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Market Intelligence

REMOTE WORKING 2023

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This Remote Working volume features discussion and analysis of emerging trends and hot topics within key jurisdictions worldwide.

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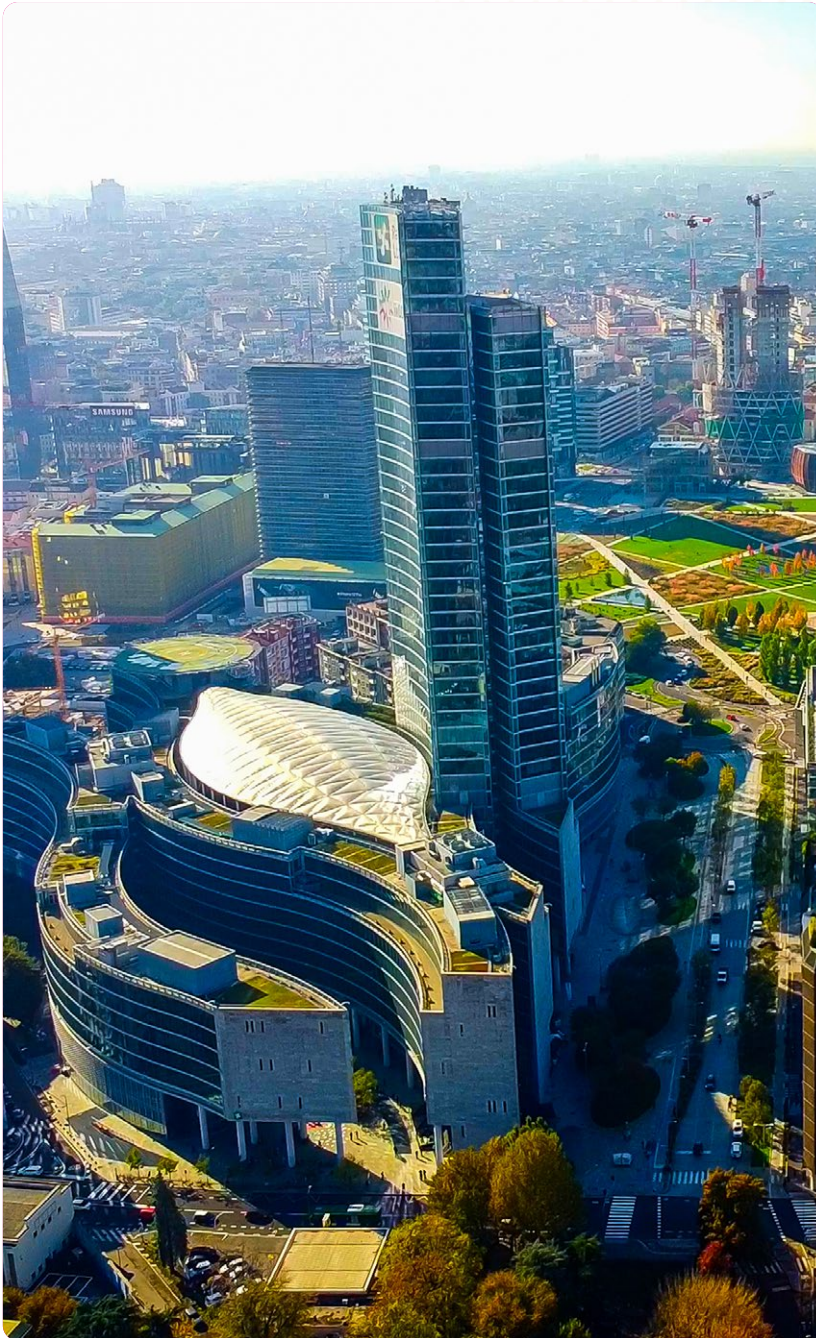


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Italy

Angelo Zambelli is founding and managing partner of Zambelli & Partners.

He has an outstanding reputation in employment and labour law, industrial relations, agency contracts and labour litigation; he also has in-depth knowledge in the planning and implementation of extraordinary finance operations and restructuring plans, including reorganisation and downsizing of companies.

Angelo is the author of several books, among them *Employment and Labour Law Handbook* – Il Sole 24 Ore, 2023; *Company Crisis and Employment Relationship* – Il Sole 24 Ore, 2018; *International Labour and Employment Compliance Handbook* – IBA and Wolters Kluwer (2013 - 2022).

He has been awarded 'Best Lawyer of the Year' at the Legalcommunity Labour Awards (2017, 2015 and 2014), 'Best Lawyer of the Year for Industrial Relations and Trade Unions' (2021, 2013 and 2012) and 'Best Lawyer of the Year for Restructuring' (2020). He was also awarded 'Employment Lawyer of the Year' at Le Fonti (2021 and 2018).

He is ranked among the top 30 leader lawyers in Italy by *Legalcommunity* and *GQ* magazine. In 2023, he has been ranked by *Who's Who Legal* as 'Global Elite Thought Leader' for labour & employment and 'Thought Leader' for pensions & benefits. Angelo has been also included among the four 'Most Highly Regarded' Italian employment lawyers by *Who's Who Legal* (2018, 2019, 2020, 2021 and 2022) and *The Legal 500* in its 'Hall of Fame'. He is classified as a 'star' in the Italian labour market by *Legalcommunity*.





1 What are the most consequential issues that an employer should consider when determining its post-covid-19 remote work policies?

Remote working, also defined under Italian law as ‘smart working’ or ‘agile work’, was conceived by the Italian legislator as a way of working characterised by the absence of time or space constraints and organised by phases, cycles and objectives. It was envisioned to achieve a level of work-life balance and increase productivity. Although many Italian employers had always been rather reluctant to embrace the idea that their employees would not come to the office to perform their tasks, in the last years we have seen a considerable recourse to remote working as one of the main instruments able to contain the spread of the pandemic. Despite the circulation restrictions imposed by the government in the wake of the lockdowns caused by the pandemic, companies were able to operate and provide their services through remote working avoiding the interruption of their activities. Beyond the fact that this modality of carrying out the working performance has represented a useful remedy to cope with the pandemic, it is clear that it is not only an answer to a transitory emergency, but it is contributing to a real transformation of the traditional work. To this end, it is fundamental for employers to identify the key issues connected to such change in a labour market, in which employees would not get paid by being in the workplace for the entire working hours, but for achieving goals and performing well. While the possibility of determining ‘where and when’ to work is more functional and would potentially allow employees to work endlessly, such flexibility has to be properly regulated so that this new working procedure will not endanger neither the employees or the employers. Employers remain responsible for the health and safety of their employees and, therefore, they have to protect the psycho-physical integrity of the worker regardless of the place where the work is performed. It is required to guarantee that employees



Angelo Zambelli

would receive adequate information on the prevention measures applicable to the workplace. Moreover, as remote working would expose employees to constant work-related communications such as e-mail and messages, this circumstance shall be monitored by proper tools that would effectively allow workers to disconnect from work. Working time shall not exceed its legal and contractual duration. The right of disconnection is expressly acknowledged under the law. It is also stated that those who exercise the right to disconnect shall not be subject to any negative consequences on employment relationship, also in terms of economic treatment. Employers are not prohibited from sending their employees email outside of working hours, but the law recognises the employee’s right not to open it during the hours of disconnection, without thereby incurring disciplinary sanctions or other retaliatory measures. Some national collective bargaining agreements and some corporate policies have already

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included specific regulation of the ‘right to disconnect’ from work. However, there are still many companies that have not taken any material action to enable the exercise of the right of disconnection, and this is one of the matters that company policies shall address. In addition, considering that employees may access work material from anywhere through any work device or even through personal tools, it is fundamental that they are informed about the correct use of the work tools they are assigned and made aware of the privacy and security policy in force to avoid sensitive information falling into ‘insecure environment’. The obligations that remote workers shall comply with, however, shall be expressly stated under the policy or the individual agreements governing remote working, and employees must be made aware of any disciplinary consequences of the actions (or the omissions).

2 Pragmatically speaking, is there a threshold to determine when working remotely (from home or otherwise) requires local rules to apply?

There is no minimum threshold to determine when remote working (or smart working) rules shall apply. Once the employee and the employer agree that the employee may render part of the working activities outside the company premises – even for half day a month – the relevant remote working rules shall apply. Moreover, the remote working we have seen during lockdowns was just an emergency adaptation of office work at home better known in Italy as teleworking. Teleworking (ie, working remotely during the entire working hours) was conceived more than 20 years ago as a mere relocation of the workplace: from office to home. However, because of the difficulties employers might have had in trusting their employees to work from home, teleworking did not have a great impact on the Italian work environment scene. Conversely, remote working as envisaged by the Italian legislator in 2017 would include some days in the office, fixed or as needed, and the possibility to work from workplaces other than the company premises or home. As we can see, remote working (or smart working) differs from teleworking by its flexibilities and the possibility for an employee to establish the time and the place of work within the contractual and legal limitation of the employment relationship. Unlike teleworking, remote working rules do not determine how many days shall be rendered remotely and any arrangements are regulated under the individual agreement between the employer and the employee, to the extent allowed under the law. The parties are substantially free to agree on the days the employee may remotely work.





3 If employees voluntarily move away from their main work location, can employers unilaterally impose locally appropriate compensation packages?

When people talk about remote working, they may often imagine themselves on the beach of a Pacific Island typing on the keyboard and sipping a fresh-squeezed juice. After all, getting rid of the stress of commuting and working from idyllic places seem to be a great perk for many employees. Let's say that such dream comes true, the employer might reasonably be tented to reduce the salary of the employee, assuming that his or her new work life would not warrant the same remuneration as previously. Theoretically, this might make sense. However, under the Italian labour law, should the employee and the employer agree that the employee may work remotely and, subsequently, the employee decides to move away, the employer may not unilaterally change the economic treatment of the employee. In general, the employer may not worsen the economic treatment contractually agreed with the employee. Such an amendment may be enforceable only through agreements between the employer and the employee that are executed by following specific procedures. Caution is required to safeguard the employee's position and any decision that would worsen their treatment shall be taken under precise and definite conditions. In the past years of covid-19, many workers decided to leave big cities such as Milan or Rome to stay in their hometowns or in the countryside where the cost of living is much lower. However, this did not allow the companies to lower the salaries of the employees. In addition, the Italian rules on remote working provide that the employees who work remotely have the right to economic and regulatory treatment that cannot be worse than those applied to employees who perform the same duties on company premises only. In other words, the application of remote working by itself may not justify a reduction of salary even if the employee



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decided to relocate to a place where the cost of living is much lower. This, obviously, would not apply for indemnities or compensation granted in connection with how working activities are performed. For instance, if a worker who receives a cashier's allowance starts to work remotely and stops doing cashier-related duties, he or she would no longer be entitled to receive the cashier's allowance.

4 Do you anticipate a rising trend of employers hiring remote workers as opposed to managing office-based employees who subsequently go remote? What practical issues should employers bear in mind when considering remote hiring?

In the current situation, companies are tending to hire new employees and allowing them to work remotely. As a matter of fact, many employers have implemented and still are implementing flexible working initiatives consistent with the corporate culture oriented to work-life balance and employee well-being. The pandemic, to

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this extent, has triggered several measures that supported the employees with kids when the school was shut down due to the spread of the infection and, recently, the government has approved a new regulation transposing the Directive (EU) 2019/1158 on work-life balance for parents and carers who will have priority when they will request to work remotely. Besides the benefit deriving from remote working, such as having flexible working schedule, saving commuting time, cost of petrol or food, there are also some good reasons for companies to shift to more remote work: employers can benefit just as much from remote work agreements as their employees do. Remote working can offer companies cost savings, and many established businesses have already managed to reduce expenses. With most employees working remotely, companies can considerably reduce real estate costs. It is possible to pay for smaller premises and lower maintenance and support costs for electricity, heating, air conditioning and all the other little necessities that keep an office operating. With reduced staff onsite, refreshment and cleaning services are also likely to decline. Beyond the direct costs savings

deriving from remote working, there are also other benefits that can save money in the long term. Offering remote working can be a good reason for employees not to leave a company. The remote working experience incentivises people to stay loyal and could help to reduce employee turnover. Flexible work arrangements may have positive effects on the company organisation: as the pandemic has come to an end, many companies have seen their employees wanting to continue working remotely. Working from home is an advantage but it is appropriate for people to stay in touch with the company. Remote working shall be performed within the subordinate structure of the employment relationship upon a clear arrangement that provides for both rights and obligations. While the idea of moving away and working from places other than the employer's premises may sound like the future of normal working life, employers shall be enabled to exercise their directive powers and request – for instance – that remote workers come to office at any time and giving them proper advance notice. From this perspective, it is clear that flexibility afforded by remote working shall be based upon arrangement between the employee and the employer that set boundaries that both parties shall take into account.

5 Do local laws provide remote employees with more generous leave entitlements, such as sick leave? Can employees avail themselves of leave entitlements in both the primary work location and the remote work location?

Among the benefits that may arise from remote working there is also the possibility for the employee to choose the place of work without being necessarily bound to the national territory (although, in such a case, issues may arise whenever taxes and social security charges are paid to those authorities of the country in which the employee is formally employed, despite him or her regularly performing the work





performance from a different country). This means that, in theory, remote working might be practicable even abroad, both within EU and outside the EU, if not otherwise arranged with the employer. The idea that with a good connection it is possible to work from anywhere gave rise to the prevailing vision of a covid-19-reformed work world made up of a large group of travelling remote workers. The concept of digital nomadism is still increasing, and it seems to have overshadowed the potential inconveniences from transnational issues associated with working abroad. Working remotely under an employment contract regulated by a foreign legal system may lead to difficulties that would make it very unrealistic for employees to work abroad on daily basis. One of the issues linked to working abroad concerns - for instance - sick leave. In Italy, this matter is usually covered by the applicable national collective bargaining agreements or, if not expressly regulated thereunder, by the law. The Italian social security protection system grants employees an average 180 days of paid sick leave a year. However, the length of this period varies considerably depending on the applicable collective agreement, as well as on any further period of unpaid sickness leave. Employees on sick leave are entitled to receive the relevant sickness allowance according to the provisions of the law or the applicable collective agreement and they cannot be dismissed unless for specific causes (eg, dismissal for severe misconduct by the employee). If employees hired under an Italian employment contract fall ill while staying abroad, as they are granted the very same leave entitlements as employees stationed at the employer's premises, they will have access to the Italian social security treatment upon submission of the relevant documentation collected in the remote work location. Lacking such documentation, the employee may not benefit from the Italian sickness protection system. For this reason, before making any change of the work location, it is important that both employee and employer are aware of the correct procedure to follow to understand each other's rights and obligations should any problems arise while abroad.

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6 What are some best practices for protecting confidential and proprietary information in a remote work environment?

Most remote employees seem to enjoy the benefits of working from home thanks to the possibility of working from anywhere and anytime, without being forced to follow a time schedule or to be stuck in traffic congestion in rush hours. Although this possibility to work from anywhere and around the clock added a huge shift towards remote working, such accessibility is currently a cause of concern for some people. To be able to access to company information make inevitably such information vulnerable to attack from third parties. Along with the spread of remote working, cybercrime seems to have increased. There are many instruments to avoid external attacks, and remote employee must be properly informed and trained on how to keep networks and systems secure and to ensure company data and business information be treated as sensitive. For instance, IT professionals would recommend using a VPN system that enables



remote workers to prevent intruders from accessing data, and they discourage the use of public Wi-Fi. Companies should adopt IT security systems that use an encryption process to scramble data text so that hackers cannot read it. Another risk connected with remote workspaces is the likeliness of losing devices containing confidential or sensitive information. To reduce the risk of access to such information, it is possible to use an encryption system that makes company data inaccessible. To this end, it would be helpful to adopt more than one authentication method to secure computer network. These are useful tools the company should bear in mind when it allows employees to work remotely. The implementation of a security system is essential, but it is more important that people using it are properly instructed and trained. Companies need to implement policies that employees must abide by when they work remotely. It is imperative to establish rules regarding the correct and proper use of the technological devices and which behaviour should be avoided to mitigate any risk arising from working outside company premises. To make such rules effective and discourage employees from misbehaving, company policies shall state clearly that failing to comply with the policies will bring disciplinary consequences. However, according to current market practice, employers, rather than implementing such policies, seem to simply prevent remote employees from working from certain locations, such as public places or those open to the public, where a disclosure of confidential information may take place. Thus, they are clearly setting out a specific prohibition under the individual agreement governing remote working.

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7 How does a remote employee affect the employer's tax obligations? Do the employee's activities render the employer to be 'doing business' in the remote location? Will these activities create a taxable presence for the foreign employer in the local jurisdiction?

The possibilities of working in Italy for foreign employer are significantly increasing. One of the most recurrent cases regards Italian or even foreign workers who decide to move to Italy while having an employment contract with a foreign company. However, this may imply significant risks from both a tax and social security standpoint. First of all, according to rules governing this issue, both taxes and social security charges are to be paid to the authorities of the country where the work is performed by the relevant employee (as far as taxes are concerned, a 183-day per year threshold apply). Therefore, whenever taxes and social security charges continue to be paid to those authorities of the country in which the employee is formally employed. Despite the person working from a different country, the risk exists that the one of the countries in which the work is remotely performed may claim for payment of the omitted taxes and social security charges. This claim would be addressed to the employer if (as happens in Italy)- the latter acts as withholding agent with respect to both taxes and social security charges due by its employees. Moreover, the risk that such conduct may lead to a permanent establishment (PE) of the employee exists and is concrete. The Organisation for Economic Cooperation and Development considers a PE to be a fixed place of business through which the operations are wholly or partly carried out continuously. Based on the assumption that the remote worker would not conduct any business on behalf of the overseas employer by simply working from home, for tax purposes the engagement of the remote worker should not be considered as a PE. However, this does not exclude the fact that an employee working from a hometown overseas or a holiday home



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for quite a long period could create a PE for the organisation. As an example, for a remote employee acting as a sales manager who sends products descriptions to potential clients without needing to negotiate a contract, it would be quite unlikely that such circumstance would be considered a PE. Conversely, if the activity of the sales employee included negotiation and execution of contracts in Italy on behalf of the foreign entity, it cannot be excluded that the tax authority may consider such activity as resulting in a PE. If the activity performed in Italy by the employee hired overseas triggers the existence of a PE of the company in accordance with Italian tax law and the tax treaty it shall be evaluated based on the actual activities carried out by the employee in Italy. Any time a foreign entity agree that an employee would work remotely and abroad it should evaluate whether such a situation would constitute a risk to be subject to the local taxation law.

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8 What are some best practices for tracking remote work arrangements?

According to Italian law on ‘ordinary’ remote working, employers and employees shall agree upon remote working by executing a written individual agreement whereby terms of working outside the employer’s premises are defined. This agreement establishes the rules the workers shall abide by while performing their working activities remotely. Given the fact that Italian law provides for remote work arrangements to be executed in writing, including for probative purposes, companies have been forced to somehow track all remote work agreements. However, to allow recourse to remote working during the pandemic emergency, the employer was enabled to activate remote working by submitting the relevant communication to the competent Italian authority without the need to sign an individual agreement. The possibility of implementing remote working by this simplified procedure did not lessen even after the Italian government

declared the end of state of emergency. Remote working is still widely used as an effective instrument to avoid physical contact and helps to mitigate the risk of contagion. Many Italian organisations are allowing their employees to work remotely. The recourse to remote working, however, shall be coordinated rather than randomly used or granted by the company. For this purpose, companies must keep abreast of all remote working arrangements and know precisely the effective use of remote working within the organisation. It is fundamental to monitor how many remote working arrangements are in place. This is also useful to ensure a proper balance between work at the office and remote working. For efficiency reasons, organisations should keep abreast of whether their offices are overcrowded or completely abandoned.

QUESTIONS



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The Inside Track

What do you think are the most exciting and promising opportunities of remote working? How do you think it will affect the future of work?

Remote working allows employees to work from anywhere without being in the office. I believe that the biggest challenge of the future work may consist in finding the right balance between presence in the office and remote work, shifting to a more hybrid working. It is necessary to combine individualism and team working by creating a work environment that will reduce the physical distance, motivate collaboration and encourage participation in teamwork activity and company productivity. It is unlikely that remote work will function in an environment characterised by a high rate of absenteeism, low participation, and poor communication.

In your view, what are the most difficult challenges raised by the rise of remote working? How do you think employers should tackle these challenges and adapt accordingly?

A cultural shift is required. Remote working allows us to change the paradigm of work by evaluating results and not time, but it also requires a transformation of front-line managers who must learn to think and work differently. Companies shall invest in training and development of managerial leadership to adopt methods that are aimed at improving delegation skills, setting work by objectives, specific goals and deadlines. Managers should become aware of the fact that measuring productivity should be more important than monitoring employees.

What do you enjoy most about practising and advising in this area?

Remote working is a challenge for the world of work. Employment law has changed rapidly in the past 20 years, trying to find a compromise between the rigid structure of the subordinate employment relationship and the flexibility that characterises rather an autonomous and independent work relationship. As an adviser in this field, I find exciting to see first-hand the evolution that innovation in technologies would bring in developing new models of work and the subsequent transition from the traditional work regime to the new uncharted territories of rather more flexible employment relationship.





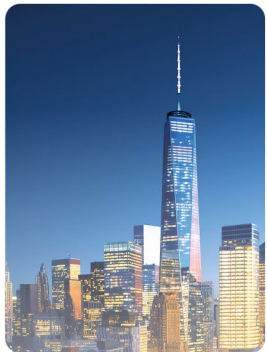
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