Outside agent or employee?

Maurizio Iorio, Attorney at Law

Companies' organizational model sometimes include external collaborator, formally classified as commercial agents and often paid entirely through commissions, that perform tasks with a high degree of professionalism, autonomy and decision-making power, under the direction of the company, in coordination with and – at times – with a direct relationship with the company's top management.
However, companies should note that sometimes these professional figures may request the recognition of the employees' status and, if appropriate, of executives in view of the managerial functions performed. The law in fact takes into account the substance and not the form of a specific working relationship.

Tasks performed

In practice, it is found that sometimes the tasks assigned to 'commercial agents' can include activities that are also very relevant for the company, such as: development of sales and marketing of the company's products; building partnerships with customers and/or suppliers; identification of new products; management of key customers and resolution of disputes with customers which may be different from those generating their commission.

Company's internal evidence

In pursuing these activities, such 'agents': receive or may receive periodic company's reports of the turnover achieved with all customers and products lines, including those not generating any commission in their favour; sign, always or occasionally, on behalf of the company, bids for the supply of products; sometimes they have a room provided and equipped by the 'principal' (with furniture, Ethernet communication and telephone lines etc.) at the company's premises where they dedicate to their work a sometime significant time averaging 3 days or more per week; their name and internal phone number often appear in the employees extension list; sometimes they are in charge of coordinating the company's employees and/or sales agents.

Main distinction between agent and employee: subordinacy is what counts

As said, in the field of law what matters is the substance and not the form. In particular, according to the established case-law of the Supreme Court, in order to correctly classify the working relationship (i.e. employee or commercial agent), regard must be had to how the relationship actually takes place and, specifically:

(a) "…*for qualifying the working relationship as dependant employment or self-employment... it is necessary to ascertain whether* ***the condition of subordination*** *is met or not, intended as the performance of the working activity as employee under the direction of the principal, and therefore with the inclusion in the organization of the latter*... " (Supreme Court decisions No. 14296 of 08/06/2017, No. 26758 of 13/11/2017, and many others).

(b) However, "...*in the case of high-profile work involving intellectual content, the criterion according to which the worker is subject to the exercise of managerial, organizational and disciplinary power may not be, in that particular context, significant for classifying the working relationship, and* ***it is therefore necessary to use alternative differentiation criteria*** *such as compliance and duration of the relationship..., the presence*..." or not "...*of a minimal business organization…, the existence of an effective power of self-organization for the worker..."* (Supreme Court decision No. 22289 of 21/10/2014).

Distinction between employee and manager: the National Collective Bargaining Agreement (CCNL in italian) is what counts

Assuming that the worker is an employee and not a commercial agent, it is a matter of establishing how to classify him; for that purpose, according to the Supreme Court, "... *since the inclusion in the category of managers is expressly regulated by* ***collective bargaining****, it is necessary to refer... to the relevant provisions of the bargaining agreement and the court is bound to comply with the requirements laid down by those provisions, as they – by reflecting the will of the parties and their specific experience in the sector – become legally binding and decisive*..." (Supreme Court decisions No. 8650 of 26/04/2005, No. 28888 of 01/12/2017, No. 5609 of 09/06/1990, and many others).

For example, pursuant to the current Collective Agreement for Industrial Managers concluded on 1 January 2015: "*Article 1.1. Managers are those workers for whom the conditions of subordination laid down in Article 2094 of the Italian Civil Code are fulfilled and who play a role within the company characterised by a high degree of professionalism, autonomy and decision-making power and who perform their functions in order to promote, coordinate and manage the accomplishment of the company's goals...".*

More precisely, there is a high "*degree of autonomy and responsibility*" as provided by the collective bargaining agreement: (a) when "... *the level of responsibility in the relevant sector in direct relation with the company's top management justifies the managerial position... in compliance with the case-law that interprets and applies that provision... on the basis of which the characteristic of the existence of a managerial qualification is represented by the direct link between the employee and the top management of the company*..." (Supreme Court decision No. 19579 of 04/08/2017), but also,

(b) when "... *the worker does not... hold a position that can influence the company's performance... it is sufficient that the employee, for his undisputed professional qualification and extensive responsibility in this area, works with a corresponding degree of autonomy and responsibility, having to refer, to this end, in view of the complexity of the company structure, to the multiplicity of internal dynamics and the diversity of the forms of executive management (not always summarized a priori in complete terms) (see Supreme Court decision No. 14835 of 24/06/2009 and more recently decision No. 20805 of 14/10/2016)*" (Supreme Court decision No. 19579 of 04/08/2017).

In conclusion

As said above, the law focuses on the substance and not the form. A worker can be classified as an employee and, perhaps, as company manager, even if he has entered into and has currently underway an agency contract.

According to the established Supreme Court case-law, the first distinguishing feature of subordinate employment with respect to self-employment is the **subordinate relationship**, understood as the inclusion of the worker in the employer's organization and under his direction. This form of subordination will be **all the more generic the greater the degree of autonomy** delegated to the worker on a par with the tasks assigned to him and the greater – in the case of managers, according to the bargaining agreement – the degree of "*professionalism, autonomy and decision-making power*" acknowledged in practice to the 'agent'.

In cases of doubt between employment and self-employment, **alternative differentiation criteria** must be considered, including compliance and duration of the relationship, the presence or not of a minimal business organization, the existence of an effective power of self-organization for the worker.

As for the classification as subordinate worker with managerial duties, such role "*characterised by a high degree of professionalism, autonomy and decision-making power*"

may also be deduced – according to the Supreme Court – from the "***the direct link between the employee and the top management of the company***".

The recognition of employee status and possibly of company manager, entails the payment by the employer of the **social security contributions not paid** to INPS (Italian National Social Security Institution) and, where appropriate, of the **severance indemnity**. In fact, while in the case of agency contract the severance indemnity is not due if this is terminated by the agent himself (without prejudice to the FIRR - Contract Termination Indemnity Fund), in the case of termination of employment the severance indemnity is always due.

Maurizio Iorio, Attorney at Law