# Covid emergency: smart working or emergency working?

**An analysis by lawyers Ciro Cafiero and Paola Pezzali on the measures and changes in the world of work due to the pandemic: it is not agile work but a new "creature", because the peculiar aspects that regulate smart work are lacking. A condition to be facilitated for tax purposes, like welfare, because it limits the use of cash and maintains productivity.**


***by Paola Pezzali and Ciro Cafiero***

With the law n. 81 of 22 May 2017, Italy has introduced the category of smart working into national legislation, an institution already known in Europe and more implemented in the United States of America, and which today, in the country's health emergency, seems to be the tool suitable to combine, as far as possible, the economic needs of companies and the protection of the health of workers and employees in a broad sense.

However, it is necessary to ask whether the institute, now implemented in an emergency phase and referred to in the Prime Ministerial Decree of 4 and 8 March 2020, configures the agile working mode provided for by law no. 81 of 2017, or, rather, a different form of work in an emergency.

**The legislative perimeter of smart working** Law no. 81 of 2017 to art. 18 defines agile work as a flexible way of performing subordinate employment, in order to increase productivity and facilitate the reconciliation of life and work times. Articles 18 to 26 define the boundaries of agile work, establishing that it is that work that can be done in part inside the company premises and in part outside, and therefore not only from the home of the worker, according to the schedules identified in the employment contract and in the absence of a fixed position. Smart working therefore has the

prerequisite to promote flexible forms of agile work, in order to increase productivity and at the same time facilitate the reconciliation of life and work times, always but in the framework of subordinate work.

The case is characterized by being based on the agreement between the parties, on the full and complete uniformity of the method of performance of the service - in terms of hours - with that carried out in the company, on the full and complete homogeneity of the remuneration, tax and social security legislation with the case of subordinate work, on the uniformity of the applicable regulations on safety at work, and also on the obligation for the employer to provide the technical devices necessary for carrying out the service in agile work mode.

**The new provisions**

Following the state of health emergency that arose with the spread of the coronavirus, smart working was immediately identified as one of the instruments suitable for containing the infection by avoiding personal contacts.

The new provisions, however, specify that the agile working method can be applied by employers for the duration of the state of emergency (for six months, as required by the resolution of the Council of Ministers of January 31, 2020**)** to each employment relationship subordinate, **even in the absence of an individual agreement.**

In essence, the state of emergency and the need to guarantee the distancing, if on the one hand made it necessary to combine the health needs and the constitutionally guaranteed right to health with the economic needs and the continuity of the state administrative activity, on the other they eliminated the the very foundation of the typology of agile work as required by law 81 of 2017 - or the agreement between the Parties - in fact creating a new typology of smart working, which we could define as **emergency work**, ontologically different from the case contained in the current regulatory provision.

**Differences between smart work and emergency work and possible gray areas**

Regardless of the state of the problems that may arise from having waived through a secondary legal source, such as the DPCM, the content of a legislative provision such as that relating to agile work, contained in articles 18 to 26 of law n . 81/2017, it is undeniable that the typology with which the Government intended to regulate, mainly, the carrying out of the work activities in the emergency phase is "*a new creature".*

Article. 18 of the law n. 81 of 2017, in fact presupposes the existence of the written agreement, an act necessary both for evidentiary purposes and for administrative regularity. The agreement, in fact, constitutes the source of the procedures for carrying out the service, regulates the place outside the company where the service will be carried out, modulates the exercise of the disciplinary, control and managerial power of the employer, identifies the times of rest and disconnection procedures, establishes the characteristics of distance learning, indicates and details the tools made

available to the worker, establishes the conduct of the worker in carrying out the remote service from whose violation sanctioning profiles may derive, and lastly, but of primary importance, it identifies the risks that the worker may incur commensurate with the spaces and times of performance of the service outside the Company or the Public Body.

In this respect, it should not be forgotten that Law no. 81 of 2017, art. 22, **maintains the safety obligations governed** by decree no. 81 of 2008, with the clarifications dictated by Inail circular no. 48/2017, thus burdening the employer with all the responsibilities related to the implementation of prevention measures, the guarantee of the proper functioning of the assigned technological tools, and the maintenance of the same. Pursuant to art. 23 paragraph 2 of Law no. 81/2017, there is also protection against accidents at work and occupational diseases dependent on the risks associated with working in an *agile* manner.

There are those who do not see that having eliminated the agreement between the Parties - the instrument through which to regulate the peculiar aspects of the performance of the service - automatically prevents the applicability of that part of the provisions contained in Law no. 81 of 2017, which find their regulatory source in the Agreement.

In fact, there is a question as to what the disciplinary or directive power that the employer can exercise in the absence of specific agreements, as well as what the responsibility to which the employer will be called which, in most cases, will be in the pandemic situation, it did not provide the tools for the performance of the service, especially as regards the Public Administration.

And again, how can the employer be held responsible in terms of safety, not having had the opportunity, considering the emergency situation that effectively prevents travel, to view anything of the place where the service will be performed?

It is undeniable that the above-mentioned critical issues may become insurmountable if - as indicated above - it does not approach the agile work disciplined in the Prime Ministerial Decree of 4 and 8 March 2020 as a new form of limited duration emergency work, strictly connected to the state of emergency .

**Smart working as a welfare tool**

If this is the necessary approach to follow, it would be useful at this point to imagine this new, different and temporary instrument with its own purposes, strictly connected to the pandemic emergency period, trying to make the most of its potential, albeit in the limited period. As is known, the legislator, with Law no. 81 of 2017, pursued in the construction of *smart working* the intention of avoiding the risk that agile work would remain subject to tax and social security contributions to a different discipline than that applied to subordinate work tout court. Except that, in hindsight, the challenge on agile work is played precisely - today more than ever - on the fiscal and social security level, or in the identification of tax and social security measures that may represent a certain form of

**reward**, in favor of those companies, especially in the private sector, which at this time of particular economic and social complexity use this tool rather than resorting to social safety nets. From this point of view, it does not seem sufficient to consider the remuneration of the agile worker as subject to the flat-rate tax for the productivity bonus, but it becomes fundamental to introduce measures such as, for example, the complete tax reduction of the remuneration quotas through the recognition of its nature as an instrument of welfare, in this case of *welfare* in favor of the State, which thus reduces the audience of recipients of wage integration funds. **By recognizing the nature of welfare to smart working,** it would be possible to balance the need for immediate economic convenience for the company in crisis, together with greater productivity in the short term, and at the same time to guarantee the economic and employment stability of the staff, in with a view to relaunching the country's economy. A significant evolution, therefore, of the traditional approach of collective relations in the face of crisis situations.