The labour law reform: outline of some new rules

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Law No. 92 of 28 June 2012, ("**Reform**"), which came into force on 18 July 2012, introduced a number of new rules regarding employment contracts, labour disputes and unemployment benefits. Although the Reform came into force very recently, certain provisions have been already amended by virtue of the Decree No. 82 of 22 June 2012, in its final version as resulting from Law No. 134 of 7 August 2012.

Below is an outline of the main new rules applicable to fixed-term employment contracts, consultancy services rendered by VAT holders and unlawful dismissals.

1. Fixed-term employment agreements

Pursuant to section 1, paragraph 1, Legislative Decree 368/2001, as amended by the Reform, the open-end employment contract is to be deemed the "*common type*" of employment contract.

The Reform introduced a number of restrictive rules on fixed-term agreements even if, on the other hand, it set forth a significant exemption which may lead to more flexibility in establishing fixed-term employment relationships.

In this latter connection, pursuant to paragraph 1-*bis* of section 1, Legislative Decree 368/2001, as introduced by the Reform, the **first fixed-term relationship,** for a term no longer than 12 months (not subject to extension), established by a certain employer and employee for the performance of any duties, does not require that a reason be alleged to justify its fixed-term nature. The Reform has therefore introduced an exemption to the ordinary rule requiring that fixed-term employment contracts be justified by technical, productive, organizational reasons or by the employer's need of replacing employees temporarily absent from work.

Pursuant to the Reform, such an exemption can apply also in other cases to be established by the collective agreements in compliance with some principles identified by the Reform.

As mentioned above, the Reform has also introduced some restrictive rules on fixed-term contracts.

1.1 Continuation Continuation of the employment relationship after the expiration of the term: performance after the expiry date is allowed for an extended term but the employer is subject to new burdens

Pursuant to the new rules introduced by the Reform:

- in relation to contracts with a term lower than 6 months, the relationship cannot continue for more than 30 days after the expiration of the original term;
- in relation to contracts with a term longer than 6 months, the relationship cannot continue for more than 50 days after the expiration of the original term.

Once such 30/50 days period elapsed, during which the employee is entitled to payment of salary at an increased rate, the employment relationship is to be deemed open-ended since the expiration of same terms.

While on the one hand the Reform has extended the terms during which the performance of fixed-term contracts beyond their original expiry date is allowed, on the other hand the employer is required to notify the Labor Offices – before the expiration of the original expiry date – (a) that the employment relationship shall continue over such term and (b) for how long the performance shall continue. A decree to be issued by the Ministry of Labour shall provide employers with guidelines to accomplish this new administrative burden.

1.2 Extension of the length of the required interruption period between a previous contract and a new one

Pursuant to the new rules, an employer is allowed to enter into a new fixed-term contract with the same employee provided that between the previous contract and the new contract the following minimum periods of interruption elapsed:

- 60 days from the expiry date of the first contract, if its term was lower than 6 months;
- 90 days from the expiry date of the first contract, if its term was higher than 6 months.

If the required interruption period is not complied with, the new contract shall be deemed an open-ended contract.

Under specific circumstances, collective bargaining agreements may reduce the above 60-90 days period to respectively 20-30 days. Lacking any such collective regulations, the Ministry of Labour shall enact, within 12 months following the entry into force of the Reform, a decree setting forth the conditions upon occurrence of which the reduction at issue may apply. Please note that, due to the recent amendments to the Reform, the above mentioned reduction applies also to the so-called "seasonal activities" as well as to any other case set forth by collective bargaining agreements at any level.

1.3 The 36-month period requirement: working activities carried out under a fixed-term temporary staffing scheme shall be taken into account

Pursuant to Legislative Decree 368/2001, unless otherwise set forth by the applicable collective agreements, if fixed term relationships for the performance of equivalent duties, entertained between same employer and employee, exceed in the aggregate 36 months, including extensions and renewals, the employment relationship is to be deemed open-ended.

The Reform clarified that working relationships entertained by same employer and employee for the performance of equivalent duties within fixed-term temporary staffing schemes shall count for the purpose of calculating the above-mentioned 36-month period.

1.4 Additional social security contributions: the fixed-term employment contract shall become more expensive

As from 1 January 2013, save for certain specific cases, fixed-term employment contracts shall be subject to an additional social security contribution equal to 1,4%. However, should the fixed-term contract be converted into open-ended contract, the employer shall be entitled to obtain the restitution of (up to) 6 months of the (already paid) additional charges.

We remind that fixed-term contracts are subject to other limits and requirements set forth by Legislative Decree 368/2001 and by the applicable collective agreements.

2. Consultancy relationships with VAT holders

The Reform introduced some rules aimed at avoiding the abusive use of consultancy relationships with VAT holders. According to the Reform, if certain conditions occur, consultancy relationships entertained with VAT holders are *not* deemed "pure" consultancy relationships but "*continuous service relationships*". As a consequence, pursuant to certain mechanisms governing self-employment agreements, the relevant contracts are exposed to the risk of being re-characterized in terms of employment if they do not identify a specific "project" to be achieved by the individual contractor.

In particular, services rendered by VAT holders are deemed – unless otherwise proved by the principal – services "*rendered on a continuous basis*" (and, as such, are subject to the above-mentioned risk of re-characterization in terms of employment) if at least 2 out of the 3 conditions below occur ("**Conditions**"):

1) if the working relationship with the same principal lasts in the aggregate more than 8 months per year for two consecutive years;
2) if the consideration earned by the individual contractor through the relationship at issue reflects more than 80% of the yearly considerations earned in the aggregate within a two-consecutive-year period.
3) if the individual contractor has a fixed workstation at one of the premises of the principal.

The Reform identifies however some exceptions. In particular, the services rendered by a VAT holder are not deemed services "*rendered on a continuous basis*" if such services: (a) entail peculiar professional skills; (b) are performed by individuals with an annual income arising from consultancy services at least equal to Euro 18,663; (c) are carried out in the performance of professional services requiring enrolment at professional registers.

The new rules apply to consultancy relationships established after the entry into force of the Reform, *i.e.* 18 July 2012. As per the contracts already in place, the new rules shall apply after a 12-month interim period.

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3. The new sanctions applicable to "big size" companies in case of unlawful individual dismissal

Before the Reform, in case of unlawful dismissal employers qualifying as "big size" companies for the purpose of Italian law on individual dismissals (*i.e.* employing more than 15 employees) were subject in principle, pursuant to section 18 of the Workers' Statute, to the "sanctions" of (a) reinstatement of the employee and (b) payment of damages in an amount equal to the salary accrued between the dismissal and the reinstatement (for a minimum of five months salary), plus social security contributions.

The Reform introduced a more complex system in terms of legal consequences arising from unlawful dismissal. In very general terms, the following regimes apply to unlawful dismissals carried out by big size companies, depending on the nature of the dismissal and the reasons alleged in support.

3.1 Dismissals based on discriminatory reasons or entailing violation of certain mandatory provisions of law

If the dismissal is based on discriminatory reasons, or is carried out in violation of certain mandatory provisions of law (for example, the rules on parenthood), or is implemented not in writing, the employer shall be subject to: (i) reinstatement of the employee; (ii) payment of damages equal to the salary accrued from dismissal until reinstatement (for a minimum of five months salary), plus social security contributions.

The Reform expressly provides that damages can be decreased be deducting what the employee gained meanwhile in performing working activities for other employers.

3.2 Disciplinary dismissals

If the Court ascertains that (a) the dismissal was based on facts which did not actually occur or (b) same facts should have been sanctioned with a less serious disciplinary sanction according to the applicable collective agreement, the employer shall be subject to: (i) reinstatement of the employee; (ii) payment of damages up to 12 months salary, plus social security contributions.

The Reform expressly provides that damages can be decreased by deducting (1) what the employee gained meanwhile in performing working activities for other employers; and (2) what the employee would have gained if he/she had searched a new job with due diligence.

In any other cases where disciplinary dismissals are deemed unlawful, the protection afforded to the employee is purely compensatory and the employer shall be subject to payment of damages between 12 and 24 months salary; therefore, there is no reinstatement and the employment relationship is deemed terminated from the date of dismissal.

3.3 Dismissals carried out for "economic reasons"

If the Court ascertains that there is a *clear lack* of the organizational/business reasons alleged in support of the dismissal, the employer *can* be subject to the more serious sanctions of: (i) reinstatement of the employee; (ii) payment of damages up to 12 months salary, plus social security contributions. Otherwise, *i.e.* if the Court does not intend to apply such more serious sanctions or the lack of the organizational/business reason is not straightforward, the employer shall be subject to payment of damages between 12 and 24 months salary.

3.4 Dismissals carried out in violation of formal requirements

If no reasons in support of the dismissal are provided to the employee, or other formal violations are ascertained by the Labor Court, the employer is subject to payment of damages between 6 and 12 months salary, unless the Labor Court finds that - in addition to the violation of the formal requirements - any of the above violations occurred; in such latter case, the relevant sanctions outlined above shall apply.