

December, 20 2021

"National Protocol" on agile work in the private sector

On December 7, 2021, the "*National Protocol on agile work in the private sector*" (hereinafter, the "**Protocol**¹") has been signed between the Government and the Social Parties, which identifies a set of criteria and guidelines in order to regulate agile work (or "smart ") in a systematic way for the post-emergency period.

Meanwhile, given the recent decision issued by the Council of Ministers of the Italian Republic to extend the state of emergency until March 31, 2022, we deem that the duration of the provisions regarding "emergency" agile work with the simplified procedures and without the individual agreement signed with the employee is extended accordingly².

Given the above, the Protocol - notwithstanding some additional provisions which are set out below - forms an integral part of the existing discipline set out in Law no. 81/2017 - **which is fully confirmed and effective** - but with the express intention to confer to the **Collective National Bargaining Agreements** a special role for "*the regulation of the performance of agile work*" in order to lay down "**a guideline for the future Collective, National and Corporate and/or Territorial Agreements**".

In any case, the Protocol acknowledges that the agile work "**must be agreed voluntarily**" and that it is "**subject to the signing of an individual agreement**".

The main provisions of the Protocol are summarized below.

- A) **Any refusal by the employee** to adhere to or perform his/her work in agile mode shall not constitute just cause or justified reason for dismissal, nor shall it be relevant from a disciplinary standpoint.
- B) **The individual agreement** shall comply with the provisions of the relevant national collective bargaining agreement, if any, and shall be consistent with the guidelines defined by the Protocol, ensuring that the following provisions are met:
 - a) **the duration** of the agreement, which may be either a fixed-term or an open-ended one;
 - b) **the alternation** between working periods inside and outside the company's premises;
 - c) the **places**, if any, where the working performance outside the company's premises is not allowed;
 - d) any aspects relating to the work performance carried out outside the company's premises, also about the **employer's directional powers** and the **conducts** which may lead to disciplinary sanctions;
 - e) **the employee's rest time** and the technical and/or organizational measures necessary to ensure disconnection (see point D below);
 - f) **working tools** (see point E below);

1 Available at the following link.

2 For further information, please see "Newsletter on employment law" and "Law Decree no. 34 of 19 May 2020: Employment support measures".

- g) **the forms and modalities of control of the working activity** outside the company premises, in compliance with the provisions of Article 4 of Law no. 300/1970 as well as the regulations on the protection of personal data;
- h) any **training** that may be necessary for the performance of work in agile mode;
- i) the forms and modalities for the exercise of **trade union rights**.

In case of a justified reason, **both the employer and the employee may withdraw** before the expiry of the term, in the case of a fixed-term agreement, or without notice, in the case of an open-ended agreement.

C) It has been stated that:

- a) *"the working day carried out in agile mode is characterized by the **absence of a specific working time and autonomy in the performance of the working activity within the scope of pre-established objectives**, according to the organization and tasks assigned by the supervisor to ensure the operations of the company and the interconnection between the various business functions";*
- b) *"the employee has the right to choose the place where he/she can carry out the working activity in **agile mode**, as long as the location is adequate to ensure the regular performance of the activity, in safety and privacy conditions, also with specific reference to the treatment of company's data and information, as well as to the connection with the company systems".*

In this regard, the broad flexibility provided by the Protocol in terms of "no working hours" as well as "freedom in choosing the place where to carry out the working activity" justifies the statement that "agile work differs from telework, to which the current legislative and contractual regulations continue to apply".

D) Agile work may be structured according to **time slots**, identifying the "**disconnection period**" in which the employee "does not perform his/her work".

It is also indicated that **overtime work "normally" cannot be planned or authorized**, "unless explicitly provided for in the National/Territorial and/or Corporate Bargaining Agreements".

In case of legitimate absence (e.g., illness, accidents, paid leave, vacations, etc.), the employee may disconnect his/her connection devices.

E) **The employer, unless otherwise agreed, will provide the employee with the technological and IT equipment necessary for the performance of work in agile mode**, to ensure the availability of tools as well as the security of access to the company's systems.

The maintenance and replacement costs of the equipment shall be borne by the employer, who remains the owner. Such equipment shall comply, also, with all the health and safety requirements of Legislative Decree no. 81/2008.

F) The **mandatory** (at least annual) **information**, already set forth by Law no. 81/2017, is confirmed, about the **general and specific risks associated with the performance of work in agile mode as well as specific training on the health and safety as well as personal data protection** (see point G below).

Moreover, the agile employee: (i) will be entitled to be covered against accidents at work and occupational diseases due to risks connected with the work performed outside the company's premises; as well as (ii) to be covered by INAIL insurance against accidents at work and occupational diseases, including those deriving from the use of video terminals, as well as protection against injuries *in itinere*.

G) With regard to personal **data protection and confidentiality**, the employer is required to adopt technical and organizational measures to ensure the protection of employees' personal data and related data processing.

Specifically, it is required that employers adopt data breach risk management procedures and adequate security measures that include, *inter alia*, encryption (where applicable), the adoption of authentication and VPN systems, the definition of backup plans and malware protection.

The employer must also promote training and awareness initiatives for employees on the use, custody and data protection of the tools used to perform the working activity and on the precautions to be taken.

- H) The Social Parties have reaffirmed their commitment to facilitate access to agile work for **employees in conditions of fragility and disability**, also in order to use this modality as a measure of reasonable accommodation. In addition, agile work has been indicated as **a tool for welfare and inclusiveness**, in order to support parenting, inclusion and work-life balance.
- I) Finally, the need to encourage the proper use of agile work is promoted, also by virtue of a **public incentive** for companies that regulate agile work with a **second-level collective agreement**, implementing the Protocol and any other provisions set out in the National Collective Bargaining Agreements.

Such second-level agreement, according to the provisions of the Protocol, should assume, in the attempt of further provisions, "*a balanced use between female and male employees*" as well as promote "*a perspective of environmental and social sustainability*".

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