

ITALY

Executive's Working Time: Can the Executive Work on a Part-Time Basis?

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Executives on a part-time basis?

The scholars and the courts have always tried to define the legal concept of executives, given that the Italian civil code simply defines the aforesaid category of workers as being neither workmen nor employees, although working as subordinates.

As far as employment contracts are concerned, the category of executives has been defined on a vague level, characterised by the absence of the typical legal protection granted to the other two categories of workers under the contract of employment.

Therefore there are only a few provisions of law on this issue, mainly asserting the right and discretion of the employer to terminate the contract and excluding the possibility of setting a limit on working hours per day and per week.

Nevertheless, the financial crisis in Italy, together with the exigencies of Italian companies to use flexible employment contracts, have raised the possibility of reducing standard working hours for executives, to reduce costs.

Pursuant to art. 17, paragraph 5 of the Legislative Decree no. 66/2003, executives have been excluded by the application of the current law provisions on working time, so applying part-time contracts of employment to executives creates some difficulties.

Exclusion from these provisions would seem to be justified by the managerial position and the trust-based nature of the role. Entrepreneurs rely on executives' skills and need to give them the necessary autonomy and discretion to perform a high quality job. Under these circumstances, it is not feasible to agree a regular distribution of working hours, which are linked to the essential nature and relevant responsibilities of the tasks carried out, and therefore must be flexible.

The fact that an executive's operating autonomy is not suited to time constraints, and that executives usually have wide discretion in scheduling their working time, does not imply that the related tasks shall not be subject to a maximum duration.

At first glance, executives seem unconcerned by the provisions of law setting forth the principles of part-time employment (Legislative Decree no. 61/2000), but this provision does not expressly exclude executives from its application.

Therefore it may be assumed that executives shall, as subordinates, agree a reduced working time or turn their full-time contract into a part-time one, by inserting specific clauses into their individual contracts, which consider the reduction of time needed to carry out their tasks as an exception to the provisions on minimum remuneration set forth

by the collective agreements.

Whereas there seem not to be legal limits for executives to enter into a part-time contract of employment, the elements of the part-time standard contract still seem to cause some difficulties, in particular when referring to the requirement of setting the covenants in writing, including the distribution of working hours that must be significantly reduced, as provided by the collective agreements.

Collective agreements do not set forth specific provisions on the working time of executives, but only fix and define, in some cases, their general nature in relation “to some extents, with wide discretion to the usual working time of the operating unit to which the executive has been assigned” (in accordance with the collective agreements for executives assigned to the tertiary sector).

In this framework the reference for the application of a part-time contract of employment will be the distribution of working hours in relation to the specific operating unit to which the worker has been assigned.

As far as the duty to indicate the distribution of the working hours is concerned, with reference to day, week, month and year, pursuant to article 2, paragraph 2 of Legislative Decree n. 61/2000, as essential elements of the contract, under pain of conversion of the part-time contract into a full-time one, the Supreme Court (*Corte di Cassazione*) pronounced the Decision no. 22003/2008. Such decision sets forth the principle, according to which a part-time contract of employment for the performance of executive tasks, where entered into under written form and duly transferred to the relevant public authority, complies with the provisions on part-time contracts of employment when specifically indicating only the maximum amount of working hours, while giving the employee discretion in the distribution of such hours.

In other words, for a correct application of a part-time contract of employment, it is necessary that the distribution of working hours is *a priori* and duly determined, with the purpose of preventing the employer from unilaterally setting forth variations in the distribution of the working hours that have been set to carry out the relevant tasks and activities. Such discretion would affect the nature of the part-time assignment, constraining the employee to offer a disposability, in terms of working hours, that would make him lose any advantage derived from the reduction of working time, which is already linked to a reduction of remuneration.

In consideration of the above, the courts and the case law highlight that, with regard to tasks at the executive level, any working time limit, being excluded by the current provisions of law, may derive only from clauses under collective agreements, standard corporate procedures or individual contracts. Should there not be, on this matter, any provision originated by such sources of law, the part-time contract of employment for executives would nevertheless be considered lawful and enforceable if a limit in the amount of working hours, for the performance of the task, is set and only if the autonomy of the executive to distribute their working hours is left unprejudiced. Indeed such autonomy shall not be left at the employer’s discretion, in consideration of the specific executive level of the tasks.

Upon the foregoing, the Supreme Court affirmed the principle, according to which a part-time contract of employment for executives is valid and binding when indicating only the maximum amount of working hours and leaving the related distribution at an executive’s discretion.

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