

# The “Code” On Health And Safety Protection Of Employees In The Workplace (Legislative Decree 81/2008)

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## 1. Introduction

On April 10, 2008 legislative decree dated April 9, 2008, no. 81 – known as consolidated law on health and safety protection of employees in the workplace (the “Code”) – has been issued in the Official Gazette. The Code implements section 1 of law dated August 3, 2007, no. 123 and is composed of 306 sections divided into 13 chapters, as well as of many exhibits having a technical content.

Being the Code a very long and sophisticated law, this newsletter cannot analyze in a comprehensive manner all the legal issues arising from the interpretation of the Code. Rather, the scope of this newsletter is to provide guidelines which can help in reading the Code, and to introduce few general principles regarding, in particular (i) the scope of the Code, (ii) the main obligations for employers, and (iii) the sanctions applicable in case of violation of the obligations set forth by the Code.

## 2. Definitions and scope of the Code

For the purpose of the Code, Employee is the individual who, irregardless of the type of contract executed with the employer, carries out a working activity within the organization of a private or public employer, with or without remuneration, even for the sole purpose of training (section 2, lett. a).

Section 2, lett. b, defines the Employer as the (natural or legal) person holding the employment relationship with the Employee or, in any case, the person that, based on the type and structure of the organization where the Employee carries out his duties, has responsibility for the undertaking or the establishment.

Further, Dirigente (Executive) is the individual who, due to his professional skills and the hierarchical powers granted to him, implements the directives received from the Employer, organizes and supervises the performance of the working activities (section 2, lett. d). Preposto (Person in charge) is the individual who, due to his professional skills and within the boundaries of his hierarchical powers, supervises the performance of the working activities and guarantees the proper implementation of the directives received (section 2, lett. e).

The Code applies – save for few exceptions – to any public and private sector, and to any kind of risks.

Further, it applies to both employees and independent contractors. In this respect, the following needs to be pointed out:

**Self-employed workers.** The Code applies to self-employed workers having a stable contractual relationship with the Employer (i.e. Collaboratori Coordinati e Continuativi and Collaboratori a Progetto) with respect to the activities performed by the workers within the company's premises.

**"Pure" consultants.** Few provisions of the Code (in particular sections 21 and 26) apply to consulting relationships falling under section 2222 and the followings of the Civil Code. Such provisions regard, among others, work equipment and personal protective equipment.

**Seconded employees.** In case of secondment pursuant to section 30 of Legge Biagi (legislative decree no. 276/2003), all the obligations to avoid risks in the workplace and protect employees' health and safety are on the employer to which the employee has been seconded, being understood however that the seconding employer is in charge of informing the seconded employee about the specific risks related to the performance of his working duties.

**Temporary employees.** The obligations to avoid risks in the workplace and protect employees' health and safety are on the employer enjoying from the employees' working activities. It is worth noting, however, that according to section 23, paragraph 5, of legislative decree no. 276/2003, the agency providing the temporary employees is in charge of informing them about safety at work and carrying out the appropriate training. The provisions on temporary staffing contained in the legislative decree no. 276/2003 and in the Code need, therefore, to be jointly interpreted in such a way to guarantee a consistent interpretation.

Finally, the Code sets forth specific provisions ruling on health and safety protection in case of teleworking, work from home, stage, and other peculiar cases.

### 3. General obligations and responsibilities of the Employer. Tasks which can and cannot be delegated by the Employer to other persons

Section 15 identifies the general measures to be adopted to protect health and safety of the employees whose implementation is, in general terms, Employer's responsibility (such as, for example, the identification of risks in the workplace, the reductions of such risks, the adoption of measures to check the employees' health, etc.).

However, pursuant to sections 16 and 17, the Employer can delegate certain tasks to other individuals, provided that:

- I. delegation is formalized in writing and by virtue of a document having a set and clear date;

- II. the delegated person must have technical and professional skills suitable to carry out the delegated activities properly;
- III. the delegated person must be provided with any necessary organizational and financial powers to perform the delegated activities properly;
- IV. the delegated person must give his consent in writing.

In case of delegation of tasks, the Employer is not in any case exempted from the obligation to supervise the proper performance of the delegated activities by the delegated person.

The Code provides that **the following activities cannot be delegated**:

- a) the assessment of the risks in the workplace and the subsequent adoption of the Risks Assessment Document;
- b) the designation of the person responsible for the Protective and Preventive Unit.

#### **The Risks Assessment Document (“RAD”)**

Any and all risks regarding health and safety of employees in the workplace must be properly assessed by the Employer. The Code provides that the RAD must have a set and clear date and a minimum content identified by the law. Pursuant to section 306, paragraph 2, all the provisions of the Code regarding assessment of risks (including the relevant sanctions in case of breach of such provisions) shall be effective after 90 days from the issuance of the Code in the Official Gazette (April 30, 2008). This means that by July 28, 2008 Employers shall be required to assess any and all risks for their personnel and adopt/amend the RAD. Employers having up to 10 employees shall be required to assess the risks in compliance with a standard procedure set forth by a future Decree of the Ministry of Labour. Until June 30, 2012 they shall be entitled, however, to a self-certification of such assessment.

#### **The Protective and Preventive Unit (“PPU”)**

According to the definition set forth by section 2, the PPU is a group of people, means and equipment, established within the company internally or independent from the company, in charge of carrying out activities related to the protection and prevention of risks in the workplace. The person responsible for the PPU – in charge of coordinating its activities – is designated by the Employer to whom he reports. As a general rule, the PPU can be either established within the company internally or made of external consultants, save for those cases where the Code provides that the PPU must be established within

the company (for example, manufacturing companies having more than 200 employees). The person responsible for the PPU and all the individuals belonging to the PPU must have technical and professional skills suitable to manage the risks in the workplace.

#### 4. The Representative of the Employees for safety in the workplace

Section 50 identifies rights, duties and responsibilities of the Representative of the Employees for safety in the workplace, who is elected or appointed pursuant to the procedures set forth by the Code (for example, he has access in the workplace, he must be involved by the Employer in the process of assessing the risks, etc.).

The Representative of the Employees for safety in the workplace must have appropriate time and means to carry out his duties, and he benefits from those protections and rights set forth by Italian law for Unions' representatives.

He is elected or appointed in each company or productive units. However, as regards companies/productive units having up to 15 employees, such Representative can be appointed for more companies located within the same geographical area (Territorial Representative of the Employees). Further, the Code provides that a special Representative (Site Representative of the Employees) be appointed within those sites where more companies work all together and special risks for employees exist (for example within ports).

#### 5. The sanctions

The main addressees of the sanctions set forth by the Code are Employers, Employees, Dirigenti, Preposti, the company's doctor. The sanctions system established by the Code is a very complex and sophisticated one as the violation of each specific obligation entails the application of a specific sanction. Criminal sanctions such as imprisonment are provided in relation to the most serious violations. In general terms, sanctions are measured both on the seriousness of the violations and on the type of the Employer's organization.

The Code establishes:

- **criminal sanctions** (imprisonment and/or fine), in case of violations which entail criminal liability;
- **administrative fines**, in case of violation which do not have a criminal nature.

By way of example, lack of assessment of risks and subsequent lack of adoption of the RAD, or lack of appointment of the person responsible for the PPU are crimes and subject Employers to imprisonment from 4 up to 8 months (which may be extended up to 18 months in certain cases) or to fine between € 5,000 and € 15,000. Further, irregular drafting of the RAD is a crime as well, and subject Employers to a fine between € 3,000 and € 9,000.

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It does not constitute a reference for agreements and/or commitments of any nature.

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It is worth pointing out that in case of crimes punished with **fine only**, or with the **alternative** sanction of **fine or imprisonment**, the person committing the crime can, if certain requirements are met, obtain that the crime committed be treated as a violation not having a criminal nature by following specific procedures established by Italian law (oblazione and prescrizione obbligatoria). Further, in case of crimes punished with **imprisonment only**, sections 302 of the Code provides that imprisonment can be commuted by the Court into a fine ranging between € 8,000 and € 24,000 if, before the end of the trial stage of the criminal proceedings, the violations and their harmful consequences have been removed. Such special rule does not apply if the person committing the crime has already committed others crimes or if the violation at issue caused injuries in the workplace with consequent damages to the health of employees.

Besides the above sanctions, according to section 14 of the Code violation of the provisions on health and safety in the workplace can give rise to the mandatory suspension of the company's business. Such a measure can be adopted as a consequence of inspections by the Ministry of Labour or by the National Health Institution. In particular, inspectors from the Ministry of Labour can adopt such a measure (a) if they ascertain that a number of employment relationships exceeding a certain percentage have not been recorded in the company's payroll and in other mandatory books, or (b) laws on working time have been repeatedly violated, and (c) in case of serious and repeated violations regarding health and safety in the workplace to be identified by virtue of a future Decree. The "sanction" at issue can be revoked once the Employer complied with certain requirements and followed a specific procedure. Further, lack of compliance with the measure of mandatory suspension entails the application of criminal sanctions (imprisonment up to 6 months).

Finally, section 300 of the Code amended section 25-septies of legislative decree June 8, 2001, no. 231 which set forth legal entities' "administrative" liability for certain criminal offences committed, in their interest and/or for their benefit, by persons in top management positions and by those subject to their direction or supervision. The above mentioned section 25-septies – as amended by the Code – identifies certain sanctions applicable to the company (fines and disqualification/suspension) in case of negligent homicide or serious/very serious injuries committed through the violations of the provisions on health and safety protection in the workplace.

## 6. Final provisions

Section 306 contains detailed rules identifying different effective dates for certain groups of provisions of the Code. For example, as already mentioned, the provisions regarding the assessment of risks shall be effective after 90 days from the issuance of the Code in the Official Gazette, i.e. on July 28, 2008. As a general principle, those provisions for which the Code has not set forth a specific effective date must be deemed in force from May 15, 2008 (according to the vacation legis rule), being understood however that many of the provisions of the Code shall be actually effective only once the relevant Decrees implementing the Code and setting forth detailed administrative guidelines are issued.