

Transnational posting of workers: strict controls on the entire chain.

With note No. 4833 of 5 June 2017, the Italian National Labour Inspectorate provided instructions for inspections regarding transnational postings of workers which involve multiple undertakings (i.e., seconding company, host company and the final beneficiary of the worker's performance, different than the host company).

The note sets out a strict framework, providing that a genuine posting must be assessed with reference to the entire transaction, applying both the specific requirements under the rules governing international posting and the general requirements under Italian law governing service contracts, postings and staff leasing.

Companies must plan international postings taking into account all requirements, and prepare the documentation carefully, so as not to incur in penalties or allow the posting to be reclassified as an employment relationship with the final beneficiary of the work performance.

- The National Labour Inspectorate ("NLI") offered its view on the correct application of Legislative Decree No. 136/2016 (implementing Directive 2014/67/EU concerning the posting of workers in the context of the provision of services) when undertakings in addition to the seconding company and the host company are involved.
- First, the NLI has pointed out that the notion of transnational "provision of services" under Legislative Decree No. 136/2016 is quite broad, and includes several forms of contractual arrangements that in Italy are expressly governed by law, such as contracts for services agreements and subcontractors chains, as well as other trade agreements for the exchange of services between undertakings established in different countries, even if in the same corporate group, or between branch offices of the same company.
- Based on this premise, the NLI has concluded that the requirements set out in Legislative Decree No. 136/2016 apply also when employees of a foreign service provider (i.e., the seconding company) are sent to work in Italy at either an Italian branch of the seconding company or at other economic operator located in Italy, whether or not a member of the same group of companies (i.e., the host company) and in turn at the headquarters or other business unit in Italy of an undertaking which is the final beneficiary of the performance (i.e., the customer).
- In this case, the determination of whether the posting is genuine must involve an assessment of the entire chain. To this end, the inspectors must apply both the European derivation requirements set forth in article 3 of Legislative Decree No. 136/2016 (for all involved parties, whether national, EU and non-EU) and the requirements necessary for the service agreement,

posting and staff leasing to be valid and lawful under Legislative Decree No. 276/2003 and Legislative Decree No. 81/2015 (for relationship between the host company and the customer in Italy).

- In particular, the inspectors will be required to verify the existence of clearly defined agreements and the continued existence, throughout the entire posting period, of an actual employment relationship between the workers and the foreign seconding company. This to prevent the fraudulent sending of workers in Italy, which could include conduct in breach of national law or of European derivation law.
- The NLI indeed has underscored that Legislative Decree No. 136/2016 is mainly aimed at preventing the social phenomenon of "employment dumping", which is carried out by companies that appear to be foreign companies although they in fact have established a fixed base in Italy, or carried out through fictitious companies that have no productive operations, rather purely manage or supply staff in absence of due authorization. The NLI had specifically addressed this phenomenon in its Circular Letter No. 1/2017.
- It is against this backdrop that the inspectors must assess, taken as a whole, the several elements set out in article 3 of Legislative Decree No. 136/2016, to ascertain whether (i) the seconding company actually performs activities beyond mere internal management or administrative activities (e.g. by considering the locations where the workers are hired and from where they are posted, the number of contracts entered into, and the turnover realized, in the country of establishment), and (ii) the worker is truly posted on a temporary basis (e.g. taking into account that the worker habitually carries out his/her work in the country from which he/she was posted and either has returned or plans to return there, assessing the length of the posting also considering turnover/substitutions of workers in the posting).
- Always in this perspective, and especially so as to render inspections and penalties effective, find their place the provisions on administrative cooperation between the authorities of the UE Member States as well as those relating to formalities to be accomplished by the foreign seconding company, whether or not established in a UE Member State (articles 8-24 of Legislative Decree No. 136/2016).
- In more detail, the foreign seconding company must notify of the posting the Italian Ministry of Labour in advance, disclosing, among other things, the place of actual performance of work (which could be different from the host company's premises provided that a suitable legal structure is in place such as a service contract or a subcontract). Moreover, the foreign seconding company must keep, translated into Italian, all relevant documentation for up to two years after the end of the posting, and must appoint a special contact person in Italy responsible for sending and receiving such documents. In absence of such appointment, the relevant site will be the premises of the beneficiary of the performance.
- The two-year retention period mirrors the statutory term available to bring legal action invoking joint and several liability under article 29, paragraph 2, of Legislative Decree No. 276/2003, given that international postings too are governed by the same rules under Italian law, imposing joint and several liability, and parity of treatment, among all undertakings involved, as in the case of services contracts or staff leasing (i.e., article 29, paragraph 2, of Legislative Decree No. 276/2003; article 1676 of the Italian Civil Code; article 35 of Legislative Decree No. 81/2015).
- Given the NLI's note, it will be essential for companies to take into account all the applicable requirements when planning international postings and preparing the relating contractual and management documentation.

Authors



Simonetta Candela
Partner

T: +39 02 806 341
E: simonetta.candela@cliffordchance.com



Marina Mobiglia
Senior Associate

T: +39 02 806 341
E: marina.mobiglia@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, Piazzetta M.Bossi, 3, 20121 Milan, Italy
© Clifford Chance 2017
Clifford Chance Studio Legale Associato

Abu Dhabi • Amsterdam • Bangkok • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Dubai • Düsseldorf • Frankfurt • Hong Kong • Istanbul • Jakarta* • London • Luxembourg • Madrid • Milan • Moscow • Munich • New York • Paris • Perth • Prague • Rome • São Paulo • Seoul • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

*Linda Widyati & Partners in association with Clifford Chance.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.

Clifford Chance has a co-operation agreement with Abuhimed Alsheikh Alhagbani Law Firm in Riyadh.