

## The employer according to legislative decree 81/2008 ("testo unico sicurezza")



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### Premises

Pursuant to Legislative Decree 81/2008, also called "Testo Unico Sicurezza", the employer is responsible for workplace safety and protection in the company. He is responsible for the organization and management of safety in the workplace in order to reduce the occurrence of risks and avoid accidents. The employer has therefore to be identified with that person, or those persons, who within the company structure have, according to the Testo Unico Sicurezza, such qualification; those persons do not necessarily coincide with the owner of the employment relationship (i.e. legal representative of the company).

The identification of such a figure is not always a matter of easy solution, since, especially



within companies with complex structures, it is possible to identify multiple subjects assigned to satisfy the position of guarantee assumed by the person who, according to the Testo Unico Sicurezza, has the qualification of employer. Therefore, the purpose of this study is to provide precise indications that allow an easy identification of the employer and other subjects who, pursuant to Legislative Decree 81/2008, are responsible for safety in the workplace, so that each company can define its own organizational structure and the related responsibilities in compliance with the law without necessarily concentrating them on the Board of Directors or on the company owner.

### **Clarifications regarding the definition of employer: definition according to the civil law and health and security law**

In our legal system two different notions of employer emerge: one according to labour law/civil law and one according to health and security law; moreover, these two notions do not always lead to the identification of the same person.

In civil law, according to art. 2082 of the Italian Civil Code, the employer is identified in the person who is the owner of the employment relationship, thus identifying himself with the legal representative.

In the field of health and security, pursuant to Legislative Decree no. 81/2008 art. 1 lit. b) *"the employer" is the person who is the owner of the employment relationship with the worker or, in any case, the person who, according to the type and structure of the organization within which the worker carries out his activity, is responsible for the organization itself or the production unit as he exercises decision-making and spending powers*".

Contrary to the civil law concept, the definition according to Legislative Decree n. 81/2008 links the concept of employer not only to the employee but also to the person who has the decision-making and spending powers, i.e. the person who actually has the material power to fulfil the obligations provided for by Legislative Decree 81/2008.

Therefore, not always the person with legal representation (employer in the civil law) coincides with the person able to exercise the effective power of organization of the company and the work of employees (employer according to Legislative Decree n. 81/2008), especially in companies with a medium or complex structure. For the purpose of this analysis, the aim of which is to provide explanations on the figure of the employer as responsible for safety in the workplace, we will consider the meaning proposed by art. 1 lit. b) of Legislative Decree 81/2008.

### **The employer pursuant to Legislative Decree 81/2008**

As indicated in Article 1 of Legislative Decree 81/2008, the fundamental criterion for a person to be considered an employer is the autonomous exercise of organizational and spending power in terms of health & safety.

In general terms, the employer, depending on the type of company and the purposes for which they are employed, can be identified as follows:

- in general partnerships, all partners (except for the express renunciation of active administration powers);
- in limited partnerships, the general partner;
- in family businesses referred to in Article 230 bis of the Italian Civil Code, the owner of the business, who is responsible not only for ownership, but also for the concrete exercise of



the power of management over family collaborators and any employees;

- in joint stock companies with sole director, the sole director;

- in joint-stock companies with a Board of Directors (BoD), all members of the Board of Directors of the company unless there is a specific resolution entrusting the position of guarantee (i.e. the delegation in matters of health & safety) to a single director.

### **The employer in joint stock companies with BoD**

In the case of a joint-stock company with a BoD, the status of employer is recognised, as mentioned above, to all the members of the Board of Directors unless, where possible, the BoD delegates to one of its members the responsibility and management of the company with regard to safety and hygiene at work. In this case, the attribution of powers to the managing director occurs pursuant to **Article 2381, paragraph 2**, of the Italian Civil Code, which provides that "if the by-laws or the shareholders' meeting allows it, the board of directors may delegate its powers to an executive committee composed of some of its members, or to one or more members".

Therefore, in this case, we are not in the presence of a delegation of functions pursuant to article 16 of the Legislative Decree 81/2008 as better detailed in the following paragraph 6 but of a real transfer of the position of guarantee, since, through the resolution of the Board of Directors, the so-called guarantee position is transferred to the Managing Director, who has the obligation to adopt the necessary accident prevention measures and to supervise their correct application. Therefore, the member of the BoD who has received such delegation will be considered an employer to

all intents and purposes as the sole director or, for example, the general partner.

However, the transfer of the position of guarantee to the managing director pursuant to Article 2381, paragraph 2 of the Italian Civil Code does not leave the other directors totally exempted from liability. The delegation of the guarantee position to a director, in fact, does not totally exclude the liability of the other board members. The latter will be held responsible, in fact, if "they have maliciously failed to supervise or, being aware of acts executed to the detriment of the company or of the unsuitability of the delegated party, have not intervened" (Supreme Criminal Court, Section III, 09.03.2005, no. 12370).

### **The essential requirements of the delegation of guarantee**

In order for the delegation pursuant to article 16 Legislative Decree n. 81/2008 to be considered effective, the Board of Directors who wish to delegate the function of employer to one of its members shall ensure that the following requirements are met:

a) it is necessary to verify the Articles of Association and introduce, where not already provided for, the power for the Board of Directors to delegate its powers to one or more of its members;

b) the resolution of the Board of Directors shall attribute to the managing director, pursuant to and for the purposes of article 2381, paragraph 2, of the Italian Civil Code, all powers, none excluded, concerning the organisation, management and control of the company with regard to occupational safety, technopathy and hygiene at work and, in particular, the powers of organisation and choice of hygiene and accident prevention measures, in order to ensure full compliance



with the company's obligations to implement hygiene and prevention measures and the related control, guaranteeing full and timely compliance and scrupulous observance by the company and all employees of the rules on occupational safety and hygiene, suitably informing and instructing the personnel in charge and all those in charge, and monitoring assiduously the factories, offices and external sites with full and absolute autonomy and independence, as well as with full and unlimited spending power in relation to all that is necessary to provide the company, the factory, offices and external sites with all suitable means for the protection of the safety and health of workers and third parties;

c) the resolution has to specify that the managing director will assume the figure and function of employer pursuant to and for the purposes of Article 2, paragraph 1, letter b) of Legislative Decree no. 81/2008, with the related obligations;

d) the managing director shall attend the meeting of the board of directors, approve the delegation of powers in his favour - i.e. he shall not abstain - and declare that he expressly accepts the delegation of powers; it is appropriate that this declaration of express acceptance is recorded in minutes or that the minutes is signed by the managing director;

e) the resolution of the Board of Directors may establish that the appointed Managing Director delegates specific functions among those assigned to him in the field of health and safety at work to prepared and competent persons in compliance with the provisions of Article 16 of Legislative Decree no. 81/2008 (delegation of function);

f) the resolution of the Board of Directors shall be recorded in the Companies Register;

g) the risk assessment document and the deed of appointment of the head of the prevention and protection service (RSPP) shall be signed only by the appointed managing director - not by other directors nor by the Chairman of the Board of Directors - under the heading "The appointed managing director - Employer";

h) a special company organisation chart - to be delivered at the request of the supervisory bodies – has to be drawn up in which "The Managing Director - Employer" is placed at the top of the organization.

### **Delegation of functions pursuant to Article 16 of Legislative Decree 81/2008**

If the employer, as identified above, intends to appoint the person responsible for health and safety (to be not confused with the Responsible for the Prevention and Protection Service – RSPP), this appointment will be a delegation of functions, conferred pursuant to **art. 16 of Legislative Decree 81/2008**: the delegate thus appointed will assume to all intents and purposes the status of **employer's delegated party**.

According to the abovementioned rule, in fact, the employer may delegate the functions of employer to a third party, except for the obligations of the employer that cannot be delegated pursuant to **art. 17 of Legislative Decree 81/2008**, that is:

- the evaluation of all risks with the consequent elaboration of the document provided for by art. 28
- the designation of the person in charge of the risk prevention and protection service.

In accordance with the aforementioned Article 16, the delegation of functions has to meet certain requirements in order to be considered effective.



**Article 16 of Legislative Decree 81/2008, paragraph 1**, states that "*the delegation of functions by the employer, unless expressly excluded, is permitted subject to compliance with certain limits and conditions*".

First of all, it is necessary that the delegation is made in writing with a certain date. In order to meet this requirement, a private deed authenticated by a notary public or the public deed is usually used, even if other instruments such as the use of certified mail or the so-called time stamp are considered admissible (the latter in the practice is of difficult implementation and rarely used).

The delegate has also to meet all the requirements of professionalism and experience required by the specific nature of the delegated functions. It is therefore recommended to attach the curriculum vitae to prove that the employer has verified the suitability of the delegate, in order to avoid a responsibility for having appointed a person not suitable for that role (*culpa in eligendo*).

The delegate has to be granted all the powers of organisation, management and control required by the specific nature of the delegated functions and it is also essential that he is delegated the spending autonomy necessary to perform the delegated functions. In order for the delegation to be considered effective, it is essential and fundamental that the delegated person acts in full decision-making and spending autonomy; if not, the delegated person would be a mere executor of the delegating employer's will, thus affecting the validity of the delegation. To ensure that this does not happen it is therefore necessary to concretely attribute decision-making and spending powers compatible and consistent with the tasks delegated to him. This does not mean that the delegate must be granted unlimited financial availability, but it is sufficient that he is given an adequate budget

to meet the tasks assigned. The requirement of financial autonomy may be accompanied by a periodic reporting obligation on the part of the delegate to the delegating party for the purpose of fulfilling the supervisory obligation of the delegate.

Finally, the delegation must be accepted by the delegate in writing.

It is also specified, **in paragraph 2 of art. 16 of Legislative Decree 81/2008**, that the delegation has to be given adequate and timely publicity; with regard to this request for publicity, it is considered appropriate to proceed with the registration of the delegation in the Companies Register and its diffusion in the workplace by means of a newsletter.

Although Article 16 of Legislative Decree 81/2008 does not mention anything in this regard, it is necessary that the delegation, in order to be valid, needs an additional requirement: it has to assign specific tasks. In other words, a delegation without any specification or indication of the powers actually conferred is considered ineffective.

Even if all the employer's obligations are to be transferred, with the exception of those that cannot be delegated, it is still considered necessary, in order for the delegation to be valid, that it makes precise and express reference to the provision that refers to the delegated task.

### **The obligations to supervise the delegate's actions**

The delegating employer, although the delegation is valid and effective, still has a residual responsibility. There may also be cases where the responsibility of the delegating party is additional to that of the delegated party.



The same **paragraph 3 Article 16 of Legislative Decree 81/2008** specifies that *"the delegation of functions does not exclude the employer's obligation to supervise the correct performance by the delegated person of the transferred functions. The obligation referred to in the first period shall be deemed fulfilled in the event of adoption and effective implementation of the verification and control model referred to in Article 30, paragraph 4"*. In accordance with this article, the delegating party's supervisory activity with regard to the delegated party shall be considered to have been correctly performed if the company adopted the organisational model pursuant to Legislative Decree 231/2001 which provides for a control system for the implementation of the requirements of Legislative Decree 81/2008 delegated to the Supervisory Body.

The obligation to supervise is not limited to a mere control activity but also integrates the obligation to intervene on the part of the delegating party when the delegated party fails to comply with its duties (and it has been specified that the occurrence of impeding duties on the part of the delegating party is linked not to actual knowledge of the non-compliance but to its knowledge). Therefore, the delegating party's failure to intervene in the event of the delegated party's failure to comply with his duties may give rise to liability on the part of the delegating party for complicity in the intentional crime or cooperation in the culpable crime.

The delegating party will also be considered liable when the principle of the delegating party's decision-making and spending autonomy ceases to apply due to the continuous interference of the delegating party. The delegating party, by withdrawing the aforesaid autonomy of the delegated party, expresses its intention to cancel the effects of

the delegation or to restrict the scope of application and therefore regains its original position and the relative responsibility.

### **The Sub-delegation**

The delegated party, in accordance with the provisions of **Article 16, paragraph 3 bis of Legislative Decree 81/2008**, may delegate specific functions in the field of safety at work. The sub-delegation has the same requirements for the delegation of functions pursuant to art. 16 of Legislative Decree 81/2008, even if with certain measures. In this circumstance, authorisation from the employer is required and, above all, sub-delegation may not concern the generality of the functions transmitted by the employer to the primary delegated party, but only specific fulfilments that have to be indicated in detail at the time of sub-delegation. Also in this case, the responsibilities of the delegating party remain as described in the preceding paragraph.

### **Analogies between Legislative Decree 81/2008 and Legislative Decree 152/2006 (Testo Unico Ambientale)**

Since the Legislative Decree 152/2006 does not provide for a rule similar to that of the Legislative Decree 81/2008 with regard to the delegation of functions, the Criminal Supreme Court (Section III, 20 November 2017, no. 52636) clarified the requirements of the delegation of functions in environmental matters pursuant to **Legislative Decree 152/2006**, analysing the similarities between the latter and the delegation of functions in the field of health and safety at work pursuant to Article 16 of Legislative Decree 81/2008.

The Court concluded that the regulations concerning the requirements of the delegation of functions and the residual responsibility of



the delegating party pursuant to Legislative Decree 81/2008 must also extend to the delegation of the management of environmental and ecological authorizations and the maintenance of the same pursuant to Legislative Decree 152/2006.

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