

Secondment agreements Q&A: Italy

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Italy specific information concerning the key legal and commercial issues to be considered when drafting secondment documents for use internationally.

This Q&A provides country-specific commentary on *Practice note, Secondment agreements: International*, and forms part of *Cross-border employment*.

See also *Standard document, Secondment agreement: International*, with country specific drafting notes.

1. Where the secondment is to your jurisdiction, what mandatory local laws will apply? Can the secondee's contract of employment, which is stated as being under the laws of their home country, be enforced under your national laws? If so, in what circumstances can this be done?

The parties can choose the law applicable to the secondment. However, mandatory Italian public safety laws will still apply (*Article 9, §1, Treaty of Rome and Decreto Legislativo 25 February 2000, n. 72 (D.Lgs. 72/00)*). These provisions are deemed crucial to safeguard Italy's public interests, such as its political, social and economic organisation.

In addition, an employee seconded to an Italian company must be subject to the same employment terms and conditions, national collective labour agreements (*Contratto Collettivo Nazionale Di Lavoro (CCNLs)*) and statutory provisions as those applicable to the specific categories of employees performing analogous work in Italy (*D.Lgs. 72/00*).

Under EU law, note that local laws, collective agreements or arbitration awards "which have been declared universally applicable" guarantee seconded workers:

- Maximum work periods and minimum rest periods.
- Minimum paid annual holidays.
- Minimum rates of pay, including overtime rates. (Note that this does not apply to supplementary occupational retirement pension schemes.)
- Minimum conditions in relation to the hiring-out of workers, in particular, the supply of workers by temporary employment undertakings.
- Health, safety and hygiene at work.

- Protective measures regarding the terms and conditions of employment of pregnant women or women who have recently given birth, as well as in relation to children and young people.
- Equality of treatment between men and women and other provisions on non-discrimination.

(*Article 3, European Directive No. 96/71/EC (Posted Workers Directive)*.)

The Italian Supreme Court has extended such protection to the laws regulating the termination of the employment relationship.

In instances where the seconding enterprise enters into new agreements regarding retributive treatment with the secondee, the seconder is not responsible for these arrangements.

2. Are there any relevant national laws that any party to a secondment agreement may need to be aware of before entering into such an arrangement?

Yes. See *Question 1*.

3. Do foreign nationals require a residence/work permit to live and work in the jurisdiction? Does it take a long time to obtain these?

Residence/ work permit

Prospective residents or anyone intending to stay in Italy for longer than 90 days must obtain a permit to stay. A three-month permit can be renewed for an additional three months; beyond six months, the foreign national must apply for a long-stay permit (*permesso di soggiorno*).

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Residency visas require proof of independent income. This visa does not grant a right to work in Italy. Applicants must prove that they have enough money to support themselves for the length of their stay, independent of any salary they may currently be receiving. An applicant also needs to show either ownership of a home in Italy or a rental agreement. In addition, the applicant must have no criminal record.

The Italian work permit scheme is administered regionally, so implementation differs significantly depending on the foreign national's exact destination within Italy.

No work permit is required for business trips of up to three months, if the visitor does not enter into an employment relationship with an Italian entity.

The work visa is the most difficult visa to obtain. There are two types of this visa:

- **Dependent work:** for those employed and paid by an Italian company. The procedure to obtain this visa depends on the type of employment relationship (that is, permanent contract, fixed term contract, seasonal work or particular activities).
- **Independent work:** for freelancers, such as programmers and consultants.

Foreign nationals intending to work in Italy must be sponsored by a company. A potential employee or agency cannot apply for an Italian work permit directly.

Procedure

Each year, the immigration authorities determine how many non-EEA nationals, categorised by citizenship and profession, can enter Italy for employment reasons, in line with a quota system.

An employer wishing to hire a non-EU citizen (*lavoratore extracomunitario*) must file an online request for *Nulla osta* (authorisation to work) with police headquarters. An entry visa (*visto di ingresso*) is also required, which is granted by the competent diplomatic or consular representation (in the sending country).

Within eight days of entering Italy, the non-EU citizen and their employer must sign an entrance agreement (*contratto di soggiorno*). At the same time, the non-EU citizen employee must apply for a residency permit (*permesso di soggiorno*) for work reasons.

The parties must sign the employment agreement (*contratto di lavoro*) within the following six months.

Note that the following categories of workers can obtain a work visa regardless of the quota set by the immigration authorities:

- Workers who carry out particular activities (that is, high level executives, university professors, musicians and artists).

- Employees with superior expertise.

For each of these categories, certain procedures must be followed.

4. In your jurisdiction, how should a secondment arrangement usually be recorded between:

- **a) The seconder and secondee; and**
- **b) The seconder and the host.**
- **Are any particular formalities required?**
- **What would be the appropriate documentation where an employee is being seconded to another company in the employer's group?**

There are no specific requirements regarding the form used to record secondment arrangements between the seconder and the secondee. However, it is strongly preferable to enter into a written agreement to protect both parties in the case of conflict and for tax purposes. The employee's consent is not required for the secondment to be lawful as long as Italian laws are respected.

Similarly, while there are no mandatory requirements for a secondment arrangement between the seconder and the host, it is advisable to record it in writing.

An order of secondment must be in writing.

While the law does not require any formality, it is advisable to have a written document stating the length of the secondment and the terms and conditions of the employment relationship during the secondment in case of a conflict.

5. What information needs to be included about the parties at the start of the secondment agreement?

There are no specific requirements regarding information to be included about the parties.

6. Are there any limitations or requirements in national law that the seconder needs to be aware of in relation to the length or format of the secondment to your jurisdiction?

The secondment must be limited in time.

However, the employer is not required to pre-determine the duration of the secondment even if it would be advisable. The parties can provide that the secondment will simply last as long as the employer has an interest in it.

7. Under your national labour laws, who will be the secondee's employer during the secondment? Other than by the express agreement of the parties, could there be any change to the employer during the secondment?

The employer does not change. As a result, the seconded employee continues to be managed by the seconding employer.

8. What statutory employment rights could the secondee to your jurisdiction acquire?

See *Question 1*.

9. Are there any circumstances under national law where the secondee's continuity of employment may be broken as a result of the secondment? What would be the impact on the secondee if continuity is broken, if any?

When seconding an employee, the employer does not terminate the employment contract, nor does the employee enter into a new employment contract. Both the employer and the employee retain the obligations contained in their employment contract (*Supreme Court decision No. 8567 of 10 August 1999; Circular of the Ministry of Labour No. 5/25814/70/VA of 8 March 2001*).

Note that courts also tend to permit the secondment of employees hired on a part-time basis (*Supreme Court, decision No. 7762 of 23 August 1996*).

10. Can the terms of the secondee's employment terms be changed by their employer as a result of the secondment? If so, how can this be done?

No, as the contract of employment is definitive. However, in some circumstances, amendments can be introduced in accordance with the law and/or the employee's consent. In general, the job can only be changed on a restructuring affecting the employee's role.

11. Can provision be made in the agreement for the secondment to conduct any performance and pay reviews of the secondee during the secondment (see *Standard document, Secondment agreement: International: clause 6*)?

Yes, however, the provisions must be consistent with the secondment's interest and should be agreed by the parties before coming into effect.

12. Can provision be made in the secondment agreement for the secondment to continue to pay the secondee's salary and wages during the secondment and for the host organisation to reimburse the secondment (see *Standard document, Secondment agreement: International: clause 5*)?

An employment relationship between the worker and the secondment must be kept in place for the entire duration of the secondment. The secondment remains liable for all obligations arising from the employment agreement.

The host organisation can reimburse the cost of the employee to the secondment, however, from a tax point of view it is advisable not to reimburse 100% of the relevant costs.

13. Can provision be made in the secondment agreement for the secondment to continue to provide all the benefits to the secondee during the secondment, together with any sick pay or other leave entitlements (see *Standard document, Secondment agreement: International: clause 5*)?

Yes, it is possible. However, note that the employee is entitled, at a minimum, to the same employment terms and conditions provided by Italian law, CCNLs and statutory provisions applicable to specific categories of employees performing analogous work in Italy (see *Question 1*).

14. Are there any requirements that the secondee must receive paid overtime for work performed in your jurisdiction? Can this be paid by the host (see *Standard document, Secondment agreement: International: clause 5.2*)?

The applicable national collective labour agreement sets requirements regarding the payment of overtime, which are to be paid by the host company. Directors and other high level executives are not entitled to any payment for overtime.

15. Are any service taxes payable on any secondment fees paid by the host to the secondment, if applicable under the terms of the agreement (see *Standard document, Secondment agreement: International: clause 5*)?

The fees are subject to Italian tax rules.

16. What potential tax, social security or other payments will the parties be liable to make in your jurisdiction as a result of the secondment:

- **Secondee?**
- **Seconder?**
- **Host?**

Tax

All income produced by the employee in the host country is subject to the taxation system of the host country if the secondment is longer than 181 days per year (*Article 2, Italian law 917/86 I*).

In addition, the secondee continues to pay taxes and social security in their country of origin for up to two years if the employee is a European employee or from a nation with a specific treaty with Italy.

These rules raise the issue of double taxation. However, the effects of such double taxation can be reduced or eliminated by using the tax credit provided by Article 18 of the Income Tax Consolidation Act (*Testo Unico delle Imposte sui Redditi* (TUIR)). Accordingly, the amount exceeding the tax due by the taxpayer for a particular year can be recovered by means of a tax credit mechanism available under Italian law.

Alternatively, double taxation could potentially be avoided if Italy has entered into a double tax treaty with the employee's country of origin.

Social security

Italian law contains mandatory rules regarding social security contributions to be paid by employers. Provisions concerning this matter are also set out in international conventions and EU regulations and directives.

As a general rule, provisions on social security (in particular, those laid down by international conventions) apply within a certain territorial limit only. Unless otherwise provided, the obligation to pay social security contributions is governed by the law of the place where the working obligation is performed.

This rule aims at avoiding duplications in the fulfilment of accounting formalities and procedures related to social security contributions and potential inconveniences deriving from the payment of the same contributions in more than one country.

Note, however, that if an employee is seconded to an EU country, they are entitled to all social security benefits deriving from the law of their country "of origin", for one year, which can be extended to two years with the consent of the secondee or, for non-EU countries, on the basis of applicable international conventions (if any) existing between the countries involved (*Article 12, EC Regulation No. 883/2004*).

17. What data protection issues may arise under national law as a result of the secondment? How can the parties deal with these in the:

- **Secondment agreement between the seconder and the host (see *Standard document, Secondment agreement: International: clause 8*)?**
- **Letter from the seconder to the secondee (see *Standard document, Letter of secondment: International: clause 9*)?**

In Italy, sensitive data can only be processed with the data subject's written consent and the consent of the Italian Data Protection Authority. There are, however, some exceptions to this rule:

- If the processing is necessary to meet obligations under employment law (*section 26(4d), Data Protection Code*).
- If the processing is necessary to fulfil specific legal obligations or duties for the management of the employment relationship (including hygiene and safety and social security and welfare, subject to the provisions of the code of ethics and good conduct).
- If the processing is done only to verify the possible unlawful behaviour of employees (known as defensive surveillance).

Directive 95/46/EC on data protection (*Data Protection Directive*) and the Italian Data Protection Code allow for data transfer inside the EU and the EEA.

Data transfer to third countries located outside the EU and EEA is not always permitted (*Data Protection Code*). However, international data transfers to countries outside the EU and EEA can usually be achieved by:

- Obtaining the data subject's express consent.
- Incorporating standard contractual clauses.
- Incorporating binding corporate rules.
- Providing adequate protection decisions.

18. Can additional restrictive covenants be introduced for agreement by the secondee at the start of the secondment? If so, are there any formalities that need to be addressed to ensure that the restrictive covenants are valid and enforceable (see *Standard document, Secondment agreement: International: clause 10*)?

Types of restrictive covenants

Non-competition clauses can be introduced with the employee's consent. A Non-Competition Covenant

(NCC) must be paid and limited in time (to a maximum of three years) and state the area of activity. A NCC cannot be so wide as to prevent the employee from finding another profession that is not substantially in competition with the former employer.

Formalities/procedure

The parties may want to include a relevant restrictive covenant, which prevents the employee from being poached by the host for a certain period. This is at the parties' discretion and must be consistent with Italian law (that is, Article 2125 of the Civil Code). The law requires, among other things, that both parties agree in writing.

19. Other than where it is explicitly stated in the secondment agreement, who will own any intellectual property rights created by the secondee during the secondment under national laws (see *Standard document, Secondment agreement: International: clause 11*)?

Any creation of the mind, such as an invention, will be the property of the employer (transferor). The ownership of an invention is transferable, however. Note that the employee is entitled to be compensated for their contribution. The rate of compensation is calculated by taking into consideration different factors such as the work involved, salary, the value of the invention, and the employee's contribution to the invention.

20. If the secondee does not continue with the secondment for whatever reason or is unavailable for a prolonged period, can the seconder provide a substitute secondee to the host if such provision is made in the secondment agreement?

Yes. Note that any substitute who is a foreign national will need to apply for their own work visa.

21. Under national laws, can the secondment be terminated as set out in *Standard document, Secondment agreement: International: clause 12*? In what other circumstances can the secondment arrangement be terminated immediately, without notice (or a payment in lieu of notice) by:

- **Secondee?**
- **Seconder?**
- **Host?**

Termination under clause 12

The secondment agreement can be terminated if the host is guilty of any serious or (after warning) repeated breach of the terms of the agreement. On

the premature termination of the secondment, the secondee can return to their previous position, and the employer can decide whether there are any legitimate grounds for dismissal.

With respect to *Standard document, Secondment agreement: International: clause 12.2(c)*, the host may be permitted to terminate the secondment agreement if an economic dismissal can be justified and it conforms with Italian law.

Without notice termination for other causes

Secondee.

None.

Seconder.

None.

Host.

None.

22. If the secondment is terminated without notice by a host based outside your jurisdiction, can the secondee's employment with the seconder based within your jurisdiction terminate simultaneously and if so, in what circumstances?

No. In such instances, the employee reverts to their original position and the employer can then decide whether there are reasonable grounds for dismissal (see *Question 21*).

23. Does the seconder based within your jurisdiction have any obligation under national law to return the secondee to their original job when the secondment ends? What does the seconder need to do if the secondee's job is no longer available.

Yes, in accordance with the employment contract.

24. Does your national law recognise the concept of one party indemnifying the other as set out in *Standard document, Secondment agreement: International: clause 14*? If not, what can be included to protect each party from the potential liabilities set out in this clause?

The employer (seconder) retains full responsibility for the actions of the secondee during the secondment. However, the host can be required to indemnify the seconder if it is found to be reasonably responsible.

Similarly, the seconder must fully indemnify the host against any claim or demand by the secondee arising out of their employment with the seconder, apart from any claim relating to any act or omission of the host or its employees or agents.

25. Does your national law stipulate whether the original employer (the secondor) or host will be responsible for the secondee's acts and behaviour, if they cause loss or damage to the host, its employees, customers or suppliers, during the secondment?

Vicarious liability

The concept of vicarious liability is recognised in Italy.

The secondor is responsible for the acts of its employees. Where loss or damage occurred in the course of employment, and causation can be proven, the secondor can be held vicariously responsible for the employee's actions.

Original or host employer

The Civil Code recognises the employer's responsibility in the case of loss or damage committed by employees, customers or suppliers (*Article 2049*). The secondor assumes all risk associated with the secondment and therefore retains responsibility for the behaviour of employees during any secondment.

26. Is the secondee protected against discrimination and/or harassment by the host and its employees during the secondment to your jurisdiction?

Yes.

27. Are there any mandatory national laws which dictate the governing law and jurisdiction that will apply to this secondment agreement or can this be agreed between the parties (see *Standard document, Secondment agreement: International: clause 20*)?

See *Question 1*.

28. How does the secondment agreement need to be executed to ensure that it is valid and enforceable? Does it need to be registered with any authority in your jurisdiction?

Execution formalities

While there are no mandatory requirements in relation to the secondment agreement, it is advisable to put it in writing (it is advisable for the agreement between the secondor and the secondee to be in writing as well) (see *Question 4*).

The employer/secondor must notify the employee/ secondee of their place of work within 30 days of their hiring (*Legislative Decree no. 152/97*).

Registration formalities

None.

29. Does the secondment agreement need to be in a language other than English in order for it to be valid and enforceable (see *Standard document, Secondment agreement: International: clause 21*)?

There are no specific language requirements. The parties can choose the language to be used at their discretion, but it is advisable to use a language both parties know to avoid any misunderstandings. If a dispute arises, Italian courts will require an Italian translation of all documents that are not written in Italian.

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