New rules on fixed – term employment contracts

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1. Premises

On August 21, 2008 the temporary Law Decree no. 112 of June 25, 2008 ("**Decree 112/2008**") has been converted into law. Decree 112/2008 introduced new rules on fixed-term employment contracts, whose general legal framework is set forth by Legislative Decree no. 368 of September 6, 2001 ("**Decree 368/2001**"), as recently amended by Law no. 247 of December 24, 2007 (*i.e.* the law implementing the Welfare Reform approved in July 2007).

The purpose of this newsletter is to provide an overview of the main rules governing fixed-term employment contracts even in light of the recent amendments introduced in the Italian legal system. This newsletter shall therefore outline the requirements to be met to establish a lawful fixed-term employment relationship and shall briefly describe the sophisticated legal regime applicable to this kind of employment relationships.

It is important to point out that the legal framework governing fixed-term employment contracts – outlined in this newsletter - is supplemented by the rules contained in the collective agreements. Therefore, when establishing and managing a specific fixed-term employment relationship the relevant applicable rules must be identified on a case-by-case basis by virtue of the joint interpretation of the law and of the provisions set forth by the collective agreement applied by the employer.

2. Requirements to be met for the establishment of fixed-term employment relationships

2.1 In the Italian legal system the ordinary employment relationship is, in principle, on a permanent basis, as expressly provided by Article 1, paragraph 01, of Decree 368/2001 last. Therefore, fixed-term employment contracts represent a "special" type of contract, which is lawful provided that certain conditions are met.

In this connection, Decree 368/2001 provides that a fixed-term contract is lawfully entered into if it specifies in writing **technical reasons, or reasons connected to production, organization or replacement**" justifying the establishment of a fixed-term employment relationship.

A combined and consistent interpretation of all the provisions contained in Article 1 of Decree 368/2001 – as amended in 2007 and 2008 – would lead to the conclusion that permanent employment is the "ordinary rule", while fixed-term employment is an "exception" which implies, only for fixed-term contracts (and not for permanent contracts), the need of specifying the technical reasons, or reasons connected to production, organization or replacement in support of the establishment of the employment relationship.

However, the recent amendments to Decree 368/2001 have weakened the above general principle since Article 1 of Decree 368/2001, as amended by Decree 112/2008, provides that the technical reasons, or reasons connected to production, organization or replacement may also be referred to the **ordinary business carried out by the employer**. This amendment seems to allow a less restrictive use of fixed-term contracts since the reference to the ordinary business carried out by the employer could lead to the conclusion that fixed-term contracts are lawfully entered into any time needs – identified on the basis of ordinary technical-organizational criteria, including foreseeable and short needs, or replacement needs – which cannot be reasonably faced through the establishment of a permanent employment, exist (and are

specified in the contract).

Such interpretation, supported by the wording of the law, needs however to be further supported by the Courts' decisions that shall be rendered in the next months at trial level. Guidelines from the Ministry of Labour should also likely to be issued shortly.

For sake of completeness, fixed-term employment contracts for ***Dirigenti*** (*i.e.*, executives) do not require the existence of technical reasons, or reasons connected to production, organization or replacement. In this case, the employment contract shall merely be required to specify the fixed-term nature of the relationship, the effective date and the expiration date, while no reasons justifying the fixed-term relationship need to be provided.

2.2 An additional restriction to fixed-term contracts is represented by the maximum number of fixed-term contracts that an employer can lawfully execute within the relevant thresholds set forth by the applicable collective agreement. Fixed-term employment contracts entered into to accomplish certain needs (such as to replace employees temporary absent from work, in support of start-up activities, to hire on a seasonal basis, or to hire employees over 55 years of age) are however exempted from the above thresholds.

2.3 Fixed-term contracts are prohibited in certain circumstances expressly set forth by Article 3 of Decree 368/2001, including (i) to replace employees on strike, (ii) if the employer is not in compliance with the health and safety at work regulations, and (iii) within productive units where redundancy procedures or payments have been recently adopted or are under implementation.

3. Main rules on extension of fixed-term contracts, continuation of work after the expiry date and re-hiring of fixed-term employees

3.1 The term initially agreed by the parties can be extended under the following conditions:

(i) the initial term was less than 3 years;

(ii) the extension – allowed only once – is due to objective reasons and is referred to the same work;

(iii) the employee gives his consent to the extension.

The total duration of the fixed-term relationship cannot exceed three (3) years.

3.2 If the employment relationship continues after the expiry of the initial or extended term the employee is entitled to an additional remuneration for any additional working day equal to (a) 20% of the original salary up to the 10th subsequent day, and (b) 40% per each further working day.

Where the employment relationship continues (i) beyond the 20th day for contracts shorter than six months, or (ii) beyond the 30th day in other cases, the employment relationship shall be deemed to be open-ended.

3.3 Should the employee be re-hired under a fixed-term contract (a) within 10 days from the expiry date of a previous contract of up to six months duration, or (b) within 20 days from the expiry date of a previous contract of more than six months duration, the second contract shall be deemed open-ended.

In the event of two successive fixed-term hirings without discontinuity, the employment relationship shall be deemed open-ended from the date the first contract was entered into.

4. Maximum aggregate length of fixed-term employment relationships and exception

Pursuant to Article 5, paragraph 4-*bis*, of Decree 368/2001, as amended, if the employment relationship between the same employee and employer has exceeded the overall period of 36 months due to succession of several fixed-term employment contracts to perform equivalent employment duties (such overall period includes extensions and renewals, regardless of the interruptions running between the various contracts), an open-ended employment relationship is deemed in force.

National, regional or shop collective agreements entered into by the most representative unions at national level are allowed to introduce exceptions to the 36-month rule.

As an exception to the above 36-month rule, paragraph 4-*bis* provides that the parties can enter into, only once, an additional fixed-term employment contract provided that such contract is executed before the competent Local Labour Office (*Direzione Provinciale del Lavoro*) and a union representative is present. Should the parties fail to comply with such requirements or exceed the term agreed upon in the contract, such contract is converted into an open-ended employment contract.

Regulation no. 13/2008 issued by the Ministry of Labour clarifies that the execution of the contract before the Local Labour Office is merely aimed at verifying the compliance of the contract with the "formal" requirements established by the law, as well as the existence of the employee's actual consent. As a consequence, the execution of the contract before the Labour Office does not imply itself that the contract complies with any and all the substantial legal requirements to be met by fixed-term employment contracts.

The 36-month rule does not apply to fixed-term employment relationships with *Dirigenti*, whose maximum length is 5 years.

5. Priority right to permanent employment

Fixed term employees who worked for the same employer for more than six months under one or more fixed-term contracts have priority to permanent employments established by the employer within the following 12-month period for performance of the same duties already performed under the previous fixed-term contract.

The priority right to permanent employment expires after 1 year from the expiry date of the fixed-term contract, and can be enforced by the employee only if he has notified the employer of his willing to enjoy from the priority right within 6 months from the expiry date of the previous fixed-term contract.

Decree 368/2001 allows national, local and shop collective agreements to introduce different provisions on the priority right to permanent employment.

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6. Temporary rules applicable to pending disputes

Article 4-*bis* of Decree 368/2001 – which has been introduced by the latest final version of Decree 112/2008 - introduced a temporary regime applicable to disputes pending as of the date of coming into force of the relevant provision. Proceedings already concluded by final judgements do not fall under the temporary regime at issue.

The temporary rules provide that employers being part to disputes regarding infringement of Article 1 (requirements for fixed-term contracts), Article 2 (special provisions for the air transportation and harbour service sectors), and Article 4 (extension of term) of Decree 368/2001 are exclusively required to pay to the petitioning employees an indemnity ranging from 2,5 to 6-month salary.

The Court shall quantify the indemnity to be awarded to the petitioner on a case-by-case basis, within the above range, by taking into account the criteria set forth by Article 8 of law no. 604 of July 15, 1966, namely (i) total number of employees, (ii) employer's size; (iii) employee's seniority, (iv) behaviour of the parties and other special circumstances.

It is worth noting that according to certain commentators, Article 4-*bis* of Decree 368/2001 seems not to be in line with the fundamental equality principle established by Article 3 of the Italian Constitution. The reasons grounding the commentators' position can be summarized as follows. The temporary rules apply **exclusively** to pending disputes; thus, they do not apply to those case where employers have already violated Sections 1, 2 or 4 of Decree 368/2001 but the employees, as of the date of coming into force of the temporary regime, have not yet brought the relevant action before the Labour Court. Since, according to certain case law, unlawful fixed-term contracts must be deemed as open-ended contracts, the application of the temporary rules exclusively to pending disputes implies that similar unlawful fixed-term contracts shall give rise to payment of the indemnity between 2,5 and 6-month salary *or* to establishment of a permanent employment relationship depending on whether or not, on the date of coming into force of Article 4-*bis* of Decree 368/2001, the relevant litigation had already been commenced.