European Working Group on Labour Law

Working time issues

Italian Report

University of Cassino and Southern Lazio

Erica Maida
Alessandra Morelli
Luca Valente
Simone Valente

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Questions for National Reports

1 - What are the sources of the working time regulation in your country (implementation of EU directives, Constitution, law, collective agreements, case law ....)?
2 - What are the goals of the regulation?
3 - How did your country implement the working time regulation directive and the part time directive?
4 - Is there, in your country a general framework about working time (i.e. a legal or conventional or statutory working time rules, weekly rest, holidays, specification for overtime working hours). What is the scope of this regulation (workers, employees, others...)?
5 - What is the legal, contractual (individual contracts) conventional (collective agreements) or statutory system about working time?

(a) Are there limits to working time? (apart from those included in the EU directive)
(b) Are there derogations to the general regulation of working time?
(c) What is the definition of overtime work in your country? Is the worker allowed to refuse overtime work and, if so, under which conditions? What are the consequences of a refusal of the worker?
(d) Is there a financial or other (for instance days of compensatory rest) compensation for overtime hours?
(e) Do workers have the right to ask for a reduction or an increase of their working hours? If so under which conditions? Does the employer have specified reasons to refuse the change?

6 - How is working time organised over the week, the month or the year? Do working time accounts exist?

- What are the conditions of modulation (i.e an irregular repartition of working time in the week, the month or the year?)
- What are the consequences on wages?
- What are the consequences on rest periods?

7 - Are there legal or other rules about paid leaves (holidays, week days off, etc.)

8 - Are there legal or other rules for situations with specific working time models such as:

. part time work
- definition (if any)
- conditions (if any)
- wages

. week-end work
- is work on Sundays allowed and under which conditions?

. night work
- definition
- conditions
- wages

. **others forms of working hours (for instance, shift work...).**

9 - Is there a debate in your country about working time? And if so, what are the issues discussed especially in the context of economic crisis?

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1. Sources of working time regulation in Italy

In the Italian legal system, working time regulation is set out in a complex interweaving of sources.

1.1. Constitution

At the top of the internal regulatory system, we find the Italian Constitution, dated 1948, that lays down some general and fundamental principles about working time.

In particular, Article 36 Const. states, at its second paragraph, that the law shall establish the maximum duration of the working day.

It further affirms, at its third paragraph, that employees enjoy an inalienable right to a weekly rest and to paid vacations on a yearly basis.

Article 37 Const. mandates the establishment of special working conditions for females and under-aged youngsters, in order to safeguard their physiological distinctive traits (in respect of the women, such a protection involves in particular the events related to maternity and the interests of new-born children): this norm represents the legal basis for certain limitations and special regulations on working time.

Article 32 protects the right to health and it is relevant, in the present context, for the obvious consequences that the duration of the working performance may cause on the employees' health.

It is meaningful, in this respect, to observe that the European legal framework on working time, which the Italian ordinary legislation represents an implementation of, is based on the Union's competence in the matter of health and safety at work.

The principles affirmed by the Italian Constitution in 1948 anticipated the values that the European Charters regarding human rights would have recognized in the following years (as an example we can nominate Article 2 of the European Social Charter, approved by the Council of Europe in 1961 and revised in 1996, and Article 8 of the Charter of Fundamental Social Rights of Workers signed in Strasbourg during the European Council of 1989).

1.2. Civil Code and Legislative Decree No. 66 of 2003

Core of working time regulation is Legislative Decree No. 66 of 2003, implementing the European Directives 93/104/CE and 2000/34/CE, even if important principles are still contained in a few norms of the Civil Code (dated 1942), namely Article 2107, 2108 and 2019 (see better below).

Legislative Decree No. 66 of 2003 represents the result of a legislative process begun at the end of '90s, when Directive 93/104 had been partially implemented by Art. 13 of Act No. 196 of 1997 (which established 40 hours as normal weekly working time) and by the National Collective Agreement signed by Confindustria (employers' confederation) and Cgil, Cisl and Uil (trade union confederations) on 12 November 1997 (this agreement applied only to the industrial sector).

In 1998 the government presented a bill proposal which sought to transpose the provisions of the Directive but also to reduce the legal working week to 35 hours, following the French experience. This proposal, which threatened to provoke a government crisis, ended up with the non-approval of the bill by the Parliament and in a consequent postponement of the transposition of the Directive.

After that, Act No. 409 of 1999 regulated overtime in the industrial enterprises while Legislative Decree No. 532 of 1999 introduced dispositions concerning night work.

The term for implementation for the Members States expired on 23 November 1996, but the mentioned acts of the Italian legislator provided an incomplete implementation of Directive 93/104 and therefore Italy was sentenced for incomplete transposition of this Directive (*Court of Justice*, 9 March 2000, C-386/98, *Commission CE vs. Italy*).

Finally, the legislative process culminated, in 2003, with the above-mentioned Decree No. 66 which repealed all the previous regulations, which dated back to 1923, and created a new ordered and comprehensive legal system concerning working time.

Legislative Decree No. 66 of 2003, amended by Legislative Decree no. 213 of 19 July 2004 (in particular with regard to penalties for failure to observe the new norms), sums up rules on working time and daily and weekly rest, breaks, annual leave and night work.

Part of the Italian doctrine has raised considerable doubts about the content of the act.

In particular, some provisions would contravene the no-regression clause provided for by Art. 18, par. 3, of the Directive (now Art. 23 of Directive 88/2003).

The no-regression clause has the purpose to avoid that the States may use the directive to worsen the already existing protections: the directive transposition, in fact, cannot be a reason to lower the general level of protection.

However, the level of protection seems to have decreased, especially with regard to working time maximum duration.

The rules contained in Legislative Decree No. 66 of 2003, in fact, do not state a legal limit to the daily and weekly overtime work: they do not fix, furthermore, an explicit legal limit to the maximum duration of the working day.

In any case, all these doubts have not been confirmed in case law until now.

1.3. Collective agreements

The system of legal sources analysed until now gets more complicated when we proceed to add the collective agreements matter.

Collective bargaining always had an important role in working time regulation and, actually, the Legislative Decree No. 66/2003 affirms to respect its autonomy in negotiating.

Furthermore, the law, as we will widely explain below, provides collective agreements with the authority to introduce significant derogations (both *in melius* and *in peius*) to the standard rules.

1.4. Part-time work sources

Part-time work deserves a debate of its own, first of all because its regulation is not contained in Legislative Decree No. 66/2003, but in the recent Legislative Decree No. 81 of 15 June 2015.

Part-time work regulation has been amended several times over the years but the most important reform was with the Legislative Decree No. 61/2000, which implemented Directive 97/81/CE.

This Decree set up more flexible provisions, in order to facilitate the recourse to this type of employment contract.

Furthermore, the Decree laid down the not discrimination and the voluntary principles, as provided for by the Directive.

At the same time, the weakness that characterized this specific European provision allowed the Italian legislator to act in "freedom", establishing a part-time work "closer" to the Italian tradition.

The reform of 2015 has repealed the previous regulation but has not really introduced remarkable innovations.

1.5. Other sources

Finally, we have to underline that working time for child labour is separately regulated (Act No. 977 of 1967) as well as some of the most important aspects of working time related to worker's personal needs -as licences, permits and leaves- and reductions or suspensions of working time for parents (Legislative Decree No. 151 of 2000).

2. Goals of working time regulation

Working time regulation pursues many different interests and needs that, furthermore, fall within different subjects.

From the point of view of the individual interest of the worker, the first and most important reason, for which time limits are required, is the protection of health, understood as the safeguard of his physical and psychological well-being.

Part of the Italian doctrine has connected the general right to a free and dignified life, provided for by Art. 36, par 1, Const., to the specific right to a fair working time, contained in art. 36, par. 2, Const., building, this way, a guarantee of protection of the worker's personality.

However, working time regulations also pursue public and collective interests.

In this prospective, the purpose of working time regulation, which is based on modulation and flexibility, is to coordinate the labour force in the light of developments in production and changes in demands, in order to increase, at the same time, the companies' productivity.

From another important point of view, working time regulation deals with the social life of the employees and with their family needs, adopting specific measures to promote a work-life balance.

Finally, it should be recalled that in the past some authors had connected the mechanism of working time limitation to the possibility to encourage labour supply.

Nowadays, however, this approach has been discarded.

At the most, a better distribution of the job offer would be possible through the incentive of part-time work.

In fact, the law that delegated the regulatory Decree concerning part-time work affirmed that the new act should have had the purpose to increase the employment opportunities.

3. Implementation of the working time regulation directive and the part time directive

Legislative Decree No. 66 of 8 April 2003 has given "organic" transposition to the Directives on working time regulation (Directive 93/104 as amended by Directive 2000/34).

This Legislative Decree, in fact, sums up regulations on working time and daily and weekly rest, breaks, annual leave and aspects of night work and repeals the previous rules, which dated back to 1923.

Directive 97/81/CE on part-time work has been, instead, implemented by Legislative Decree No. 61 of 2000.

In the Italian legal system, in fact, the transposition of EU directives by means of collective agreements is not possible because the lack of an *erga omnes* effect.

Moreover, any legal intervention aimed to extend the subjective legal effect of collective agreements transposing directives would be in contrast with the constitutional limit imposed by the failure to implement Art. 39 (par. 2, 3 and 4) of the Constitution which provides a specific procedure to reach this effect.

4. Regulatory framework on working time

As it was mentioned above, the organic legislation of working time in the Italian system is laid down in Legislative Decree No. 66/2003.

This regulation is aimed at striking a balance between the protection of employees' fundamental rights and the enhancement of organizational flexibility.

As it will be further explained, this objective is pursued by a synergy between mandatory legislative rules and collective agreements.

It must be pointed out, in this respect, that the latter, according to Article 1 of Legislative Decree No. 66/2003, can be signed at any level, provided that the signatory parties include one or more representative unions.

4.1. Range and scope

Under Art. 2 of Legislative Decree No. 66/2003, the rules laid down in the same Decree apply to all sectors of activity, both public and private, with exceptions of apprentices under 18, of seafarers, i.e. personnel working in any capacity on a seagoing ship to which Directive 1999/63/EC applies, and of civil aviation flight personnel referred to in Directive 2000/79/EC.

Furthermore, Italian regulation on working time does not apply to school staff regulated by means of Legislative Decree No. 297 of 16 April 1994, and to staff in the Armed Forces and in the Police and to municipal and provincial police staff, with reference to the specific institutional executive activities.

Many scholars have expressed doubts about the exclusion of the school staff from the scope of Directive.

In fact, in the Directive lacks an express provision which allows Member States to exclude the whole sector of school staff.

Instead, the other exclusions seem to be in line with the Directive, if one considers that these sectors are excluded by the Directive 89/391/EEC (Art. 2, par. 2), which is expressly recalled, with reference to its scope, by the Directive 93/104/EEC, as amended by Directive 2000/34.

Only in presence of particular requirements regarding services or reasons referring to civil protection services and of others services fulfilled by National Corps of fire brigade, as defined by Ministerial Decree, the Italian regulations on working time do not apply to the following sectors: a) civil protection services, included the National Corps of fire brigade; b) judicial and penitential structures; c) public order and security; d) libraries, museums and State archaeological areas.

These partial exclusions seem in line with the Directive, if one considers that these sectors are excluded by the Directive 89/391/EEC, which is expressly recalled, with reference to its scope, by the Directive 93/104/EEC, as amended by Directive 2000/34.

However, many scholars think that the exclusion regarding the special demands of services offered by libraries, museums and archaeological areas cannot be included into the scope of the Directive 89/391/EEC and so such a derogation would be not in line with the Directive 93/104 (as amended by Directive 2000/34/EEC).

The adoption of ministerial decrees would have been necessary for making the mentioned exclusions operating.

Anyway, only one Decree of the Ministry of interiors (enacted in agreement with the Ministries of labour, of health, of finance and of the public function) has been issued with reference to the organization and management of the working time for security guards (Ministerial Decree 27 April 2006).

In short, the Ministerial Decree foresees that the derogation to Legislative Decree no. 66/2003 is only allowed for: - the armed supervision services on the premises of the institutional or sensitive objectives; - services in airports, in ports, in railway stations, in stations of the metropolitan railways, in urban and extra-urban transport lines; - services of transport, supervision and escort of cash or other goods or values and the night supervision services.

The Ministerial Decree provides that national collective agreements will foresee for these services a maximum daily working time, limits on night work and overtime and the possibility of applying the derogations provided by Article 17, par. 1, of Legislative Decree No. 66/2003 (see below).

The possibility of introducing derogations through this Ministerial Decree for the security guards derives from the fact that supervision services provided by the security guards constitute auxiliary security services to the public security for which Legislative Decree foresees possibility of derogations.

However, it is possible to express doubts about the compliance on this decree with respect to Italian legislation, because the security guards' category is not expressly foreseen in the mentioned Art. 2, par. 2, of Legislative Decree no. 66/2003.

4.2 Definitions

As far as the definitions are concerned, Italian regulations sometimes have transposed them verbatim, while in other cases they may differ from the Directive (Art. 1 of Legislative Decree No. 66/2003).

"*Working Time*": Legislative Decree No. 66/2003, adopting the definition given in the Directive, provides that "working time" means "*any period during which the worker is working, at the employer's disposal and carrying out his activity or duties*".

"*Overtime*": The work performed above the limits of the normal time.

"*Rest period*": Also in Italian regulations this concept is defined in a negative way, as it is the case in the Directive. The rest period is defined as any period which is not working time.

"*Night time*": Night time means a period of work performed during the night hours and implies a period of at least seven consecutive hours, including the hours between midnight and five o'clock in the morning.

"*Night work*": Night-workers are employees who spend at least three hours of their daily total of working hours on night duty, or 80 working days per year in it. This last limit is adjusted proportionately in the case of part-time workers and is used when collective bargaining does not lay down specific limits.

"*Adequate rest*": Also in this case the definition of the Directive is adopted verbatim and therefore means that employees have regular rest periods, the duration of which is expressed in units of time and which are sufficiently long and continuous to ensure that, as a result of fatigue or other irregular working patterns, they do not cause injury to themselves, to fellow workers or to others and that they do not damage their health, either in the short term or in the longer term.

"*Collective agreements*" mean any collective agreement signed by comparatively most representative Trade Unions.

4.3. Normal weekly working time

Article 3 of Legislative Decree No. 66 of 2003 sets the "normal" working time at 40 hours per week.

The notion of normal time shall be read in antithesis with that of "overtime" which Article 1 of Legislative Decree No. 66/2003 defines as the work performed above the limits of the normal time.

Article 3 then provides collective agreements with the authority to introduce special regulations.

Firstly, collective agreements can put the threshold of the normal working time at a lower level, "*only for contractual purposes*".

The marked formulation shall be read in coordination with the rules on overtime.

The combination of the two provisions is interpreted to the effects that the special regulations of overtime (mainly related to limitations and extra pay: see *infra*) apply only when the legal threshold is trespassed, whereas the time lapse between the contractual and the legal thresholds is regulated by collective agreements (so-called "*additional time*" – "*lavoro supplementare*").

Secondly, collective agreements may provide that the normal weekly working time has to be calculated as an average over a period that shall not exceed one year (so called multi-period working time - "*orario multiperiodale*").

Under this regime, the weekly working time can exceed the legal or contractual threshold without activating the rules on overtime.

The condition is that the exceeding hours shall be compensated in another time lapse by a proportionate reduction, to the extent that, in the given period, the average weekly time does not go beyond the legal or contractual threshold.

Some limitations to the power of collective agreements are laid down by Article 4 of Legislative Decree No. 66 of 2003.

This norm, in compliance with Article 2107 of the Civil Code (that demands to special statutes the establishment of the maximum daily and weekly working time) states that collective agreements can set forth the maximum weekly schedule, provided that the average duration does not exceed the threshold of 48 hours every 7 days, inclusive of overtime.

The basis for the calculation of the average can't exceed four months, but collective agreements can raise such a limit to six months or, recurring objective, technical or organizational reasons, even to twelve months.

4.4 Maximum weekly working time

Under Art. 4 of Legislative Decree No. 66/2003, the maximum duration of weekly working time is defined by collective agreements but, in any case, working time cannot exceed an average duration of 48 weekly hours, over a period of 7 days, including overtime hours.

4.5. Maximum daily working time - Daily rest

Under Art. 7 of Legislative Decree No. 66/2003, employees must be ensured a period of rest of 11 consecutive hours every 24 hours. These 11 hours must be successive, with the exception of the case of activities involving periods of work split up over the day.

This rule indirectly provides the size of the maximum working day, i.e. 13 hours.

In this respect, the implementation of the European Directives entailed a worsening of the working conditions, from the employees' point of view, since the previous regulation established a maximum working day of 8 hours.

4.6. Breaks during the execution of daily work performance

Breaks can be provided for also during the execution of the work performance.

Article 8 of Legislative Decree No. 66/2003 states that employees working more than six hours a day shall enjoy a pause aimed at restoring their psycho-physical conditions, consuming their meal and, in general, alleviating the effects of monotonous and repetitive duties.

In case collective agreements do not provide a specific regulation, the break shall be no shorter than 10 minutes, and its positioning in the working schedule shall be harmonized with the productive needs.

4.7. Weekly rest period

As we have seen above, Article 36 of the Italian Constitution recognizes the weekly rest period as a fundamental and inalienable right.

Under Article 9 of Legislative Decree No. 66/2003 every worker is entitled, per each seven-day period (calculated as an average on a time lapse no longer than 14 days) to a minimum uninterrupted rest of 24 hours, as a rule on Sunday, plus the 11 hours' daily rest referred to in the above mentioned Art. 7 (in other words, the two periods can't overlap).

However, many exceptions are provided in this case too.

We are going to examine these exceptions below in this report while focusing on the analysis of derogations.

5. Derogations

Legislative Decree No. 66/2003 provides for many derogations to the standard regulations.

First of all, under Art. 16, par. 1, without prejudice to the more favourable conditions laid down in the collective agreements, the rules governing the normal weekly working time (see the above described Art. 3 of the Decree) do not apply to various categories of particular activities or workers such as activities of mere custody (caretakers, guardians), discontinuous works, journalists, etc.

Secondly, according to Art. 17, par. 2, of Legislative Decree 66/2003, the rules contained in articles 7, 8, 12 and 13 of the same Decree (i.e.: daily rest; breaks; notification of regular use of night workers and length of night work) can be derogated by national collective agreements signed by the comparatively most representative trade unions.

In the private sector, in case of lack of specific dispositions in the national collective agreements, the derogations can be provided for by the collective agreements at local or plant level signed by the trade unions comparatively most representative at national level.

In the absence of regulation by collective agreements, the Minister of Labour and Social Security, at the request of the national trade unions, can adopt a Decree to introduce derogations to the articles 4, par. 3 (within the six-month limit), 7, 8, 12 and 13 of Legislative Decree no. 66 of 2003 (i.e.: reference period of maximum weekly working time; daily rest; breaks; notification of regular use of night workers and length of night work) with reference to:

- a) activities characterized by the distance between the work place and the residence place of the worker, included offshore work, or the distance among his different places of work;
- b) activities of guard, vigilance and stay characterized by the necessity of assuring the protection of the goods and the people, in particular, when it is keepers or porters or vigilance enterprises;
- c) activities characterized by the necessity of assuring the continuity of the service or of the production, in particular, in case of: 1) services rendered to the acceptance, to the treatment or the care by hospitals by rest houses and jails; 2) the harbour or airport staff; 3) print services, radio, television, cinematography production, postal or the telecommunications, services of ambulance, fireproof or civil protection; 4) services of production, management and distribution of gas, water and electricity, services of collection of the domestic rubbish or the incineration systems; 5) industries in which the work cannot be interrupted for technical reasons; 6) activity of research and development; 7) agriculture; 8) urban transport services;

- d) in case of predictable activity overload, and in particular: 1) in agriculture; 2) in tourism; 3) in postal services;
- e) for staff in the sector of the railway transports: 1) for the discontinuous activities; 2) for the service onboard the trains; 3) for activities connected to the railway transport and that assures the regularity of the railway traffic;
- f) to facts due to circumstances extraneous to the employer, exceptional and unforeseeable or exceptional events whose consequences could not have been avoided despite the due care provided by the employers;
- g) in case of accident or upcoming accident risk.

Furthermore, to the same conditions (i.e. by ministerial decree) it is possible to introduce derogations to the discipline of art. 7 (daily rest): a) for the turn work activity, whenever the worker changes team and cannot take advantage between the end of the service for a team and the beginning of that for the next team of a daily rest team period; b) for activities characterized by work period divided during the day, especially of the staff assigned to cleaning activities.

Under Art. 17, par. 4, of Legislative Decree no. 66 of 2003, all the above listed derogations, in line with the Directive, shall be allowed under condition that equivalent compensatory rest periods are granted to the workers concerned or, in exceptional cases in which this is not possible for objective reasons, to grant such equivalent period of compensatory rest, the workers concerned are afforded appropriate protection.

According to the general principles of the protection of health and safety of workers, Articles 3, 4, 5, 7, 8, 12 and 13 (i.e. normal working time; maximum weekly working time; overtime; daily rest; breaks; notification of regular use of night workers and length of night work) do not apply to the workers whose working time, because of the nature of the activity, is not measured or predetermined or it can be determined by the workers themselves.

That happens, “in particular”, in case of: a) managers, guiding staff of the companies or other persons with autonomous decision-taking powers; b) family workers; c) workers officiating at religious ceremonies in churches and religious communities; d) home-working and teleworking.

Art. 18 of Legislative Decree No. 66/2003 contains specific provisions for workers on board seagoing fishing vessels.

To these workers do not apply the regulations of the same Decree on maximum weekly working time (Art. 4), daily rest (Art. 7), breaks (Art. 8), weekly rest period (Art. 9) and night work (Art. 11, 12, 13, 14, and 15).

Then, as allowed by the Directive, the Legislative Decree No. 66/2003 lays down, for the application of Article 6 of the Directive (maximum weekly working time), an average of 48 hours of work a week calculated over a reference period not exceeding 12 months.

In any case, maximum hours of work cannot exceed 14 hours in any 24-hour period and 72 hours in any seven-day period; or minimum hours of rest cannot be less than 10 hours in any 24-hour period and 77 hours in any seven-day period.

Branch collective bargaining can determine different periods.

Hours of rest may be divided into no more than two periods, one of which shall be at least six hours in length, and the interval between consecutive periods of rest shall not exceed 14 hours.

Many exceptions are also provided for by the Decree about weekly rest period.

Under Art. 9, par. 2, of Legislative Decree No. 66 of 2003, in fact, in some cases rules on the weekly rest do not apply.

These are the following: a) for the turn work activity, whenever the worker changes team and cannot take advantage between the end of the service for a team and the beginning of that for the next team of a daily rest team period; b) activities characterized by work periods divided during the day; c) discontinuous activities for the staff that works in the sector of the railway transports; service onboard the trains; activities connected railway transport which assures the continuity and the regularity of the railway traffic.

Moreover, the Italian legislator has provided for a special regulation for the staff dependent from public-transport companies (but not mobile workers), assigned to activity characterized by the necessity of assuring a continuous service; for these employees the regulations provided for by Royal Decree No. 2328 of 1923 (converted by the Act no 473 of 1925), and in the Act. No. 138 of 1958, remain in force, as far as compatible with the provisions of Legislative Decree No. 66/2003.

Finally, it must be underlined that company collective agreements signed pursuant to Art. 8 of Decree Law No. 138/2011 (converted into law by Act No. 148/2011) may derogate from the limits set in Legislative Decree No. 66/2003.

The aforesaid Art. 8, in fact, provides that, in order to increase employment rates, to improve the quality of employment relationships, to stimulate competitiveness and wage increases, to fight un-declared work and implement restructuring, the majority of representative trade unions at national or local level and their representative bodies at plant level may sign collective agreements at plant level -provided that a generally binding effect is given in case the majority of the abovementioned representative bodies sign these- which may derogate from existing legal provisions concerning: (a) monitoring of workers using audio-visual devices and the

introduction of new technologies in the field; (b) workers' tasks and professional classification; (c) fixed-term contracts, part-time or reduced time contracts, joint and several liabilities in case of procurement and agency work; (d) working time; (e) hiring, working conditions and firing, including project work, dismissal on discriminatory grounds, excluding marriage, and during (or due to the request of) maternity and parental leave.

The aforesaid derogations from existing legal provisions (including Legislative Decree No. 66/2003) are, however, without prejudice to the Constitutional principles and to the constraints arising from the Community rules and from the International Labour Conventions.

6. Overtime work

Also overtime work (extra hours) is regulated by Legislative Decree No. 66/2003.

Overtime must be limited (Art. 5, par. 1, Legislative Decree No. 66/2003), separately paid and offset by wage increases whose size is determined by collective agreements concluded by the comparatively most representative trade unions (Art. 5, par. 5, Legislative Decree No. 66/2003).

These wage increases vary between 10% and 60%, according to overtime working conditions (for example in case of night-work overtime).

Furthermore, overtime increases are subject to a tax rate lower of 10%.

The same collective agreements may, in any case, allow, as an alternative or in addition to the wage increases, employees should benefit from compensatory rest (Art. 5, par. 5, Legislative Decree No. 66/2003).

This rule lays the foundations for the establishment of the so called "*hour-banking*", a mechanism consisting of the storage of overtime hours in an individual account, which amount is defined from collective agreements and individual contracts: generally, is not allowed to convert these hours in money.

So, during the year, employees can enjoy compensatory rests from their individual account, in respect of the applicable collective agreement.

Some collective agreements may require a minimum of overtime hours before starting to storage hours in the individual account.

Collective agreements may also provide for hypotheses of conversion of these hours in money such as in cases where enjoyment of the compensatory rests is not possible anymore (for example due to the termination of the employment relationship).

Collective agreements also regulate the conditions of use and the implementing rules concerning overtime, without prejudice to the aforementioned maximum limits of duration (48 weekly hours, over a period of 7 days) provided for by Art. 4 of Legislative Decree No. 66/2003 (Art. 5, par. 2, Legislative Decree No. 66/2003).

In case of absence of collective agreements' regulation:

a) the use of overtime is allowed only by prior agreement with the worker and for a period of up to 250 hours a year (Art. 5, par. 3, Legislative Decree No. 66/2003);
b) overtime must be remunerated with a wage increase not less than 10% more than the ordinary pay (Art. 5 of R.D.L. No. 692/1923).

Art. 5, par. 4, of Legislative Decree no. No 66/2003 also provides for other cases where, except as otherwise required by collective agreements, overtime is admitted regardless of the will of the individual worker:

- exceptional technical-productive needs, impossible to be addressed through the hiring of more workers;
- cases of *force majeure* or cases where the non-performance of overtime may result in a serious and immediate danger, or damage to persons or production;
- special events, such as exhibitions or fairs, linked to production.

Recapping the above indicated rules, overtime is allowed and, consequently, the employee is obliged to perform it, in the following cases:

a) When the limits, the conditions of use and the implementing rules concerning overtime are regulated by the applicable collective agreement;
b) In case of lack of regulation by the collective bargaining, when an agreement between the individual parties exists and for a period of up to 250 hours a year;
c) In particular hypotheses such as: 1) exceptional technical-productive needs, impossible to be addressed through the hiring of more workers; 2) cases of *force majeure* or cases where the non-performance of overtime may result in a serious and immediate danger, or damage to persons or production; 3) special events, such as exhibitions or fairs, linked to production.

If the employee refuses, without a justified reason, to perform overtime work in the above mentioned cases, she/he will be liable to disciplinary sanctions for non-compliance of her/his obligations.

In fact, the employer has the right, in response to the worker's denial, to open a disciplinary proceeding and, as a consequence, to adopt the disciplinary measures provided for by the law

(Art. 7 of Act. No. 300 of 1970) like verbal or written warnings, penalties, suspensions (even of the wage) for a few days or, in the most serious cases, dismissal for misconduct.

This last, maximum sanction may concern, for example, unjustified refusals in the event of exceptional, technical-productive needs or in case of imminent danger of damages to people or in case of repeated and unjustified refusals regularly contested.

The choice of the sanction to be adopted remains within the discretion of the employer, but it has to be respectful of the principle of proportionality fixed by Art. 2106 of the Civil Code and based on the specific facts and circumstances of the case.

For example, a Labour Court (Milan, ruling of 04/01/1985) has considered a sanction of 5 days of suspension from the work excessive but, in another case, the dismissal of a truck driver who had refused to perform overtime on Saturday, after other three similar refusals regularly sanctioned by the employer, has been considered lawful (Corte di Cassazione, ruling no. 11821/2003 but see more recently, in the same direction, Corte di Cassazione, ruling no. 16248/2012).

By the way the employer cannot deduct from the employees' wages the requested and not performed overtime hours.

In fact, the worker's denial, even if unjustified, cannot lead to a pay cut but only to disciplinary sanction.

The employee, in any case, can always prove that the refusal was justified by a specific, legitimate reason.

7. Workers' right to ask for a reduction or an increase of their working hours

In the Italian legal system, the employees have no right to ask for a reduction or an increase of their working hours and, consequently, the employers do not need specified reasons to refuse the requested change.

Only in part-time contract regulation, as we will explain afterwards, we find some exceptions to this rule (see below).

8. Organisation of working time over the week, the month or the year. Working time accounts.

As we have already underlined above in this report, in our legal system collective agreements have the faculty to provide for a multi-period working time regulation where the normal working time is not calculated over the week but comparing the normal weekly working time to the average duration of the work performance over a period up to one year.

The normal working time is considered observed if the average of 40 hours during the time is respected and this means that in some working periods the threshold of 40 hours can overcome through performance that is not qualified as overtime as long as the temporary excess is matched by other periods where working time goes below the same threshold.

8.1. Example of the s.c. "multi-period" working time: National Collective Agrremnent on credit system

Here is an example on how the multi-period system works in the national collective agreement regulating the credit system.

In Art. 105 of this collective agreement we can, in fact, clearly see how this method can be practically applied.

In occurrence of technical, organizational, programmable or commercial needs, the enterprise is entitled to distribute the working hours so that in some predetermined periods of the year, the normal working time will be exceeded to allow reduced performance in other periods of the same year.

The employees concerned receive the regular wage, provided for the contractual weekly timetable, in both periods.

The average weekly duration of the period taken as a reference must, anyway, comply with maximum and minimum limits: the performance cannot exceed 9 hours and 30 minutes a day and 48 hours per week and cannot be less than 5 hours daily and 25 hours weekly.

It is further established that, except in some situations, overtime is forbidden during periods of heavier work that, in any case, cannot exceed the limit of 4 months.

These periods have to be communicated in due time to the employees and if changes are necessary, to either parts, the agreement between the company and the employee is required.

The multi-period working time can be performed only by the staff with full-time contract and, in case of termination of the employment relationship or in case of change of job that does not allow the possibility of multi-period work anymore, the employee is entitled, for the hours

worked in addition to the reference, to a compensation equal to the hourly wage for the number of hours performed in excess.

Art. 106 of the above mentioned collective agreement of the credit system deals with the so called "working hours' bank" system ("*banca delle ore*").

Under this disposition, the employer has the choice to ask for additional work performances that cannot exceed two hours a day or 10 hours per week.

The very first 50 hours are not considered as overtime (no wage increase is provided) but they give the right for a mandatory recovery through the reduction of the daily work performance even before the prearranged extension occurs.

For the first 50 hours of additional work, for which increased wages in excess of that relating to to the daily overtime are provided, the employee has the right to choose between recovering these hours through the hours' bank mechanism or receiving the increased wage for the overtime.

As regards the other 50 hours, they give the right for the overtime payment with the following timing: the overtime cannot exceed 100 hours per year and it cannot take place during the Saturday, the Sunday and during the public holidays with the exception of specific needs and circumstances.

During the very first 6 months of performance of additional work, the recovery can be enjoyed subject to the agreement between the interested parties.

After the first 6 months, the employee is entitled to the recovery only if the warning period is proportional to the entity of the recovery itself:

- 1 day of warning for the hours' recovery;
- 5 days of warning for the recovery of 1 or 2 days;
- 10 days of warning for the recovery of 3 or more days;

Anyway this recovery must be enjoyed within 24 months.

In case of extended periods of absence (like diseases, accidents and maternity) that prevented the execution of the recovery within the pre-established terms, the employee can choose between the fruition of the recovery of the hours and the payment for the overtime.

In any case the additional performances must be authorized by the employer and registered in the ways prescribed by the law.

9. Paid annual vacations

Paid annual vacations are a fundamental and inalienable right according to Article 36 of the Italian Constitution.

Article 10 of Legislative Decree No. 66/2003 states that the vacation period shall be no shorter than four weeks per year, and should be enjoyed for two weeks (continuously if the employee so requires) during the same year in which it has been accumulated, whereas the two remaining weeks shall be used within 18 months since the end of the year.

In case the employer doesn't comply with the rules, he/she is liable of an administrative penalty.

Article 10, par. 2, also dictates that the fruition of the vacation period shall not be replaced by the payment of a compensation with the exception of the case of employment contract's termination.

This entails that the employer has the power to impose the employee the fruition of the vacation period.

Such a framework of regulation is complemented by Article 2109 c.c., which grants the employer the right to allot the time slots in which vacations can be enjoyed by each employee.

For this purpose, the employer shall take into account the needs related to the organization of the undertaking and the employee's interests.

According to the Constitutional Court ruling no. 66/1963 the employer has the right to decide the periods of annual paid vacations' fruition but this power cannot be exercised in a way that frustrates the purpose that it is supposed to chase.

According with the Ministry of Labour we can recognize 3 different periods of annual paid vacations:

1) A period of 2 weeks that has to be enjoyed during the year of maturation and, on request of the employee, uninterrupted. This request has to be formulated promptly cause the employer needs enough time to coordinate the different needs of the company and of the employees;
2) Another period of 2 weeks that can be also enjoyed in different periods but still during the 18 subsequent months from the end of the year;
3) A third period, larger than the 4 weeks established by Legislative Decree No. 66 of 2003, that can be divided in different periods.

This last period can also be monetized according to the collective agreements.

The Constitutional Court, repealing the original version of the art. 2109 c.c which established that the entitlement to annual paid vacations come to fruition after a year of uninterrupted

service, stated that the annual paid vacations come to fruition day by day in correlation with the provided service.

The ripening of that right cannot be interrupted by the suspension of the work-performance due to illness because the fundamental right established by the Art.36 of the Constitution is not limited to the working activity but it is extended to the entire employment relationship.

10. Specific working time models

10.1. Part time work

Various employment agreements provide for a job performance with reduced working hours compared to a "normal" job contract.

The oldest form of this types of contract is represented by part-time work, nowadays regulated by Legislative Decree No. 81 of 15.6.2015 (replacing Legislative Decree No 61of 2000 which had implemented Dir. 97/81/EC, relevant to the outline agreement regarding part-time work concluded by UNICE, CEEP and CES).

Part-time contract is characterized by a reduced work schedule compared to the normal period provided for by the law or by collective agreements.

The part-time job contract satisfies the needs both of the employers who, by using this contractual form, are able to make use of more flexible manpower, and those of their employees who can, in this way and contextually, perform their work and dedicate time to other exigencies, such as their families and studies.

The part-time contract must be stipulated in writing and contain the precise indication of the duration of the job performance and its collocation (Article 5, par. 1 and 2, Legislative Decree No. 81 of 2015).

This form is required *ad probationem* (Article 5, par. 1).

In the absence of evidence as to the stipulation of a part-time employment contract, at the employee's request, the existence between the parties of a full-time employment relationship may be declared, as from the date when the lack of a written document was legally ascertained (Article 10, par. 1, Legislative Decree No. 81 of 2015).

Also the lack of indication of the duration of the work performance entails the possibility for the worker to request that the employment relationship be considered full-time as from the date of legal ascertainment (Article 10, par. 2, Legislative Decree No. 81 of 2015).

Whenever, on the contrary, the parties have omitted to indicate the collocation of the job performance, the judge will make provision for the determination of the modes of job collocation according to equity, taking account of various elements such as the worker's family responsibilities, his/her need to integrate his/her income by performing other jobs, the employer's requirements (Article 10, par. 2, Legislative Decree No. 81 of 2015).

The regulations applicable to part-time employment contract are those governing subordinate employment: the part-time employee is, in fact, to all effects and purposes, a subordinate worker.

In application of the non-discrimination principle, pursuant to Directive 97/81/EC, the part-time worker must not receive a less favourable treatment than a comparable full-time worker, i.e. the employee classified at the same level pursuant to the classification guidelines established by the collective agreements, merely because his/her work is only part-time (Article 7, par. 1, Legislative Decree No. 81 of 2015).

The application of the non-discrimination principle entails that the part-time employee should benefit from the same rights as the comparable fulltime worker.

Alongside the non-discrimination principle also the so-called "*pro rata temporis*" or re-proportioning applies, according to which the treatment of the part-time worker must be re-proportioned "*because of the reduced entity of the job performance*" (Article 7, par. 2, Legislative Decree No. 81 of 2015).

The re-proportioning principle is not in contrast with non-discrimination but, on the contrary, represents a corollary to the latter, because the equality of treatment cannot disregard the consideration of the effective period of work performance.

Under the limits regulating full-time (see the above examined Art. 3 of Legislative Decree No. 66/2003), supplementary working time, in terms of working hours that exceed the amount fixed in the individual contract, is allowed if provided by the collective agreement (Article 6, par. 1, Legislative Decree No. 81 of 2015).

If this is not the case, the employer may request the worker to work up to a maximum of 25% of the determined working time: in this case, supplementary work entails a 15% increase of the usual pay (Article 6, par. 2, Legislative Decree No. 81 of 2015).

Overtime is also allowed under the same conditions and following the same rules provided for by the law or by the collective agreements in case of full-time employment relationships (Article 6, par. 3, Legislative Decree No. 81 of 2015).

"*Elastic clauses*", in the sense that the employer may request the employee to work longer hours (differences between supplementary and overtime work are unclear in this case) or for a period

of the day, week, month or year that diverges from the one agreed in the contract, may be included within the individual contract if so provided by the relevant collective agreement or if the individual contract is signed before a Certification Commission.

In any case, these clauses shall specify, under penalty of nullity, (1) the duration of the notice period preceding the modification of the working time/period (*minimum* 2 days); (2) the conditions and the way in which the employer can modify the working time/periods; (3) the upper ceiling of the modification, which may not exceed 25% of the working time or periods agreed in the individual part-time contract.

In case the employer uses such elastic clauses, the employee is entitled to specific compensations to the extent and in the forms established by the collective agreements (Article 6, par. 5, Legislative Decree No. 81 of 2015) and, if the clauses' regulation is not contained in the relevant collective agreements, the employee has the right to a wage increase of 15% (Article 6, par. 6, Legislative Decree No. 81 of 2015).

The employee's refusal to sign an elastic clause cannot, in any case, constitute a justified reason for the dismissal of the employee: dismissal would be unlawful and null (Article 6, par. 8, Legislative Decree No. 81 of 2015).

The changeover of the employment relationship from full-time to part-time, under Art. 8, par. 2, Legislative Decree No. 81/2015, needs a formal agreement in writing between the contractual parties, therefore, as a logical consequence, the employee cannot be obliged from the employer to transform his or her employment relationship nor he or she has a right to ask such a modification.

In any case, the refusal of the employee to transform the employment relationship from full-time to part-time and *vice versa* does not constitute a justified reason for the dismissal (Article 8, par. 1, Legislative Decree No. 81 of 2015).

The employee has the right to transform her or his full-time relationship into one of part-time only in case she or he suffers 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 (Article 8, par. 3, Legislative Decree No. 81 of 2015).

Furthermore, in case of entitlement to parental leave, the employee has the right to obtain, only once, the transformation of the full-time employment relationship into a part-time one, provided that the reduction of working time does not exceed 50%: the employer must comply with the employee's request within 15 days (Article 8, par. 7, Legislative Decree No. 81 of 2015).

10.2 Intermittent work (or job on call)

The intermittent employment contract or on call (job on call) was introduced by Legislative Decree No. 276/2003 (Art. 33 and subsequent) and then repealed by Art. 1, par. 45, of Act No. 247/2007.

This peculiar type of employment contract was later reintroduced by Act No. 133/2008 and its regulation was subsequently amended by Act No. 92 del 2012 and by Law Decree No. 76/2013.

Intermittent work is currently regulated by Articles 13 and subsequent of Legislative Decree No. 81/2015 which have replaced the dispositions previously in force without making any significant changes to its regulatory framework.

Art. 13, par. 1, Legislative Decree No. 81/2015, defines intermittent work as "*The contract, also fixed-term, whereby a worker places him/herself at the disposal of an employer who can make use of the relevant job performance discontinuously or intermittently*".

This legislative definition seems to lay emphasis on the availability the worker is obliged to guarantee to the employer.

The legislator has, however, regulated two models of job on call, whereby such availability does not act in the same way: within the first model the worker is obliged to answer the employer's potential call, while the second model provides for no obligation on the side of the worker and leaves the latter free to accept the call or not.

In the first case, the worker is entitled to an availability indemnity, i.e. an indemnity to compensate him/her for remaining at the employer's disposal also in periods when no work is performed (Art. 13, par. 4, Legislative Decree No. 81/2015).

Pursuant to Art. 16, par. 5, Legislative Decree No. 81/2015, unjustified refusal to reply to the employer's call may entail the termination of the employment contract together with refund of the availability indemnity referring to the period following the said unjustified refusal.

In the second model the worker is not liable to the employer in case of unjustified refusal but has no right to any availability indemnity.

The possibility to use the job on call option is subject to objective and subjective restrictions, which operate alternatively.

With respect to the former, the job on call contract can be concluded for the performance of discontinuous or intermittent work services, according to the needs identified by the collective agreements, also with reference to the possibility of implementing the work in predetermined periods over the week, month or year (Art. 13, par. 1, Legislative Decree No. 81/2015).

If no collective bargaining exists, it is up to the Ministry of Labour and Social Policies to regulate by Decree the identification of those cases contemplating the use of job on call (Art. 13, par. 1, Legislative Decree No. 81/2015).

Regarding the latter, the job on call may, however, be concluded, without the aforesaid restrictions, with persons over fifty-five years old or under twenty-four (Art. 13, par. 2, Legislative Decree No. 81/2015).

The rationale underlying this provision is to permit the unencumbered use of this type of contract for persons who, due to their age, find it more difficult to enter or re-enter the job market than most other workers.

Resorting to the job on call option is, however, forbidden for the replacement of workers on strike; at productive units where, in the six previous months, collective dismissals have been implemented or wage support measures have been applied; to employers who have not performed risk assessments (Art. 14 Legislative Decree No. 81/2015).

Without prejudice to tourism and entertainment sectors and public entities, "*Jobs on call are permitted for each and every worker with the same employer, for a total period not exceeding four hundred days of effective work over three calendar years*" (Art. 13, par. 3, Legislative Decree No. 81/2015).

Should the foregoing period be exceeded, the employment relationship will be transformed into full-time and permanent (Art. 13, par. 3, Legislative Decree No. 81/2015).

The job on call contract must be stipulated in writing.

The form required is *ad probationem*, in order, more precisely, to provide evidence of a series of features such as: indication of the duration and the objective or subjective cases which permit the stipulation of the contract; place and modes regarding availability, if guaranteed by the worker, together with relevant prior notice of call which may not, however, be less than one day; financial and normative treatment accorded to the worker and potential availability indemnity; indication of the forms and modes whereby the employer is legally allowed to request the job performance and if the ways of verifying such performance; times and modes of payment of remuneration and the availability indemnity; potential, specific safety measures needed with respect to the type of activity indicated in the contract (Art. 15, par. 1, Legislative Decree No. 81/2015).

The regulation of job on call is the same as the legislation governing subordinate employment relationship, but only as regards the "*working periods*", i.e. those periods when the worker effectively performs his/her job.

Pursuant to the non-discrimination principle, in fact, the on call worker "*shall not receive, for the working period, any financial or legislative treatment substantially less favourable in comparison to same-level, same-duties workers*" (Art. 17, par. 1, Legislative Decree No. 81/2015).

The non-discrimination principle must be balanced with the "*pro rata temporis*" standard, whereby the worker's financial and normative treatment must be re-calculated on the basis of the service effectively performed (Art. 17, par. 2, Legislative Decree No. 81/2015).

In those periods when the worker performs no wok at all, he/she has no rights whatever, without prejudice to the case where he/she has undertaken to guarantee his/her availability to the employer (Art. 13, par. 4, Legislative Decree No. 81/2015).

The entity of the availability indemnity must be indicated in the individual employment contract. This is established by the collective agreements and may in no case be less than the amount provided for by the Decree of the Ministry of Labour and Social Policies, after consultation with the employees' and employers' associations, comparatively most representative at a national level (Art. 16, par. 1, Legislative Decree No. 81/2015).

With respect to the availability indemnity, it is not clear whether this is to be considered remuneration or not.

The fact that it is subject to contributions, albeit without the obligation to comply with the minimum sums provided for by the provisions currently in force, would seem to corroborate the first hypothesis (Art. 16, par. 3, Legislative Decree No. 81/2015); whereas, the second case points to the exclusion of such indemnity from the computation of each and every institution of law or collective agreement (Art. 16, par. 2, Legislative Decree No. 81/2015).

The current regulation of intermittent work does not provide for any kind of exclusivity clause in favour of the employer.

10.3. Night work

Legislative Decree No. 66/2003 lays down a special regulation of night work, starting from a specific definition of the concept.

Firstly, under Art.1, par. 2, lett. e, no. 1, it is considered as night work the activity performed during night time for at least three daily hours on a regular basis.

Secondly, under Art.1, par. 2, lett. e, no. 2, the night worker is the one who executes a share of his working obligation during night time according to the rules laid down in collective agreements, or, in the lack of a collective regulation, for at least three hours calculated on a minimum basis of 80 working days.

This last limit is adjusted proportionately in the case of part-time workers.

Night time is, for the purpose of the law, the period of at least seven consecutive hours that includes the lapse between midnight and 5 am.

The activation of night shifts is possible pursuant to a consultation with works councils or local trade unions.

Furthermore, the public inspectorate shall be informed (Article 12 of Legislative Decree No. 66/2003).

In any case, working time of night workers must not exceed an average of 8 hours in a given 24 hours' period, provided that collective agreements do not establish a different period for the calculation of the average.

Italian legislation provides that collective agreements shall define the requirements of the workers who can be excluded from the obligation to perform night work.

It is forbidden, anyway, to assign women to night duty from midnight to six o'clock in the morning during the period between the ascertainment of pregnancy and one year following the childbirth.

Furthermore, the below listed employees can refuse to carry out night work, by a communication in written to the employer within 24 from the beginning of the performance (Art. 18*bis*, par. 1, Legislative Decree No. 66/2003).

These persons are:

- female workers with a child under 3 years;
- a working father living with a female worker in the above mentioned condition;
- a male or female worker who is the only parent taking care of a child of under 12, living with him or her;
- a male or female worker with a disabled person in his/her care.

According to criteria and modes provided by collective agreements, the introduction of night work must be preceded by the consultation of the union representative bodies within the company, if constituted, or, otherwise, with the territorial trade unions (Art. 12, Legislative Decree No. 66/2003).

Moreover, the employer must inform annually the supervisory services of the competent public authority on the execution of night work performed in a continuative way or included in regular periodic turns, unless provided by collective agreements.

Night workers have the right to a free health assessment and so the employer, through the competent public health bodies or through the so called "*competent doctor*", introduced by the Italian legislation on health and safety (Legislative Decree No. 626/1994, now Legislative

Decree No. 81/2008) must evaluate the state of health of night workers through preventive and periodicals controls, at least every two years, aimed to verify the absence of contraindication to the night work in which the worker is employed. In case night workers suffer unfitness for the night work verified by the competent doctor or the public health authority, the worker has to be transferred to the day work, in equivalent tasks, if existing and available.

If collective agreements do not provide for any solution and there is no alternative day work available, the employer can dismiss the employee for "*objectively justified reason*".

According to the meaning of Art. 14, par. 1, of Legislative Decree No. 66/2003, in order to protect their health, night workers must undergo preventive and periodical checks, paid by the employer, and their working performance must be paid complying with several duration limits, according to the provisions of Art. 13, par. 1, of the same Decree.

Regarding duration limits, the law is not totally clear because it establishes that the working time of a night worker may not exceed eight hours on average in the 24 hours, but it allows collective agreements to pick a larger reference period to calculate the limit.

In this way, collective agreements could calculate the average of 8 hours over a very wide period, with obviously harmful consequences on the night workers' health.

The protection of night workers' health therefore depends, for the most part, on periodical medical checks, whose only aim is to verify that there are no contraindications to night work.

For that reason, if the doctor finds the onset of inability to work at night, the worker, at this point unsuitable, will be assigned to day work in another equivalent task, if existing and available, as provided by Art. 15.

If there is a lack of equivalent tasks, it is up to collective agreements to locate a solution (Art. 15, par. 2) and, regardless of its regulatory intervention, in case of lack of equivalent tasks the worker may be even assigned to lower duties, if this is the only alternative to justified sacking/dismissal for objective grounds that, in accordance with the principles developed by the case-law, is legitimate in case of onset of inability and impossibility to employ the worker in different tasks.

The Decree does not arrange anything, instead, for the case in which the temporary inability to work at night shots *ope legis* for worker mothers, as provided by Art. 15, par. 2, which prohibits in all cases to assign women at work from midnight to 6 a.m. from the cognition of the state of pregnancy until the child turns one.

Therefore, in this case, the principle codified in Art. 7 of the Legislative Decree No. 151/2001 applies under which physically demanding work as well as dangerous and unhealthy ones are

prohibited, and hence the worker mother has to be assigned to other tasks even if they are lower, with the warranty of the maintenance of the wage level.

Moreover, if the transfer is not possible, the Decree provides the ban/exclusion from work for the whole time of the prohibition, with the right to a compensation in the amount of 80% of the wage.

The *fil rouge* of the legislation on working mothers is therefore constituted by the rest warranty, with an adequate wage treatment, in all cases in which the woman cannot or should not work in order to protect her motherhood.

Moreover, Art. 11 of Legislative Decree No. 66/2003 provides, at letters a), b) and C), a "*non obligation*" of night work, in case of family and care needs not necessarily linked to the physical fact of maternity, nor directly necessities of protection of the workers' health.

From this it can be therefore seen that certain workers, depending either on law or collective agreements, are not forced to perform night work; however, neither the directive nor the decree do speak out about the obligations imposed on other employees.

According to the dominant doctrine and case law, in case of transfer of the working performance within the daytime, the employer has wide discretion to set and vary unilaterally the distribution of working time through the exercise of its directorial power (with the exception of the part-time contract).

The majority of the doctrine states that the same rule applies also to the transfer from daytime work to the night one, while Legislative Decree No. 66/2003 does not contain any rules in order to establish general limits to the power of the employer to assign employees to night work, as the "right of precedence" to perform night work for workers who did request it, provided for by the Legislative Decree No. 532/1999, now repealed.

From an analysis of the whole discipline of the Decree, in which it is however emphasized the deep difference between day work and night work, especially in terms of incompatibility of night work with family needs of the worker, we can however deduce a general obligation to night work without an agreement between parties being necessary, from which are exonerated only the subjects specifically mentioned in paragraph 2 of Art. 11 (e.g. working men and women who are the only parent with custody of a cohabitant child under the age of 12).

An indication in the sense of an obligation of night work, without the need of a prior agreement, comes also from Art. 12 of the Decree, which does not require the collective agreement even for the introduction of night work, providing, for this purpose, only the consultation of company trade unions.

Collective agreements in general confirm the compulsory nature of night work if required, unless the worker adduces a "justification" to shirk from this responsibility.

The current regulation of night work entrusts to collective bargaining the possible definition of reductions in working time or of economic compensations for night workers (art. 13.2 d. lgs. 66/2003). The rule must be interpreted in the sense that the collective bargaining may choose compensatory tools of night work either in an alternative or cumulative way but, in case of lack of provision by collective agreements, the worker will nonetheless get a bonus pay, due to the more cumbersome nature of night work and regardless of the execution of the night work in regular periodic shifts, in application of the principle of proportionality enshrined in art. 36 Const.

10.4. Sunday work

As we have underlined above in this report, Sunday work is allowed in our legal system because the 24-hour weekly rest period can be shifted to another day in several cases.

Workers employed on Sundays are entitled to a compensatory rest in principle of 24 consecutive hours, which can be reduced for special categories of workers and activities.

Moreover, work on Sundays is generally paid with a special increase in the wage rate (e.g. for metalworkers 50%).

However, this increase is not due whenever the collective agreements provide for shift workers, who perform Sunday work, an overall treatment more favourable than that of the other employees, even only in terms of fruition of more rest days (Corte di Cassazione, ruling 19.10.2001, no. 12852).

10.5. Week-end work

According to the definition contained in the note of the Ministry of Labour of 12 July 2004, weekend is "*the period that goes from Friday afternoon, after 1 p.m., until 6 a.m. of Monday morning*".

Weekend work is allowed in the Italian legal system and it can be provided both in part-time contract and in the intermittent work contract whose regulation, as we have seen, explicitly refers to weekend work or work in given periods (e.g. summer holidays, Christmas holidays, etc.).

10.6. Holiday Work

Acts 260 of 1949 and 90 of 1954 recognized four national holidays (25 April, 1 May, 2 June and 4 November) and 11 other holidays, plus usually the patron saint's day.

Five of these holidays have been abolished by law (Act. No. 54 of 1976), with the consent of trade unions, in order to increase the number of hours worked yearly and particularly to reduce the phenomenon of "after holiday" absenteeism.

At present, after the dispositions introduced by Act No. 792/1985 and Act No. 336/2000, the recognised holidays are 12 (7 religious and 5 civil).

Workers paid by the hour, at rest during these days, receive regular pay while work done on these days -for technical or organisational reasons- is remunerated with a wage increase equal to that fixed for work on Sundays.

When these holidays fall on Sunday the workers receive double pay.

As far as holiday work's wage is concerned, we need to make some further clarifications.

Concerning the worker paid in established amounts, in fact, holidays should be paid with the total daily remuneration including any optional element and, if the holidays coincide with Sunday, with an additional daily fee of remuneration, as far as the holidays concerned are national holidays as the Republic anniversary -June 2- or the Labour day -May 1- (Art. 5, par. 3, Act. No. 260/1949, as replaced by Article 1 of Act 31.3.1954, No. 90).

In any case, the worker who lends his activity during national holidays shall be entitled to the remuneration for the actual amount of work paid, with the bonus for holiday work.

If the worker is paid by hour, instead, it is recognized the right to the regular daily remuneration including any optional element, adjusted to a sixth of the weekly working time established by the contract or, if missing, by the law.

The right concerned is always due for the holidays of April 25, May 1 and June 2, while for the remaining holidays it is due only if there is not a work suspension for more than two weeks (Art. 5, par. 1, Act No. 260/1949, as replaced by Articles 1 and 3 of Act No. 90/1954).

At the same time, in case the holidays coincide with Sunday, the daily wage must be increased with a further amount of a sixth of the weekly time (Corte di Cassazione 16.7.2002, no. 10309), all of this without prejudice to the right to the increase of remuneration on the basis of the extent provided for by collective agreements in case of holiday work, albeit limited to the actual amount of work paid (Corte di Cassazione, 28.7.2004, n. 14266).

In both cases, that is concerning both the worker paid in established amounts and that paid by hours, nothing prevents the collective discipline from considering chargeable, for the purposes of the specification of the remuneration for holiday work: the bonus for night work lent according to periodic scheduled shifts (lent uninterruptedly); additional monthly salaries; the fees paid for non-accidental, but normal and constant, activities programmed by the employer on

the basis of periodic shifts; meal allowance; collaboration and production prizes (even if paid with annual periodicity).

Moreover, besides the questionable relevance of the remuneration for overtime fixed and continuous or with a lump-sum payment, there is no way company awards, occupational allowances and locomotion cost can be considered chargeable, as long as the collective discipline ensures to the worker, by fixing a higher increase rate of, a better treatment than the one achievable by adopting the legal parameter.

The right to rest on public holidays is not considered as absolute, because it is not expressly sanctioned by the Constitution alongside to the right to a weekly rest period and the right to have annual paid leaves provided for by Art. 36.

Nevertheless, the worker can refuse the work performance required by the employer.

This means that even if he refuses to provide work, the employee does not lose the right to receive the normal wage, which therefore must be regularly paid by the employer.

Nor, in the same way, he may be sanctioned for unjustified absence, since the presence at work on public holidays is a free choice of the worker, who cannot be forced to work.

Such protection is expressly and unanimously recognized by the case law (Corte di Cassazione 8.08.05 no. 16634;15.09.97 no. 9176) and by the doctrine which, while acknowledging the absence of an express prohibition of holiday work, states that this eventuality is implicitly provided for by the legislation regarding the remuneration increase in case of actual work in these days.

Moreover, the right just outlined is not mandatory: the worker can in fact give up the enjoyment of the holiday and decide to work on these occasions.

The employer may therefore require the performance but the actual performance of the activity can only occur in the presence of a specific agreement between the parties.

The exceptions to the prohibition of Sunday work are in fact not applicable, even if in an analogue way.

10.7. Shift work

Legislative Decree No. 66/2003 defines shift work as "*any method of work organization, even team work, according to which workers are then employed in the same work tasks according to a certain pattern, including a rotary rhythm, which may be continuous or discontinuous, and that entails the need, for workers, to work at different times over a given period of days or weeks*" (Art. 1, par. 2, letter F).

According to the meaning of letter e) of the same article, shift worker is defined as "*any worker whose working time is inserted in the framework of the shift-work*".

The power of the employer to decide when to resort to shift work, to establish the number of shifts and their subdivision between workers, to distribute the working time throughout the day and week and to establish the rest day is justified by the prerogative to conform the working performance to the organization's needs.

What we are talking about is a legal power in the strict sense which, even if exercisable at its discretion for the protection of personal interest, is nonetheless subjected to a number of limits to protect the worker.

There are, in fact, several constraints that affect the organizational activity of the Entrepreneur: we are talking about procedural and substantial constraints, directly detectable in the Constitution (taking for granted that rules about substantial equality protection, conditions of dependent employment, trade union freedom and private economic initiative do work even within private relationships).

More constraints can also be found in the provisions of the Workers Statute (Act No. 330 of 1970) and in the general clauses of good faith and contractual fairness, even if they are used as an autonomous technique of fulfilment check, instead of clarification instruments to achieve a better knowledge of accessories commitments.

From these clauses we acquire a number of obligations whose aim is to circumscribe the exercise of the employer's power under certain perspectives of abuse, arbitrariness or manifest iniquity: let's consider for example the obligation to motivate a single decision, or the one to apply predetermined self-organization rules and to comply with the directives of the legal system (such as social consciousness, generally observed uses and the ethical values of a given historical moment).

From the reference to the principles enshrined in articles 1175 and 1375 of the Civil Code, it is also deduced the *congruence with the organization and with business needs* as a parameter to judge the legality of the employers' choice to establish availability rounds and to provide an objective allotment parameter such as the turn limitation for workers with least seniority.

All of this, while allowing, only where required by the organization and to compensate sudden lacks, the recourse to a reserve of employees which, in availability shifts, provide a work performance within non rigidly predetermined times, seems however to exclude the existence of an amending power of working performance placement, if not in the presence of an objective reason, namely in case of specific business needs, punctually deducted and proved by the employer (we remember, in this regard, the ruling of the Corte di Cassazione no. 597/1987,

which grants to the entrepreneur, by exercising the organization powers provided by articles 2086, 2094, 2104 of the Civil Code, the chance to modify, for business needs and paying respect to contractual agreements, the working performance execution way and the working activity distribution throughout the day and week).

All of this, by undermining the generally assumed existence of an unlimited *ius variandi* regarding the working time distribution, save the occurrence of specific agreements in regards to it, could lead to configure the time location of the work performance as a qualifying characteristic of the work obligation, that can only be amended with an individual or collective disclaimer, and without prejudice, in the absence of textual information, of the common intention of the parties as it can be deduced from the evaluation of the overall behaviour, even if it follows the contract's stipulation (Art. 1362 of the Civil Code).

These conditions and constraints, imposed on the employer, therefore have the purpose of protecting the worker interest in knowing in advance temporal coordinates of his specific daily commitment, to be able to program the time of his life, especially considering the disappearance of the maximum limits about both normal and extraordinary daily timetable, beyond that of the obligation of divulgation, originally arranged by the Art. 12 of the Decree No. 1955/1923.

Moreover, it does not have to be forgotten that, to date, production has to increasingly adapt to the ever changing demands of the market which sometimes imposes in some adaptation rhythms which were once unknown.

But, despite the purpose of this legislation is the worker protection, this aim seems to be contradicted by the corollary that the space beyond working time, whose role is to allow psychophysical energies recovery and familiar, cultural and social relationships development, remains circumscribed, also because of the availability to provide work at times that are not strictly predetermined, since the shift, with the predetermined parameter of seniority, is inscribed in the very structure of the performance.

But the possibility of a performance provided without a predetermined working time is an exception with regard to the recognition, by case law, of the obligation to communicate to workers their shift with a reasonable advance in the case of its variation, on penalty of the compensation of the damage suffered.

This exception is in fact justified by the occurrence of business needs, due to sudden absences of work providers, and from the pre-constitution of a shift allotment criterion based of availability, that must be nonetheless negotiated with trade unions, in full respect of the general clauses of good faith and fairness.

Beyond these reliefs, it is clear that, even if we recognize the employer power to adjust the working performance to business needs, save the occurrence of different agreements, the worker is not obliged to the continuation of his or her shift, when in the transition from one working shift to another, the following session man is absent, because in this case there is no force majeure that legitimates the protraction of the normal working hour (Corte di Cassazione, ruling 24.7.1984, no. 4336).

The worker session man shall then be entitled to daily and weekly rest period.

The duration of the daily rest must be maintained intact, in both the day that precedes and follows weekly rest period, while the consecutive nature of the 24 hours of weekly rest period can be waived in case of "*shift work, every time the worker changes shift or team and cannot benefit, between the end of a shift or a team and the beginning of the following one, of periods of daily or weekly rest*" (art. 9, par. 2, of Legislative Decree No.66/2003, as amended by Article 41, par. 6, Decree Law No. 112/2008).

As far as night work is concerned, instead, to calculate the wage increase, it is essential to establish whether the night work performance is included in regular periodical shifts: in this case, in fact, the wage increase provided for by collective bargaining constitutes an integral part of normal remuneration and therefore the sums paid to the worker for leaves, holidays, Christmas bonus or as severance grant shall be calculated taking into account this increase as well (Corte di Cassazione, ruling 2.12.1999, no. 13440).

11. Debates about working time issues

No particular debate is currently underway in Italy about working time issues.

We can, anyway, report an interesting, recent case regarding the transposition of the EU Directive on working time in Italy.

The European Commission had, infact, opened an infringement procedure (No. 2011/4185) against Italy for failing to apply correctly the Working Time Directive to doctors in public health services (“reasoned opinion” sent in May 2013 - MEMO/13/470 and subsequent referral to the CJEU of February 2014).

Under Art. 41, par. 13, of Law Decree No. 112/2008, in fact, several key rights contained in Legislative Decree No. 66/2003 (implementing Working Time Directive) such as the 48-hour limit to average weekly working time and minimum daily rest periods of 11 consecutive hours, did not apply to "managers" operating within the National Health Service.

The Directive 2003/88/EC does allow Member States to exclude "*managing executives or other persons with autonomous decision-taking powers*" from these rights.

However, doctors working in the Italian public health services are formally classified as "managers" without necessarily enjoying managerial prerogatives or autonomy over their own working time.

In addition, Italian law contained another provision (Art. 17, par. 6 *bis*, of Legislative Decree No. 66/2003) that excluded workers in the National Health Service from the right to minimum daily rest.

In order to avoid the continuation of the infringement procedure by the European Commission, Italy has repealed, with Art. 16 of Act 30 October 2014 No. 161, both the above mentioned provisions which contained derogations to the rules established by Legislative Decree No. 66/2013.

As a result of these modifications of the national legislation, in the month of December of 2014 the European Commission has decided to close the infringement procedure.