

Services contract: the client is not exempt from liabilities on health and safety of contractor's employees.

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By Andrea Gangemi and Lucia Ceccarelli

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Background

According to Article 26 of Legislative Decree no. 81 of April 9, 2008, as amended by Legislative Decree no. 106 of August 3, 2009 ("*Testo Unico sulla Sicurezza sul Lavoro*") the client is the main responsible for the safety of all the employees, including those of the contractor when the activities provided by the service contracts are carried out within the client company's structure or its productive cycle with a consequent interaction in the performing of the ordinary working activities.

In the light of this, the client must comply with certain obligations, both during the preliminary step and the performance of the work by the contractor:

- I. verify the technical – professional suitability of the contractor;
- II. provide detailed information on the specific risks existing in the environment of the company in which the contractor must carry out the work and inform the contractor of the preventive and emergency measures that might be relevant to the contracted activity;

- III. promote cooperation with the contractor in the implementation of measures of prevention and protection against the work risks impacting the work activity contracted out;
- IV. promote coordination with the contractor regarding activities for the protection and prevention of the risks to which their workers are exposed, so that information is exchanged between these parties in order to eliminate the risks due to interaction between the workers of the two (or more) different companies involved in carrying out such work together;
- V. prepare a document which contains an evaluation of the relevant risks and the measures adopted in order to avoid or reduce such risks ("**Documento Unico di Valutazione dei Rischi**" or "DUVRI"). This document must be attached to the service or supply contract;
- VI. co-ordinate the interventions of prevention and protection for the employees in order to eliminate the risks of the interaction between the employees of the different involved firms in the performing of the working activities.

In brief, the client must diligently interact with the contractor in order to adopt all the measures necessary to protect the health and safety of all the workers within the framework of an effective organizational and management model.

In fact, the failure to fulfil with the abovementioned mandatory obligations set forth by *Testo Unico sulla Sicurezza sul Lavoro* carries both to criminal and administrative sanctions for the client and for the contractor.

Recent Supreme Court case law

In Decision 5420, which was issued on February 10, 2012, the Criminal Section of the Supreme Court stated that the failure to comply with the DUVRI implying the missing evaluation of the risks deriving from the interaction between the employees of the different involved firms in the performing of the working activities, is *per se* a fact that cause criminal liability even for the client in the event of an injury.

As mentioned above, the evaluation of the risks deriving from the interaction is a mandatory duty of the client which has to inform the contractor not merely about the potential physical contact between employees, but also the whole preliminary activities to be necessarily followed in order to avoid injuries in the work place.

The decision referred to a case of death happened in 2007 in the industrial premises of the client where an employee of a contractor's company, during a maintenance service at the pressing floor, has been run over by a motor track.

Before the Criminal Court the Judge stated that no physical interaction occurred between the employees of the contractor and those of the client and,

consequently, there were not additional risks to evaluate. In addition, the above mentioned Court stressed that there was not the causality relationship between such death and the missing drafting of the DUVRI by the client.

The Supreme Court overturned the first degree's decision firstly challenging the notion of interaction adopted by the Criminal Court and establishing a clear wider interpretation of it with respect to the past.

In particular, the Supreme Court observed that, in the liability point of view, the concept of interaction has to be considered not only as the mere risky physical contacts between the workers of client and the contractor, but even as any preliminary activity carried out by both companies prior to these risky contacts intended to prevent them.

In the light of this meaning, the Supreme Court analysed that the client covered a guarantee position with respect to the obligation to duly act in order to safeguard the general interests of preventing injuries in the work place. Accordingly, the violation of provisions which impose the drafting of DUVRI laid down the logical antecedent to the event of injury and generates the relative liability.

Therefore, the Supreme Court ascertained that, in the case in question, the preliminary evaluation of the risks due to interaction would have allowed to prevent the event of employee's death.

In substance, although the contractor's employees operate autonomously within the client work places, they must be aware, by the client, of the risks they may face.

In this respect, an exempt of liability would set up only whether the contractor is assigned to well-defined and limited works to be carried out in a completely organizational and managerial autonomy with respect to the client.

Conclusion

Based on the principle confirmed by the above mentioned Decision, the outsourcing of activities to a contract does not eliminate the personal liability of the client, who remains the principal guarantor for all the employees which operate in his work places and who must verify that the contractor observes correctly and in concrete the accident prevention measures.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.