



Smart Working during Coronavirus and beyond

Webinar - 8 April 2020

Speaker: Patrizio Bernardo

Smart Working: regulatory provisions

- **Agile Working:** Law 22 May 2017, no. 81

Law Decree of the President of the Council of Ministers no. 45 of 23 February 2020, Law Decree of the President of the Council of Ministers no. 47 of 25 February 2020, Law Decree of the President of the Council of Ministers no. 52 of 1 March 2020, Law Decree of the President of the Council of Ministers no. 64 of 11 March 2020, Joint Protocol for the regulation of measures to combat and contain the spread of the COVID-19 virus in the workplace of 14 March 2020, Law Decree no. 18 of 17 March 2020.

- **Teleworking:** Inter-confederal agreement of 9 June 2004 implementing the European Framework Agreement on teleworking concluded on 16 July 2002.

Agile working and teleworking: points in common

Purpose: increasing competitiveness, reducing company costs, facilitating the reconciliation of life and work time by the worker and, in these days, ensuring health and safety protection and compliance with public health measures.

Smart Working and Coronavirus

(Article 4, para. 1, lett. a), D.P.C.M. no. 52 of 1 March 2020)

«The following measures shall apply throughout the national territory:

*a) agile working arrangements governed by Articles 18 to 23 of Law no. 81 of 22 May 2017 may be applied, for the duration of the state of emergency referred to in the resolution of the Council of Ministers of 31 January 2020 [that is until **31 July 2020**, n.d.r.], by employers to any employment relationship, in compliance with the principles dictated by the aforementioned provisions, **even in the absence of the individual agreements provided for therein.** The reporting obligations set forth in Article 22 of Law no. 81 of 22 May 2017 are fulfilled electronically also by using the documentation made available on the website of the National Institute for Occupational Accident Insurance».*

Smart Working and Coronavirus

(Article 1, para. 1, nos. 7 and no. 10, D.P.C.M. no. 64 of 11 March 2020)

«In order to combat and contain the spread of the COVID-19 virus, the following measures should be taken throughout the country: [...]

7) with regard to production and professional activities it is recommended that maximum use should be made by companies of agile working arrangements for activities that can be carried out at home or at a distance; [...]

10) for all non-suspended activities, maximum use of agile working arrangements is encouraged».

Smart Working and Coronavirus

(Joint Protocol for the regulation of measures to combat and contain the spread of the COVID-19 virus in the workplace of 14 March 2020)

- Identification of smart working as an "extraordinary organizational solution" aimed at fighting and containing the spread of the virus.
- *«With reference to the Prime Ministerial Decree of 11 March 2020, point 7, limited to the period of the emergency due to the COVID-19, companies may, with reference to the provisions of the national collective labour agreements and thus favoring agreements with company trade union representatives:
 - order the closure of all departments other than production or, in any case, those whose operation is possible through the use of Smart Working, or in any case remotely; [...]
 - use Smart Working for all those activities that can be carried out at home or remotely...».*

Agile working in the Italian legal system

(Law no. 81 of 22 May 2017)

Article 18, para.3-*bis*, Law no. 81 of 22 May 2017:

Employers must prioritize requests made by female workers to perform the employment relationship via agile working during the three years period following the end of the maternity leave period or by workers with disabled children according to Article 3, para. 3, of Law no. 104 of 5 February 1992.

Article 39 of Law Decree no. 81 of 17 March 2020 (Cura Italia Law Decree):

- «1. Until 30 April 2020, employees with disabilities or those who have a disabled person in their household, in accordance with the conditions set forth in Article 3, para. 3, of Law no. 104 of 5 February 1992, have the right to work in a agile working modality pursuant to Articles 18 to 23 of Law no. 81 of 22 May 2017, provided that such arrangement is compatible with the characteristics of the activity.*
- 2. Workers in the private sector suffering from serious and proven pathologies with reduced working capacity shall be prioritized for the acceptance of applications to perform work in a agile working modality pursuant to Articles 18 to 23 of Law no.81 of 22 May 2017».*

Agile working and teleworking

	Agile working	Teleworking
Agreement	To be in written form for the purposes of its validity and proof (Article 19, Law no. 81 of 22 May 2017).	There is no formal requirement, except for some specific written information obligations (Article 2, A.I. of 9 June 2004).
Performance	Partly inside the company premises and partly outside (Article 18, Law no. 81 of 22 May 2017).	Regularly carried out outside the company premises (Article 1, A.I. of 9 June 2004).
Workplace	Flexibility and full autonomy in the choice of workplace (Article 18, Law no. 81 of 22 May 2017).	Fixed and predetermined workstation.
Working hours	There are no time constraints, the manner in which the service is to be provided is defined in a written agreement, including by phases, cycles and objectives (Article 18, Law no. 81 of 22 May 2017).	Working hours to be carried out within the framework of company directives with a workload equivalent to that of comparable workers carrying out activities on company premises (Article 8, A.I. of 9 June 2004).
Safety in the workplace	Do the provisions of Title VII of Legislative Decree no. 81/2008 (Article 3, para. 10, Legislative Decree no. 81/2008) apply ?	The provisions of Title VII of Legislative Decree no. 81/2008 (Article 3, para. 10, of Legislative Decree no. 81/2008) apply.
Checks	The law regulating smart working expressly requires compliance with the provisions of Article 4, Law no. 300/1970 (Article 21, para. 1, Law no. 18 of 22 May 2017).	No specific discipline provided for in the A.I. of 9 June 2004.

Agile working in the Italian legal system

(Law no. 81 of 22 May 2017)

The Agreement (Article 19)

- written agreement between the parties, additional to the existing employment agreement;
- performance of work partly inside the company premises and partly outside: absence of a fixed workstation;
- possibility to adopt different forms of organization by phases, cycles and objectives.

Agile working in the Italian legal system

(Law no. 81 of 22 May 2017)

Principle of non-discrimination (Article 20, para. 1)

- The worker who opts for agile working will be entitled to an economic and regulatory treatment not less than that applied overall to workers who perform the same tasks exclusively within the company (in implementation of collective agreements pursuant to Article 51, Legislative Decree no. 81/2015).
- This is without prejudice to the possibility of providing additional elements improving the economic and regulatory treatment of the worker.
- Fiscal and social security contributions incentives for increases in productivity and efficiency of subordinate work are applicable (Article 18, para. 4).

Agile working in the Italian legal system

(Law no. 81 of 22 May 2017)

Working hours (Article 19, para. 1)

- absence of time constraints, to be performed within the maximum daily and weekly working time limits provided by the law and collective bargaining agreements;
- so-called “*right to disconnection*”.

Agile working in the Italian legal system

(Law no. 81 of 22 May 2017)

The disciplinary power of the employer (Article 21, para. 2)

An individual agreement on agile working can identify misbehaviors which trigger the application of disciplinary sanctions.

Agile working in the Italian legal system

(Law no. 81 of 22 May 2017)

Checks pursuant to Article 4 of Law no. 300/1970

- The law regulating agile working expressly requires compliance with the provisions of Article 4, Law no. 300/1970 (Article 21, para. 1).
- Interpretative issues:
 - a) is the trade union agreement or the authorization of the National Labour Inspectorate referred to in Article 4, par. 1, L. no. 300/1970 necessary?
 - b) Does it apply by way of derogation (as per para. 2, of Article 4 cit.) when the service is rendered through the use of technological instruments?
- In any case: it will be necessary to provide the worker with the information regarding:
 - a) the processing of personal data that may be collected during the performance of work in agile working modality (Articles 13 and 14, EU Regulation no. 2016/679);
 - b) the procedures for using the tools and carrying out controls, always in compliance with the regulations on privacy (Article 4, para. 3, Law no. 300/1970).

Agile working in the Italian legal system

(Law no. 81 of 22 May 2017)

Health and safety at work

Article 18, para. 2, Law no. 81/2017:

«The employer is responsible for the safety and proper functioning of the technological tools provided to the worker for the performance of the work activity».

Article 22, Law no. 81/2017:

« 1. The employer shall guarantee the health and safety of the worker who carries out the work in a agile working modality and, for this purpose, it shall provide the worker and the workers' safety representative, at least once a year, with written information identifying general and specific risks related to the particular way in which the employment relationship is carried out.

2. The worker is required to cooperate in the implementation of the preventive measures prepared by the employer to address the risks connected with the performance of the service outside the company premises».

Agile working in the Italian legal system

(Law no. 81 of 22 May 2017)

Article 3, para. 10, Legislative Decree no. 81 of 9 April 2008:

«The provisions of Title VII shall apply to all employed persons who provide continuous work at a distance, by means of computer or telematic links, including those covered by Presidential Decree no. 70 of 8 March 1999 and by the European Framework Agreement on teleworking made on 16 July 2002, irrespective of the sector of the work carried out».

Agile working in the Italian legal system

(Law no. 81 of 22 May 2017)

INAIL Guidelines of 26 February 2020

(Article 3, D.P.C.M. 23 February 2020, no. 45 - Article 2, D.P.C.M. 25 February 2020, no. 47 - Article 4, D.P.C.M. 1 March 2020, no. 52)

- Information pursuant to Article 22, para. 1, Law no. 81/2017.
- Adoption of general health and safety protection measures pursuant to Article 15 of Legislative Decree no. 81/2008.
- Drafting of the Risk Assessment Document pursuant to Articles 17 and 28 of Legislative Decree no. 81/2008.
- Additional obligations of training and information to all workers, pursuant to Articles 36 and 37 of Legislative Decree no. 81/2008.

Agile work in the Italian legal system

(Law no. 81 of 22 May 2017)

Article 23, para. 2 and 3, Law no. 81 of 22 May 2017:

«The worker has the right to protection against accidents at work and occupational diseases dependent on risks related to work performed outside the company premises.

The worker has the right to protection against accidents at work occurring during the normal journey from the place of residence to the place chosen for the performance of the work outside the company premises, within the limits and under the conditions set forth in the third paragraph of Article 2 of the Consolidated Law on compulsory insurance against accidents at work and occupational diseases, as per Presidential Decree no. 30 June 1965. 1124, and subsequent amendments, when the choice of the place of the performance is dictated by the needs connected with the performance itself or by the worker's need to reconcile life and work requirements and meets criteria of reasonableness».

Agile working in the Italian legal system

(Law no. 81 of 22 May 2017)

Withdrawal (Article 19, para. 2)

The withdrawal of one of the parties from the agile working agreement does not entail the termination of the employment relationship, as it is an ancillary agreement to the existing contract between the parties.

Terms of withdrawal:

- if the agreement is for an indefinite duration:
 - at least 30 days' notice;
 - no notice if there is a justified reason.
- if the agreement is of a fixed-term nature:
 - upon expiry of the period;
 - before the expiry of the period if there is a justified reason;
- in the case of disabled workers, at least 90 days' notice is required.

Thank you for
your attention!

Patrizio Bernardo
Avvocato

Partner
Delfino e Associati Willkie Farr
& Gallagher LLP

Via Michele Barozzi, 2

20122 Milan, Italy

T: +39 02 763631

F: +39 02 76363636

E: pbernardo@delfinowillkie.com

W: www.willkie.com