action); upon termination of the hearing the court will, having examined proves as far as strictly necessary, either accept or dismiss the action by way of an immediately enforceable ruling; the enforceable nature of the ruling cannot be suspended or withdrawn pending a decision in any opposition proceedings, which must be brought within 30 days of notification or communication of the ruling; the opposition proceedings are ordinary labour proceedings, following which a decision is issued, which may be appealed within reduced terms (30 days). It is possible to petition the Supreme Court (*Cassazione)* against the appeal decision.

2. Resignations or mutual consent termination

A procedure has been established to prevent the abusive use of the so-called practice of "*dimissioni in bianco*" (pre-arranged resignation where the worker is required to sign an undated letter when hired), providing that the effectiveness of resignations or mutual consent termination of the employment relationship will be subject to the suspensive condition of certain procedures, including: validation with the *Direzione Territoriale del Lavoro* or *Centro per l'Impiego* (Job Centre) or offices identified in collective agreements; a declaration by the worker at the foot of the transmission receipt relating to communication of termination of the relationship to the competent offices; validation with the *Servizio Ispettivo del Ministero del Lavoro* (Employment Ministry Inspectorate) during pregnancy or the child's first three years of life. Additional procedures may be established by way of ministerial decree. Workers are also entitled to withdraw their resignation or consent to termination within 7 days. Specific provisions have also been introduced with regard to parental leave and baby-sitting services.

3. Unemployment benefits

Forms of financial protection against unemployment, commencing from 1 January 2013, all be included within the new *Assicurazione Sociale per l'Impiego* (ASpI) (a universal unemployment benefit), and even the special unemployment benefit called mobility indemnity will cease to exist. ASpI will, following the transitional period from 2013-2015, be capped at 12 months up to 54 years of age and at 18 months from 55 years of age and above, and will be extended to all employees, including apprentices.

For the first three years and on an experimental basis, employees entitled to the new benefit may apply for a lump-sum settlement in order to set-up their own business, self-enterprise, micro-enterprise or to establish a cooperative.

The new social contributions required to be paid by employers to finance this benefit will replace certain rates so far paid by employers (such as those relating to mobility and involuntary unemployment and the additional rate for unemployment in the textile sector). For fixed -term employment contracts there will be an additional contribution of 1.4% payable by the employer, save for certain exceptions. In case of transformation of the agreement into an open-term contract the employer will receive a reimbursement equal to the additional rate paid for a maximum of 6 months. Additionally, in case of interruption of an apprenticeship or an open-term employment contract, for reasons other than resignation, a dismissal contribution will be

payable to Inps. Commencing from 2017, in case of collective dismissals in the absence of a trade union agreement, this contribution will be multiplied by 3.

Requisites for access to ASpI are the same as those previously provided for ordinary unemployment benefit for non-agricultural workers: 2 years of welfare seniority and one year of contributions over the previous two years. The reform also governs the so-called Mini-ASpI, which replaces the current unemployment benefit with reduced requisites and the duration of which will be equal to half of the total weeks of contributions for the previous year. A requisite for access is the presence of at least 13 weeks of contributions over the last 12 months.

Cassa integrazione guadagni ordinaria (ordinary temporary lay-off fund) and *contratti di solidarietà* (solidarity contracts) remain in force in accordance with current regulations. With regard to provisions applicable to the *cassa integrazione guadagni straordinaria* (extraordinary temporary lay-off fund) they are extended to certain sectors and undertakings commencing from 1 January 2013, whilst commencing from 1 January 2016 insolvency with termination of business activities as provided by article 3 of L. 223/1991, is eliminated as a cause for access to this fund. For the period 2013-2016 the Employment Ministry may also provide for certain treatment or extensions of *cassa integrazione guadagni* or mobility payments as an exception.

To protect those sectors not covered by the *cassa integrazione guadagni straordinaria*, undertakings that employ on average over 15 employees are under an obligation to activate a solidarity fund c/o the governmental social security agency, the creation of which is subject to collective bargaining. If these funds have not been activated by 31 March 2013, the Employment Minister, in concert with the Minister for the Economy, will establish a residual solidarity fund that employers in the identified sectors will contribute to. Solidarity funds already established for certain sectors, such as the airline transport and airport system sectors, will be reconverted on the basis of agreements to be stipulated by 30 June 2013.

Further provision has been made for the possibility to reach agreements on support for older workers who lose their job and reach pensionable age within the subsequent four years.

4. Independent contractors with VAT registration number and with contracts for project work

The reform provides for certain rules that intend to curb the improper use of contracts for professional collaborations with holders of VAT registration numbers: 12 months after the effective date of the reform a presumption of the coordinated and continual nature of the collaboration will be introduced, such that a "project" will be required, where at least two of the following conditions are met: (i) duration in excess of 8 months over a calendar year; (ii) fee for the collaboration, even if billed to various parties traceable to the same business establishment, which represents more than 80% of the overall amounts received over the same calendar year; (iii) use of a fixed work-station at one of the offices of the principal. Where there is no project, these collaborations will be considered as open-term employment contracts from the date on which the relationship was established. This presumption will not operate in case the service provided: (i) actually relates to intellectual professional activities which require registration in specific registers (to be identified within 3 months by an Employment Ministry decree); (ii) is characterised by theoretical skills acquired through significant training or technical-practical expertise acquired through relevant experience on engaging in that activity; or (iii) is provided by a person who has an annual income from his or her own professional activity of no less than 1.25 times the minimum level for the purposes of payment of contributions (currently around 18,000 euro).

The reform also concerns rules regulating *lavoro a progetto* (contracts for project work) in general. The amendments concern both contributions and regulations.

There will be a progressive increase in the contribution rate (commencing from 2013 and up until 2018), which will be made similar to the rate for employees: this rate will in fact be increased from 27.72% to 33% for those who are not registered with any other social security regime, and from the current 18% to 24% for pensioners and those who are already insured through other forms of mandatory social security schemes.

With respect to regulations, it is clarified that a “project” cannot consist of a mere re-proposal of the corporate object of the principal undertaking. On implementing a now consolidated case law stance, the reform also provides that if there is no specific project the contract will be considered as an open-term employment contract. The fee paid to the project workers may not be lower than minimum amounts established for each industry sector by collective agreements signed by the comparatively most representative trade union organisations. Provision has also been made for a presumption of employment relationship (rather than project work relationship) in case the activities engaged in by the project collaborator are analogous to those engaged in by employees within the principal undertaking, save for certain exceptions. The project may not involve the performance of purely executive or repetitive tasks, which can be identified on the basis of collective bargaining. Furthermore, the right to include in the individual contract clauses that permit withdrawal by the principal by way of simple notice prior to expiration of the term or completion of the project has been eliminated (the reform provides for a possibility for withdrawal by the principal exclusively for just cause or where it is manifestly clear that the collaborator is professionally unsuitable rendering realisation of the project impossible).

Commencing from 2013 coordinated and continual collaborators will be awarded an unemployment benefit for periods of unemployment, on the basis of precise criteria and limits.

5. Fixed-term contracts

As previously illustrated, for this type of contract the reform provides for an additional contribution rate of 1.4% earmarked to finance the ASpl.

It will no longer be necessary to indicate the technical, productive, organisational or substitutive reasons justifying the fixed-term:

- in case of a first fixed-term employment contract or fixed-term work agency supply of work contract with a duration of up to 12 months (non-extendable); or
- alternatively, where provided by collective agreements and within the overall limit of 6% of workers employed in the production unit, in case of hiring linked to an organisational process caused by specific case scenarios identified by the reform (for example, product launches or launch of an innovative service).

For the stipulation of fixed-term contracts with the same employee for similar duties, the maximum limit of 36 months still applies (inclusive of extensions and renewals), but provision is made for calculation of those months including any periods of work agency supply of work for the same user.

The time that must pass between one fixed-term contract and another has also increased: 90 or 60 days according to the duration of the contract itself (rather than the current 20 or 10 days). However collective bargaining may establish a reduction in these periods in case fixed-term hiring occurs in the context of an organisational process caused by specific case scenarios identified by the reform. In the absence of an intervention through collective bargaining, the Employment Ministry shall identify specific conditions at which such reductions shall be made, within 12 months of the effective date of the reform.

Conversely, the period during which the fixed-term contract can continue after expiration, due to organisational requirements, has increased to 30 or 50 days (as compared to the current 20 or 30 days) again according to the duration of the contract.

The term within which a short-term contract may be subject to notice of challenge has been increased, commencing from 1 January 2013, from 60 to 120 days following termination of the contract (whilst the subsequent term for judicial action is 180 days, as in the case of al dismissals).

With reference to the particular case of a fixed-term contract defined as a "*contratto di inserimento*" (a starter's or access to work contract), the reform has abolished this contract, whilst still maintaining in force those in progress and those that will be stipulated by 31 December 2012.

6. Part-time

With reference to part-time work, the reform provides for the possibility for collective bargaining to govern not only flexible clauses to be introduced in individual contracts but also conditions and procedures whereby the worker may request a change to or the elimination of these clauses. Student workers or cancer patients will in any event be entitled to revoke consent to these clauses.

7. Contract for intermittent employment (job on call)

An obligation has been introduced with respect to this type of contract, to provide previous notice to competent authorities (using simplified procedures) at any time that the worker is called. Article 34 (2) of Legislative Decree 276/2003 has been amended, rendering intermittent work possible where using young persons aged less than 25 or persons over the age of 55.

Intermittent employment contracts previously signed and that are incompatible with the reform will cease to take effect twelve months after the effective date of the reform.

8. Traineeship and orientation (internship)

Within 6 months of the effective date of the reform, an agreement shall be concluded by the State-Regions Conference for the definition of minimum standards at a national level, in compliance with certain principles fixed by the reform to curb the distorted use of this institution and to ensure payment of an adequate compensation in relation to the service provided, upon penalty of administrative sanctions proportionate to the gravity of the offence committed.

9. Casual labour

The reform narrows the scope for use of this institution: casual labour means purely occasional working activities which, with respect to all "employers", do not result in payment in excess of 5,000 euro over the course of a calendar year, to be reassessed annually. Without prejudice to this limit, with regard to "employers" that are commercial business-men or professionals, casual work may not result in payment in excess of 2,000 euro per annum, to be reassessed annually, with respect to each "employer". The related way of payments so-called vouchers will be hourly, progressively numbered and dated. The use, in accordance with applicable regulations, of required casual work vouchers remains unchanged to 31 May 2013.

10. *Associazione in partecipazione* (profit-sharing partnership)

The reform limits the number (no greater than three) of partners that can be involved in these types of activities, save for

married couples, relatives to the third degree and kinship to the second degree. In case of violation of this limit, the relationship with all of the partners will be considered as an open-term employment contract. There is a presumption of an open-term employment contract in certain cases, such as for example when there is no sharing with a partner of the undertaking's profits. Contracts in force at the effective date of the reform and certified pursuant to Legislative Decree 276/2003 will not be affected by the reform.

11. Apprenticeship

In the context of the reform the apprenticeship contract becomes the principal gateway to the world of employment. The training that an apprenticeship is intended to provide is pursued using various interventions, including the fixing of a minimum duration of six months save for certain exceptions and, commencing from 1 January 2013, an increase in the ratio between apprentices and qualified workers from the current 1/1 to 3/2 (excluding employers who employ less than 10 employees, for whom the ratio cannot exceed 100%). An employer who does not have any qualified or specialised employees or who has less than three such employees, may hire no more than three apprentices. It will be possible to hire a new apprentice whilst further hirings for those who employ more than 10 employees will be conditional upon the percentage of stabilisation of previous apprentices over the previous three years (30% for the thirty six months following the effective date of the reform; 50% subsequently).

12. Changes to the regime for employment joint liability with contractors and sub-contractors

The reform also intervenes with respect to article 29 of Legislative Decree 276/2003 introducing certain novelties relating to the regime of joint liability for the contracting client for salaries, social security and health and safety insurance premiums with respect to employees of contractors and sub-contractors. The reform has introduced a possibility for collective bargaining to derogate from that joint liability. Further, it is specified that contracting client will be sued for payment together with the contractor and any other sub-contractors and may rely on the benefit of prior enforcement of the contractor and any sub-contractors, such that the enforcement action can only be brought following a failed enforcement action against such parties. The contracting client may have recovery actions against those parties.

13. Delegation in relation to participation by employees in profits, capital and company management

The reform contains a delegation for the Government to adopt provisions that favour the involvement of workers in the undertaking, within 9 months of the effective date of such reform, through the stipulation of collective company agreements, on the basis of certain expressly indicated guide-lines. In particular: (a) identification of information, consultation or negotiation obligations with regard to trade unions, workers or specific bodies identified in collective agreements; (b) provision for procedures for the purpose of verifying the outcome of agreed plans or decisions; (c) creation of joint bodies with the power to control and participate in the management of certain matters (including but not limited to forms of remuneration connected to results achieved, organisation of work, health and safety of workers, professional training, equal opportunities, corporate social responsibility); (d) control of performance and over certain management choices, through participation in supervisory bodies by elected workers' representatives or representatives designated by trade unions; (e) provision for participation by workers in profits or capital for the undertaking and in the implementation/results of business plans, with the creation of forms of access for trade union representatives to information on progress in business plans; (f) possibility for workers' representatives to participate in supervisory committees for certain types of undertakings; (g) privileged access for employees to ownership of shares, quotas of an undertaking's capital or option rights connected to them, directly or through various ownership procedures with collective representation in the governance of the undertaking (foundations, investment companies, workers' associations).

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