EWL STUDENT SEMINAR 2022

UNIVERSITÀ DEGLI STUDI DI NAPOLI PARTHENOPE

COVID-19: A pressure test for Occupational Health and Safety (OHS).

1. The legislative framework for the employers' obligations to ensure OHS with a reference also to working time.

In Italy, work is a right recognised and protected by the Constitution, the primary source of our legal system as provided by the **art.1** *"Italy is a democratic Republic founded on labor […]",* but especially the **art.4** states that *"The Republic recognises the right of all citizens to work and promotes those conditions which render this right effective. Every citizen has the duty, according to personal potential and individual choice, to perform an activity or a function that contributes to the material or spiritual progress of society".*

Another fundamental right recognised by our **Constitution (art. 32 Cost)** to all citizens, and with a particular reference to workers, is the right to health: there is, therefore, a close and inevitable correlation between work and health protection.

The occupational health and safety (**OHS**) obligation falls primarily on the employer as established by our *Civil Code* (1942) at the **article 2087**.

Employees, who claim to have contracted an illness or suffered an accident in the course of their work, may bring an action against the employer, if the damage suffered is the result of the OHS obligation's breach, as provided by the art. 2087 of the Civil Code. Indeed, it prescribes the employer's obligation to take every measure needed, in order to protect workers' physical and moral integrity.

On the other hand, the importance accorded by our national sources to the occupational health and safety must be harmonised with the ones at European level. The main international sources are:

- The **article 31** of the *Charter of Fundamental Rights of European Union,* which deals with workers' dignity and introduces a maximum amount of working hours to provide workers' physical and psychological wellness.
- The **article 153** of the *Treaty on the Functioning of the European Union* (*TFEU),* concerning the improvement of the working environment to protect workers' health and safety and the representation through collective defence of the interests of workers and employers. Aimed to achieve all this, the member States of the European Union shall improve:
  - working environment;
  - working conditions;
  - social security and social protection of workers;
  - protection of workers in the event of termination of the employment contract;
  - information and consultation of employees;
  - integration of people excluded from the labor market;
  - equality between men and women with regard to labor market opportunities and treatment at work.

Source www.softstrategy.it

- The **Directive 89/391/EEC**, which pursed the OHS compliance by setting general principles concerning: the prevention of occupational risks; the elimination of risk and accident factors; the information, consultation and participation, in accordance with national laws and/or practices, of workers and their representatives. This directive also lists the essential obligations of the employer and the worker. It was transposed in Italy by the **Legislative Decree 626/1994**, later amended by the **Legislative Decree 81/2008** (*Consolidated Act on safety in the workplace),* then implemented by **Legislative Decree 106/2009** (re-enforcing sanctions for employers who do not comply with their obligations).

The main purpose of Legislative Decree 624/1996 was bringing Italy on the same level of other European countries.

It was replaced by the *Consolidated Workplace Safety Act* 81/2008 and the most important changes compared are:

- the introduction of criminal sanctions in case of transgression of the legislation;
- the introduction of the Workers' Safety Representative, who can inspect the company's premises and safety-related documents;
- the obligation for employers to draw up a risk assessment document.

A further tightening of penalties for the violation of the above-mentioned obligations was accomplished by the Legislative decree 106/2009: in addition to the duty of information, the employer must supervise and check workers' compliance with accident prevention rules.

The employer can also designate specific persons to whom delegate the OHS obligations, but he must supervise on their activities.

However, some obligations cannot be delegated, such as: the risk assessment, the drawing up of the Risk Assessment Document and the appointment of the Head of Risk Prevention and Protection

Services. Moreover, because of the pandemic, SARS-CoV-2 has been officially included in the list of biological agents subject to risk assessment in the workplace.

- The **Directive 2003/88/EC**, which introduced measures regarding working time that must be applied to both public and private sectors. This directive was implemented in Italy by the **Legislative Decree 66/2003**, which provides a minimum daily rest-period of 11 consecutive hours every 24 hours. While normal working time is set at 40 hours per week and collective agreements may establish a shorter duration and refer to the average duration of work over a period not exceeding one year.

2. The specific requirements on the Individual workers' cooperation to the fulfilment of OHS in the pandemic

As affirmed previously, the obligation to ensure OHS majorly relies on the employer. Originally, the worker was, indeed, a safety creditor, addressee of the measures adopted by the employer. However, over the years the legislator's intervention evolved in a direction of greater involvement of the employees, in order to guarantee the maximum safety level in the workplace.

With the **Directive 89/391/EEC**, the employee has taken an active and fundamental role in prevention policies. The European directive was implemented in the Italian legal system with the **Legislative Decree 626/1994**, whose article 5 provides that the employee may hold an independent position of guarantee of OHS.

In this way, the worker becomes a joint participant, alongside the employer, in the obligation to ensure OHS, also with regard to colleagues and third parties who, according to the circumstances, can be found in the workplace. The omission to cooperate constitutes culpable conduct of the worker, which can be detected in court.

On the other hand, if the employer defaults in ensuring OHS, the workers have the right to evade situations of risk, also denying their work performance. According to the case-law, the employees' refusal to perform their job is legitimate, due to the synallagmatic nature of the employment contract. Key rule of this principle is the article 1460 of the Italian Civil code, the "objection to the non-fulfilment", which provides that each of the contracting parties can refuse to fulfil their obligation, if the other does not fulfil or does not offer to fulfil their own obligation at the same time.

The Legislative Decree 626/1994 was, then, replaced by the **Consolidated Workplace Safety Act 81/2008**. The article 20 of the Act, entitled "worker's obligations", prospects a general collaborative and prepositive quality of the employer, which has to characterize the practice of prevention implemented by the employer and the employee together.

During the pandemic the collaboration to ensure OHS, between the employer and the workers, become more and more necessary. To prevent the spread of Covid-19 in the workplace, the Italian legislator relied on tools already available in the legal system, adapting them according to the situation of extraordinary emergency, or introducing new containment measures, first at local then at national level.

Official INAIL website: graphical information on infections reported to the Institute as of 21 April 2020 by gender, age group, Region and occupation

- SMART WORK

At the beginning of March 2020, it became clear that the most efficient way to maintain certain activities was to work at home.

For some years now, the Italian legal system has recognized, by the **Act 81|2017**, the so-called "smart work" (lavoro agile) or flexible work, defined as a subordinate work modality without place or time constraints. In order to implement flexible work, an individual agreement between the employer and the employee is originally required, thus excluding any unilateral decision by either party. However, during the state of emergency, it did not seem realistic to go through individual negotiation processes, therefore, the government decided to allow flexible work without prior individual agreement. The employer has to guarantee the health and safety of the worker who performs work in agile mode. The worker has the right to protection against accidents at work and occupational illnesses dependent on risks connected to the work performed outside the company premises and with the use of technological devices.

- VACCINE REQUIREMENTS

After the approval of vaccines by the competent European and national
health authorities, the legislator has provided for the establishment of a national strategic vaccination plan to be adopted by the Ministry of Health, with the aim of achieving the highest possible level of vaccination coverage.

Since October 15, 2021, the legislator requires for the access to workplaces of any kind a "health pass", the so-called **Green Pass COVID 19**. The "health pass" can be obtained by any person: a) fully vaccinated; b) cured of Covid 19; c) tested negative. In the first case, the validity period of the "pass" is 12 months; in the second, 6 months; in the third, 48 hours. Therefore, workers who have not obtained the "health pass" are not admitted to the workplace and are considered absent without authorization. They are suspended from work and deprived of their pay, but their absence cannot be considered a fault or a legitimate reason for dismissal.

- FRAGILE WORKERS

The emergency situation highlighted the need to protect psychophysically vulnerable workers, such as severely disabled and immunocompromised people, who are now considered "fragile" because of the additional dangers and risks generated by the pandemic. A set of support measures has been put in place by the legislator: by providing that "vulnerable workers" would carry out their activity in agile work, even if this implied assigning them to a different task within their professional category or participating in specific training activities, possibly online.

Moreover, periods of absence from work for "vulnerable workers" related to health emergencies cannot be taken into account when calculating the maximum period of absence due to illness.

- PROTOCOLS

The 24 April 2020, the **"*Common regulatory protocol for measures to combat and contain the spread of the Covid-19 virus in the workplace*"** signed on 14 March 2020 was supplemented upon proposal of the President of the Council of Ministers, the Minister of Economy, the Minister of Labor and Social Policy, the Minister of Economic Development and the Minister of Health. It contains guidelines shared between the Parties aimed at facilitating companies in the adoption of anti-contagion safety protocols.

The prosecution of production activities can only take place in the presence of conditions that ensure adequate levels of protection for the workers. Failure to implement the Protocol shall result in the suspension of the activity until safety conditions are restored. The main aim is to combine the continuation of production activities with the guarantee of healthy and safe working environments and working methods.

3. The role of workers' representation within the undertaking and collective bargaining in the view of ensuring the OHS rights and duties during the pandemic

The Protocol of 24 April 2020, already mentioned previously, regulates measures to combat and contain the spread of Covid19 virus in the workplace.

The company shall inform all workers and anyone entering into the company's premises about the provisions of the Authorities, delivering and/or posting at the entrance and in the most visible places, special information leaflets. In particular, the information shall concern:

- The obligation to stay at home in case of fever or other flu symptoms;
- The commitment to comply with all the provisions of the Authorities and the employer when entering in the company, such as the use of the mask, the use of hand cleansing agents and the maintenance of a safety distance of one meter;
- The commitment to inform the employer of the presence of any flu symptoms promptly and responsibly during the performance of the work;
- The company shall ensure the daily cleaning and periodic sanitization of premises, workstations and common areas.

Limited to the period of the emergency, companies may, with reference to the provisions of the national collective bargaining agreements, use smart work for all those activities that can be carried out at home or remotely. In accordance with the article 9 of the **Act 300/1970** (which provides that workers, through their representatives, have the right to monitor the application of the rules set for the prevention of occupational accidents and diseases and to promote the research and implementation of all appropriate measures to protect their health and physical integrity) Italy has adopted a series of controls such as: preventive visits, visits on request and visits upon return from illness.

On 6 April 2021, following a new discussion between the Ministers and the Social Parties, it was approved a new Shared Protocol, which became effective on 21 May 2021. The approach and the structure of the "new" Protocol are identical to the text of the previous Protocols. However, the update was necessary to incorporate into the document the changes and the evolution of the increased knowledge of SARS-CoV-2 virus and its spread, with particular regard to workplaces. The Protocol ensures that the continuation of production activities can only take place in the presence of conditions that guarantee adequate levels of protection for workers. Failure to implement the Protocol results in the suspension of activities until safety conditions are restore.

GLC Europe: Safety in workplace and personal values.

4. OHS authorities, grievances procedures, practitioners.

The regulator's role in setting and enforcing the adoption of basic standards is fundamentally important to ensuring the health, safety and fair treatment of workers and the productivity of workplaces. Therefore, it's important for occupational health and safety (OHS) systems to know what will best achieve this.

In Italy, the institutional system of safety and health at work comes under the Ministry of Labour and Health, in conjunction with the Regional Coordination Committees and the social partners. Their responsibilities include delivering advice for legislative developments, supervision, promoting health and assisting businesses.

The National Information System for Prevention in the Workplace is charged with guiding, planning and evaluating the effectiveness of prevention against accidents and occupational diseases and with steering supervisory activity by expanding specific archives and creating unified databases.

But when the OHS obligation is not efficiently complied, grievances procedures come to the aid of the worker. A grievance is generally defined as a claim by an employee that he or she is adversely affected by the misinterpretation or misapplication of a written company policy or collectively bargained agreement. A grievance procedure is a means of internal dispute resolution by which an employee may have his or her grievances addressed. Within a union environment, the processes will typically involve the employee, union representatives and members of the employer's management team.

Grievance processes may differ somewhat from employer to employer and under various collective bargaining agreements. However, most will have certain general processes in common.

Grievances are brought to the employee's immediate supervisor. This may be either an informal process or the beginning of the formal process. Generally, there will be a requirement that the grievance be submitted in writing using a grievance form. Usually, the supervisor and the union representative will review the grievance to determine whether it is valid or not. Also, most grievance procedures will require that the submission occurs within a specified timeframe following the event or incident.

Three possible outcomes may occur at this stage of the process:

1. The supervisor and the union representative may determine that no valid grievance exists;

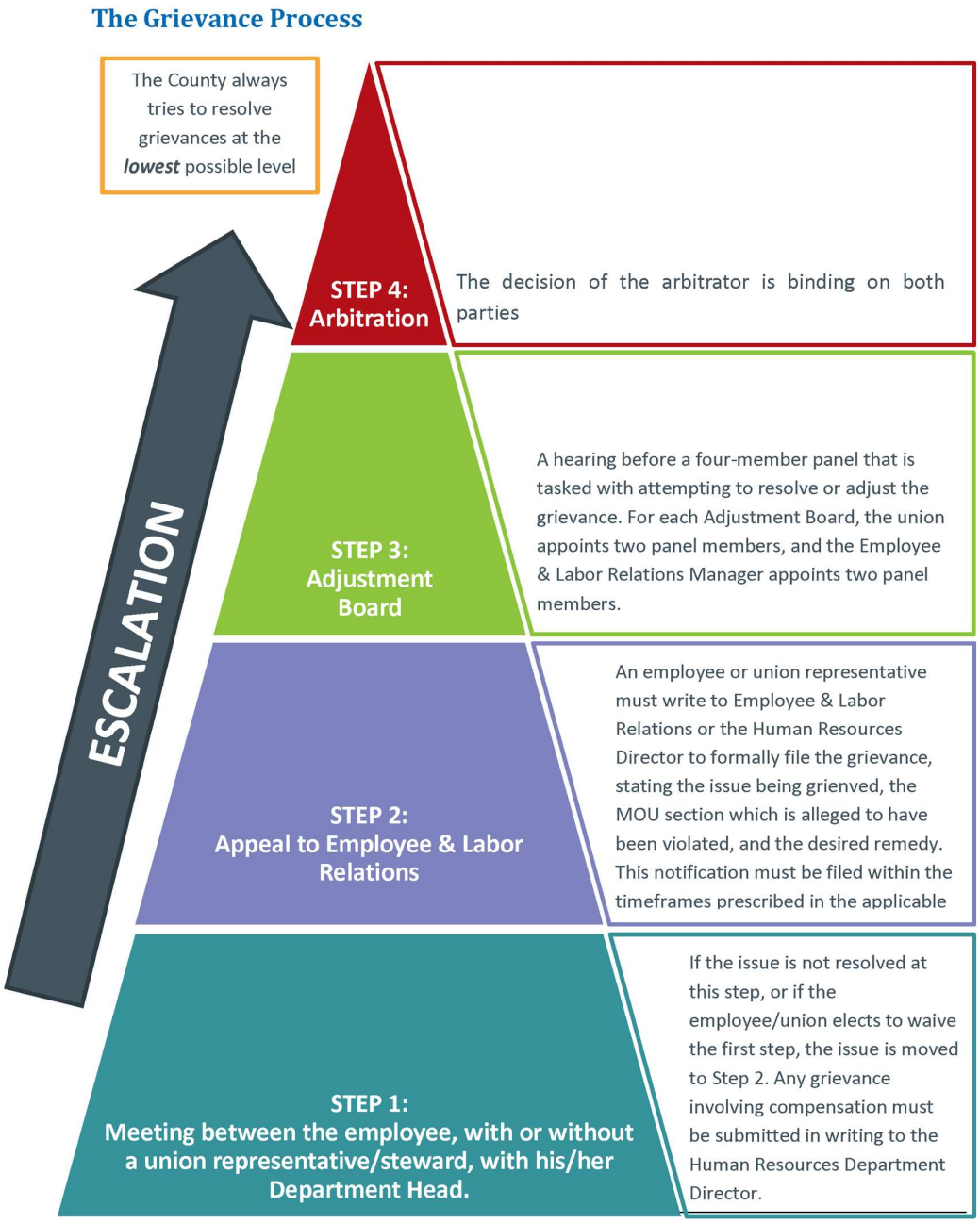
2. The grievance may be resolved;

3. The grievance may not be resolved to the employee's satisfaction, so it will move forward to the next step in the process.

The next step typically involves the next level of supervisor in the company hierarchy. In most union environments, the employee will be represented by the union and is not present in the review process. A failure to resolve the grievance will lead to a further step in the grievance process.

The third step in the process will lead to a review by an even higher level of company management and potentially a higher-level union representative. Ultimately, the grievance may reach the highest levels as set forth by the contract.

If the grievance remains unresolved through the highest levels of management within the company, many procedures include a provision by which an outside arbitrator may be called in to resolve the issue.



County of San Mateo Human Resources Department Employee & Labor Relations: The Grievance Process

5. Sanctions and responsibilities for the violation of the safety obligation.

The workers' safety and the discipline relating to its violation have always been an essential point in labour legislation.

The first attempt is represented by the **Act 80/1898**, with whom the legislator introduced the employer's obligation to provide accidents insurance, if they had occurred during the working hours, because of a "violent cause", and their consequences lasted more than five days.

Since this first try, the legislative framework has grown further.

As explained above, in 2008 the Legislative Decree no. 81 (replacing the Legislative Decree 626/1994) has revised the sanctioning system which is now based on the "contravention". The decree, beyond indicating a series of duties for the employer, provides a series of heavy sanctions if the obligations aren't complied.

Indeed, the employer is punished with the arrest from 3 to 6 months or with a fine ranging from 2.500 Euro to 6.400 Euro, when:

- the risk assessment document is not adopted;
- the subject in charge of the prevention and protection service is not appointed;
- the training, foreseen by the law if the employer decides to personally take care of OHS, is not followed.

Specifically, it provides that the preparation of the general risks' document must follow specific procedures and, above all, must collected and evaluate a series of elements necessary to identify the risks to the health of workers. If these procedures are not observed, the employer faces a criminal sanction, from 1,000 euro to 2,000 euro. However, if he has not conducted (or has conducted incompletely) the risk assessment and has not correctly drawn up the risk assessment document in highly dangerous companies, the penalty changes into imprisonment from 6 months to 18 months.

In addition, the art. 55 provides for a long series of criminal sanctions that usually are followed by heavy administrative sanctions, to make the system more effective and therefore to encourage companies to adopt any better protection for their employees. Among these, we can mention in particular:

1. the suspension or revocation of authorizations, licenses or concessions which were used to commit the violation
2. the prohibition to contract with the public administration;
3. the exclusion from facilitations, financing, contributions or subsidies and the possible revocation of those already granted;
4. the suspense of the activity in case of serious and repeated violations.

However, this measure has a discretionary nature which means that the Administrative Authority isn't obliged to issue it.

As mentioned before, through **Legislative Decree 106/09**, an important series of changes has taken place. The measure of the most serious fine has been reduced (currently reaching 6,400.00 euros); the maximum arrest has been reduced from 12 months to 6 months; the most serious administrative penalty has also been reduced from 2,500.00 euros to 1,800.00 euros.

Thereby, the employer must face both the sanctions and the responsibilities for the violation of the safety obligation provided by the art. 2087 of the Civil code and Legislative decree 81/2008, as amended in 2009.

Any breach of art. 2087 cc represents a contractual breach, which leads to the injured worker's right to sue his employer and obtain the compensation for damages.

Furthermore, the circumstance that the worker has behaved in a negligent or imprudent manner is not sufficient to exclude the employer's responsibility if the latter hasn't adopted the necessary measures to protect the employees' health. The worker's behaviour isn't important for the contributory negligence. Unless the worker's behaviour was so atypical and exceptional that the employer could never get the necessary protections to avoid the damage. If the circumstance is the one described, and it was the exclusive cause of the damaging event, the employer's responsibility is excluded.

Regarding the compensation for damages, the first possible form is the insurance one provided by the National Institute for Insurance against Accidents at Work, that consists in a rapid compensation without a trial. These economic services cannot be properly defined as compensation, in fact the injured worker could require them without the fault of the employer. The worker could ask for the so-called "differential damage" when the employer isn't fault-free. The latter is the difference between the amount paid by the National Institute and what can be requested from the employee as compensation for damages in civil law.

The damage referred to in the art. 2087 cc is both physical and moral.

Whatever the nature of the damage is, the injured worker is entitled to various forms of protection: from a civil law point of view, he has the possibility to ask for enforcement or to legitimately refuse the service, alternatively to constitute a civil party in a proceeding of contravention; or he may find relief from a criminal point of view, in the case of crimes of negligent injury or manslaughter.

Following a disability-related accident, it is possible to be placed back in the previous role if conditions allow it, or to obtain a different job position. But, in any case, the person with a work disability cannot be condemned to unemployment: his or her return to work is a right. The employer, taking advantage of the National Institute for Insurance against Accidents at Work funds, is obliged to ensure the necessary interventions to reintegrate the worker in his or her job, such as: sensory devices that allow the use of computers, to automated doors, toilets and elevators easily accessible and adaptations of office furniture.

The emergency caused by Covid-19 soon gave rise to a debate on the consequences that will come from the new precautionary regulations to avoid the spread of virus, both in terms of new employer's obligations and in terms of non-compliance consequences.

In this regard, the art. 4 of the **Decree-Law 19/2020** provides a new sanctions discipline. Indeed, unless the fact constitutes a crime, the violation of containment measures ruled by is just punished with an administrative penalty, that specifically consists in the payment of a sum from 400 to 3,000 euros. In addition, the same regulation provides that for any breach of the containment measures, the employer could face the accessory administrative sanction of closure of the business or activity from 5 to 30 days. This regulation was converted into the **Act 35/2020**, which provides the doubling of the pecuniary administrative sanction when the violation is repeated.

Furthermore, in the event of Covid-19 infection the employer could be criminally liable. This might happen as long as it is proven that the infection has occurred in the workplace and that it is a consequence of the failure to adopt preventive measures for workers' protection, thus for the employer's specific fault.

Situation following the end of the state of emergency

With the **Decree-Law 24/2022**, Italy gradually begins to return to normality, starting on 31 March 2022 - when the state of emergency ends - some anti-Covid restrictions will be lifted. Restrictions which, of course, also affected the workplace.

The vaccination requirement, introduced for some professions, remains in force until 31 December 2022 with suspension from work, if not vaccinated, for:

- health professionals;
- workers in hospitals;
- workers in nursing homes.

From 1 April, it will be possible for all other workers to enter workplaces with the Green Pass Base, for which the obligation will be, then, removed from 1 May.

With the end of the state of emergency, the "simplified" smart work by way of derogating to the Legislative Decree 81/2017 (on the "ordinary" smart work), also lapses. In order to regulate Smart Work from 1 April, it will be possible to stipulate individual agreements regulating the alternation of smart working days and days in the office.

Recently, then, a National Protocol on Private Agile Work was introduced, signed by the social partners (employers and trade unions) with the Ministry of Labour to regulate all aspects of contracting, including on safety.

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- *Art. 153 of the Treaty on the Functioning of the European Union (TFEU);*
- *The Directive 89/391/EEC;*
- *The Directive 2003/88/EC.*

Italian legislation:

- *Art. 1 Constitution;*
- *Art. 4 Constitution;*
- *Art. 32 Constitution;*
- *Art. 2087 Civil Code;*

- *Legislative decree 626\1994;*
- *Legislative decree 81\2008;*
- *Legislative decree 106\2009;*
- *Legislative decree 66\2003;*
- *The Protocol of 24 April 2020;*
- *The Protocol of 6 April 2021;*
- *Art. 1460 Civil Code;*
- *Act 81\2017;*
- *Art. 9 of the Act 300\1970;*
- *Act 80\1898;*
- *Decree law 19\2020;*
- *Act 35\2020;*
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