

The first measures taken by the Government of the 16th Parliament. Joint liability within contract for the supply of work or services.

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1. The latest legislative measures

On May 8, 2008 the Government of the 16th Parliament was formed. Immediately after its establishment, employment law has been involved into a series of changes, most of which have been introduced through urgent decrees. As announced by the new Minister of Labor, such changes shall be followed by further legislative measures over the next few months.

The recent measures introduced by the new Government include Law Decree no. 97 dated June 3, 2008 ("**Law Decree no. 97/2008**"), *Urgent provisions on the monitoring and transparency of public expenditure allocation mechanisms, tax issues and extension of terms*, and Law Decree no. 112 dated June 25, 2008 ("**Law Decree no. 112/2008**"), *Urgent provisions for economic development, simplification, competitiveness, public finance stabilization and tax equalization*. The aforementioned decrees are complex measures that regard a plurality of areas of law and that, among others, have variously affected Italian employment law (by way of example, in relation to fixed-term contracts, working time, apprenticeship contracts, joint liability within contracts and resignation).

As regards resignation, it is worth pointing out, in particular, that **Law Decree no. 112/2008 has repealed Law no. 188 dated October 17, 2007, which had introduced a complex procedure for the purposes of the validity of resignation** (see our previous Newsletter dated April 2008 – *Voluntary Resignation*). Therefore, effective as from June 25, 2008, i.e. the date on which Law Decree no. 112/2008 came into force, any employee who intends to resign is no longer required either to fill in the specific forms or follow any on-line procedure.

In addition to informing on the ongoing legislative changes (many of which are provisional pending the conversion of the related decrees into laws), this Newsletter shall also provide an update on the currently existing, complex legal framework regulating contract for the supply of work or services (the "Contract"), in relation to which several regulatory changes occurred over the years including, most recently, the new provisions on Contract contained in the Code on health and safety protection of employees in the workplace, Legislative Decree no. 81 dated April 9, 2008 ("**Legislative Decree no. 81/2008**" or the "**Code**") (see our previous Newsletter dated June 2008 - *The Code on Health and Safety Protection of Employees in the Workplace*) and the relevant provisions on Contract contained in the above-mentioned Law Decree no. 97/2008. Even in light of such recent changes, the legal framework governing Contract is extremely fragmented and may give rise to several issues when applying, jointly combined, the various legal provisions ruling on this kind of contractual relationship.

2. The regulatory framework applicable to joint liability within Contract between principal, contractor and subcontractor after the enactment of Legislative Decree no. 81/2008 and Law Decree no. 97/2008.

Contract (*contratto di appalto*)¹, especially with reference to services, have become increasingly popular in view of the need for companies to outsource those activities that do not fall within their core business.

The legislator has therefore worked over the last few years in order to create a body of rules (unfortunately, not always clear and consistent) aimed at ensuring the correct fulfillment of the obligations regarding payment of salaries, social security contributions and taxes in relation to the employees involved in Contracts and at safeguarding their health and safety.

For the time being, further to the latest legislative changes applicable to Contracts, the complex system according to which the principal, contractor and subcontractor shall be jointly liable is based on the following main rules:

- i. The principal is liable jointly with the contractor and with each of the additional subcontractors, if any, for payment to the employees of the **salaries and social security contributions**. This liability shall continue to apply for two years after the cessation of Contract (Art. 29, par. 2 of Legislative Decree no. 276 dated September 10, 2003, so-called Biagi Law, as amended by Legislative Decree no. 251 dated October 6, 2004, so-called Decree to correct Biagi Law, and Law no. 296 dated December 27, 2006, so-called 2007 Financial Act).
- ii. The contractor is liable jointly with the subcontractors for payment of the **tax withholdings on the income from subordinate employment and for payment of the social security and insurance contributions** due in relation to the employees involved in subcontracts (Art. 35, par. 28, Law Decree no. 223 dated July 4, 2006 converted into Law no. 248 dated August 4, 2006, so-called Bersani Decree). The contractor shall be liable without any time limit, except for the ordinary statute of limitations.
- iii. The principal is liable jointly with the contractor and with the subcontractors (if any) for the compensation of **any damage for which the employees working for the contractor or the subcontractors have not been indemnified by INAIL and IPSEMA**². This provision shall not apply to the damage consequent to the risks specifically associated with the contractors' or subcontractors' activities (Art. 26, par. 4, of Legislative Decree no. 81/2008). In this case too, the joint liability at issue shall apply with no time limit, except for the ordinary statute of limitations.

No exemption from the joint liability specified above shall apply to either the principal or the contractor.

As suggested in our previous Newsletters, when dealing with Contracts it is strongly advisable for the principal (and for the contractor, in the case of subcontract) to include in the related agreements specific clauses that attribute to the contractor or the subcontractor the liabilities, if any, arising from failure to comply with the obligations to pay salaries, social security and insurance contributions and taxes. To this end, by way of example, specific warranties or indemnification clauses, or termination clauses should be provided in the relevant contractual arrangements.

¹ Under Italian law, Contract (*contratto di appalto*), regulated by Sections 1655 et seq. of the Italian Civil Code, is an agreement by which one of the parties undertakes to perform, through its own organized means and running a business risk, a work or service for a consideration. The contractor may then, in turn, contract out the work or service to a third party, either in whole or in part. This is referred to as subcontract that, under Section 1656 of the Italian Civil Code, has to be authorized by the principal.

² INAIL is the Italian public insurer for accidents at work, while IPSEMA insures maritime workers.

Likewise, the agreements should include contractual mechanisms protecting against any claims for compensation for the damages suffered by the contractor's or subcontractor's employees who have not been indemnified by INAIL (for example, the obligation of entering into specific insurance policies).

For the sake of completeness, we must point out that Law Decree no. 97/2008 has not yet been converted into law. Therefore, we cannot exclude that the legal framework regarding Contract may be subject to further amendments when the conversion shall take place.

3. (continued) Safety-at-work provisions applicable to Contracts under Legislative Decree no. 81/2008.

On May 15, 2008 the Code (Legislative Decree no. 81/2008) came into force.

Article 26, chapter III – section I of the Code contains the relevant provisions on Contract. In addition to the rules already mentioned under paragraph 2. above, the following rules have been established by the Code in relation to Contracts:

1. Obligation for the employer-principal to prepare a document for the **assessment of risks** to be attached to the Contract, "*indicating the measures adopted to exclude or minimize interferences*". Such obligation does not regard the risks specifically related to the principals' business activity.

In our opinion, the breach of this obligation may be punished with the **criminal sanctions** provided for employers and executives (*dirigenti*) in the case of failure to cooperate and liaise with the contractor for the prevention of, and protection against, risks (i.e. imprisonment from 4 to 8 months and fine ranging from € 1,500 to 6,000; Art. 55, par. 4, lett. d), Legislative Decree no. 81/2008).

As regards Contracts entered into before **August 25, 2007** and still in force as of December 31, 2008, the aforesaid document for the assessment of risks shall have to be attached to the Contracts by the latter date.

2. Obligation to include, in staff-leasing agreements, Contracts and subcontracts (even if they were already in force when the Code on safety in the workplace became effective), **a specific indication of the costs related to safety at work**.

With reference to the agreements entered into before August 25, 2007, the costs relating to safety at work must be indicated by **December 31, 2008**, should such agreements still be effective on such date.

The provision establishing the obligation at issue states that failure to indicate the above-mentioned costs shall cause the **agreement to be null and void** pursuant to Section 1418 of the Italian Civil Code.

3. Obligation, for contractors and subcontractors, to provide the personnel involved in the Contract with an **identification card** containing the employee's and employers' details. In case of failure to do so, an administrative sanction shall apply to employers ranging from a minimum of € 100 to a maximum of € 500 for each employee (Art. 55, par. 4, let. m), Legislative Decree no. 81/2008).

Conversely, the Code has not confirmed the no longer in force provisions entitling companies staffed with less than ten employees to replace said identification card with a note to be entered in a specific register of employees involved in the Contract, as well as the obligation for independent contractors to show such card.

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Moreover, in relation to **public Contracts**, Art. 26, par. 6 of the Code provides that, while preparing the bids, the competent authorities are required to check whether the economic value of the bid is reasonable and sufficient if compared to the costs of labor and to those related to safety at work. In particular, the latter costs must be specifically indicated and must also be fair and consistent with the type of works to be carried out.

Finally, Art. 14 of the Code has provided new rules governing the **mandatory suspension of the company's business**, applicable also to construction yards.

Ispettori del Lavoro (Labor Inspectors) and, in certain cases, inspectors working for the ASL (Local Health Authorities) can order the suspension of the business activity if they ascertain (a) that a number of employment relationships exceeding a certain percentage have not been recorded in the company's payroll and in other mandatory books, or (b) that laws on working time have been repeatedly violated, or (c) in case of serious and repeated violations regarding health and safety in the workplace.

Employers who do not comply with the order of the suspension of the business activity shall be subject to imprisonment for up to six months.

As already pointed out in our previous Newsletters, the risk that contractors or subcontractors may be ordered to suspend their business activity – with consequent adverse impact on the principal's business – suggests that specific contractual mechanisms be included in the relevant contractual arrangements (for example, the negotiation of guarantees or indemnification clauses for the damages arising from the suspension of outsourced activities due to the order of suspension).

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