European Working Group on Labour Law

Reconciling Work and Family Life in Europe: A Comparative Perspective

Italian Report:

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Questions for National Reports

1. ***Reconciling Work and Family Life within Labour Law***
   - aims and rationale of law in this field
   - identification of the principal sources of labour law in this field, including collective agreements
   - brief overview of the national approach to childcare provision (insofar as this relates to the approach adopted by labour law to the reconciliation of work and family life)

2. ***Rights***
   - maternity leave
   - paternity leave
   - parental leave
   - emergency leave
   - adoption leave
   - leave for caring responsibilities
   - other relevant categories of leave

   In relation to these consider the following, taking into account social security law:
   - conditions of accessing these rights;
   - length and pay
   - return to work after exercise of rights for all of the above
   - who pays? (state / employer)
   - effect of not working on social security (does the period of leave count towards pension rights or continuity of employment?)

3. ***Flexible working: is there a right?***
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   - What are the consequence(s) of any changes on the contract of employment?
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   - What courts / authorities are competent?
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1) *Reconciling Work and Family Life within Labour Law*:

a) Aims and rationale of law in this field

Reconciling work and family life is certainly one of the most debated subject matter among the members of European Union in the labour law field.

As a result of the adoption of several European Directives, the Member States has been encouraged to issue various rules in this area. Their aim is to increase flexibility in the labour system, allowing workers to conciliate employment duties with household needs, in order to take care of the members of the family, in particular minors and/or disabled persons.

Simultaneously, the general rationale of the theme about reconciling work and family life is to support the gender equality and to promote the sharing of family responsibilities between men and women, conferring fathers a right of avail themselves family leaves.

The final purpose is to foster the participation of women in the labour market, considered as an essential step for the reaching of a real equality of the sexes, but still far from its achievement: statistics show Italy as the last European country in the ranking of women participation in the labour market and, moreover, they highlight that only the 30% of them restart to work after giving birth a son.

b) The principal sources of labour law in this field

Even though there is not any provision within Italian Constitution which directly regards the theme about reconciling work and family life, we can consider the Article 37 as the principal source in this field. The rule, indeed, states that working women are entitled to equal rights and, for comparable jobs, equal pay as men; furthermore, working conditions must allow women to fulfil their essential role in the family and ensure appropriate protection for mother and child.

The Article 37 Cost., therefore, can be consider also as the main source of the right of the women to maternity leave. This right has evolved over the years and today is regulated by the Decree 151/2001 (so-called Consolidated Act on the protection and support of maternity and paternity). All the regulations on maternity, paternity and parental leave are, hence, assembled in this Act. As ordered by Article 1, it regulates all the leaves, days off and abstentions from work related to maternity and paternity of natural or foster child.

In addition to the Consolidated Act, there are other sources in this field. First of all the Act 176 of 1992, better known as Framework Law on care, social integration and rights of disabled persons, which provides employee with disabilities the opportunity to avail themselves of three

paid days off per month (as much as relatives which take care of disabled kin). Up to the third year of life of the disabled child, their parents can avail themselves of three discretionary day of leaving of two hours per day, whereas from the third year up to the eighteen of life, parents of the disabled child can benefit from three days of leave per month.

Under the subject matter about leave for reason related to family care, is fundamental the anti-discrimination legislation: the Code of Equal Opportunities (Decree 198/2006), after modification by Decree 5/2010, qualifies as discriminatory in a work relationship "*Any less favorable treatment due to the condition of pregnancy, maternity or paternity, including adoptive, or due to the ownership and use of relative rights*" (Article 25, clause 2-bis).

Regarding the flexible work, Italy have implemented the content of Directive 1997/81/EC with the Decree 61/2000, which regulates part-time work. It is a subordinate working relationship in which hours are fewer than those of normal working time established by the law (40 hours per week) or by collective agreement.

On one hand, the aim of this type of contract is to tackle job insecurity; on the other hand, its purpose is to foster persons otherwise excluded by the (full-time) labour market: women, in particular, since they are often forced to abandon their job in order to take care of their child.

Ultimately, it should be highlighted the fundamental role played by contractual agreements in the subject matter of leaves due to family needs. The Decree 61/2000 mentioned above, for example, commits to collective agreements, signed by the most representative trade unions in Italy, the task of identifying terms and conditions for allowing the employer to modify the distribution of working time or increase working hours (Art. 3, par. 7). In terms of leaves for family reasons, in the end, the most collective agreements enforce the employer to supplement the allowance paid by the INPS during compulsory maternity leave (80% of salary) up to a fixed amount that is generally equal to 100% of normal salary.

c) The national approach to childcare provision

In the Italian legal system, the most considerable instrument for the childcare is the nursery. Introduced by the Act no. 1044 of the 6th December 1971, it is a social service which contributes to the education of children (from the age of three months up to three years) and it is aimed by the following purposes:

- to stimulate all the cognitive, affective, personal and social activities of the child, assuring a proper mental and physical development and guaranteeing, at the same time, a preventive health and psycho-pedagogical care;

- to collaborate with the family in order to foster the proper development of the child's personality;
- to facilitate the access of parents to the labour market as well as the social and working inclusion of the woman.

Nowadays, nurseries are under authority of the Regions, as stated by the Articles 117 and 118 of the Constitution, with respect of the principles set by Act 328/2000. The State and the Regions finance annually the building and the managing of nurseries.

The fees required to families for using nursery services are annually established, according to funds allocated by State, Regions and Municipalities. The fees vary depending on the family income, but are set specific benefits in situation of necessity (e.g. unemployed or "on redundancy payments" parents, families with two or more minors, single-parent families, etc). With regards to this, it should be highlighted the Article 4, par. 24, let. B from the Act no. 92 of the 28th June 2012; it has experimentally introduced, during the triennium 2013-2015, the option for the working mother (at the end of the maternity leave period and alternatively to the parental leave) of demanding one of the two following types of benefits:

1. Vouchers for purchasing baby-sitting services;
2. Subsidies for facing costs related to child care services.

These benefits, for a value of € 300.00 per month, must be used in the eleven months after the end of compulsory leave, for a maximum of six months; the part-time working women are allowed to receive subsidies to an extent proportioned to the reduced size of job performance. The subsidy for facing costs related to child care services is dispensed through the direct payment to the educational institute chosen by the mother. Vouchers are, instead, monthly dispensed by INPS to the mother for each month not used of parental leave.

For this purpose are allocated 20 million per year (2013-2015), thereby the benefit is granted according to the amount of resources available for each year and to specific rankings based on household income.

However, from the age of three years old, children can freely use services supplied by kindergarten (3 to 5 years old) and primary schools (6 to 10 years old).

In addition, other forms of economic support for families are: maternity allowance (Art. 65, Act. 448/1998), which is granted for the birth of the son, for the adoption or pre-adoptive custody of a minor to unemployed women (or employed ones provided that are not entitled to maternity benefits or otherwise for the difference between the lower benefit and the actual allowance) as long as residing in Italy and with an income which do not overcome € 35,256.00, according to economic situation indicator (ISE) calculated for 2014. This allowance must be required to the

Commune within 6 months from the birth and is directly paid by INPS. For the year 2014 the amount is equal to € 338.21 per month for a maximum period of five months (€1,691.05 is the total amount). This amount, by the way, is multiplied for the number of sons, natural, adopted or under custody.

In the end, other important rules contained in the Act 53/2000 ("Provisions for the support of motherhood and fatherhood, the right to care and education, and for the coordination of the timing of the city") should be mentioned, in particular the Article 9 ("Measures to reconcile life and working times), which states the annual allocation of public subsidies to employers which implement contractual agreements according to the following types of affirmative action: a) projects articulated to allow workers and employees to take advantage of special forms of flexible working hours and work organization, such as reversible part-time work, teleworking and homeworking; b) plans and actions aimed at promoting the reintegration of workers after a period of parental leave or for reasons anyway linked to the need for reconciliation of life and working time.

2) *Rights*:

a) Maternity leave

Maternity leave, regulated by Articles from 16 to 27 of the Consolidated Act on the protection and support of maternity and paternity (Decree 151/2001, hereinafter only C.A.), is a period of mandatory abstention from work reserved to the woman during pregnancy and post-partum.

The mandatory abstention consist of:

- two months before the probable date of the childbirth;
- three months after the childbirth (if the birth occurred after the expected date, are added the days between the expected date and the actual date; in case of premature birth are added the days between the actual date and the expected date).

The maternity leave, therefore, consists in 5 months of abstention from work. Nevertheless, the woman may choose to continue to work until the month before the expected date of birth, and to abstain from work for four months after childbirth. That option, however, can be exercised only on the condition that the medical specialist of the National Health Service, as well as the health and safety doctor, attest that the option is not detrimental to the health of pregnant women and the unborn child.

The violation of the prohibition to use the worker during the leave shall be punished with criminal sanctions.

During the maternity leave the employee is entitled to receive 80 per cent of her regular wage (usually based on the last monthly wage before the beginning of the leave) from the national social security institution (INPS) and the period is counted as regular work having regard to seniority of work, annual vacation and others contractual benefits. Collective agreements usually oblige employers to pay the difference up to the regular wage. Furthermore, the worker cannot be dismissed from the beginning of pregnancy up to one year after the child's birth.

In order to make use of the leave and receive the indemnity, the Collective Agreements require no more than that the woman has in place a working relationship with the payment of the relative salary. It is not required, therefore, a particular length of service.

The indemnity, in particular, is entitled to:

- Employees in the private sector, insured with INPS, having an employment relationship existing on the date of beginning of the leave.
- Unemployed or redundant workers, in case of one of the following conditions (Art. 24 C.A.):
    - maternity leave is started within 60 days from the last day of work;
    - maternity leave is started after 60 days, but there is the entitlement to unemployment benefits, mobility allowance, or income supplement fund. Unemployed, whose job, in the last two years, has not been entitled to receive unemployment benefits, are allowed to obtain the indemnity on condition that maternity leave is started within 180 days from the last day of work; moreover, the worker must have paid to INPS 26 weekly contributions in the last two years before the beginning of the leave;
- workers in the primary sector with open-ended or fixed term contract that, in the year in which the leave take place, have employee qualification evidenced by the enrollment in the annual register for, at least, 51 days of farm work (Article 63 C.A.);
- housemaids or caretakers with 26 weekly contributions in the year before the beginning of the leave, or alternatively 52 weekly contributions in the last two years before the beginning of the leave (Art. 62 C.A.);
- homeworkers (Art. 61 C.A);
- workers in socially useful activities or public utility (Art. 65 C.A.).

The employer normally pays in advance what INPS must pay and then requires a refund by the Institute. INPS, instead, pays directly:

- seasonal workers;
- agricultural labourers;

- term or occasional workers of the show business;
- housemaids or caretakers;
- unemployed or redundant workers under income supplement fund;

Furthermore, the direct payment made by INPS, may also occur whenever is proven the missed anticipation of the indemnity by the employer, either in case of will of the latter, or in case of actual impossibility. If the employer refuses to pay will be warned to act by INPS and if he does not comply within 30 days, the Institution will pay directly.

Employees of the Public Administration are entitled to the same rights provided by C.A. regarding maternity leave (Article 2). Unlike private workers, however, they receive an indemnity equal to the 100 per cent of their regular wage, which is paid by the Public Authority they work for.

Mandatory leave can be anticipated, with respect to the normal 2 months before the probable date of birth, in two cases: a) serious complications of pregnancy or persistent forms of disease that could be exacerbated by pregnancy, after authorization of the Local Health Authority (ASL); b) if worker conditions are considered dangerous for women or child's health, after authorization of Territorial Directorate of Labour (DTL) (Art. 17 C.A.). Mandatory leave may, in addition, be extended for other 7 months postpartum if the employee works in dangerous, tiring and unhealthy working conditions cannot she cannot be moved to other duties. Even during the months of the extension or anticipation, worker is paid by INPS an indemnity equal to 80% of the regular wage.

At the end of the period of maternity leave, the employee is entitled to retain her job and, unless she expressly waives, to come back in the same production unit she worked before the leave, or otherwise located in the same town and working there at least until one year of age of her child.

The worker must be employed for the same tasks or, at least equivalent, she used to execute before the leave as well as to benefit from any improvement in working conditions under collective agreements.

The whole period of mandatory maternity leave shall be counted towards seniority of service, considering also the thirteen month and day offs (Art. 34 C.A.). For the duration of the leave, moreover, are accredited to the worker contributions relevant to the maturation of pension rights and the determination of the pension extent (Art. 25 C.A.).

b) Paternity leave

The Articles 28 and follows of Legislative Decree no. 151 of 26 March 2001 recognize the extension of the right to the compulsory abstention from work to father, in substitution of the mother for the duration due to the latter or for the remaining portion that would have been entitled.

Paternity leave is, in fact, recognized when certain events occur relating to the child's mother, irrespective of the fact that she is working or unemployed. Paternity leave is recognized in the follows cases:

• *death or serious illness of the mother.*

• *abandonment of the child by the mother.*

• *sole custody of the child to the father (Art. 155 bis c.c.).*

• *total or partial waiver of the working mother to maternity leave are entitled to the same in the case of adoption or custody of children.*

The conditions, economic and social security treatments are the same provided for the maternity leave mandatory.

Next to the discipline of paternity leave described above, the legislator, by Act no. 92 of 28 June 2012 containing *"Provisions for the reform of the labor market in a growth perspective"*, introduced, on an experimental basis and for the period 2013-2015, some interventions aimed at the promotion of a "culture of sharing of tasks of child care within the family and to promote the reconciliation of work and life".

In particular, paragraph 24, letter a) of the Art. 4 establishes for the father, an employee, a self-compulsory leave of one day and leave optional alternative to maternity leave of the mother of two days.

The compulsory leave and optional leave above mentioned are accessible by the father, an employee, not later than the fifth month of the child's life.

As in its provisions for the compulsory maternity leave, the duration of compulsory leave and optional leave of the father is unaffected in cases of multiple births.

The compulsory leave of the father is an autonomous right and, therefore, it has to be considered additional to maternity leave.

The use, however, by the father's employee, of the optional leave, pursuant to the second sentence of Article 4, paragraph 24, letter a) mentioned, of one or two days, although continuous, is conditional on the choice of the working mother not to take advantage of as many days of maternity leave, resulting in anticipation of the end date of the leave of *post partum* mother for a number of days equal to the number of days enjoyed by his father.

The provision of the law constitutes, therefore, this case not as a stand-alone right but as a right derived from that of the mother.

This optional leave is usable by the father at the same time also the abstention of the mother.

Even the optional leave must be received by the father before the fifth month of the date of birth of the child regardless of the final date of the period of compulsory leave due to the mother in front of a prior waiver by herself of an equivalent period (one or two days).

The two new types of leave described above also apply to the foster father and, if so, the end of the fifth month period starts from the effective adoption of the child into the family in the case of national adoption or from the entrance of the child in Italy in the case of international adoption.

The father employee is entitled, for the days of mandatory and optional leave, with a daily allowance paid by INPS equal to 100 percent of the salary. This allowance is anticipated by the employer subject to certain situations where it is expected to pay directly by INPS.

At the regulatory and social security treatment are applied the provisions relating to paternity leave by the Articles 29 and 30 of the Legislative Decree no. 151/2001. The entire period of leave, therefore, must be counted for the purposes of service in all respects, including those relating to the thirteenth month and to the recess. For the duration of the leave also are credited to the employee imputed contributions relevant to the vesting of right to the pension and to the determination of the extent of the same.

c) Parental leave

The term “parental leave” is borrowed from the Directive 96/34/EC. Prior to the transposition of this Directive, the Italian legislation did not use the adjective “parental”, while widespread were leave enriched with endless variations such as, for example, those ordinary, extraordinary etc. in the public sector.

The transposition of Directive replaces the previous optional abstentions. So, it has the transition from the term “abstention”, which indicates a kind of “deprivation”, to the term “leave”, which indicates a permit. The mutation was not only formal, because the optional abstentions stand out from the legislation of parental leave, making a decisive step from the protection of working mothers to equal treatment among working parents, revaluing fully the father's role in the context of care to the children and freeing motherhood from a purely physical concept, expanding legal protection to adoptive and foster parents. The center of the protection becomes, in this way, the child.

The classical doctrine identifies the roots of suspension from work in the concept of impossibility of performance under Art. 1218 c.c. With the Act no. 53/2000, however, is realized the transition from a situation of impossibility to fulfil the job performance to a situation of potestative right. The ownership of the right to abstain from work is up to "each parent". It should be considered that the previous legislation had as the main referent the working mother, while the father enjoyed a right only in a subsidiary way, *id est* only in case of lack of exercise by the mother for waiver or impossibility, assuming the appearance of a non-originary but transferred right. With the present legislation, however, the father has attributed an independent subjective right. The right to parental leave is recognized, in fact, to the applicant parent even if the other parent is not entitled. The institute of parental leave introduces a “right sexually neutral” and recognizes the importance of the family role of both parents: the leave, in fact, can be enjoyed simultaneously by both parents. The right of each parent can be qualified by one side as right / duty of parents to educate their children, on the other side as a right of legal source attributed to each primarily and originally.

Parental leave allows parents to take time off work, for a continuous or fractionated period, not exceeding 6 months, but within a maximum of 10 months, to care for the child during the first eight years of life. Parental leave is part of the category of optional leave and the choice to rely poses a serious economic cost because the salary is drastically reduced to 30%. In addition, while the protections of maternity leave are independent from the event of the birth of the offspring, in parental leave, child birth and survival are a prerequisite for enjoying the relevant safeguards.

The parent who wants to use such leave must communicate such decision to the employer in accordance with the procedures and criteria laid down in collective agreements and in any case with a notice of not less than 15 days, indicating the beginning and the end of the period of leave requested.

With regard to the conditions of access to parental leaves, it is recognized both to male and female employees only if the working relationship is already in force at the date of the request.

Parental leave is not acknowledged to the unemployed or suspended workers, to the domestic workers and homeworkers. In the case in which the employment relationship ceases to act at the beginning or during the period of use of the leave, the right to leave which may be less from the moment when the employment relationship is terminated.

Male and female workers enrolled in the separate management of the Social Security system (as established by the Act no. 335/95) may request the parental only if: a) they are enrolled as project workers and categories assimilated and are not simultaneously pension earners and

enrolled in another form compulsory social security; b) are enrolled as professionals with at least 3 months of contributions in the last 12 months; c) there is an employment relationship still valid in the period in which it is located parental leave, and there is the actual abstention from work.

The self-employed can apply for parental leave provided they have made the payment of contributions for the month preceding that in which the leave begins (or a fraction of it) and that there is a real abstaining from work. The parental leave is recognized, in constancy of the employment relationship, to the natural parents within the first eight years of a child's life: in particular, it is recognized to a) working mother, after the period of compulsory maternity leave and for a period not exceeding six months; b) to the father, from the child's birth and for a period not exceeding 6 months. If the father uses at least three months' leave, he is rewarded with a bonus of one month: in which case his individual maximum is 7 months, and the maximum for the couple is 11 months: it is a promotional norm to induce the worker father to take on more family responsibilities.

If there is only one parent (being the case of death or serious illness of the other parent, of abandonment of the child, of sole custody to just one parent or no formal recognition of the child), the leave is recognized for a period not exceeding to 10 months. It should be noted that the father can ask for parental leave also during the months of compulsory maternity leave after the birth and in which the same mother benefits of daily rest periods.

The Act no. 228 of 24 December 2012, implementing the Directive 2010/18/EU, introduced the possibility to fractionate in hour the parental leave, assuring, however, to sectorial collective bargaining the establish the rules for the recurs to such leave on an hourly basis, as well as the criteria for calculating the hourly basis.

With regard to salary, during the period of optional leave the parent concerned is entitled to an indemnity paid by INPS equal to 30 % of the global average daily wage. The benefit is assured to natural parents within the first three years of live of the child for a total maximum period of 6 months and to foster parents within three years from the entrance of the child into the family, or from three to eight years of live of the child, if the parents do not have benefited before. The allowance in that casa will be paid at 30 % only if the individual income of the parent is less than 2,5 times the annual amount of the minimum pension.

The male and female civil servants has the right to full salary for the first 30 days of parental leave with the exclusion of remuneration for overtime work and those linked to the presence at work. During the months after the wage due to civil servants is equal to 30 % of that normally perceived.

As a rule, the employer anticipates the benefits paid by INPS and demand reimbursement to the Institute. The INPS provides direct the payment of the allowance to the employees in certain exceptional cases (e.g. agricultural workers, seasonal or domestic workers assimilated). The direct payment from the INPS may also occur whenever there is a proven failure to anticipate the treatment by the employer both for the will of the latter, both for an objective impossibility.
If the employer refuses to pay it will be summoned by INPS and if does not comply within 30 days, the institution will pay direct.
At the end of the period of parental leave, the employees have the right to retain their job and, unless expressly they renounce, to returning in the same production unit in which they were employed at the time of the request, or otherwise located in the same territory. In addition, they have the right to be assigned to the same tasks or equivalent tasks occupied before. The law provides for the absolute prohibition of dismissal of the employee on maternity leave, imposing, in case of violation, the nullity of the dismissal.
The C.A. no. 151/2001 has, also, reaffirmed the prohibition of any discrimination based on the exercise of rights related to pregnancy, maternity and paternity state also adoptive. The prohibition of discrimination related to the state and the exercise of rights related to maternity and paternity, including adoptive, is also reiterated in the new Code of Equal Opportunities (Legislative Decree no. 198 of 2006). This principle involves the various aspects of the institution of parental leave.
In 2010 intervened in this discipline the Directive 2010/18/EU, which expressly provides for the repeal of Directive 96/34. The Community Act implementing the Framework Agreement revised on parental leave concluded by the European social partners (BUSINESSEUROPE, UEAPME, CEEP and ETUC). In the new Directive is inserted a clause devoted to returning to work. The reformer intent acts in the sense of making more flexible hours in order to preserve the workers from any obstacles and to create an ideal extension of the conciliation fully realized during the leave. In order to adopt measures aimed at optimal reintegration is appropriate for the parties should keep in touch even during the period of absence from work.
During the optional leave the length of service does not begin to all effects as in the compulsory leave, in fact it does not begin with the effects of accrual of leave and on thirteenth month. The period of parental leave is considered beneficial to the effects of pension rights and, therefore, gives the right to figurative credited with full coverage (if taken during the first three years of the child's life) or reduced (if taken between the fourth and the eighth year of the child). The parental leave, instrument can potentially ensure proper reconciliation between family responsibilities and work, serving in their practical application throughout their weakness. The

latter is determined mainly by insufficient remuneration factor, that discourages generalized recourse to the institute. Because women's pay is generally lower than that of their husbands, they are almost always mothers to "sacrifice" their salary during parental leave. Therefore, the practical application of the leave would result in indirect discrimination of gender.

d) Emergency leave

Both parents may alternatively use unpaid leave for illness of children. They may refrain from work for the duration of the illness of the child, until the age of three years of life; while for children aged between three and eight years, the limit is five working days for year for each parent.

To avail of the leave, the parent must present to INPS a certificate of illness issued by a medical specialist of the National Health Service or their delegate. Finally, the Institute shall submit it to the employer concerned. The notion of the child's illness does not coincide with that of the illness of the employee, because it includes not only the pathological stage itself, but also the subsequent convalescence. This implies that neither the INPS nor the DTL are required to carry out checks on the health of the child. The use of leave for the child's illness arose during parental leave may suspend the enjoyment, in fact the law does not impose any prohibition on the accumulation of the two institutions. This requires that the individual must submit an application for suspension of the leave and that there are the requirements relating to access one or the other.

Leave or permit for the child's illness is not paid in the private sector. It is expected the length of service, excluding the effect of the maturation of leave or of thirteenth month.

In the public sector, however, the first 30 days of leave for illness of the child, if they fall in the first three years of a child's life, are paid at 100%.

The period coinciding with the absences for illness of the child is considered to be useful to the effects of pension rights and, therefore, gives the right to figurative earn with full coverage (if taken during the first three years of the child's life) or reduced (if enjoyed between the fourth and the eighth year of the child).

e) Leave for caring Responsibilities

During the first year of a child's life the working mother and the working father are entitled to daily rest periods paid for permits referred to as breastfeeding, for a total of two hours, with the option to exit the company. The hours of work permit are considered in all respects work hours. The female employee who intends to take advantage of the daily rest must submit a simple application to the employer, conversely the worker father must apply to both the employer and

INPS attaching certain documents; however, both parents are required to notify any subsequent changes.

Male/female employees are entitled to rest for breastfeeding only provided that throughout the period required they have a valid relationship of work in progress and that the child is living. The mother has no right to take advantage of the daily rest if she is on parental leave. The worker father cannot take breastfeeding if the mother is an employee in mandatory or optional abstention or if the mother doesn't use the rest because absent from work for suspension (e.g. expectation or unpaid leave, work breaks for vertical part-time). Instead, the conditions under which the father has the right to rest for breastfeeding are: sole custody of the child to the father, death or serious illness of the mother, the case in which the employed working mother does not take advantage either by choice or because belonging to the category not entitled and therefore the father can benefit from it instead of the mother. In addition, the father employee can make use of daily rest for the first child during the use, by the mother, of the maternity leave for the second born. The right belongs to the father even if the mother is an housewife, regardless of the proven objective impossibility of the mother to care for her son.

The daily rest periods are not due to domestic/carers, workers at home, self-employed and parasubordinate.

Permits are granted for a period of two hours (two one-hour rest, even cumulative) when the working day is equal to or more than six hours, or one hour (just one rest), if the daily schedule is less than six hours. Is entitled to such a permit even the horizontal part-time working mother, required to make only one hour of work during the day. In this case the use of the permit determines the worker's total abstention from work. Should be noted that if the employer has established in the farm or in the immediate vicinity a nursery or another suitable structure, the rest periods are half an hour each. In general, working hours referred to in order to establish whether or not the law permits breastfeeding is contractual and not the actual one, because the rest are granted for the care of the child, to this end once fixed determine rigid bands that cannot be changed. The temporal modulation of permits must therefore regardless of the specific contingencies relating to the hours of daily work. For example, in case of a strike for the entire working day or partial which includes hours in which permits are included, the permits are not up, or in the case of partial strike which does not coincide with the time set for the rest, the worker entitled to receive both hours of permit.

The breaks for breast-feeding are doubled in cases of adoption or custody of 2 or more children, also not brothers, entered the family even on different dates, and in the case of having twins or

multiple births. It is for these rests, an allowance equal to full pay, but is paid by INPS and is anticipated by the employer.

At the end of the period of permit or rest, the male or female employee have the right to retain the job and, unless expressly so agreed, returning in the same production unit in which they were employed at the time of the request, or otherwise located in same municipality. In addition, they have the right to be used for the same job or an equivalent task. During the rest periods, length of service shall run but not to the effects of accrual of leave and thirteenth month. As the optional leave, even the daily rest entitle accreditation notional pension contributions with full or reduced coverage.

f) Adoption leave

Italian Legislator has recognized for the adoption and custody the same protection acknowledged to natural parents. The legal provisions wanted to give application to the principle of equality established by the article 3 of the Constitution, aiming to protect the parenting in its entire hypothesis.

In such a perspective, we can individuate, as the first two expressions of this object, the Acts no. 1204/1971 and no. 903/1977. In these Acts, foster mother had a mandatory right to leave from work within the three months from the entrance of the child into the family.

Optional leave, instead, could have been asked within a year from the entrance of the child, not less than 3 years old, in the family.

In such provisions it is worth to be emphasised the absence of any definition of the *status* of the foster parent.

The deficit was filled by the Constitutional Court with the Decision no. 332/1998 and the Act no. 903/1977, which assured to foster fathers the same mother's right of leave in case of not enjoys by her.

It represented a *traslatio* of the right from the mother to the father, as established for the natural parents too.

The legislative decree no. 151/2001 brought to completion the assimilation of the position of the foster parents compared to the natural parents.

In the legal framework, in fact, the women workers, or alternative, men that have adopted a minor have the right to a maternity or paternity leave of the maximum duration of 5 months, even in the case that during the period of adoption the minor reaches the age of majority.

In case of custody of a minor, the leave can be used in a continuative or a fractioned way for a maximum period of 3 months within the first 5 months.

The condition for the recourse to maternity or paternity leave changes whether it is an adoption of a national or international dimension.

In case of a national adoption, in fact, the leave has to be performed during the first 5 months after the effective entrance of the child in the family, while in case of international adoption the leave can be enjoyed even before the entrance of the child in the national territory and during the period of permanence of the foster parents in the strange Country for the adoption procedure.

Despite the comprehensive duration of the leave, it can be performed within the 5 months after the entrance of the child in Italy. Such provisions find applications even if the minor, at the entrance in the family or in Italy, is in pre-adoptive position. The authority that cares the adoptive procedure has the obligation to certify the duration of the period of stay abroad of the employee (men or female).

In case of international adoption or pre-adoption it is established the right for both the foster parents to perform a not-paid leave for the duration of the entire period of permanence abroad in the foreign country.

In the case of interruption of the adoptive procedure, the period held abroad before the entrance in Italy of the child is already recognized as a period of maternity leave.

In the case of national or international pre-adoption or adoption, the optional leave can be performed at the same conditions established by the law for the biological parents, within 8 years from the entrance of the minor in the family unit and, however, non after the reach of the age of majority.

Foster parents receive the indemnity for the optional leave for the maximum period of 6 months within the first 3 years from the entrance of the minor in the family unit.

Any other period of leave can be compensated if the income of the workers is inferior to a minimum established by law.

Foster parents have the right to enjoy daily rest, within the same conditions established for the biological parents, within the first year of entrance of the child in the family.

At least foster parents have the right to not paid absence from work for the correspondent period of sickness of any child of an age less than 6 years. Furthermore, they have the right to be absent from work in the limits of 5 working days per year, for the sickness of any son within the age of 8 years.

Notwithstanding the above, if, at the moment of the adoption, the child has an age between 6 and 12 years, the leave can be performed in the first 3 years from the entrance of the minor in family unit.

Several others legal provisions for the protection of the work during the period of maternity find extensions even to the case of adoption or pre-adoption.

In particular to such end the national legislation applies to foster parents: - the prohibition of dismissal or suspension during the period of mandatory maternity leave or paternity leave, within the first year from the entrance of the minor in the family unit (in case of international adoption the prohibition operates from the communication of the first meeting with the minor or the foreign proposal of the authority); - the invalidity of the dismissal caused by the request or the perform of the optional leave or the time – off for sickness of the child; - the special provision for the resignation; - the right to maintain the workplace occupied before during the all period of mandatory or optional leave, paternity leave, daily rest and time-off for sickness of the child; - the right to come back to work at the end of the period of mandatory or optional leave, paternity leave, daily rest and time-off for sickness of the child within the first year of entrance of child in the family unit; - the right to receive all the indemnity established in case of dismissal or resignation during the first year from the entrance of the minor in the family.

3) *Flexible working: is there a right?*

a) What is flexible working - Typologies of flexible working

In the Italian legislation there is not a juridical definition of flexible working.

Notwithstanding the above, scholarship and case-law identify with the expression all the contractual typologies of work that differ from the general model of subordinate employment at full time and for indefinite period.

Having regard to the topic of our work, therefore, we have to emphasise the flexible contracts of employment that aim to conciliate the employers' necessity with the exigency of the workers to reconcile work and family live.

As regards this last aspect in Italian legislation a very crucial role is played by the following flexible working contracts: 1) Part-time work; 2) Homeworking; 3) Job sharing.

1) Part-time work is a particular type of employment contract characterized by a reduction in ordinary working time established by the law (Act 66/2003) or by collective agreement (in Italy generally 8/day and 40/week hours). Introduced by Act 863/1984, part-time work has been reformed by Act 61/2000 implementing Directive 97/81/EC concerning the framework agreement on part-time working concluded by UNICE, CEEP and ETUC. Act 61/2000 was later amended by a number of legislative measures (Act 100/2001, Act 276/2003, Act 247/2007, Act 183/2001, Act 92/2012).

Act 61/2000 actually distinguishes three types of part-time work (art. 1, c. 2):

a) Horizontal part-time: daily working time is reduced (eg. four -instead of eight- working hours every day);
b) Vertical part-time: daily working time is full, but the employee works only in definite days or periods of the week, of the month or of the year (eg. week-end contracts or seasonal-contracts);
c) Mixed part-time: is a combination of the two main types mentioned above (eg. week-end contracts with reduced daily working time).
Part-time contract must be concluded in writing and exactly indicate the job and the distribution of working hours.

2) Homeworking is a special type of work that may take very different organizational forms ranging from the so called "*distributed computing applications*", as in the case of mobile telework, to forms based on information processing. This variety of organizational forms depends on the combination of several factors: the objectives of the actors involved, the problems and the needs to be met, the technical and operational solutions adopted and the technological structures available.
Act 877/1973 (amended by Act 858/1980) adopts a rather precise definition of subordinate homeworkers including in it all the employees who work at their domicile or in premises of their own only with the help of members of the family (excluding salaried workers) for an entrepreneur who directs the character of the job to be done and its execution. Homeworkers are paid at piece rate according to tariffs bargained collectively.

3) Job sharing is a peculiar type of work arrangement (similar to part-time) whereby two or more persons share the same job. This type of arrangement has been held admissible according to the general principles of labour law, as confirmed by a ministerial regulation of 1998. Act 276/2003 has formally recognised it and determined some basic regulations (art. 41): the written form of the contract, the principle of non-discrimination, the possibility of workers freely distributing the work among themselves (but each is responsible for the entire obligation and the employer has to be informed, at least weekly, about working-time distribution among the workers). The termination of the contract with one worker extinguishes the whole obligation, unless the other is willing to take it on and the employer agrees.

b) Extent of flexible working

Part-time employment is one of the main forms of labour market flexibility: on the demand side it allows the structure of working time arrangements to adapt to the needs of enterprises, while on the supply side it tends to reconcile family and life requirements with those of work. In 2011 (latest official estimates available) 29.3 percent of women and 5.9 percent of men worked part-

time in Italy. The proportion of part-time employees in 2011 was 15.5 percent (3.5 million people). In the last years, moreover, there has been a significant increase in the incidence of involuntary part-time employment, i.e. the number of workers declaring that they work part-time in the absence of full-time employment opportunities (from 49.3 percent in 2010 to 53.3 percent in 2011). The incidence of involuntary part-time work is higher among men, yet it registers significant values among women too (63.7 and 50.2 percent, respectively).
It is, instead, estimated (no official data are available) that in 2011 there were more than 2 million homeworkers in Italy, most of whom were women.

c) Who can request flexible working? How (what procedure)? On what grounds may a request be refused?

Whereas that in Italy there is not a right to pass from a standard employment contract to a flexible working employment relationship, even if it is justified to reconcile work and family life, it is not possible for us to indicate who is entitled to enforce such a right in relation to the family needing of care (mothers, fathers, etc..), nor it is possible to identify some situations in which the belonging to a certain category of workers plays a role to ensure that right.
A real right to part-time is provided, by way of exception, only for the worker suffering from oncological pathology, for which residue a reduced capacity to work, also in reason of the effect of the pathological therapy, as ascertained by a medical commission set up at the AUSL (local health authority) with competence at territorial level (see Article 12-bis of Legislative Decree no. 61/2000).

d) How does national law deal with the situation where an employer wants to change previously agreed flexible working arrangements (e.g. changing part-time hours to full-time hours)? What would be the consequences for the employee of refusing the employer's request?

In the context of flexible working, once agreed and predetermined work duties, characteristics and conditions, is not possible to modify the contractual provisions without an agreement between contractual parties (i.e. employer and employee).
To better understand the question, we can use, by way of example, the discipline of the part – time work.
The most rigid aspect of the regulation of part- time work is individuated in the predetermination, since the beginning, of the duration and hourly, weekly, monthly or annual

collocation of the work (see Art. 2, par. 2, Legislative Decree no. 61/2000), that once agreed cannot be modified without the express agreement of the employee.

Notwithstanding the above, there are alternative possibilities that consent to the employer to ask to the employee extensions or modifications of the hours of work, including the possibility to conclude accessory or supplementary agreements to the primary contract of employment.

For instance, in the horizontal part – time work the employer, according to how established in the collective agreement, has the possibility to ask supplementary working activities respect the previously agreed in the contract of employment, in the maximum established *via* collective agreements.

This supplementary work needs the consensus of the employee only if the possibility is not regulated in the collective agreement.

If the hypothesis is regulated *via* collective agreement the employee cannot refuse the employer order on pain of disciplinary sanctions.

It is, however, explicitly excluded, in case of refuse of the employee, the possibility for the employer to dismiss him / her.

In the vertical and mixed part – time, instead, the recourse to supplementary work can be admitted *via* the stipulation in the contract of employment of a so called *clausola di elasticità* (clause of elasticity), according to the article 3, par. 7 – 9 of the Legislative Decree no. 61/2000 (as modified by the art. 22, par. 4, Act no. 183/2011).

In that case the employer has the right to modify the work activity of the employee increasing the duration of the working hours.

The employer is only obliged to communicate in advance (not less than two days before) such increasing to the employee, without prejudice to other agreements between the Parties. The notice is provided by the law to guarantee to employees to organize his / her family needing.

In practise the situation that is reached *via* the stipulation of the so called *clausole di elasticità* is the same that is realised by the execution of supplementary hour of work with a specific difference, *id est* the supplementary activities must be asked each times, while through the stipulation of the *clausole elastiche* the tasks are due once for all.

In all the three typologies of part – time work it can be stipulated between parties a so called *clausola di flessibilità* (clause of flexibility) according to the art. 3, par. 7 – 9 of the Legislative Decree no. 61/2000, as modified by the art. 22, par. 4, Act no. 183/2011.

The *clausola di flessibilità* gives the right to the employer to modify (but not to extent) the temporal location of the working activities with a minimum notice of two days.

The stipulation of a *clausola elastica* or *flessibile* asks the agreement of the employee that has to be clearly expressed in writing and must be signed, even contextually to the sign of the contract of employment, with the assistance of a representative of the trade union organisations at plant level (RSA / RSU) chose by the employee (see Art. 3, par. 9, Legislative Decree no. 61/2000). The refuse to sign these clauses cannot constitute a subjective justified reasons for the dismissal of the employee.

The faculty to sign *clausole elastiche* or *flessibili* is not left totally to the private autonomy of the employer and the employees, because the collective agreements, even if signed at plant level, are called to determine the conditions and modalities according to whom the employer can modify the temporal location of the working activities or increase the duration of the working hours in its maximum limits (see art. 3, par. 7, Legislative Decree no. 61/2000).

It is worth to be emphasised, furthermore, that the art. 3-*bis* of the Legislative Decree no. 61/2000, as modified by the art. 3, par. 7 of the Act no. 92/2012, invites the collective agreements to establish conditions and modalities that allow the employee to ask the elimination or the modification of the *clausole elastiche* or *flessibili* eventually agreed with the employer.

Despite these collective provisions, the faculty to repeal the consent to such clauses has to be guaranteed to the employee affected by an oncological pathology, as established by the art. 12-*bis,* Legislative Decree no. 61/2000.

Nevertheless, the increased availability of working time has to be remunerated to the employee, who is recognized the right to specific compensations in money or other benefits of different nature (e.g. additional rest), in the measures established *via* collective agreements (see art. 3, Legislative Decree no. 61/2000).

The changeover of the employment relationship from full – time to part – time, according to art. 5, par. 1, Legislative Decree no. 61/2000, needs a formal agreement in writing between contractual parties, therefore, as a logical consequence, the employee cannot be obliged from the employer to transform his employment relationship nor he has a right to ask such a modification. In any case, the refuse of the employee to transform the employment relationship from full – time to part – time and vice versa does not constitute a subjective justified reason for the dismissal.

The changeover of the employment relationship from part – time to full – time does not represent a right, but the employee has a right of precedence in the recruitment with a full – time contract for the same or equivalent duties carried on with the part – time contract.

The return to full – time work is only guaranteed to employees whose contract of employment was changed in part – time for the care of oncological pathology at the end of the disease and for the civil servant after two years from the transformation of the working relationship.

4) *Enforcement and remedies*

a) What courts / authorities are competent?

In case of violation of employees rights regarding leave or flexible working, the workers have the right to enjoy two kind of protection: *id est* a jurisdictional or an administrative defence.

The Italian legal system, in fact, ensures to employees a possibility to claim specialised labour courts where the procedure is characterized by the *criteria* of celerity and free of initial costs.

The competent court is that of the place where the employer has his registered office.

When the judge renders his decision about the payment of sum of money for employment credits he determines the interest and the damage from the devaluation of the credit.

Against the decisions of the labour courts the employee has the right to ask a second analysis of the case in front of the court of appeal and then he can recur to the Supreme Court of Cassation for the *errores in iudicandi et in motivandi* of the previous decisions.

The administrative defence, instead, is characterized by the intervention, directly or following a complaint of the employee, of the following public authorities: the inspective section of the competent Territorially Direction of Work (DTL), The National Social Security Institution (INPS) and the National Institute for Industrial Accident Insurance (INAIL). Both INPS and INAIL may draw up inspection reports for non – payment of social contributions or for any violation of the labour law provisions related to the protection of the employees.

DTL are peripheral articulation of the Ministry of Labour that perform both function of administration of the labour market and inspective functions.

The inspective activities are exercised with specific reference to the fulfillment of the payment of the social contributions by the employers and to supervise the accomplishment of all the legal and administrative provisions in charge on the employers related to the working relationship. In this regard the DTL has the power to impose administrative sanctions in case of ascertainment of unlawful conducts.

b) What role is played by anti-discrimination law?

The equal opportunity code between women and men (approved with the Legislative Decree no. 198/2006), after the amendments approved with the Legislative Decree no. 5/2010, expressly qualifies, *ex* art. 25, par. 2-*bis*, as a discrimination *"any treatment less favourable in reason of*

the status of pregnancy, as well as maternity or paternity, even adoptive, or by virtue of the ownership and exercise of the corresponding rights".

In case of work discrimination related to the exercise of any form of leave linked to pregnancy, maternity or paternity (even adoptive), therefore, employees can enjoy the special judiciary procedures provided by the Legislative Decree no. 198/2006.

The most effective procedure is that provided by the art. 38 of the Legislative Decree no. 198/2006 through which the employee can claim with urgency labour court and obtain in due time a motivated decree of the judge that orders to the employer to immediately stop the discriminatory conduct and the removal of the effects. In case of not compliance to the Judge Decree the employer is sanctioned with the fine till 50.000 Euros and the imprisonment till six months.

c) Is there protection from victimisation?

The article 41-*bis* of the Equal Opportunity Code, as introduced by the Legislative Decree no. 5/2010, is entitled victimization and allows the enjoy of the special judiciary protection described above, that in the case is extended to: *"any prejudicial behavior put into place against a person that is reached by a discrimination or any other person, as a reaction to an activity aimed to obtain the respect of the principle of equal treatment between women and men"*.

d) What remedies are available?

In relation to the part – time contract of employment, according to the art. 5 of the Legislative Decree no. 61/2000, as we already underlined, the refuse of the employee to change his contract of employment from full – time to part – time and *vice versa,* or the refuse to agree clauses of *flessibilità* or *elasticità,* does not constitute a valid subjective justified reason for the dismissal, that has to be considered unlawful.

The artiche 8 of the Legislative Decree no. 61/2000, furthermore, established others sanctions.

In particular, in absence of a contract in writing and if the employer is not able to prove the existence of a part – time contract of employment, the legislation establishes that the relationship can be declared by the judge as a full – time. Same sanction is established in case of lack of indication in the contract of the duration of the working activity.

As a form of protection of the employee, moreover, the legislation obliges the employer to predetermine the temporal collocation of the activity during the day, the month or the year if specific clauses of *elasticità* or *flessibilità* are not stipulated.

In the cases of lack of indication of the period of performance, therefore, it will be the task of the judge to determine the temporal modality of the working performances for the future recognizing to the employee who has requested that a sum as compensation for the damages.
Having regard to the legislation concerning the leaves, the article 54 of the Legislative Decree no. 151/2001 establishes the prohibition of the dismissal for the employee (mother or father in case of enjoy of the paternity leave) that starts from the beginning of the pregnancy period, ascertained by a medical certification, until the end of the first year of the child. The violation of such prohibition determines the nullity of the dismissal with the obligation for the employer to reinstate the employee. Same protection is provided in the case of dismissal caused by the enjoy of a parental leave or a leave for sickness of the child.
During that period, moreover, the female employee cannot be collocated in mobility after a collective dismissal, nor she can be suspended from work and collocated in integration of the wage, with the exception of the case that the entire activity of the employer is suspended.
To verify the genuineness of the resignation of a female employee the parties are obliged to validate the same, from the beginning of the pregnancy to the first three years of the child, in front of the DTL.

5. Current developments and reforms

In Italy at today there are no special proposal or projects for reform in the matter subject of the report because, as we have seen, just recently the Italian legislator has promulgated some dispositions aim to implement the protection of the employees on this field, as well to facilitate the reconciliation of work and family life, as the baby sitting voucher and the mandatory paternity leave.
This is a small step, but we are optimistic it can be the right direction.