QuotidianoPIÙ

Lunedì 17/06/2024 • 06:00
LAVORO ENGLISH VERSION

Digitial platform work in Italy: how the new EU Directive will change things

The European Parliament voted on a new **Directive for Digital Platform Work**. This new approved text will then have to face some further hurdles and once approved the new text will then be published in the Official Journal of the European Union – and hence the new Directive of Platform Work will become EU Law. When this happens, each European Union Member State will then have 2 years to integrate this new EU law into their national laws. So where does Italy stand in this matter?

di Luca Failla - Avvocato - Managing Partner studio boutique Failla & Partners

di Paola Salazar - Avvocato in Milano

On April 24th 2024, the European Parliament voted on a new **Directive for Digital Platform Work** after an agreement was finally reached between the European Parliament and the European Council on the final text of the proposal originally presented in February 2024. This new approved text will then have to face some further hurdles and once approved the new text will then be published in the Official Journal of the European Union – and hence the new Directive of Platform Work will become EU Law. When this happens, each European Union Member State will then have 2 years to integrate this new EU law into their national laws. So where does Italy stand in this matter? This is an especially important question as we consider that the main purpose of this new **EU Directive** is the improvement of working conditions for people engaged to provide a service through digital platforms (such as, but not only, Uber, Deliveroo, and many others).

In order to achieve this objective – which also has the ulterior aim of guaranteeing that people who are hired through **digital platforms** are provided with more adequate forms of protection in the presence of automated decision-making and monitoring systems - the new EU Directive highlights new fundamental principles to be considered. This is especially important in light of the debates on this subject which have been heard in the Italian labor courts in recent years.

In fact, we already see in the beginning of the new EU Directive that it is "*at improving the working conditions of digital platform workers and protecting the personal data of the people who carry out work via digital platforms. Both objectives are pursued simultaneously.*"

The first and most important foundation of this new discipline is in the increase in the number of digital platform in general. This increase in the use of digital platforms has of course become solidly entrenched in our society today in a large part due to the pandemic.

To better understand how these objectives will fit into a **traditional workplace** and its internal systems of organisation it is useful to start with an examination of statisical data.

In particular, here we turn to European-level studies which provided useful concrete information to the legislators drafting the new directive - as well as those who provided their definitive approval.

These studies were instrumental in highlighting how the different categories of workers involved in digital platform work are predominantly characterized by young men, in most cases in possession of a high school diploma, who carry out this type of alternative work activity ('alternative' in the sense that it is an emerging area) as a secondary source of income. The most represented sectors in this area are:

- taxi services: 39%
- deliveries (food delivery, moving services, grocery pickup): 24%
- household services (cleaning, other manual work): 19%
- professional services (accounting): 7%
- freelance activities (graphic design, photo editing): 6%
- home services (childcare, healthcare): 3%
- micro-tasks (classification of objects, labelling): 2%.

Here we see that the most represented type of digital platform work encompasses delivery services, taxi services and domestic work. However, we must also note here that at **the EU level the data** also revealed that of the 28.3 million people who obtain work via digital platforms - 7% (2 million) are employed workers while the other 93% (26.3 million) are self-employed.

Hence, it is only a relatively small percentage of self-employed workers that are being targeted by the new EU Directive as the European authorities estimate that at least 19% of them (around 5 million) are in fact classified incorrectly.

This is because they are being classified, in terms of the management of a self employment relationship, as on the contrary being in a role which is closer to a subordinate form of employment instead of what is officially being declared between the parties as a self-employment relationship.

It is for this reason that the new EU Directive aims to properly identify - using the mechanism of the legal presumption of subordination - the principles with which individual EU Member States will have to comply with new reporting requirements regarding employment relationships through digital platforms.

This is being done to avoid cases of abuse by companies that may catagorise a 'self-employed worker'. The presence of certain conditions will concretely establish the scope of protections inherent in the digital platform employment relationship – also taking into consideration principles of transparency, effectiveness and protection of any data collected on a digital platform worker (also pursuant to the GDPR). It is an important step in properly governing digital platform employment contracts regardless of the *nome juris* (legal designation) used by the parties.

The new EU Directive will be without prejudice to the position of digital platform workers who actually carry out activities within the framework of a genuine self-employment relationship. This is not only at the level of a non-negligible declaration of principle but also, above all, on the basis of the equally important right of freedom to provide services which are also protected at the EU community level

And here we come to the most relevant point in reference to this new organisation of the workforce.

The evolution of the regulations governing the internal workforce organisation of this type of business has had in recent years – which started with the introduction of self-employed work through digital platforms in 2019 (articles 47-bis and subsequent Legislative Decree no. 81/2015) - has led to the need for new judge's statements that precisely define the protection of workers - especially those involved in home delivery services. Here there has been an assumption that those who carry out home delivery services (especially those operating in the "food delivery" sector) are formally classified as self-employed. However, the reality is that they are protected through application of the protections provided for by the Italian legal system as if it would be a subordinatte employment relationship between the parties.

This last point, which also includes trade union protections and social security obligations, was established in Italian case law through the Turin App ruling of January 11th 2019, the Civil Cassation - Labor Section no. 1663 ruling of 2020, and by the Court of Florence on November 24th, 2021 and the Court of Milan on October 19th, 2023.

We must note through that, in practice, they have to be protected not only para-subordinate collaborations through digital work platforms as the execution of the service methods are "organized by the client" – and this is one of the areas where the classification as subordinated work classification can be applied by Italian Law (as expressly provided for by art. 2, paragraph 1 of Legislative Decree no. 81/ 2015). But at the same time, employment relationships created through digital work platforms between the parties have to be protected as a subordinate employment relationship even if they are declared to be "autonomous" as we see above they often may appear to lack the typical elements of 'autonomous management of service' provided for by law.

Ultimately, the classification between the parties of the employment relationship as a self-employment relationship, even if provided for by law, would be of no use when the functional inclusion of the worker in the client's organizational structure is proven. This also includes when the work relationship is implemented through the use of automated systems. (i.e. algorithms) that highlight a relevant and deeply ingrained exercise of management, organization, and control powers.

Italian labor law on these matter originally seemed to take the side of the guiding principles regarding autonomy and subordination. However, a number of years ago a Judge would have most likely qualified a person's externally organised work performance through a digital platform as autonomous. Today, when these same traditional metrics for autonomous vs subordinated work relationships are viewed with new eyes – what was previously considered 'autonomous' in terms of work which is 'externally organised' is clearly, in many cases, firmly in the subordinated employmeny camp.

This is precisely due to the technical evolution of the digital platforms themselves and hence Italian labor law, and the companies hiring workers through digital platform services, need to examine more closely an incisive re-qualification function by the courts - beyond the *nomen juris* attributed by the parties to the employment contract (for example self-employment through a platform

pursuant to articles 47 bis and following Legislative Decree no. 81/2015).

There is a need to go further and outline **the peculiar organizational features** of the work being carried out through any digital platform (especially in terms of delivery services) which could be classified as "subordinate". This includes any situation where the rider's activity is completely organized through external digital platforms – including those that apply the use of algorythms. Here care must also be taken in terms of the violation of information obligations on automated systems (see Court of Palermo June 23rd, 2023).

In this way, a person's work performance would not only not be legitimately para-subordinate (because hetero-organised) but also completely devoid of the features of autonomy, not only in terms of the methods of carrying out the performance but, above all, in organizational terms (see Court of Milan September 28th 2023 and Court of Milan - October 19th, 2023).

According to EU law, which is also often referred to by Italian judges when ruling on the merit of a matter, a service provider can lose the classification of being an independent economic operator if he / she does not autonomously determine his own behavior in his activities – but instead depends entirely on his / her client. Here it is the fact that the worker does not bear any of the financial and commercial risks deriving from an autonomous and self employed actvity, acting as an integrated auxiliary function of the client (Court of Justice 04.12.2014 C- 413/13).

The framework of the new EU Directive is built precisely on this legal presumption of control over the execution of the work. Primarily it focuses on technical control through automated decision-making and monitoring systems. Of note, 'control' is also based on a number of parameters – but if 2 of the parameters are present then the protections provided for by the law for subordinate employment relationships will be applied. Hence employers of workers through digital platforms providers must be quite attentive on this front..

These **important parameters** are characterized, for example, by:

- the level of remuneration;
- the existence of stringent rules of conduct;
- the supervision and verification of the performance results;
- the limitations on the freedom to accept or not to accept the assignment
- The ability, or not, to organize one's own activity;
- the existence of an exclusivity restriction and the impossibility of creating one's own clientele.

The integration of this new EU Directive into Italian law - and the identification of these parameters within the confines of current Italian labor regulations - will be a very delicate operation. This is because the realization of the main objective of this new EU regulation – that is the definition of a framework of common protections for those who are engaged to work through digital platforms (also in terms of the impact assessment of the role of algorithyms and data protection) - cannot be done without considering the existing regulatory system … which in many realities and organizations (as the data tell us) also functions on the basis to the ordinary civil principles relating to self-employment relationships.

It is important that we remember that work through digital platforms does not only consist of the activities of the individual riders.