

CAVEAT DOMINUS: A COMPARISON OF POST-EMPLOYMENT ENTITLEMENTS IN THE U.S. AND ITALY WHEN EXECUTIVE EMPLOYMENT IS TERMINATED WITHOUT CAUSE

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INTRODUCTION

Management of a U.S.-based multinational is often shocked by what it hears when seeking advice from a European labor lawyer regarding employee rights in connection with the termination of a European executive. Simply put, the rules in Europe are quite different from the rules in the U.S., and unlike the in U.S., they do not favor the employer. To assist businesses and executives based in one country and doing business, or contemplating doing business, on the other side of the Atlantic, this article discusses the differences in what management and executives can expect when the employment relationship is terminated in the U.S. and Italian contexts.

EXECUTIVE RIGHTS AT TERMINATION IN THE U.S.

The general, indeed historic, rule of U.S. employment law is that, without a specific contract of employment, U.S. executives are, like most other employees, considered employees “at will” – meaning the will of the employer. This rule, by itself, is often re-stated to mean that an employer can terminate an executive “for any reason (except a prohibited reason), at any time, or for no reason at all” unless a written contract exists that provides for rights upon termination.

Legal Issues at Termination

Legal issues may arise where either of the following conditions are met:

- The executive receiving the notice of termination has a contract with the employer – usually a written (*i.e.*, express) contract or, much less often, an implied contract as the result of statements, promises, or representations by the employer or the employer’s agent.¹
- The reason for the executive’s termination is a prohibited reason.

In the U.S., most prohibited reasons fall under one of the many forms of illegal discrimination. Overriding U.S. Federal law prohibits “employment actions” – including termination – motivated by discrimination based on gender, sexual harassment, age, race, ethnicity, religion, national origin, physical or mental disability, or retaliation for being a “whistleblower” or engaging in other protected conduct. Moreover,

¹ The differences between express and implied employment contracts are beyond the scope of this article. The following discussion of executive employment agreements presumes a written agreement that is negotiated between the executive and the employer with the assistance of legal representation and customarily entered into at the commencement of the employment relationship.

each state and many localities have separate laws prohibiting discriminatory employment actions against persons in even broader categories of protected status, quality, or identity, such as *inter alia* sexual orientation, marital or domestic partner status, family responsibility, and caregiver status. With respect to new and different protections under state and local laws, the list keeps growing as each year passes.

Entitlements for Termination Without Cause

For the purpose of focusing this discussion on possible entitlements that a U.S. executive can expect when he or she is terminated by the employer “without cause,”² the following discussion assumes that (i) the U.S. executive is being terminated without cause (e.g., the employer has decided that someone else can do a better job or the position is being eliminated) and (ii) the executive’s termination is otherwise lawful and does not reflect discrimination or otherwise legally prohibited conduct by the employer.

Under these circumstances, the key issue is to determine what, if anything, the terminated executive is entitled to receive. The detailed answer varies according to the executive’s particular situation, but the general answer is that the executive is entitled to whatever is provided *by the explicit terms of his or her contract* or as part of *the employer’s overall company policy*, plus a few extra entitlements under the law regardless of what the contract says, even if there is no contract.

Limited Benefits under Law or Customary Practice

Considering these extra-contract legal entitlements, such as they are, will easily demonstrate why it is so important for executives in the U.S. to obtain a carefully negotiated agreement when they enter into employment, since without any such agreement, the executive’s legal entitlements are modest indeed. They include the following:

- Up to a certain number of weeks – rarely surpassing 20 weeks – of unemployment compensation from the government, administered through a type of insurance plan into which U.S. employers are obligated to make periodic contributions
- The ability to remain on the employer’s health benefits plan, at the cost of the employee, for up to 18 months (so-called C.O.B.R.A. benefits, an acronym that refers to the title of the Federal legislation that created this entitlement)
- If the employer has a generally applicable severance pay plan or policy, the

² Also beyond the scope of this article is a discussion of termination for cause. The definition of “cause” is a carefully negotiated term in most executive contracts, and accordingly, differs from contract to contract. It typically centers on the notion that the executive has performed an act that so egregious, anti-social, or against the letter and spirit of the employment relationship that the employer is justified in immediately terminating the executive’s employment with little or no further entitlement. Examples include the following: (i) The employee has committed a crime or an act of moral turpitude or violated a material term of the employment contract or the employer’s trust, or has performed an act likely to cast the employer into public disrepute; (ii) in the specific industry of the employer, the employee has broken a rule or regulation; (iii) the employee breaches the terms of employment by virtue of total or substantial non-performance of one’s job duties after having been notified of this failure and given an opportunity to cure the defective performance.

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number of weeks of continuing pay provided for by that plan or policy (customarily, an amount based on a formula such as one or two weeks of pay for every year of service, sometimes commencing after a fixed number of initial years of service)

- A “roll over” into another plan of portable *vested* retirement benefits under a savings, deferred compensation, or retirement or pension plan maintained by the employer (while *unvested* benefits generally disappear upon termination)

Front-End Planning for Back-End Benefits

This list of legally mandated entitlements is rather small. Accordingly, U.S. executives and their employment attorneys know that before an executive accepts employment, the focus must include termination rights and entitlements, which must be negotiated carefully with the employer pursuant to a written contract.

The most prominent of such “negotiated” entitlements are the following:

- Severance. This covers a continuation of salary in order to bridge the transition to a new position. As the trend in the U.S. is for executive contracts to be “at will” rather than for a set term of years, the executive’s written employment agreement (or binding offer letter) must contain a specification of precisely what severance the executive will receive from the employer if the executive is terminated “without cause.” Six months of base compensation is a minimum. Depending on the executive’s level of seniority and the care with which the executive’s agreement has been negotiated, severance pay amounting to a full year of the executive’s base compensation (or even more) is not uncommon.
- Continuing Health Benefits. Because without a contract it is the executive, not the employer, who has the legal obligation to pay the premiums to continue health insurance coverage under C.O.B.R.A., an executive’s contract should allocate payment responsibility to the employer during the severance period.
- Bonuses. Without a specific contractual entitlement, many executives, as a purely legal matter, will forfeit bonuses upon termination without cause before the date on which the bonus is to be paid, even if they have worked an entire year. The executive’s contract should address this as well and provide for the payment of a bonus, or a meaningful portion of it, depending on the date of termination. This becomes especially important in those industries, such as the financial services industry, where executive compensation frequently involves a modest base salary and a far larger annual bonus.
- Accelerated Vesting of Equity Interests and Other Incentives. Similarly, without a contractual provision providing that in the event of a termination without cause, all future incentive benefits, including the right to stock or stock options, shall become vested (and thereafter payable to the executive on some agreed-on future date), the executive must assume that all *unvested* incentives and equity interests will be forfeited upon the end of his or her employment.

The foregoing should be sufficient to convince the reader that without a good written employment agreement, negotiated by a knowledgeable executive employment

attorney, *none* of these items are automatic legal entitlements in the U.S. upon an executive's termination. For an executive in the U.S. to be certain of these enhanced entitlements, he or she must negotiate *an individual written agreement before accepting employment*.

EXECUTIVE RIGHTS AT TERMINATION IN ITALY

Generally speaking, and especially when compared with the situation in the U.S., Italy is very protective of employees. Individuals tend to stay with an employer, rather than move from one company to another, and it is very difficult to terminate employment agreements.



Non-executive employees may only be terminated (i) for cause, (ii) for a justified subjective reason such as serious nonperformance, or (iii) for a justified objective reason such as an internal reorganization that results in redundancy. Until 2012, companies with more than 15 employees were obligated to reinstate an unlawfully terminated employee and to pay damages for the unlawful termination. For years, this was an obstacle to job creation and the growth of the Italian economy. In 2012 and 2015, legislative reforms were passed, which limited the circumstances for reinstatement, reserving this measure only for the most serious cases of unlawful termination. In all other cases, the remedy is limited to payment of an indemnity for damages incurred by the employee.

The foregoing protections apply only to non-executive employees who, as a rule and with certain exceptions discussed below, are excluded from the legal framework that limits individual dismissals. Executives, on the other hand, are granted substantial protections with regard to termination of their employment under collective bargaining agreements.

Legal Framework

In Italy, the rights of an executive in relation to an employment agreement are ruled by the law and, most of all, by collective bargaining agreements (*Contratti Collettivi Nazionali di Lavoro* or “C.C.N.L.’s”). Although theoretically possible, employment relationships that are not ruled by a C.C.N.L. are very rare.

It is therefore uncommon for executives to enter into a proper employment agreement or to provide for the consequence of a termination. Rather, it is common to be hired by a simple letter indicating the main conditions of the employment, such as salary, title, and main duties, with all other rights and duties provided under the applicable C.C.N.L.

Italian law provides its own set of protections beyond the scope of the C.C.N.L.’s in cases of (i) discriminatory dismissal based on gender, age, religion, and other similar items; (ii) dismissal based on an illegal motivation, such as a retaliatory dismissal; or (iii) other motives considered illegal by the law. To illustrate, the executive must be reinstated in his or her position, which means that the working relationship continues. However, the executive may instead choose an indemnity amounting to 15 months’ salary. In addition, the executive may claim an indemnity in the amount corresponding to the salary not received during the period of wrongful termination from the date of dismissal to the date of reintegration.

As with all other employees, the executive is entitled to a notice period, unless the

dismissal is for cause. The duration of the notice period is determined by the applicable C.C.N.L. The most important C.C.N.L.'s are those applicable to the industrial and commercial sectors.

The duration of the notice period depends on seniority. In the above mentioned C.C.N.L.'s, the notice period ranges between a minimum of six months' and a maximum of 12 months' salary. The higher range applies for executives whose employment has exceeded 15 years.

It is common to substitute the notice period for an indemnity that is equal to the salary that would have been paid during the notice period and to exonerate the executive from a continuing obligation to work for the company. Bonuses or other variable remuneration may also be included. Thus, the amount involved in the indemnity may be high.

Health Insurance

All Italian residents are covered by social security, which includes access to public health care for a reduced amount, depending on income. Most executive employment packages include additional coverage that reimburses all or part of private health care. Such coverage normally continues during the notice period, even if the executive is not required to work during that time.

Vesting of Equity Interest and Other Incentives

There is no specific rule regarding the acceleration of stock options or other incentives that are generally ruled by the provisions of the incentive plan and the company policy in this regard; these aspects are often included in negotiations following termination.

Additional Indemnity

The C.C.N.L.'s also provide for the right of the executive to receive an additional indemnity when the dismissal is not justified. The range of motives for dismissal that have been considered as justified by the courts is quite wide. It includes all motives that may jeopardize the relationship between the employer and the executive.

The amount of the additional indemnity provided by the C.C.N.L.'s is based on duration of employment, age, and other case-specific facts. The most recently renewed C.C.N.L.'s reduced the number of months for which the additional indemnity may be payable to less senior executives. The minimum is now two months' salary, and the maximum can reach 24 months' salary.

T.F.R.

T.F.R. stands for *Trattamento di Fine Rapporto* (i.e., severance pay), which is an amount of money that each employer must hold for all his or her employees until they leave the company or job. It is not a redundancy payout, since it is paid even in the case of voluntarily resignation, but rather a kind of compulsory savings plan.

N.A.S.P.I.

N.A.S.P.I. (*Nuova Assicurazione Sociale per l'Impiego*) is a governmental institution acting as unemployment insurance. It may provide compensation for unemployed persons, including executives, for a maximum period of 24 months.

The period of eligibility begins after the end of the notice period and its duration will depend on the amount paid by the company and the duration of the employment.

In any case, the maximum monthly amount payable by N.A.S.P.I. is currently €1.3 million (approximately \$1.45 million).

Practically Speaking

In Italy, it is common for executives and their employers to negotiate a “termination package” – within the range provided by the applicable C.C.N.L. When a complaint is filed before a labor court, it is generally done in order to provide additional leverage in negotiations.

CONCLUSION

Italian employment law provides greater legal rights to a terminated executive than U.S. law. In the U.S., benefits are derived from a well-drafted employment agreement. In Italy, as in much of Europe, benefits are derived from employment law and industry-wide collective bargaining agreements. As a result, U.S. businesspersons and their attorneys are often surprised by the differences between a typical Italian employment contract and those in the U.S. The surprise is even greater when it is discovered that an employment agreement with an Italian executive is subject to a set of mandatory provisions of law and industry-wide agreements that provide significant termination rights notwithstanding the absence of a detailed agreement or any agreement at all. More importantly, these rights cannot be bargained away by the employee in an employment agreement. *Caveat Dominus!*

“Italian employment law provides greater legal rights to a terminated executive than U.S. law.”