

# LEGAL ASPECTS OF HEALTH AND SAFETY AT WORK IN ITALY: RECENT TRENDS AND PERSPECTIVES

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**Abstract [It]:** il saggio sottolinea come la crisi finanziaria del 2008 e la pandemia abbiano influenzato significativamente i sistemi di produzione, i contratti di lavoro e i livelli occupazionali. Si sono diffusi nuovi metodi di organizzazione del lavoro che comportano sfide significative per i sistemi di protezione della salute e della sicurezza sul lavoro. In particolare, la crescente evanescenza di un luogo di lavoro stabile, a causa dei progressi tecnologici che implicano la delocalizzazione dei lavoratori sempre meno tenuti a mantenere posizioni fisiche fisse, comporta il passaggio da una "sicurezza sul luogo di lavoro" al più ampio concetto di "sicurezza del lavoratore". Pertanto, pare necessaria l'adozione di un sistema di prevenzione "non-fordista" che vada oltre i limiti spaziali e temporali del lavoro tradizionale in fabbrica, assicurando misure efficaci di salute e sicurezza anche per i lavoratori con contratti flessibili. Ruolo cruciale, nel processo di adattamento ai nuovi scenari del lavoro, è assolto dai sindacati e dai rappresentanti dei lavoratori.

**Abstract [En]:** the essay emphasizes how the 2008 financial crisis and the pandemic have significantly influenced production systems, employment contracts, and employment levels. Indeed, new methods of organizing work have emerged, posing significant challenges to existing systems for the protection of health and safety at work. In particular, the growing evanescence of a stable workplace, driven by technological advancements detaching jobs from fixed physical locations, leads to a shift from "safety in the workplace" to the broader concept of "worker safety". Therefore, the adoption of a "non-Fordist" prevention system turns out to be necessary, transcending the spatial and temporal limits of traditional factory work, ensuring effective health and safety measures for workers, even with flexible contracts. A crucial role in adapting to these new work scenarios is attributed to trade unions and workers' representatives.

**SUMMARY:** 1. The heritage of the pandemic. - 2. Changes in the work organization. The protection of health and safety for non-standard workers. - 3. Protection of health and safety and the growing evanescence of the workplace. - 4. Health and safety and smart working. - 5. Just in time production needs and health and safety at work. Rethinking safety training? - 6. For a "non-Fordist" prevention system. The importance of the organization, management and control models. - 7. Concluding remarks: health safety and safety at work, AI and environment.

## 1. The heritage of the pandemic.

The issue of health and safety at work - as well as that of the evolution of work - is an international level issue. For this reason, it is very important to study it in depth and in a comparative and European Union perspective.

With all its virulence, the pandemic has indeed insinuated itself into a socio-economic situation already deeply weakened by the long wave of the 2008 financial crisis, which had already caused serious effects on the organization of production systems, on the type of employment contracts and on employment levels<sup>1</sup>.

In Italy, the pandemic crisis has also legitimized some methods for the organization of work that were struggling to establish themselves in the past, such as those based on the combination of digitalization and delocalization.

Even though the smart working adopted for precautionary reasons was only a “distant relative” of real smart working («agile work» pursuant to articles 18 and subsequent of the Law n. 81/2017), it has nevertheless contributed to sweeping away many prejudices about the possibility of working remotely<sup>2</sup>.

On the other hand, the pandemic has also drawn attention to aspects - such as that of health and safety at work - that are usually somewhat neglected beyond the media emphasis following tragic accidents at work<sup>3</sup>.

The frequency of these tragedies immediately emerged again just after the end of the pandemic emergency.

## **2. Changes in the work organization. The protection of health and safety for non-standard workers**

In the near future, but already today, work will be increasingly diversified, not only as regards the various more or less flexible employment contracts, but also for what concerns its phenomenology. This phenomenology tends to go beyond the traditional categories of space and time with which the work has traditionally been conceived.

In front of these scenarios, it could be difficult to affirm the principles of the framework directive no. 391/1989/CE, which, through the principle of “participatory prevention”, has revolutionized the way of understanding the safety employer’s obligation. This obligation in Italy has its roots in the old but evergreen article 2087 of the Civil code<sup>4</sup>.

Today those principles must deal with the continuous changes that affect production structures, industrial relations, as well as the same “paradigms” of Labour Law and of the employment relationship.

On the one hand, the internationalization of capital and the fragmentation of production chains often complicate the recognition of the identity of the employer.

On the other hand, despite the universal definition of “worker” provided in Italy by Legislative Decree no. 81/2008 - defined as the person who carries out a working activity within the organization of an employer regardless of the type of employment contract - in reality it is not easy to apply the discipline envisaged for the standard employees to non-

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1 D. GAROFALO - M. TIRABOSCHI - V. FILI - F. SEGHEZZI, *Welfare e lavoro nella emergenza epidemiologica. Contributo sulla nuova questione sociale*, Adapt University Press, Modena, 2020.

2 R. ROMEI, *Il lavoro agile in Italia: prima, durante e dopo la pandemia*, in *Labor*, 2020, pp. 431 ss.; M. BROLLO, *Lavoro agile per i lavoratori fragili: lezioni dalla pandemia*, in *Arg. dir. lav.*, 2022, pp. 405 ss.

3 A. DELOGU, *La funzione dell’obbligo generale di sicurezza sul lavoro. Prima, durante e dopo la pandemia: principi e limiti*, Aras, Fano, 2021.

4 P. ALBI, *Adempimento dell’obbligo di sicurezza e tutela della persona. Art. 2087*, Giuffrè, Milano, 2008.

standard workers or self-employed workers, who still organize their own business in a independent way even when their organization is a part of the production cycle of other producers.

In the case of flexible employment contracts (fixed term contract, agency work, part-time work, job on call), the adaptations must not concern the quantity of applicable protection, but its quality, which must necessarily take into account the main difference between these flexible contracts and the standard ones, consisting in the different level of contextualization of the worker within the company organization. After all, for what concerns atypical jobs, directive no. 91/383/CE requires “the guarantee not of the same safety measures” provided for other workers, “but of the achievement of the same level of protection”, also through “differential” protection.

### **3. Protection of health and safety and the growing evanescence of the workplace**

One of the most important aspects concerns the growing evanescence of a stable workplace.

If new technologies bring out jobs that are increasingly detached from a stable physical place of work, the equation “organization-workplace” is at risk of blurring.

Therefore, the organization in which the worker carries out his activity must be understood above all as the set of rules through which the employer’s production project is carried out, and no longer just as a physical entity corresponding to a place<sup>5</sup>.

Consequently, if the employer’s organization corresponds to the digital platform, there is a need for safety rules capable of “following” the worker and no longer calibrated only on a specific physical place. From this perspective, the need for “worker safety” emerges, rather than “safety in the workplace”.

How must adequate protection for the health and safety of workers be organized, independently from a specific workplace that the employer does not control? How may we assess the risks beyond the boundaries of the company?

When the workplace tends to fade away, the risks to be assessed should be those which, at least in abstract terms, may be reasonably and predictably attributable to the execution of a delocalized work performance.

This entails the need for a careful analysis from the beginning of the work process, as, moreover, always imposes the principle of primary prevention according to which risks must be avoided or eliminated<sup>6</sup>.

After all, since the conformation of information and training obligations derives from the risk assessment<sup>7</sup>, the lack of availability and control of the places of the working activity could provoke specific difficulties in organizing the training. Training should therefore focus above all on the specific methods of carrying out the work activity, also making use of

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5 C. LAZZARI, *Lavoro senza luogo fisso, de-materializzazione degli spazi, salute e sicurezza*, in *Labour & Law Issues*, n. 1, 2023, pp. 22 ss.

6 B. MAGGI, *L’analisi del lavoro a fini di prevenzione*, in *Quad. dir. lav. rel. ind.*, n. 29, 2006, pp. 13 ss.

7 C. ALESSI, *La formazione in materia di sicurezza dopo il d.l. 21 ottobre 2021, n. 146*, in *Dir. sic. lav.*, n. 2, 2022, pp. 62 ss.

simulation techniques such as to allow the worker to learn the behaviors necessary from time to time in the various scenarios in which he operates.

#### **4. Health and safety and smart working**

These are very serious problems, mostly the case of smart working. Indeed, in this specific case, the fulfillment of the employer's safety obligation must not consist only in the delivery to the worker of the information on the risks required by article 22 of the Italian law no. 81/2017<sup>8</sup>.

Therefore, the specific individual agreement that the Law requires to activate smart working, in which the limits of the worker's mobility can also be identified, is crucial for the prevention purposes.

The problem becomes even more complex when the delocalization concerns self-employed workers, for whom the Italian protection discipline still appears too meager, recognizing only their right of training and health surveillance at their own expense. It is no coincidence that, by interpreting in a very flexible way an ambiguous legal provision of 2019, Italian case law has recognized to the riders working as self-employed the same protections given to the employees<sup>9</sup>.

However, more than the need for the same protection, in such cases there is a need for specific rules capable of adapting to the peculiarities of the working activity that cannot easily be subsumed within the framework of general protection. Perhaps those workers might need less protection. Anyway, the legal rules should be designed ad hoc considering the delocalization of the working activity and the autonomy which characterizes self-employment.

#### **5. Just in time production needs and health and safety at work. Rethinking safety training?**

Another important issue concerns the reconciliation of effective protection of health and safety at work with the need of the companies to have workers capable of responding to changing production needs in an immediate and flexible way.

In this regard, it is necessary to rethink the concept of training for health and safety so that, in addition to representing an obligation of the employer, it might become a real and proper permanent asset of the worker.

At the very least, general training on the fundamental principles on health and safety at work should be given to the worker before the establishment of the employment relationship, as it must become a necessary requirement for the employability and even for the validity of some employment contracts.

In other words, it would be necessary to extend the "conditionality" regime that in Italy already exists for the validity of temporary or flexible employment contracts, in order to let it

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<sup>8</sup> G. LUDOVICO, *Lavori agili e subordinazioni*, Giuffrè, Milano, 2023.

<sup>9</sup> A. PERULLI, *Oltre la subordinazione. La nuova tendenza espansiva del diritto del lavoro*, Giappichelli, Torino, 2021; F. FERRARO, *Collaborazione coordinata e obbligo di sicurezza del committente*, in *Riv. Giur. Amb. Dir.*, n. 4, 2023.

depend not only on the fact that the employer has carried out the risk assessment, but also on the fact that the worker has received at least general training for health and safety at work.

In Italy the issue of safety training is one of the most critical aspects of the legal discipline concerning prevention of risks at work.

There is a huge gap between reality and the definition of training provided by Legislative Decree no. 81/2008, pursuant to which defines training as an educational process aimed at creating skills and influencing mental habits.

Recently, an Italian Law envisaged the obligation to train the employer.

As for the workers, the obligation to train, which corresponds to the right to be trained, emphasizes the responsibility of the employees in terms of safety provided for in article 20 of the Legislative Decree no. 81/2008. According to this norm, the workers are entitled to a cooperation duty.

The accountability of the worker tends to increase when the work is performed outside the traditional premises of the company. It happens in smart working or in other situations in which the worker operates in other “places”.

Obviously, it does not imply an automatic exemption from employer responsibilities in the event of an injury.

Especially in these cases, the worker could and should have an active role in the training process, contributing to the identification of those training needs that may be very different from those that emerge in relation to “internal” work performed within the company premises.

In this regard, an important role may and must be played by the individual smart working agreement which should tailor-make the protective measures necessary for any individual worker. A pact, however, should be “guided” by collective bargaining, precisely because, as an individual agreement, it is conditioned by the strength of the employer.

Thus, in the case of flexible work, one may wonder whether the employer’s obligation to supervise the behavior of the worker should be interpreted taking into account both the level of competence acquired by the individual worker thanks to the training received, and that “substantial autonomy” that characterizes the job, even though it is always performed by an employee. Of course, this does not mean exempting the employer from the burden of supervision, but rather bringing this obligation within a sphere of reasonableness to be assessed according to the characteristics of each worker, the training received and, above all, how the employee has introjected such training<sup>10</sup>.

After all, if the worker has been provided with effectively adequate and sufficient training, this cannot fail to be noted in the assessment of any liability in the event of an injury. Indeed, there is an intimate connection established by the Law between training and safe work, without prejudice to additional assessments in relation to the employer’s responsibility.

## **6. For a “non-Fordist” prevention system. The importance of the organization, management and control models**

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10 P. TULLINI, *La formazione per la sicurezza sul lavoro*, in *Dir. sic. lav.*, n. 1, 2017, pp. 75 ss.

In the light of the above, today a “non-Fordist” prevention system is deemed to be necessary. We need to go beyond the space and time limits of the traditional work in factories. The system should be capable of providing effective protection at the individual and collective level of the health and safety of workers, even when they work under flexible contracts or when they work outside the traditional workplace.

Such a prevention system, however, still requires an adequate organization of the participation of Trade Unions, also with regard to the fundamental contribution of the workers’ representatives to whom the new work scenarios pose new challenges.

After all, it would be illusory to address the problems of health and safety at work not considering that, precisely because it has to do with an organized economic activity, it must necessarily be considered from an organizational point of view.

This observation applies both with respect to the “genetic dimension” of health and safety problems - the source of risks is above all the organization of work - and with regard to the “methodological profile” - it makes prevention effective in the company - which cannot disregard an organizational approach based on transparent and traceable procedures, contrasting the common opacity of the company organization.

In this regard, it is important to enhance the adoption and effective implementation of standard systems for the organization and management of health and safety at work. These are models recognized by the Italian legal system, which, in the event of serious injuries and without prejudice to the criminal individual liability, may exempt the company from administrative liability of legal entities according to the Legislative Decree no. 231/2001<sup>11</sup>.

These models are based on procedures inspired by the famous Deming cycle (Plan, Do, Check, Act). They are also useful as a method to strengthen the certainty of the fulfillment of the prevention rules by the employer and his closest collaborators.

## **7. Concluding remarks: health safety and safety at work, AI and environment**

In conclusion, two aspects are assuming a growing importance in the field of health and safety at work.

The first aspect concerns the psycho-social risks which are increasingly emerging in the world of work, especially - but not exclusively - due to the pervasiveness of Artificial Intelligence.

On the one hand, it is necessary to strengthen the assessment of the risks associated with work-related stress that Italian law has made mandatory for some time now. On the other hand it is necessary to take seriously the indications emerging in the proposal for a Directive of the European Union on improving working conditions in platform work, which warns against creeping risks deriving from automated work management and control systems.

In this regard, it should be considered that disconnection from the platform, even if it is not yet configured as a right, like in Italy, constitutes at any rate a preventive measure that the employer must not fail to adopt.

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<sup>11</sup> P. PASCUCCI, *Salute e sicurezza sul lavoro, responsabilità degli enti, modelli organizzativi e gestionali*, in *Riv. giur. lav. prev. soc.*, 2021, pp. 537 ss.

The second aspect concerns the connection between health and safety at work and the more general issue of the environment.

This is an aspect not limited to the problem of risks deriving from climate changes - recently also considered by the Italian Law - but also dealing with the environmental sustainability of entrepreneurial activities, as the Legislative decree n. 81/2008 provides when, in the definition of the concept of prevention, it also evokes respect for the health of the population and the integrity of the external environment.

It is not easy to include the obligation to protect the external environment in the health and safety at work obligation. Anyway, it should not be overlooked that there is a link with legal basis between these two aspects.

Indeed, both crimes relating to serious injuries at work and environmental crimes are included in the list of crimes that constitute the prerequisite for the onset of administrative liability of companies according to the Legislative Decree no. 231/2001: as already noted, it is the liability from which the company might be exempt if it proves that the organization, management and control model is adopted and effectively implemented.

The model, based on specific management systems for the matters in question - occupational safety or the environment - must nonetheless possess certain common elements that are valid for different matters: an independent supervisory body, a disciplinary system and a code of ethics<sup>12</sup>.

Therefore, due to the adoption of these models, the protection of safety at work and the defense of the environment constitute two important elements of an integrated corporate strategy that may push companies to undertake the necessary efforts towards a fair and sustainable development.

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12 P. PASCUCCI, *Modelli organizzativi e tutela dell'ambiente interno ed esterno all'impresa*, in *Lav. dir.*, 2022, pp. 335 ss.