BAKER & McKENZIE

Client Alert

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The Italian way to flex-security: the Monti Reform of Italian employment law

The Italian government has approved on March 23, 2012 a sweeping reform of employment law which ambitiously aims at shaking up the job market and driven by 3 essential objectives: (I) clamping down on certain widespread abuses of what is generally referred to as “flexible” work contracts and (ii) liberalizing individual lay-offs for economic reasons, partly compensated by (iii) introducing a more generalized system of unemployment benefits.

A draft bill (hereunder referenced as the “Bill”), dubbed the Monti-Fornero Reform after the names of the prime minister and the labor minister, has been submitted to the scrutiny of the Parliament right before the Easter break and while the government is wishing for a speedy and uneventful approval, the reactions stemming from various parts of the country, most notably the employers' associations and some of the key parties supporting the Monti government, clearly show that the path to passing the bill could not be void of insidious hurdles and attempts to twist certain key passages of the Bill.

We at Baker & McKenzie are of course keeping a vigilant eye on any step forward (or backward) relating to the approval process of this Bill and are ready to make a fair guess that approval may actually ensue in a matter of months rather than weeks, and not without substantial amendments, unless the Monti government should play their wild card and ask for a vote of confidence by the forces that are supporting it in Parliament. This is a card not void of risks, as Mr. Monti may not want to put at stake the good results achieved so far by a government that has shown to the world its capability and determination to overhaul the Italian legal system in many of its most archaic and market-averse areas (including employment), and dragging Italy out of the sovereign debt crisis that until a few months ago was jeopardizing the entire euro area.

The draft Bill released by the government is a complex document of 70 articles, and contains several sweeping provisions affecting many key areas of employment law. The following is a brief overview of the most relevant areas of intervention of the Bill, with a view to our corporate clients' interest in their day-to-day HR management needs, without any ambition to provide a full and exhaustive report (which, for the reasons explained above, we believe may be premature). We have purposely left out of this overview the part of the Bill concerning the new system of unemployment benefits, which according to the Bill will only come into full effect in 2017 and concentrated our attention on the following two main topics:

A) Clampdown on flexible contract types and boost to “apprenticeship” agreements; and
B) The reform of individual dismissals in mid- or big-sized companies

A more exhaustive analysis of the Bill, also including unemployment benefits, shall be made available during the next few weeks, while parliamentary review of the Bill is in progress.

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A. Clampdown on flexible contract types and boost to "apprenticeship"

1. **The apprenticeship contract**, for a minimum period of 6 months and associated with generous social security discounts, is strongly favored by the government as the main gateway for youths to enter the job market; however, and to avoid the risk of possible abuses, companies shall only be allowed to hire apprentices (also through temporary agencies) within a ratio of 3 for every 2 skilled employees; also, no further hirings shall be allowed if less than 30% of existing apprentices have not been confirmed as permanent employees at the end of the apprenticeship contract (the percentage shall be increased to 50% after 36 months since the law comes into force).

2. **Hiring of an employee on a fixed-term basis** is currently possible only for a maximum period of 36 months including all renewals and extensions:

- the new bill includes in the calculation also any time spent at the employer's site as a temporary worker, if performance relates to the same or equivalent duties;
- as a partial balancing on the restriction above, the first fixed-term contract, for a period of maximum 6 months and non renewable, shall no longer need the specific indication of an objective business need;
- the same employee could no longer be hired on two consecutive fixed-term contracts unless a period of at least 90 days have elapsed since the expiry of the first contract (60 days if the first was entered for no longer than 6 months);
- finally, an increase of 1,4% of social costs shall apply to fixed-term contracts, partly recoverable if the employee is eventually confirmed on a permanent basis.

3. **Job on call**: the Bill contemplates severe restrictions on the use of this type of contract, essentially in two ways: (i) it will be admissible only in the specific cases and under the conditions provided by the national collective regulation applicable to the company and (ii) a specific communication to the labor authorities shall be required for each "call to work", under pain of heavy monetary sanctions.
For all job-on-call contracts already in force at the time when the Bill comes into force, the new limitations shall apply with a 12-month delay.

4. **Project workers**: according to the draft Bill, this type of semi-subordinate working relationship (project workers are in fact contractors and not employees) shall suffer a severe turn of the screw, effected in many ways:

- The Bill introduces a more severe definition of "project", which shall need to be tied to a specifically identified "final result";
- the duties performed by the project worker cannot be low-skilled and repetitive ones (collective agreements may better define these concepts);
- termination before the fulfillment of the identified project shall only be possible for cause or professional unsuitability of the project worker to the task;
- project workers shall no longer be hirable to perform a job in ways that are similar to the ones used by a regular employee, exception only made for high-skilled performances as identified in the collective regulation.

Lack of compliance with any of the above new requirements shall turn the project workers into permanent employees since the beginning of the relationship.

5. **Individual contractors (VAT-holders)**: the draft Bill introduces a presumption of law that they should be actually classified as "project worker" (if they met the conditions under previous point), or else as "permanent employees", if at least two of the following conditions are met:

- the relationship is longer than 6 months in a solar year;
- the contractor derives more than 75% of his total income in a solar year from the same principal (or more principals related to one other by a mutually shared interest, such as in the case of a performance rendered in the interest of a number of companies belonging to the same group);
- the contractor has a working station (pc, table, landline phone etc.) at the principal's premises.

The presumption above does not operate for activities performed by professionals who are members of a compulsory professional society (such as architects, lawyers, journalists, payroll providers etc.).
For all contractors already in force at the time when the Bill comes into force, the new provisions shall apply with a 12-month delay.

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B. The reform of individual dismissals in mid- or big-sized companies

The current regulation in Italy contemplates a drastic remedy in case of unlawful or unfair dismissal of an employee working in a business unit employing more than 15 employees or for an employer who overall employs more than 60 employees at national level: the employee can actually claim his job back, and shall also be paid full damages for all the salaries missed from the date of the (unlawful or unfair) dismissal up to forced reinstatement ordered by a labor court, without any cap.

In case the employee refuses reinstatement (typically in a situation where he has found another job in the interim of the court proceeding, that may last for 1 year or longer), he may unilaterally opt for payment of an indemnity equivalent to 15 months of his global salary, thus automatically relinquishing his right to get his job back.

This protection, colloquially named "Article 18" under the article of the Labour Statute which first introduced it back in 1970, has been a real taboo of Italian employment law for several decades and previous attempts to reform it have been vehemently fended off by Italian unions.

The Monti Bill introduces a completely new perspective in this set of protection, and rewrites altogether Article 18. The new formulation has been regarded by many commentators not as revolutionary as originally intended (or needed), and clearly suffers the compromise reached with CGIL, the major Italian national trade union association, who had already called to several hours of national strike over the past weeks to press home a less incisive review than the one originally leaked to the media by the government. No need to say that Italian newspapers and talk-shows, oftentimes with little knowledge of facts, have added to the public commotion and therefore pressure for a less radical overhaul of Article 18. And yet, to Mr. Monti's credit, we believe that, if the current draft is approved by the Parliament, it will constitute, 40 years after the enactment of the Labor Statute, a step towards a modern employment regulation in line with the European scenario.

Basically, the new Article 18, if approved by the Parliament, shall provide different regulations for different types of dismissal, which we may break down in 4 categories as follows.

1. **Dismissal for discriminatory reasons**

Protection in this case does not change: the employee who is dismissed for discriminatory reasons shall always be entitled to claim his job back plus damages with a minimum of 5 months of full salary and no cap. This is (and shall remain) the only case in which Article 18 applies also to employees with less than 15 employees (or 60 at national level) and to those classified as executives (*dirigenti*).
Within 30 days from the order of reinstatement, the employee may unilaterally opt for payment of an indemnity equivalent to 15 months of his global salary and give up his right to reinstatement.

2. **Dismissal for subjective (disciplinary) reasons (specific cases)**

Employees who are dismissed on subjective (disciplinary) reasons (such as poor performance, insubordination and breach of duties up to and including offences such as fraud or serious conflict of interest), could still claim their job back (and damages) only in 3 cases (which in practice cover 90% of ordinary cases): the charge does not exist, the employee did not commit it or the fact is contemplated by the disciplinary code in the collective regulation as punishable with a lesser sanction (typically a fine or suspension from duties).
In this scenario, and unlike the previous (currently in force) Article 18, where damages do not suffer any cap, the maximum awardable damages are assessed by the court at a maximum of 12 months plus social security contributions, deducted what the employee may have earned by some other job in the *interim* of the court proceeding.

3. **Dismissal for subjective (disciplinary) reasons (default case)**

In any other case not contemplated under the previous point, the labor court shall no longer be able to order forced reinstatement, but could only award an indemnity (in case dismissal is deemed nonetheless unfair for reasons other than those listed in previous point), ranging between 12 and 24 months, taking into account factors such as the total number of the workforce of the employer, the seniority of the employee, the behavior and conditions of the parties.

4. **Dismissal (and lay-offs) for objective (economic) reasons**

This is the most revolutionary part of the reform of Article 18 as currently in force. Contrary to the current regulation, if the labor court ascertains that no “justified objective reason” supports the dismissal, the employee could no longer claim his job back and may be awarded only an indemnity assessed by the same court between 12 and 24 months, taking into account the factors listed under point # 3 above as well as the initiatives taken by the employee to search another job as well as the behavior of the parties during the special (and compulsory) conciliatory procedure also introduced anew by the Bill.

This compulsory procedure is another big novelty of the Bill, aimed at slashing disputes in court, and must be initiated by the employer before notifying an individual dismissal for economic reasons. The Labor Office summons the parties within the next 7 days and by the same term, if no agreement has been found for a separation by mutual consent, the employer is free to notify dismissal (while facing most likely a dispute in court over the following months).
The new Article 18 on dismissals for economic reasons contemplates only one exception, that according to some commentators and the employers' associations risks to become the Trojan horse that generates uncertainty in an otherwise pretty clear-cut review: the employee may still claim his job back if the labor court ascertains that the alleged “economic reason” is “manifestly non-existent”, which in the intention of the government is aimed at fending off possible abuses of dismissals motivated by disciplinary (or worse,

discriminatory) reasons but passed under an apparent economic pretext.

The same protection above (without reinstatement) applies in case of violation of the procedural requirements of collective lay-offs, with a notable exception: in case the employer violates or misapplies the selection criteria agreed with the unions or (absent any such agreement), the criteria set forth by the law: in this latter case in fact, affected employees shall be entitled to seek reinstatement into their job positions.