HUNGARIAN LABOUR LAW
E - J O U R N A L

The Employer's Control and Oversight of Remote Workers: a First Look at the Italian Legal Framework*

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Abstract

The Italian regulatory framework on remote work (Law No. 81 of 2017) outlines the features of a new flexible work arrangement that does not include specific constraints as to working time or the place of work.

Originally conceived as a way to promote work-life balance and enhance competitiveness, remote work is now raising concerns about the way it is organized and about the productivity of workers and their well-being. With the opportunities, then, come new challenges, inviting a debate on how to go about solving them. Given that background, this contribution focuses on the impact of remote work on the employers' current roles and powers under the standard employment relationship. This also makes it necessary to explore the effects of flexible working-time arrangements in relation to employers' powers, duties, and responsibilities: in exercising these powers, employers are required to allow rest breaks and comply with the technical and organizational measures necessary to ensure that workers can disconnect from the technological tools through which they work (Art. 19(1) of Law No. 81/2017). However, there has yet to be found a proper way to effectively guarantee the right of workers to disconnect, and this matter needs to be examined in greater depth. It therefore appears to be fundamental to discuss the role that collective bargaining and social partners can play in improving the quality of remote work.

1. Introduction

The Italian framework for regulating remote work is based on Law No. 81 of 2017. It has been argued that remote work needs to be distinguished from the "smart working" schemes arrived at by collective

bargaining, as well as from the pandemic practice of "working from home" and the more traditional telework.[1] But – no matter how these schemes are distinguished, or how significant the distinctions may be – they all share a common denominator, which is that they all involve some kind of distance working, and it is in this broader and more comprehensive sense that we will be speaking of remote work. This is conceived as a new flexible work arrangement, without any specific working-time or working-place constraints, since working activity can be carried out "partly inside the company and partly outside", and even without a "stationary workplace" [Art. 18(1) of Law No. 81/2017]. From this perspective, remote work seems to supersede the organization of work based on "standardization" and the Fordist model. This has made it necessary to reassess the core traditional standard worker protections.[2]

While in remote work, both time and space are managed under an individual agreement between employer and employee, it is still within the framework of the law that the parties settle "their own regulation of interests".[3] This framework also includes a national private-sector protocol and public-sector guidelines.[4]

In short, although remote work was initially conceived as a way to promote work-life balance and make for a more competitive marketplace, it is now raising concerns about the way this kind of work is organized and about the productivity of workers and their well-being. These concerns became even more evident during the Covid-19 outbreak, when remote work was introduced as the regular method of performing work[5]. The main reason for pandemic practice of "working from home" was in fact not to ensure organizational well-being at work, including the trade-off between work and leisure,

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1 Marco Biasi: Brevi spunti sul lavoro da remoto post-emergenziale, tra legge (lavoro agile) e contrattazione collettiva smart-working). *bollettinoadapt.it*, 20 Jan. 2021. Telework was introduced in Italy as the first form of remote working. In the private sector, its general regulatory framework is the one established by the national interconfederal agreement signed in 2004 by twenty employer organisations and the three main trade union confederations. In the public sector, telework is regulated by Law No 191/1998 (implemented by Presidential Decree No. 70/1999). In line with the European framework agreement on telework, it refers to a form of performing work, using information technology, in the context of an employment contract, where work, which could also be performed at the employer's premises, is carried out away from those premises on a regular basis.

2 Daniele Di Nunzio: Lavoro agile, forme organizzative e soggettività del lavoro. In: Umberto Carabelli – Lorenzo Fassina (eds): Smart working: tutele e condizioni di lavoro. *I Seminari della Consulta giuridica della CGIL*, no. 4. (2021) 33–57.

3 Pasqualino Albi: Il lavoro agile fra emergenza e transizione. *WP CSDLE "Massimo D'Antona"*, no. 430. (2020) 1–23.

4 Pietro Ichino: Lo smart working e il tramonto della *summa divisio* tra lavoro subordinato e autonomo. *Lavoro Diritti Europa,* 2021. 1–6. The massive recourse to smart working in the pandemic emergency has made it necessary to supplement Law No. 81/2017. Indeed, this was a rather stripped-down law, in part because the practice it was designed to regulate (that of smart working) was at the time circumscribed. Hence the introduction of the National Smart Working Protocol of 7 December 2021 and of the Public Sector Smart Working Guidelines, both negotiated under an agreement reached at the Unified State-Regions Conference of 16 December 2021. In addition to the above-mentioned Protocol and Guidelines, it is also worth mentioning the recent report of the "Smart Working" Study Group, provided by the Minister of Labour and Social Policies, on 13 April 2021, to "analyse the effects of carrying out smart work activities, with the aim to propose solutions to the critical issues encountered in the context of work dynamics, both in the private and in the public sectors". In line with these measure, the National Bilateral Observatory on Smart Working was recently set up at the Minister of Labour and Social Policies, with the aim to monitor at national level the results achieved through smart working, also in the perspective of fostering the exchange of information, dissemination and exploitation of best practices detected in the workplace; the development of collective agreements at national, corporate and/or territorial level to regulate smart working; the development of the guidelines contained in the National Smart Working Protocol and the assessment of possible developments and implementations with reference to any new legislation and the growing technological and digital evolution.

5 Emanuele Dagnino: "Working anytime, anywhere" and working time provisions. Insights from the Italian regulation of smart working and the right to disconnect. *E-Journal of International and Comparative Labour Studies,* no. 3. (2020) 1–19.; Michele Tiraboschi: The COVID-19 Emergency from an 'industrial relations law' perspective. Some critical notes on the Italian case. *E-Journal of International and Comparative Labour Studies,* no. 3. (2020) 37–54.

but rather to guarantee social distancing among people without affecting negatively the continuity of business and services[6]. Which means that with the opportunities come new challenges, highlighting the need for a debate on how the challenges are to be addressed.

2. Anyplace, anytime? Implications for the employer's powers

Under Art. 18(1) of Law No. 81/2017, remote work is configured as an employment relationship, or rather, as a scheme under which it is possible to set up a subordinate and dependent work relationship. This is consistent with the established doctrine under which the working time and the working place are not part and parcel of the employment relationship: they are spatiotemporal coordinates of that relationship (defining its "when" and "where"), but they do not directly affect the content of the obligations it gives rise to.[7] The employer's power to unilaterally change the worker's working time and working place are "merely natural effects". These powers are therefore "not essential to the contract, […] in the sense that", consistently with Art. 2094 of the Italian Civil Code, "while they arise out of the contract, or out of the agreement between the parties, they may also be excluded from the contract".[8]

And yet, despite that framing, such is the degree of worker autonomy or independence involved in remote work that this form of work is bound to have a significant impact on the traditional configuration of the employment relationship, and so on the employer's powers. In the rapidly changing technological landscape, of which remote work is a part, these powers have been changing away from their classic makeup.[9]

From the perspective of the different ways in which work can be organized, the adoption of new technologies has been translating into the adoption of management models aimed at encouraging workers to invest in themselves, engage in their work proactively, manage their work on their own, and commit personally to achieving the most challenging goals: these are generally billed as "worker empowerment" models, and they sometimes rely on "gamification" techniques.[10]

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6 Chiara Gaglione – Ilaria Purificato – Olga Pavlovna Rymkevich: COVID-19 and Labour Law: Italy. *Italian Labour Law e-Journal Special Issue 1*, no. 13. (2020) 1–5.

7 Umberto Carabelli: Organizzazione del lavoro e professionalità: una riflessione su contratto di lavoro e post-taylorismo. *Giornale di Diritto del Lavoro e di Relazioni Industriali*, vol. 101., no. 1 (2004) 1–99.

8 Umberto Carabelli: Subordinazione, organizzazione e nuovi modelli di lavoro: una rilettura del vincolo collaborativo di cui all'art. 2094 c.c. In: Domenico Garofalo – Maurizio Ricci (eds.): *Percorsi di diritto del lavoro*. Bari, Cacucci, 2006. 347–368. According to Art. 2094 of the Italian Civil Code, is a subordinate employee the worker who obliges himself versus a wage/pay to collaborate with a company performing his own work, intellectual or manual, at the company's premises and under the direction of the entrepreneur.

9 Fabrizio Ferraro: Prime note sul potere direttivo nella disciplina del lavoro agile. *WP CSDLE "Massimo D'Antona*", collected volumes, no. 6 (2017) 137–153.

10 Han Byung-Chul: *Psychopolitics: Neoliberalism and New Technologies of Power*. London, Verso Books, 2017. In the field of labour law, see Loredana Zappalà: Informatizzazione dei processi decisionali e diritto del lavoro: Algoritmi, poteri datoriali e responsabilità del prestatore nell'era dell'intelligenza artificiale. *WP CSDLE "Massimo D'Antona"*, no. 446. (2021) 1–32.

From the perspective of the employment relationship, the focus shifts to the achievement of specific objectives, sometimes even outside the workplace and beyond the regular working hours, thereby breaking the company's spatial and temporal boundaries, in a context where a substantial part of the worker's individual life is put to productive use. Within this framework, the employer's power of control and direction has been receding into the background,[11] since the management of remote workers can be achieved by way of broad and generic policy directives that apply to workers throughout the employment relationship or just at the beginning.[12]

This is a sign of the ongoing decline of traditional classifications of work, the result of social and corporate transformation. In other words, employment ends up (sometimes) resembling self-employment,[13] making it possible to observe two converse trends: an increasing subordination in autonomy, coupled with an increasing autonomy in subordination, such that, on the one hand, independent workers (contractors) are increasingly being controlled and directed, while, on the other, dependent workers (employees) are increasingly managing their work independently of employer control and direction. This phenomenon is taking place in keeping with a process of hybridisation and osmosis that encourages interchangeability between the two types of work, laying emphasis not so much on their boundaries as on the worker protections accorded under each scheme.

After all, Law No. 81/2017 accords broad scope to individual agreement, identifying the "agreement between the parties" [Art. 18(1)] as key not only to the introduction of remote work but also to the regulation of some important aspects of the work done outside the workplace, including the employer's power to control, direct, and supervise such work [Arts. 19(c)(1) and 21 of Law No. 81/2017].[14]

So the employer's powers of supervision and direction are designed around the idea of remote work. This is highlighted not only by the fact that both their scope and the manner of their exercise need to be set out in writing, with the employer communicating these terms to the employee, but also, and more tellingly, by the fact that the same terms need to be negotiated with and agreed to by the latter, in an attempt to strike a delicate balance between the employer's interests and those of the employee.[15]

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11 Carla Spinelli: *Tecnologie digitali e lavoro agile*. Bari, Cacucci, 2018.

12 Maria Teresa Carinci: Il lavoro agile nel settore privato. In: Maria Teresa Carinci – Armando Tursi (eds.): *Licenziamento subordinazione e lavoro agile tra diritto giurisprudenziale e diritto emergenziale*. Torino, Giappichelli, 2020. 83–93.

13 Ichino op. cit. 1–6.

14 Under Art. 19(c)(1) of Law No. 81/2017, individual agreements regulate the performance of work outside the company's premises, even when it comes to the forms through which to exercise the employer's power to direct employees and control the instruments they use. As specified in Art. 21(c)(1) of Law No. 81/2017, the individual agreement provides for the exercise of the employer's power of control over the employee's work outside the company premises consistent with Art. 4 of the Workers' Statute. In response to the COVID-19 emergency, various ministerial decrees were issued strongly encouraging the use of remote work in the private and the public sectors even without an agreement between employees and employers. And because no such agreement was made, none of the specific aspects of remote work came to bear on the pandemic practice of "working from home". In other words, remote work during the pandemic only caused a shift of traditional work from the office to the home. In this regard, see Marco Biasi: Covid-19 and labour law in Italy. *European Labour Law Journal*, no. 11., Iss. 3. (2020) 306–313.

15 Marco Cuttone: Oltre il paradigma dell'unità di luogo tempo e azione: la revanche dell'autonomia individuale nella nuova fattispecie di lavoro agile. *WP CSDLE "Massimo D'Antona"*, collected volumes, no. 6. (2017) 47–60. On the crucial role of individual agreement in remote work, see also Stefano Bini: Reflexiones sobre smart working y autonomìa individual. In: Francisco Javier Calvo Gallego – Macarena Hernández-Bejarano – Miguel Rodríguez-Piñero Royo (eds.): *La revolución de las formas de empleo en el siglo XXI 2021*. Spain, Laborum, 2021. 147–170.

What this in turn suggests is that the entire law is premised on the assumption that the two parties to the contract (the employer and the employee) are in a sense in a position of equal bargaining power, in a relationship where workers are understood to be committed to the common enterprise, or as having a personal stake in it, and are expected to self-manage their work. It is as if the employment relationship, in taking on the guise of remote work, endowed employees with powers strong enough to enable them to negotiate their own terms of employment, without needing any protections other than the minimal ones provided for in the law itself: this slide toward the remote-work paradigm, in other words, seems to be informed by the science of corporate management, but above all it seems to be conceived as a different "way of being for those who work […] in a technology-rich environment".[16]

3. Focus on the performance of work and the employer's power to control and direct work

On the approach just outlined, remote work is structured on the basis of "phases, cycles, and objectives" [Art. 18(1) of Law No. 81/2017]. We can see here that the emphasis falls on project-based work. This process has already been affecting subordinate contracts of employment. It has done so in line with a competitive economy "which needs to produce in real time and on a project basis".[17]

The classic scenario is thus increasingly morphing into a new goal and results-oriented one, and this is necessarily affecting the contractual parties primary obligations: the worker's obligation to work and the employer's obligation to pay for that work.

Indeed, when the work does not have to be done on-site and allows for flextime, it will necessarily have to be based on a different model, assigning predefined tasks and planning around objectives and "job performance". These tasks and objectives will accordingly factor into performance appraisals and will be used as metrics by which to determine pay. Indeed, Law No. 81/2017 refers to the "statutory workday and workweek hour limits agreed to by collective bargaining" [Art. 18(1)], and it applies these worker protections to remote workers, too. It thereby requires that the time spent working be tracked. But this means that working hours are no longer the central concern they have traditionally been in defining the work contract. To wit, consider that standard working hours do not apply to remote work. As a result, no overtime or callback pay is recognized (a feature of the law that has attracted its share of criticism), inevitably eating away at the wages that remote workers can earn.[18]

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16 Bruno Caruso: Tra lasciti e rovine della pandemia: più o meno smart working? *Rivista Italiana di Diritto del Lavoro*, vol. 2. (2020) 215–249.

17 Di Nunzio op. cit. 33–57. It must be noted, however, that the Italian work environment is one that typically does not give workers much autonomy when it comes to managing their own work. For an analysis, see Davide Dazzi: Lavoro agile tra rottura del vincolo spaziale e ricerca di una nuova dimensione del luogo di lavoro. *Economia e Società Regionale*, no. 1. (2021) 44–54.

18 The same rule is included in the National Smart Working Protocol.

At any rate, coming back to the focus on objectives in remote work, we can surely agree with the view that the job performance is to be distinguished from the fulfilment of work obligations: the former concept is about material output, or meeting the objectives set, while the latter is a legal criterion on which basis to determine whether a worker is diligent and competent and meets work requirements".[19] However, if that is true, it is also the case that job performance is never entirely divorced from an assessment of a worker's fulfilment of duties and responsibilities. In other words, even if "there is no doubt that workers cannot be made to bear the burden of business risk, nor can they be held 'strictly liable' for failure to meet objectives",[20] it is equally undeniable that whenever objectives figure as a criterion for measuring job performance – particularly when they are used in place of standard working hours or the amount of time clocked on the job – they also feed into an assessment of whether job duties and responsibilities have been fulfilled, even if there is a standard of care or code of professional conduct (diligence) that that needs to be taken into account in making such an assessment. In short, objectives are functional to the organization of work, and they depend on the conduct of the professional, competent, or "diligent" worker – on the worker's diligence in fulfilling the duties entrusted to him or her. As a result, this diligence is functional to the task of fitting each activity into the organization of work and coordinating all such activities within that scheme. This is "the diligence required […] in the interest of the company" (Art. 2104 of the Civil Code), and the conduct required for such diligence needs to be compliant with standards of expertise as well as with any and all technical rules and standards that apply (this is "the diligence [the standard of skill and care] required by the nature of the job to be performed").

As a result, remote workers can be deemed at fault for failing to fulfil their duties if they fail to achieve the objectives owing to lack of diligence (lack of skill or care), or if they fail to comply with the technical rules and standards that govern their specific activity, or again if they ignore the broader organizational setup and workflow into which the employer has fit that specific activity.

In this context, we are still left to resolve the question of the manner in which performance objectives are to be set, considering that these decisions cannot be based solely on the negotiation of individual agreements.[21] Indeed, contrary to the assumptions on which rests the legislative approach previously outlined, the evidence shows that parties to the contract do not start out from equal bargaining positions. Which is to say that workers can be observed to stand on a weaker footing, this in two respects.

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19 Umberto Carabelli: Presentazione del Seminario. In: Umberto Carabelli – Lorenzo Fassina (eds.): Smart working: tutele e condizioni di lavoro. *I Seminari della Consulta giuridica della CGIL*, no. 4. (2021) 25–29.

20 Alessandro Boscati: Inquadramento giuridico del lavoro da remoto tra potere direttivo e autonomia della prestazione. In: Michel Martone (ed.): Il lavoro da remoto. Per una riforma dello smart working oltre l'emergenza. *Quaderni di Argomenti di Diritto del Lavoro*, no. 18. (2020) 49–75.

21 See, in particular, in Spain and in Portugal whose laws, while emphasizing the role of individual agreements, enhance the collective rights of remote workers. For the Spanish case, see Law No. 10/2021 and for the Portuguese case, see the Còdigo do Trabalho after the reform introduced by L. No. 83/2021.

First, there is their weak position as players in the labour market. Here there may be an exception to be made for highly skilled workers and ones whose skillset is in high demand, but even then, this only accounts for a slice of the remote workforce, considering how "polymorphic" the remote worker is.[22] And, second, there is the position of structural weakness in which workers find themselves in the work relationship, considering that workers interface with an organization over which they have no input, and which, on top of that, is marked by fluidity, in a context where the workplace is any place and work time is any time.

In this "anywhere, anytime" work context it proves challenging to arrive at a reasonable definition of workloads: considering the employer's position of greater power, this definition cannot be made to depend solely on the individual agreements that each worker makes with an employer or company. In fact, and needless to say, this individual-agreement scheme makes it all too easy to infringe on the selfsame right to disconnect, which is a direct expression of that duty to protect workers which is key to the protection of personal dignity[23].

4. The employer's power to supervise the activities of workers

We have seen that the employer's power to control and direct the activity of workers gets "blurry",[24] losing its neat boundaries, as a result of the employer's ability and tendency to give broad and general policy-like directives. On the other hand, employers gain greater oversight and even surveillance powers, with increasingly strict and invasive practices and methods that risk undermining both the well-being of workers and their output (the harm is therefore both qualitative and quantitative). Highlighting the paradox of these two contrasting aspects of the employer's power are the findings of a recent European study on remote work speaking to the fact that employers are exercising greater surveillance in monitoring the single work tasks assigned to workers, even as workers are given greater autonomy in completing the same tasks.[25]

Even if the power of supervision and direction distinctive to the employer is modelled on the employment relationship, it does not seem to become any weaker once it moves outside that framework.

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22 Carla Spinelli: Lo smart working nel settore privato e le sfide per il futuro. In: Carabelli–Fassina (eds., 2021) op. cit. 67–100.

23 Given these considerations, in order to ensure greater protection for workers, a number of governments across the world (i.e. in Iceland, in Belgium, in Spain and in New Zeland) have offered shorter working weeks to their employees, moving from a 40 hour week to a 35 or 36 hour week, without altering the workers' salary. Spain and Belgium are exploring a four day working week for companies, partially due to the challenges of coronavirus. In Iceland, unions have been renegotiating working patterns, and currently 86% of Iceland's workforce have either moved to shorter hours for the same pay, or are in the process of. In New Zealand, the company Unilever is recognizing to the staff the option to cut their hours by 20% without any reduction in their salaries. For an analysis, see https://www.bbc.com/news/business-57724779.amp; https://www.corriere.it/esteri/22_febbraio_16/belgio-settimana-lavorativa-4-giorni-diritto-disconnessione-7cb9125a-8f35-11ec-af55-d575edc6dd9d.shtml?refresh_ce.

24 Spinelli (2021) op. cit.

25 Eurofound: *Telework and ICT-based mobile work: Flexible working in the digital age.* New forms of employment series. Luxembourg, Publications Office of the European Union, 2020.

If anything, it grows stronger, taking on new forms that are emblematic of the fact that workers are bound to organize their work according to the way it has been organized by the firm or business they are working for.

This is aptly demonstrated by the case of delivery workers and crowd-workers in the gig economy, who are deemed freelancers or independent contractors on a digital platform, and so are not covered by employment rights and protections. These cases demonstrate how digitalization, particularly in the form of "platformization", makes workers subject to more pervasive supervision and monitoring[26]. Here we need only think about algorithmic management, which is based on reputational rating and which profiles every individual by collecting data that is both statistical (such as data identifying ethnic origin and gender) and situational (such as data identifying trade union affiliation and activity).[27]

It follows that in this framework, even when platform work is deemed freelance work – thereby dismissing claims that workers on these platforms are actually employees misclassified as independent contractors – it is liable to involve oversight practices that curtail freedom, demean the person, and breach privacy. In Italy, this has prompted commentators to demand that platform workers should at least be covered under data-protection and nondiscrimination law (Legislative Decree No. 81/2015 in what concerns delivery workers in the gig economy). In fact, the more the organization of work is broken up and fluid, the more the principal or client will be induced to supervise the coordination of work and the factors of production by way of pervasive monitoring, precisely because this entity has a diminished ability to dictate specific and stringent directives. This blurs the contours of workers' autonomy: on top of increased responsibility for performance objectives comes the worker's subjection to methods of oversight that amount to surveillance.

In view of the foregoing, new light can be shed on a thesis that has been gaining ground for some time now. According to this thesis, the power of oversight can be exercised wherever there exists a contractual work relationship, including under a contract for services, and so even outside the scope of an employment relationship. In other words, the power of oversight is essential to any type of relationship in which one party contracts an obligation to perform some service or carry out some activity for another who can then claim ownership over what that service or activity delivers.

This suggests that the scope of the power to monitor the activity of workers is greater than that of the power to direct the same activity,[28] such that, even if we only take up the perspective of the law

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26 Considering that digital labour platforms have become a crucial element of the emerging social and economic landscape, the European Commission has enacted a Proposal for a Directive of the European Parliament and of the Council on improving working conditions in platform work – COM (2021) 762. Among others, the proposal suggests new rules and parameters for classifying digital platform workers as subordinate employees, regardless of the type of their employment relationship. For an analysis, see Fairwork: Fairwork Response to the European Commission's Proposal for a Directive on Platform Work. *fair.work/en*. 9 Dec. 2021; Valerio De Stefano – Antonio Aloisi: European Commission takes the lead in regulating platform work. *socialeurope.eu*, 31 Jan. 2022.

27 Alessandra Ingrao: I sistemi di feedback basati su *rating* e *reviews* tra controllo della prestazione lavorativa e divieto di decisioni automatizzate. In: Cristina Alessi – Marzia Barbera – Luciana Guaglianone (eds.): *Impresa, lavoro e non lavoro nell'economia digitale*. Bari, Cacucci, 2019. 193–204.

28 Bruno Veneziani: *I controlli dell'imprenditore ed il contratto di lavoro.* Bari, Cacucci, 1975.

in the making (the law *de jure condendo*), when such power of oversight is so stringent as to place the independent contractor in a condition of personal subjection to the principal or client, it could serve as a guiding principle by which to redraw the scheme of workers' protections – well beyond the boundaries of the control-and-direction criterion of the employment relationship – so as to safeguard workers' freedom, dignity, and privacy.

We can arrive at the same point if we consider that these values (freedom, dignity, and privacy) now form the core of a broad conception of health understood as a "state of complete of physical, mental, and social well-being" (Art. 2(1)(o) of Legislative Decree No. 81/2008) and lie at the intersection of two areas of the law, namely, occupational safety and health, on the one hand, and antidiscrimination, on the other. For if these values underpin these areas of the law, and if their protection makes it necessary to embrace a broad conception of health, it also makes it necessary to embrace a broad definition of worker as a "person who, regardless the type of contract, carries out a working activity under the organization of an employer" (Art. 1(c)(1)(a)). [29]

If that is not the case today, it is because – making exception for the protections contained in Legislative Decree No. 81/2008 and in a few other statutory provisions – labour law in Italy appears to be still wedded to the notion of the dependent work relationship as defined in Art. 2094 of the Italian Civil Code; thus, remote work can be brought fully within the scope of labour law protections only when it takes on the contours by which it is defined in Law No. 81/2017, which qualifies it as an employment relationship (Art. 18(c)(1)). It is worthwhile to observe, in this connection, that even when this law is applicable, it fails to adequately take account of the new types of business organization, and so, as we will see, it doubtless needs a fresh approach in view of the distinctive features of remote work.

5. The employer's oversight power in remote work

From this perspective, it makes sense to ask how the employer's power of oversight or supervision – a power that in the employment relationship correlates with the power of direction – might be applied to remote work. Likewise, we should want to ask what function this power serves, considering that remote work, as defined in Article 18 of Law No. 81/2017, is work that is carried out without any working-time or working-place constraints. Additionally, we should want to ask – and this is still an open question – what boundaries should be set around this power if it is to keep within the limits established by the legal system, starting from those contained in Title I of the Workers' Statute (Law No. 300/1970)[30].

[29] On the "universalising vocation" of this definition, see Angelo Delogu: La definizione di lavoratore in materia di salute e sicurezza: dall'universalità della tutela ai nuovi bisogni di tutela. *Diritto della sicurezza sul lavoro*, no. 2 (2020) 61–78.

[30] The Title I of the Workers' Statute (Articles 1–13) regulates rights and restrictions aimed at guaranteeing the freedom and dignity of the worker; in particular in the area of freedom of expression in the workplace (Art. 1) and regulation of the employer's power

In the traditional employment scheme, the power of supervision has always been conceived as an instrument the employer can use to ensure that employees fulfil their contractual obligations. There is here a primary obligation to diligently and dutifully perform the work at hand, in keeping with with the directives set by the employer (Art. 2104 of the Italian Civil Code), and a secondary obligation to (a) perform that work in such a way as to protect the employer's broader organization of work (and so the corporate assets and equity) by complying with labour regulations, as well as to (b) comply with the duty of noncompetition and confidentiality (Arts. 2104(2) and 2105 of the Civil Code).

As discussed, when work is performed remotely, it is up to the worker's personal discretion to decide when and where to work, and under this arrangement the employer's control and oversight powers acquire peculiar characteristics.

As for the primary obligation to diligently and dutifully perform the work that has been assigned, what matters is mainly the employer's power to monitor work output. That is the case when workers work remotely, for in this scenario their obligation to perform does not bind them to any strict time constraints, and their activity will therefore be generally reconfigured on the basis of the objectives to be achieved.

Similarly, any stringent and pervasive oversight the employer should put in place to monitor the worker's performance has to be considered abusive, as when the practice borders on surveillance and extends beyond the available time slots that have been agreed to for work or beyond the maximum working hours, considering, too, that this would also be in breach of the right and duty to disconnect as set forth in Art. 19 of Law No. 81/2017.

As for the secondary obligation to perform one's work in such a way as to protect the employer's broader organization of work, we have to consider that if the work is performed outside the workplace, as is the case with remote work, it is necessary to expand the scope of the need to make sure that a company's data remains secure and confidential, as data are no longer held on company premises. This raises the question of the extent to which employers may justifiably supervise employees to make sure the latter are fulfilling their duty of confidentiality, as well as to make sure that corporate data is protected and that employees are fulfilling the fiduciary duty not to disclose information about the organization and its business and production methods. And part of the reason why these duties come into the foreground here has to do with the heightened risk to corporate confidentiality that comes with the hybrid workplace, in which work equipment and the places of work are sometimes personal to the worker and sometimes those of the company.

What is certain is that the duty of fidelity will not be able to trump or void the right of criticism which workers are recognized as having "at places where they carry out their work" (Art. 1 of the

to control (Art. 2–6), of the employer's disciplinary power (Art. 7), and of the employer's power to manage workers' duties and transfer workers (Art. 13).

Workers' Statute), with "places" being understood in a broad despatialized sense when it comes to remote work[31].

Furthermore, there is a case to be made that this right ought to be recognized universally on the basis of supranational legal sources, given the strict loyalty that independent workers are bound to pledge to the entities they work for. This is the case, for instance, with online content moderators working on global platforms on a crowd-working basis: for these workers, the duty of confidentiality has proved to be an obstacle to their visibility, preventing them from denouncing the conditions that undermine their emotional health.[32]

We won't be addressing the question of occupational safety and health, since in this respect the employer's duties are not owed to its role as a hiring entity (Art. 2094 of the Italian Civil Code) but fall directly within the scope of the occupational safety and health framework based on Article 2087 of the Italian Civil Code[33]. Still, this should not be taken to suggest that the question is somehow unimportant. In fact, it is worthy of careful investigation, if only because the peculiarly manifold scenarios in which work is carried out remotely (outside the workplace) makes it necessary to accordingly rethink occupational safety and health.[34] Indeed, as has been remarked, "the obligation to ensure worker safety and health [...] takes on [...] different forms depending on whether the work is performed inside the workplace or outside", making it clear that "whenever the employer cannot know where its remote workforce is working from, its liability for negligent oversight (*culpa in vigilando*) will be sensibly reduced".[35]

6. Freedom and dignity of the person as a limit on the employer's power of control and direction

The ability of employers to control and direct the work of their employees means that employers can also monitor and supervise that work. This inevitably also includes their ability to monitor and supervise remote work. But the subject matter is governed by Article 4 of the Italian Workers' Statute, which is designed to prevent the employer's technological oversight from turning into a stealthy and

31 According to Art. 1 of the Workers' Statute, workers, regardless of their political opinions, trade unions and religious beliefs, have the right, in the places where they work, to freely express their thoughts, in accordance with the principles of the Constitution and the provisions of this law.

32 Antonio Casilli: *En attendant les robots: Enquête sur le travail du clic.* Paris, Seuil, 2019.; Enrico Forzinetti: Il peggior lavoro della Silicon Valley? E' il moderatore di contenuti. *Corriere della Sera*, 17 Dec. 2021.

33 Art. 2087 of the Italian Civil Code specifies that the employer is required to eliminate the risks present in the workplace in the light of existing technical knowledge and, where this is not possible, to reduce them to a minimum.

34 See Paolo Pascucci: Note sul futuro del lavoro salubre e sicuro … e sulle norme sulla sicurezza di rider & co. *Diritto della Sicurezza sul Lavoro*, no. 1. (2019) 37–57, also discussing the peculiarities that set apart the employer's duty to train those in its workforce who work remotely.

35 Angelo Delogu: Obblighi di sicurezza: tutela contro gli infortuni e le malattie professionali nel lavoro agile. *WP CSDLE "Massimo D'Antona"*, collected volumes, no. 6. (2017) 108–124.

all-pervasive surveillance of workers. In fact, that practice would be illegal. The idea – with some basis in the so-called Jobs Act of 2016 – is that it is illegal to use technology as a surveillance tool by which to make sure that workers are doing their job exactly as required. Under Article 3 of the Workers' Statute technological oversight needs to be carried out in person (this is referred to as human oversight), so as to make sure that such oversight is transparent and consistent with the need to protect the freedom and dignity of workers. Article 4(1) and (2) of the Workers' Statute governs the use of audiovisual equipment and other tools that make it possible to monitor the activity or workers remotely, stating that these tools and equipment can only be used to advance the employer's organizational and productive interests, ensure workplace safety, or protect corporate assets and equity, and they cannot be installed or used without authorization from trade unions and government inspectors, unless they are essential to the work being performed and their use is integral to the company's organization of business.

Under Article 4 of the Workers' Statute (as amended by the Jobs Act), technological surveillance of work activity is permitted so long as there is no specific intent to carry out such surveillance, that is so long as the surveillance is not the *reason* for using the technology but is rather an after-effect (and any intent to surveil is therefore merely constructive). Hence the worker-protection rule requiring employers to notify workers of their use of technology, explaining how it will be used and how workers will be tracked, as well as to comply with data protection laws.

What we should want to know at this point – and this is still an open question – is whether this Article 4 provision of the Workers' Statute of Rights holds up in the face of the practice of remote work in its various forms. And we should start by querying the distinction in Article 4 between intentional and nonintentional surveillance (or between specific and constructive intent to surveil). In fact that distinction no longer appears to make much sense in a remote-work context, attesting to a certain anachronism of Article 4, still based on the traditional idea of hourly work carried out within the workplace.

After all, how is it possible to supervise remote work if not by way of remote tracking?[36] While it is unquestionable that the distinction between intentional and nonintentional technological surveillance loses force in remote work, this should not be taken to mean such surveillance, whatever its form, can be carried out disregarding the freedom and dignity of the worker. The need to protect workers does not fall away in remote work. On the contrary, such protection becomes even more crucial, considering that technological tools in this context are used not only to perform work but also inevitably to monitor its performance and make sure it is carried out to specification.

Even if Law No. 81/2017 makes explicit reference to Article 4 of the Workers' Statute, the law still entrusts the task of securing adequate worker protections to the individual agreements that workers make with the entities they work for. But, as discussed, this exposes workers to the perils of the weak

[36] Carinci op. cit. 83–93.

bargaining position they find themselves in, and so we argue that the task is instead best entrusted to national collective bargaining and, where possible, to company-level collective bargaining. This, we believe, should be the primary framework within which to negotiate worker oversight practices, understood as part of a company's organisational and productive system, and this goes as well for the data protection policies that companies are required to implement by law.

In remote work, as noted, technology inevitably acts in a twofold capacity, for on the one hand it is what enables workers to do their job, but at the same time it serves as a tool for monitoring the productive organisation of work, or how a company runs its business. Indeed, under Article 4(c)(1) of the Workers' Statute, that organization figures as one of the legal bases that allows for such technological oversight, but the practice is subject to authorisation by trade unions. Collective bargaining thus plays a crucial role in defining the shape of worker oversight practices, and the approach should accordingly be participative.[37] On a holistic understanding of a person's well-being, a parallel can be drawn to the participatory logic typical of occupational safety and health, which too revolves around the concept of the well-being and dignity of the person.

7. The right to disconnect

There is one further consideration that emerges from the foregoing remarks, and it has to do with the relation between an employer's power of oversight, on the one hand, and its obligation to ensure workplace safety and health, on the other hand. Indeed, while Article 41 of the Italian Constitution recognizes freedom of enterprise – and so the ability of companies to set up their business on their own terms, independently of government control, along with the employer's distinctive oversight powers – it also sets a limit on these powers and on that freedom by stating that such free enterprise cannot undermine the societal interest in safety, freedom, and human dignity. In this context, the right to safety calls for a broad notion of health that, as mentioned, cannot be reduced to the absence of illness or infirmity but needs to embrace an overall state of physical, mental, and social well-being (Art. 2(1)(o) of Legislative Decree No. 81/2008). The employer's obligations in this respect need to be accordingly broad-gauged.

We can see, then, that the duty to ensure workplace safety cannot be narrowly construed but is rather closely bound up with a whole suite of issues that include worker privacy and confidentiality, nondiscrimination (witness the use of reputational rankings), and work-life balance, including the

[37] Sandro Mainardi: Il potere disciplinare e di controllo sulla prestazione del lavoratore agile. In: Luigi Fiorillo – Adalberto Perulli (eds.): *Il Jobs Act del lavoro autonomo e del lavoro agile.* Torino, Giappichelli, 2018. 213–226.

right to disconnect by means of technological tools, which is particularly relevant in remote work (Art. 19(1) of Law No. 81/2017).[38]

If we take the right to disconnect, for example, we should be able to appreciate that it does not just fit into a broader effort to promote work-life balance but also connects to the right to health, and so to the protection of workers' physical and mental integrity[39]. In fact, in the emerging context of "remote" technology and work, the right to disconnect can be considered equivalent to the right to rest and leisure, with the result that it is the responsibility of the employer to ensure the health, safety, and well-being of its employees even when they are working remotely.[40]

It should be noted in this respect that Law No. 81/2017, at Article 19, provides that the right to disconnect is to be protected by way of individual agreements requiring the employer to adopt proper technical and organisational measures, and the point to be made here is that these measures are part of the overall preventive package for securing the safety and health of workers: they figure among the obligations the employer has towards workers.[41]

The purpose of the right to disconnect is not only to protect the health of workers by not invading their personal sphere, but also to prevent an abusive exercise of the employer's powers, which could expose workers to the risks attendant on the "open texture" of time in remote work, where one moment bleeds into the next without any clear boundaries between chunks of time.[42]

As some scholars have argued, the further we move away from the traditional spatial and temporal boundaries in the organization of work, the greater the risk that the time spent working gets commingled with the time spent living.[43] We have the paradox, then, that while Law No. 81/2017 was designed around the assumption that remote work could serve as a tool by which to promote work-life balance, the increasing slicing and dicing of remote work, spread out across time and space, is increasingly taking down the boundaries between the different spheres of a worker's life, or at least is making them unclear.[44]

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38 Giancarlo Ricci: Il lavoro a distanza di terza generazione: La nuova disciplina del lavoro agile. *Le Nuove Leggi Civili Commentate*, Vol. 3. (2018) 632–670.

39 Regarding the right to disconnect, it is worth mentioning the introduction of the European Parliament resolution of 21 January 2021 with recommendations to the Commission on the right to disconnect (2019/2181(INL)). The resolution lays down minimum requirements to enable workers who use digital tools for work purposes, to exercise their right to disconnect and to ensure that employers respect workers' right to disconnect. It applies to all sectors, both public and private, and to all workers, regardless of their status and their working arrangements. On the above-mentioned resolution, see Manuela Samek Lodovici et al.: *The impact of teleworking and digital work on workers and society.* Luxembourg, Policy Department for Economic, Scientific and Quality of Life Policies European Parliament, 2021. 1–162.

40 Spinelli (2021) op. cit.

41 Annamaria Donini: I confini della prestazione agile: Tra diritto alla disconnessione e obblighi di risultato. In: Matteo Verzaro (ed.): *Il lavoro agile nella disciplina legale collettiva ed individuale*. Napoli, Jovene, 2018. 111–132.

42 Francesca Malzani: Il lavoro agile tra opportunità e nuovi rischi per il lavoratore. *Diritti Lavori Mercati*, vol. 1. (2018) 17–36.

43 Anna Rita Tinti: Il lavoro agile e gli equivoci della conciliazione virtuale. *WP CSDLE "Massimo D'Antona"*, no. 419. (2020) 1–58.; Mariagrazia Militello: *Conciliare vita e lavoro: Strategie e tecniche di regolazione*. Torino, Giappichelli, 2020.

44 Piera Campanella: Smart working e salute e sicurezza del lavoratore: Soggetti, metodi e contenuti delle tutele. In: Carabelli–Fassina (eds., 2021) op. cit. 101–120.

Given these circumstances, it is worth reconsidering the role of collective bargaining and the social partners with a view to improving the quality and gainfulness of remote work, or what it pays.

8. Final comments

It is not just collective bargaining and collective actors that should play a crucial role in this field, but also the law. Although Italian labour law – with the Workers' Statute at its core – has succeeded over the last century in developing an effective worker protection framework, this very framework now needs to be revisited.

As suggested, this means developing the system of safeguards in such a way as to take new forms of work into account, including remote work and work done via digital platforms (as in the case of crowd-working). Moreover, as the boundaries between employment and self-employment grow increasingly blurry, it seems even more urgent to introduce a new Workers' Bill of Rights.

As originally drafted, the Worker's Statute of 1970 envisioned a bright line separating the person as a worker in a subordinate position of employment from the person as such, or what it is to be a person outside the frame of that position. Or, stated otherwise, the law attempted to "isolate the work performed [...] from the person involved in the employment relationship",[45] this on the assumption of a clear distinction between the sphere of personal time and space, on the one hand, and that of working time and space, on the other (witness Art. 8 of the Workers' Statute of Rights), in such a way as to protect the core aspects of human freedom, dignity, and privacy. It did so, moreover, with a view to strengthening the role of trade unions in the workplace and promoting participatory processes making it possible to press demands from the grassroots, without which tools there could be no labour representation, and workers would not be able to organize and protect their own interests.

But the context has since changed, with the slow decline of trade unionism in the industrial relations landscape and a certain overlap between paid work and personal life. And so the time has come to critically reimagine the Worker's Statute, looking beyond the employment relationship as the main lens through which to view the distinction between working life and personal life and to figure out their interrelations and spatiotemporal boundaries.

[45] Veneziani op. cit.