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## The Changing Structure and Contents of the Employer's Legal Responsibility for Health and Safety at Work in Post-Industrial Systems\*\*

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"I am deeply convinced of the necessity of new synergies between labour law and other disciplines, not only between labour law and other traditional social sciences. Labour law scholars are nowadays fully conscious of the necessity of reinforcing communication between their discipline and labour sociology, industrial relations, labour economics and game theories; but not so many perceive the necessity of a more intense communication with other less contiguous disciplines, such as labour medicine and psychology, as well as with biology and neurosciences, inasmuch as they can offer important means of explanation and interpretation of human and social behaviour; this also makes possible a more precise definition of the content of juridical rules that apply to this behaviour.

"Such interdisciplinary communication is one of the main aims of the Department of Labour and Welfare Studies at the University of Milan, to which I belong together with economists, sociologists, psychologists, and experts of human resources management (the same aim, of course, that can be seen in many other Departments of Labour Studies which in the last two decades have sprung up in many European Universities). Here is the frontier of development not only of labour economics and sociology, but also of labour law: the future of labour studies will be more and more entrusted to this kind of capacity for building bridges between different approaches, for creating, at every step, new cerebral synapses in the great collective brain of social sciences.

"This encounter and confrontation between jurists and physicians offers a precious opportunity for taking a further step forward in this direction: the subject of this report can be an interesting test bench of the feasibility and fecundity of this multidisciplinary approach. Obviously I am not able to fulfil this task alone, but only attempt to formulate hypotheses for joint work between our two academic communities."

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**Abstract:** This paper aims to outline the main changes in the nature of the employer's legal responsibility for health and safety at work in the transition from industrial to the post-industrial systems, with an extension of the area of application of health and safety protection beyond the boundaries of salaried employment. It is argued that in post-industrial systems the productivity gap between one employee and another can be far greater than in industrial systems. As a result the psychological aspects of the employment relationship take on more and more importance, with work-related depressive disorders and harassment in the workplace becoming increasingly significant issues, giving rise to the need to examine the employer's responsibility for preventive measures.

The nature of the employer's legal responsibility for workers' health and safety has undergone several transformations in the transition from the industrial to the post-industrial system, i.e. from one essentially focused on the production of material goods to one essentially focused on the production of intangible goods: information, new ideas, projects, services, design, and so on. The intention of this paper is to outline the main changes affecting this legal responsibility.

1. One of the most important changes is to be found in the enlargement of the area of application of labour law. The fact is that subordination – i.e. the worker's subjection to the employer's managerial power – is no longer the key element that defines and identifies the worker's position *vis-à-vis* the employer. On the one hand, in the post-industrial economy, subordination is no longer required for the integration of a worker into the firm's organization, and for achieving synergies between his/her role and that of all the other members of the organization. In the traditional model, for integration to take place it was necessary to coordinate the worker's activity with that of others in a given space and time, and a need for direct management and control on the part of the employer; now integration is possible, even at a great distance and without rigid time constraints, by means of information technology and online coordination.

On the other hand, the worker's position of weakness towards the employer does not necessarily coincide with a position of subordination in legal terms: modern labour economics identifies several possible factors of contractual weakness, which produce certain effects not only within the traditional employer/employee relationship, but also in the relationship between a firm and a self-employed worker. This can also be influenced by:

- the monopsonistic distortion of the local labour market (monopoly of demand for work *vs.* plurality and abundance of supply of work),
- information asymmetries that typically characterize labour markets,
- the 'lock-in effect' of an idiosyncratic investment in human capital (i.e. investment that can be fruitful in one firm, but not in others).

This is why in the last two decades EU law, together with European national laws, has progressively enlarged the area of application of protective measures beyond the boundaries of salaried employment, making reference more and more widely to the new notion of workers in a position of economic dependence, which is essentially based on the duration of the relationship and on its exclusive nature: *lavoratori parasubordinati* in Italy, *arbeitnehmerähnliche Personen* in Germany, *travailleurs dépendants non salariés* in France, atypical workers in the United Kingdom or in the U.S., and so on.

This change in the basic figure to which labour law refers appeared in the field of health and safety protection before appearing in other fields. The European Union directive no. 1989/391/EC – without referring to subordination – defines the beneficiary of the protection granted by EU health and safety rules as any person working in a continuous way for an employer, including trainees and apprentices, with the sole exclusion of domestic workers (s.3 (a)).

In fact, a more precise and complex definition is needed, in order to mark the boundary of the employer's responsibility. His/her duty to protect health and safety obviously cannot be extended to a worker who is only hired on an occasional basis, except with regard to the safety of the machinery and the firm's premises where the work is to be carried out. In addition, the need for health protection is not the same in the case of the self-employed working on a continuous and exclusive basis for a single company and in the case of self-employed workers with a number of clients: the possibility of choice typically provides the latter with effective contractual power and thus control over the quantity, quality, effort and operational modes of work.

Moreover, with regard to the particular position of a person working in the same continuous way but at home or wherever else he/she decides to work, while the employer's responsibility towards the traditional manufacturing homemaker is essentially focused on the safety of the work equipment provided by the employer, i.e. on the risk of physical injuries, the responsibility towards the modern teleworkers, who processes ideas and information, is essentially focused on the risk of an excessive level of stress for his/her mental well-being.

2. This last point brings us to another important consequence of the shift from the industrial to the post-industrial system for the nature of the employer's responsibility for workers' health and safety: the large increase in differences in productivity among workers producing immaterial goods, even when they belong to the same occupational category.

When I began to deal with labour problems, as a trade union organizer almost 40 years ago, one of my tasks was to negotiate piecework tar-

iffs. At that time two-thirds of European workers were blue-collar; and it could be observed that, if in a plant the mean performance was 100, the weakest worker might achieve 80, while the brightest one would rarely achieve more than 135 or 140. The productivity gap between the weakest and the most productive one therefore ranged from 80 to 140. Today two-thirds of European and three-fourths of North American workers no longer operate on material production, but mainly on immaterial production: data acquisition, memorization, elaboration, combination, transmission, and particularly creation and communication of new ideas (in the United States 36 per cent of the workforce is employed in *creative jobs*). If we consider two junior office workers and put them through a simple test concerning data acquisition and/or elaboration, it may turn out that the time spent by one of them in fulfilling the task is half the time spent by the other; but it may also be the case that it is one-tenth, or one-hundredth. For example, if two junior office workers are asked to find all the addresses of people with a driving licence living in a certain area, it may be that one of them, with particularly good Internet skills, is able to complete the list in half an hour and that the same task takes a week or even more for the other. When it comes to creative jobs, the difference in productivity can be infinitely greater.

The large difference in productivity between two workers belonging to the same occupational category may be apparent before the beginning of the employment relationship; and in this case the weaker worker will not be hired, or will only be offered precarious and poorly paid employment. But it may also be the case that the difference in productivity is not initially apparent and shows up later, when the employment relationship is already underway. In this case the problem arises of the gap between the low productivity that the legal system can assure to the employer as the minimum level of performance, and the much higher productivity level that the employer can obtain in two ways:

- by firing the inefficient worker and replacing him/her with a more efficient one; or (if the substitution is made impossible by the institutional context)
- by putting the worker under pressure in order to obtain a greater effort on his/her part. Here some difficult legal questions arise.

While there is no question that a difference exists between the minimum level of performance that the law is able to assure to the employer and the level that the employer can lawfully try to obtain, by means of communication, motivation and incentive strategies towards the employees, it is not as clear how far the performance efficiency can be lawfully pursued by means of such strategies and how much pressure can be lawfully exerted on the worker.

In the era in which human work mostly consisted of producing material goods, the incentive could consist of piecework payments, and unions were committed to negotiating the maximum level of physical activity that could be rewarded in that way. However, piecework payments are not easily applicable when workers operate on information flows, and the greater the difference between individual positions – as is the case of post-industrial systems – the more difficult it is for unions to exercise control on the pressure to which workers are subjected.

In this context, the sole effective limit to such pressure consists of the protection of the worker's health. The problem is that when work is of an intellectual nature, the health at stake is mental health; and the level of stress that is compatible with mental equilibrium varies greatly from one person to another. In addition, it is often difficult to identify this personal equilibrium in advance.

In post-industrial firms one of the most widespread incentive systems is that of *management by objectives* (MBO), which foresees

- the codetermination of the expected performance between the worker and the head of the office or branch, followed by a bilateral performance review between them;
- the awarding of bonuses related to the degree of achievement of agreed objectives.

This incentive system is, *per se*, perfectly lawful, but if it is utilized in a way that ends up putting the worker under excessive pressure, it can have effects that are incompatible with the employer's duty of protection of workers' health, depending on the general values and parameters of the system or on the way the scheme is implemented by the head of the office or branch. In a recent case the top managers of a large retailing chain with many thousands of employees – who were responsible for an MBO scheme in force in the firm – were charged with mistreatment and mental damage suffered by a small number of employees.

3. The typical harm suffered by post-industrial workers as a consequence of an excess of stress at work consists of an increased incidence of mood and anxiety disorders. A legal question that arises at this point, that is more difficult to cope with, is that of the causal link between the employer's behaviour and the onset of the disorder. In an individual at risk of developing major affective disorders, depression can be triggered by stress at work as well as from failure to cope with various tasks in everyday life.

It is difficult to say to what extent the employer is in charge of generating work satisfaction in the workplace, preventing the possible onset of depression and distrust in employees. Clearly, the manager of the

future will have to be selected on the basis of an ability to avoid conflict in the workplace and to reduce, as far as possible, emotional distress, without harming the company's capacity to stimulate the productivity of the employees. The employer will bear responsibility for management selection and training in this field.

Psychiatric epidemiology tells us that in western societies about 48 per cent of people suffer from a mental disorder once in their lifetime,<sup>1</sup> and that most of them would have avoided the disorder if they had not encountered an acute, high-intensity stress factor, or a lasting, low-intensity one. However, it must be pointed out that a genetic predisposition can play an important role in the onset of affective and/or anxiety disorders, even when they are triggered by stressful events. Vulnerability to stress at work, i.e. a predisposition to suddenly begin to feel that working life is an unbearable burden, is traceable at every occupational level, from the highest to the lowest. After a phase of high performance and brilliant achievements, both the super-efficient chief executive and the office worker with a low level of responsibility, faced with minor difficulties, may undergo a mental breakdown that significantly impairs their productive capacity.

In addition to full-blown psychopathology, the attention of the clinician is now focused on lifetime sub-threshold psychopathology.<sup>2</sup> This may constitute a liability to depression and anxiety, when the individual

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- 1 L. N. Robins, D. A. Regier (eds.), *Psychiatric Disorders in America: The Epidemiologic Catchment Area Study*, New York, Free Press, 1991; D. A. Regier, C. T. Kaelber, D.S. Rae, M. E. Farmer, B. Knauper, R. C. Kessler, G. S. Norquist, "Limitations of diagnostic criteria and assessment instruments for mental disorders: implications for research and policy", in *Arch. Gen. Psychiatry*, Vol. 55, 1998, pp. 109-115; R. C. Kessler, S. Zhao, S. J. Katz, A. C Kouzis., R. G., Frank, M. Edlund, P. Leaf, "Past-year use of outpatient services for psychiatric problems in the National Comorbidity Survey", in *American Journal of Psychiatry*, Vol. 156.1, 1999, pp. 115-123; R. C. Kessler, P. Berglund, O. Demler, R. Jin, K. R. Merikangas, E. E Walters, "Lifetime prevalence and age-of-onset distributions of DSM-IV disorders in the National Comorbidity Survey Replication", in *Arch. Gen. Psychiatry*, Vol. 62, 2005, pp. 593-602.
  - 2 R. C. Kessler, K. R. Merikangas, P. Berglund, W. W. Eaton, D. S. Koretz, E. E. Walters, "Mild disorders should not be eliminated from the DSM-V", in *Arch. Gen. Psychiatry*, Vol. 60, 2003, pp. 1117-1122; G. B. Cassano, S. Michelini, M. K. Shear, E. Coli, J. D. Maser, E. Frank, "The panic-agoraphobic spectrum: a descriptive approach to the assessment and treatment of subtle symptoms", in *American Journal of Psychiatry*, Vol. 154, 1997, pp. 27-38; G. B. Cassano, A. Rotondo, J. D. Maser, M. K. Shear, E. Frank, M. Mauri, L. Dell'Osso, "The panic-agoraphobic spectrum: Rationale, assessment, and clinical usefulness", in *CNS Spectrum*, Vol. 3, 1998, pp. 35-48; G. B. Cassano, L. Dell'Osso, E. Frank, M. Miniati, A. Fagiolini, K. Shear, S. Pini, J. Maser, "The bipolar spectrum: A clinical reality in search of diagnostic criteria and an assessment measure", in *Journal of Affective Disorders*, Vol. 54, 1999, pp. 319-328.

is exposed to acute or persistent stress factors. The sub-threshold model can provide employers with new tools for the prevention of work-related mental disorders; and an enrichment of the content of employers' responsibility can ensue from the progress of medical science in this field.

Here a contradiction arises between different legal principles that apply to the same working relationship. On the one hand, in order to protect the worker's right to privacy, the law forbids the employer from making any inquiry about his/her personal medical history (except for conditions which can affect the performance of the contractual worker's duties). On the other hand, the employer needs to know the present and past history of employees' mental disorders, in order to prevent the risk of depression arising from stress at work. The contradiction can perhaps be resolved by combining the right for the worker not to disclose clinical information and the opportunity for him/her to communicate it to the employer at any time during the work relationship, so signalling a specific personal risk. As a result, the employer will not be held responsible for a possible health problem arising in the employee at work due to lack of awareness of the worker's medical history.

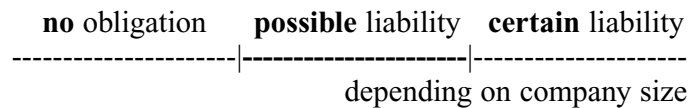
Communication between the employee and the management on this delicate matter should not only be made possible: it should also be made easier and in some way also solicited. Since the end of the 1980s some large U.S. companies – such as Ford, General Motors, Westinghouse, Wells Fargo Bank, McDonnell Douglas, Hewlett Packard, IBM, and Rank Xerox – have set up a partnership with the National Institute for Mental Health to launch a new scheme, named *Managing Depression in the Workplace*, which has implemented many initiatives: courses for managers aimed at enabling them (certainly not to make diagnoses, but at least) to realize at an early stage that an employee is beginning to suffer from depression so that they can deal with the problem in an adequate manner; the updating of medical centres' competences within the corporation; the design of flexible forms of work suitable for depressed workers to facilitate their medical treatment and, at the same time, avoid the trauma of being excluded from the workplace for many weeks or months. A scheme of the same kind has been promoted in the U.K. since the early 1990s.

Here again a legal problem arises: to what extent, in a large company, is the adoption of such specific schemes today to be considered as corresponding to the standard, so forming part of the employer's brief? And what is the company size limit over which this specific duty begins to apply?

A task that labour law scholars and the courts will have to fulfil, with the help of medical science, is to identify a continuous dimension of preventive measures and behaviour, along which an indicator of legal liabil-

ity should shift, in relation to company size and the structure of work relationships. On this incline we should be able to set a limit below which there is clearly no legal responsibility on the part of the employer, and a limit beyond which preventive measures are certainly part of the employer's contractual duty. But we must recognize that between the two limits a large segment remains, representing a series of preventive measures that cannot be considered to be a contractual obligation for all companies: the nature of the obligation increases in relation to company size and the degree of integration of the individual into the firm's organization, as shown in Figure 1.

**Figure 1.** The variable content of the employer's responsibility for the prevention of mental disorders



4. Depressive disorders can be triggered not only by an excess of pressure exerted on the worker in order to enhance productivity, but also by worker harassment by the employer, the head of department or of the branch, or even the worker's peers or colleagues, with a view to inducing him/her to resign. In Italy this phenomenon is today commonly termed 'mobbing': in the last few years we have been witnessing a new upsurge in complaints about mental diseases caused by 'mobbing', i.e. systematic harassment in the workplace.

This too is a phenomenon which has spread remarkably, and which is presumably linked to the shift from an industrial to a post-industrial productive system and from material to immaterial production: in the new context, the coordination and integration between the workers of an office or a company branch require a degree of psychological harmony among them that was not always required among blue collars inside the traditional industrial factory; and in the new context – as we have already said – a much greater difference in productivity can be observed between two workers belonging to the same occupational category than between two manual workers in an industrial plant. Harassment is often the deprecable reaction of an employer or head of department, or even of the office staff, to perceived failings in the worker's performance, be it caused by a voluntary lack of effort, or by an objective lack of capacity, in a legal context in which the law is able to assure only a low level of efficiency and pursues equality among workers and the containment of stress by means of the traditional prohibition of the dismissal of the least productive.



In the (ever wider) area of possible lack of efficiency not sanctioned by the law, it is often impossible to establish whether the conflict between the worker and his/her supervisors or colleagues has been triggered by the worker's behaviour or by the supervisors' or colleagues' behaviour: the phenomenon is often understandable and explicable only as a *systemic* phenomenon, arising from a causal circle in which it is incorrect to attribute the initial fault, or the 'objective' responsibility, to one or to the other. According to the systemic school of psychology, with regard to phenomena of this kind there is a need to abstain from 'arbitrary punctuations': in many cases the problem cannot be considered and tackled as arising from individual behaviour, or the fault of one party within the system, but must be considered and tackled as the result of shortcomings in the system as a whole.<sup>3</sup>

For example, it may be the case that the less efficient worker begins to perceive that the most important part of the work to be done is entrusted to the more efficient ones, so that his/her position in the flow of everyday activity is more and more marginal. This perception causes the worker to feel that his/her presence at the workplace is less important, and less expected every day by the colleagues. Therefore, he/she becomes more inclined than others to stay at home for a mild indisposition; his/her higher level of absenteeism increases his/her unreliability and consequently his/her marginalization in the organization of work. He/she begins to protest; colleagues perceive him/her as a troublesome and unwelcome presence; they begin to argue with him/her about trivial matters; the inefficient worker is penalized in the distribution of resources and space on the firm premises; the worker reacts by becoming less diligent; this increases the efficiency gap with the others, inducing the head of department to a further reduction of reliance and of the content of tasks that are assigned to him/her; if the worker does not resign, this vicious circle can end up with the worker falling into a state of depression.

In many instances the specialist in occupational psychology handles a case of incipient dysfunction by assuming the role of worker's therapist, when the most effective therapy might be a systemic one, because at this early stage the ailing organism should be identified in the workplace organization, rather than in the individual worker.

A legal problem in this field arises from the fact that the employer's civil and criminal responsibility does not require the malicious intent of harming the worker: the employer's liability – be it considered as a con-

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3 P. Watzlawick., J. Beavin, D. Jackson, *Pragmatics of Human Communication. A Study of Interactional Patterns, Pathologies and Paradoxes*, 1967, It. transl., Rome, Astrolabio, 1971.

tractual or as a tort liability – arises from the objective event of the worker's harm, when it is possible to affirm that it could have been avoided by the employer applying the professional diligence (to prevent harm from arising) that can be reasonably required in a case of this kind.

Most recent legal and sociological studies of this phenomenon, followed by initial court rulings, distinguish between voluntary harassment exerted by the employer, the head of department or the colleagues ('bossing' according to the definition proposed by Ege:<sup>4</sup> at least three or four aggressive actions within a month, for a spell of at least six months, are required to make it possible to speak of 'mobbing' in the strict sense of the word), and the merely culpable failure to adopt the appropriate measures that are necessary for avoiding the impoverishment of occupational content of the worker's position, the deterioration of personal and professional relationships between the worker and his/her colleagues, or culpable excess of pressure on the worker ('straining'). But in this second case too the employer bears a criminal liability for the psychological harm caused to the worker, if it could be avoided with the diligence reasonably required, according to the best standards of human resources management.<sup>5</sup> And it is difficult to establish at a theoretical level the exact nature of the boundary for the required diligence in preventing the deterioration of working relations between employees.

The studies in the last decade of this phenomenon single out three possible factors that create a fertile terrain for the vicious circle to develop:

- an organizational culture characterized by a strong drive towards conformity, in which diversity is perceived as a threat to mutual cooperation;<sup>6</sup>
- work organization characterized by poor job design, which causes role ambiguities, role conflict, and a low level of control on the part of the workers over their jobs in terms of autonomy and participation in the determination of their objectives;<sup>7</sup>

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4 H. Ege, *Il mobbing in Italia. Introduzione al mobbing culturale*, Bologna, Pitagora, 2000.

5 M. Depolo, *Mobbing: quando la prevenzione è intervento*, Milan, Angeli, 2003.

6 S. Einarsen, H. Hoel, D. Zapf, C. L. Cooper, *Bullying and Emotional Abuse in the Workplace: International Perspective in Research and Practice*, London, Taylor and Francis, 2003.

7 D. Zapf, S. Einarsen, "Bullying in the Workplace: Recent Trends in Research and Practice", in *European Journal of Work and Organizational Psychology*, Vol. 10, No. 4, 2001, pp. 369-373; G. Favretto, E. Bortolani, R. Sartori, "Mobbing: componenti psicosociali ed organizzative", in *Risorsa Uomo. Rivista di psicologia del lavoro e dell'Organizzazione*, Vol. 10, No. 2-3, 2004, pp. 301-316; G. Favretto, *Le forme del mobbing*, Milan, Cortina, 2005.

- leadership styles characterized by an excess of authoritarianism or an excess of *laissez-faire*.<sup>8</sup>

It is probably impossible to identify a specific legal obligation on the part of the employer in correcting *in limine* such characteristics of the organizational context, right from the start: the principle of exemption from judicial control of management choices prevents the courts censuring the omission of this or that initiative focused on the company climate. But when the vicious circle has been installed and an employee has been harmed, the fact of having taken appropriate initiatives aimed at improving the workplace climate – even if they have not been fully effective – can be of substantial help for the employer to avoid, if not the civil liability for the damage, at least criminal liability, which will be ascribed only to the individual who has misbehaved against the injured party.

What may be needed, in particular, is the adoption inside companies – also by means of collective agreements – of awareness campaigns, climate improvement and bridge-building measures, instruments of *intra moenia* mediation, specific managers and advisors in charge of the prevention of undue tensions, permanently available for workers who may need help, advice or protection. This is a new chapter, which will presumably become more and more important in health and safety at work, and perhaps also a new chapter of future labour legislation, at the national and even transnational level.

5. The great value of labour law lies in this: it ensures that the work contract – i.e. the legal relationship which allows the labour market to function and thus allows, so to speak, human work to be made a tradeable good – becomes the instrument capable of guaranteeing that work itself is never treated *only* as a tradeable good. In other words, it aims to guarantee that work is (and where it is not it becomes) the main means of expression, development, emancipation and security of the human person: security against need, certainly, but also against any harm to the person's physical and psychological integrity and well-being. In the post-industrial productive context this commitment assumes new specific contents, which require further multidisciplinary research in the field of workers' health and safety: on this matter a lot of ground still needs to be covered.

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8 G. Giorgi, V. Majer, "Le variabili organizzative antecedenti al fenomeno del mobbing", in *Risorsa Uomo. Rivista di psicologia del lavoro e dell'Organizzazione*, Vol. 10, No. 2-3, 2004, pp. 269-283.