

Remote controls: the new Art. No. 4 of the Italian Workers' Statute

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Last September the **Italian Legislative Decree No. 151 dated 14.09.2015** (one of the executive decrees under law No. 183/2014, better known as the 'Jobs Act') was approved. Among other things, it amended Art. No. 4 of the Italian Workers' Statute on **remote controls**.

The Italian Legislator has thus implemented the proxy set out in Law No. 183/2014 (Art. No. 1, paragraph 7(f)) which provides for the "review of the guidelines on remote controls, taking into account **technological innovations and reconciling corporate production and organizational requirements with respect for workers' dignity and privacy**".

The main changes introduced by the new wording of this rule relate to:

- A distinction between **audio-visual equipment and other instruments** giving rise to the possibility of remote control of workers' activities, on the one hand, and the **instruments used by workers during the performance of their work** and those used to **record access and attendance, on the other**;
- The former may be installed and used, **following an union agreement or a ministerial authorization**, not only for organizational and production requirements or for safety at work, but also having regard to the requirements of **protection of corporate assets**;
- The latter do not require any agreement / authorization;
- It also introduces the possibility, in the case of companies with production units located in different provinces of the same region or in different regions, to enter into union agreements with the trade unions that are the most representative at national level, in addition to with individual union representatives at plant level / single trade union representation; in the event of failure



to reach an agreement, it is possible to request the authorization of the Italian Minister of Labour;

- It recognizes the possibility of employers using the information collected through the abovementioned systems and instruments **for all purposes related to employment provided that workers are properly informed about the modes of use of such instruments and the implementation of controls, in compliance with the provisions of the Italian Legislative Decree No. 196 dated 30 June 2003**.

Unintentional controls.

Art. No. 4 of the Italian Workers' Statute aims to achieve the right balance between the conflicting interests of employers wishing to optimize the organization of production and protect their corporate assets, and workers wishing to preserve their dignity and privacy in the carrying out of their work.

With respect to the original wording of Article No. 4 of the Statute, **the existing rule no longer provides for a total and general ban** on using audio-visual systems and other equipment for the purpose of remote control of the activities of workers.

However, the new Article No. 4 *exclusively* legitimizes so-called **unintentional** controls, i.e. the controls that are the indirect effect of the presence of control systems whose main purpose is to meet organizational, production, work safety requirements or to protect corporate assets.

This means that, even today, employers may not legitimately use any instruments having the sole purpose of continuously verifying the quality of a worker's performance and workloads.

By way of example: there should not be any doubt that the use of devices (e.g. special programs installed on corporate computers – the so-called key loggers, etc.) having the sole purpose of verifying continuously, and remotely, work performance is still not permitted. These are massive and continuous forms of surveillance that represent an invasion of workers' privacy.

In this respect, the judicial provisions establishing that, while necessary for the organization of production, surveillance at work should maintain a "human" dimension, i.e. one that is not exacerbated by the deployment of technologies making surveillance ongoing and inflexible, thereby invading workers' privacy and limiting their autonomy in carrying out their work, continue to be relevant today (see in this respect, Cassation No. 4375/2010; Cassation No. 1236/1983).

Union agreement or authorization.

Today, companies with their production units located in different provinces of the same region or in different regions, may enter into union agreements for the installation of audio-visual systems and other instruments giving rise to the possibility of remote control of workers with the most representative trade unions at national level rather than with the union representatives at plant level or the single trade union representation, and, in the event of failure to reach an agreement, the Ministry of Labour is expected to grant a ministerial authorization.

Technological work equipment and tools allowing employers to record attendance.

The new paragraph 2 of Art. No. 4 of the Statute updates the rules in the light of technological innovations and, as appropriate, **excludes** the need for agreement / authorization in the case of use by employees of "technological" work equipment such as PCs, smartphones, tablets, barcode readers, etc. (which could also be used with the purpose of remote control).

Similarly, the need for agreements / authorization for use of presence surveyors (badges, traditional turnstiles, carriage bars) is also excluded.

The extremely strict interpretations, sometimes also adopted by the Court of Cassation, whereby the installation and use of electronic badges by employers would have required an agreement with the unions or ministerial authorization, failing which the information collected by means of this system could not have been used, should now have been abolished (e.g. Cassation No. 15892/2007 declared unlawful the dismissal of a worker who, on several occasions, left the company before the end of the work shift, on the basis of the non-usability of data relating to the exit of the worker using an electronic badge as its installation was not preceded by an union agreement / authorization).

Although in actual fact, several doubts arise with reference to **badges with RFID technology** (dealt with by the Order dated 9.3.2005 and No. 81 dated 1.3.2012).

If used exclusively in order to monitor access such systems lie within the scope of paragraph 2 of Art. No. 4 and therefore agreement / authorization will not be necessary.

Where there are organizational, production requirements, security needs or the need to protect corporate assets justifying the use of this technology to **monitor the movements of workers and / or access to certain restricted areas, it can no longer be regarded as a straightforward attendance recording system, but a unintentional control requiring the agreement / authorization referred to in paragraph 1** (it being understood that the system cannot be used exclusively for the purposes of controlling working activities and without workers knowing).

I believe that a similar type of reasoning will be followed with regard to **GPSs** installed on corporate assets. In the case of GPSs that are mere tools making it easier for workers to reach their destinations, no agreement is necessary. However, in the case of more complex corporate fleet tracking systems that also meet production, organizational requirements or security needs, then union agreement / authorization will be required. In this respect, please see also Order No. 370 dated 4.10.2011 on tracing systems of vehicles within the scope of the employment relationship.

Use of information collected through remote control instruments and systems.

We have said that the new paragraph 3 departs from the previous text by providing that information collected through systems and instruments referred to in the first two paragraphs may be used **for all purposes related to the employment relationship and, therefore, also for disciplinary purposes.**

This provision seems to leave behind **the concept of “defensive controls”** developed by case-law in accordance with the old rule: the prohibition of remote control of workers **did not apply in cases in which the control was aimed at ascertaining unlawful behaviour by workers and did not directly or indirectly concern work performance.**

In this respect, also in accordance with the old rule, the information collected through such systems could be *used in order to detect and establish a wrongful act of the worker that was also a disciplinary matter* (see Cassation No. 6489/2011 on video surveillance). There were some lingering doubts in such cases as to whether prior authorization was required pursuant to Art. No. 4 of the Statute.

Under the new rule, such information may also be used for purposes lying beyond the scope of so-called defensive controls, while **expressly providing that workers be informed about the use of information and controls, and that everything be done in compliance with the Privacy Code.**

These conditions were not previously provided for. In the future, **the usability or otherwise of such information will be established on the basis of evidence of the existence of suitable regulations and corporate policies with regard to the rules set out by the employer on the use of instruments and the relevant controls; the latter must be carried out in compliance with provisions of the Privacy Code** (lawfulness of data processing, relevance, fair processing, respect of the purposes of data processing). Therefore, each instrument will require specific corporate provisions to be properly advertised, failing which the information collected may not be used in court.

Obviously disclosure requirements shall not be limited to the reports mentioned in Art. No. 13 of the Privacy Code. Controls shall be carried out in compliance with the principles of proportionality, necessity, transparency and non-discrimination – see the *Linee guida del Garante per posta elettronica e internet* (guidelines issued by the Italian protection authority on email and the Internet), Gazzetta Ufficiale No. 58 dated 10 March 2007).

For every instrument it will therefore be necessary to:

- Identify the modes of use considered normal and allowed;
- Take all appropriate organizational and technological measures aimed at preventing the risk of improper use so as to limit subsequent controls;
- Make explicit which information will be temporarily stored and for how long and who has access to it;
- Whether, to what extent and by means of what procedures employers may reserve the right to carry out controls (which must comply with the principles of relevance and respect of the purposes of data processing);
- Gradualness of controls (anonymous checks and on aggregate data general warning individual controls);
- Measures of a disciplinary nature to be adopted by the employer as a result of any irregularities detected.

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