

Italy: Covert monitoring and whistleblowing: where must employers draw the line?

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Covert monitoring of business assets: recent Supreme Court decisions

Italian law recognises an employer's right to monitor its employees' working activities, even by means of investigative agents, where such monitoring is intended to safeguard the employer's business assets or prevent offences in the workplace.

This principle was confirmed by the Labour Section of the Supreme Court in Decision 16196, issued on July 10 2009, and in Decision 26991, issued on December 22 2009.

In both decisions the court tried to provide a satisfactory definition of the concept of 'defensive monitoring', which must focus on the protection of business assets, but may potentially identify malfeasance, civil wrongs and criminal offences committed by employees in connection with the performance of their professional activities.

The court stated that regardless of whether monitoring is carried out through the employer's hierarchical organization or by external agents (eg, private detectives), such activities are permissible as long as the monitoring is only defensive in nature. Where this is the case, an employer's conduct does not contravene Sections 2 or 3 of the Statute of Employees (Law 300/1970). Section 2 relates to the use of security guards, whose role must be strictly limited to the surveillance of business assets and who may not monitor the employees' performance of their roles. Section 3 relates to the monitoring of workforce performance, as undertaken by senior employees appointed to the task on an *ad hoc* basis.

Thus, the decisions provide that the dismissal of an employee on the basis of wrongdoing, the evidence for which is provided by a report from an investigative agency, is legitimate and based on just cause.

Internal and external control: defensive investigation and whistleblowing

In light of the above, employers should note that detection of an employee's malfeasance may be carried out by external private investigators or through a whistleblowing mechanism (ie, an internal company procedure).

In particular, defensive monitoring may be carried out on the basis of structured procedures that are designed to alert the employer to irregularities in the workplace and to collect evidence of such irregularities. In this regard, employees' reports can be transmitted to a specific body created for this purpose or to the company's senior manager, through confidential channels or even anonymously.

Following a legislative path set by United States, whistleblowing activities and the relevant anti-retaliation measures (to prevent a violation of the duty of loyalty on the part of the whistleblower) are gradually being recognised in Europe. There appears to be less reluctance to introduce such measures, with issues of compatibility and compliance being resolved on the basis of privacy protection rules.

In Italy the lack of specific provisions on this issue raises the question of whether whistleblowing can be used in compliance with the general principles and the set of rules that govern Italian labour law. From a practical point of view, it could be argued that whistleblowing measures can be applied only in compliance with certain restrictions.

Limits under Italian Law

Criticisms of the covert monitoring of employees by private investigators or even through whistleblowing procedures are rooted in important privacy protection concerns and an employee's rights of freedom and dignity.

The transparency principle, as enshrined in the Data Protection Code (Legislative Decree 196/2003) imposes an obligation to disclose the identity of a party that makes a report. This must be balanced against an employer's need to protect the company's assets and exercise its powers in respect of employees.

However, consideration must be given to the rights of employees to have their freedom and dignity protected from policing in the workplace. The entry into force on January 1 2009 of an ethical code on the processing of personal data, in the course of defensive investigations or to establish or defend a legal claim, is particularly relevant in this context. The code requires that private investigators conducting covert monitoring must be appropriately licensed - before, during and after a judicial action - in order to detect possible employee conduct that may have an impact on the fiduciary relationship underlying an employment contract.