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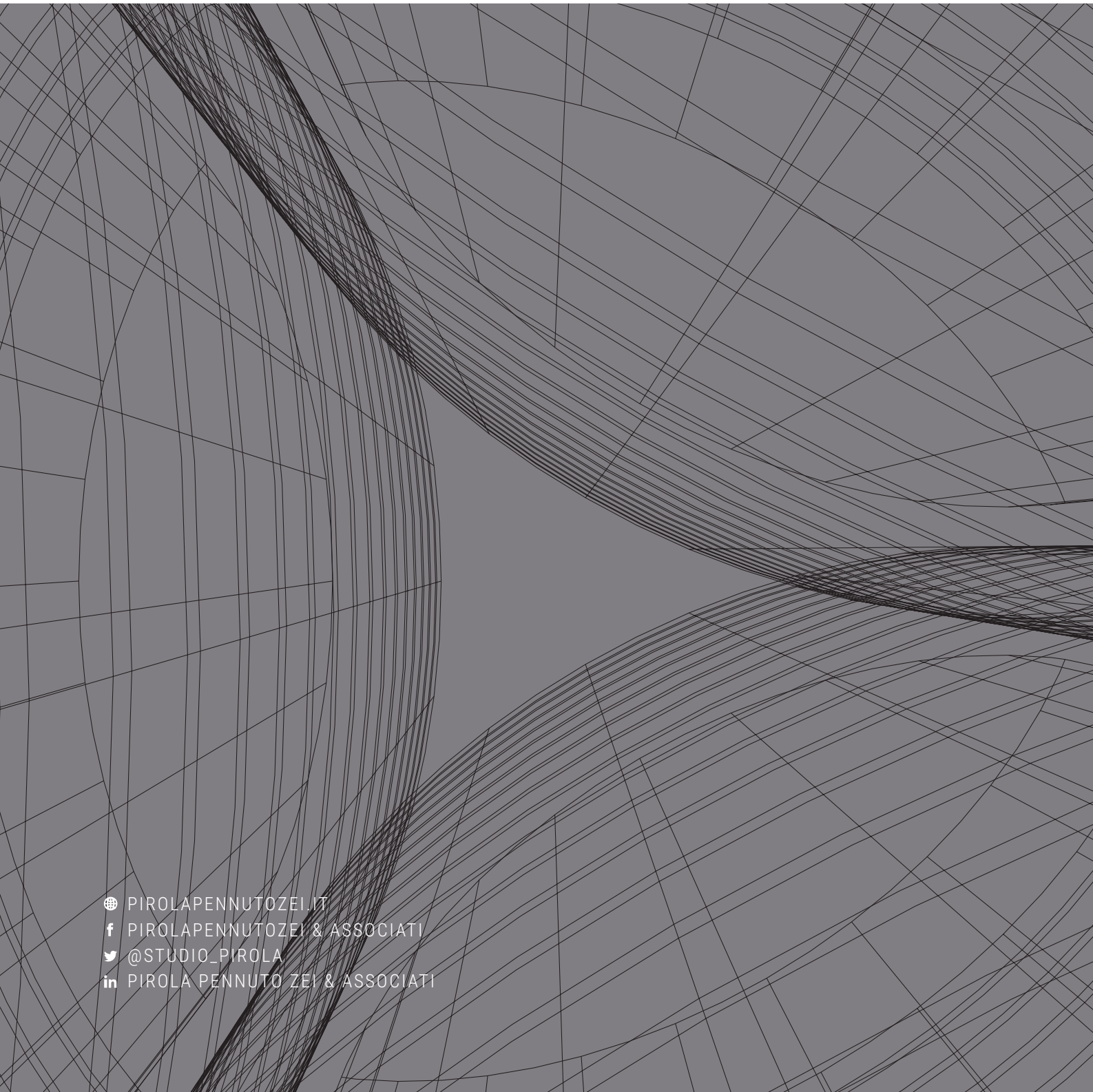
NEWSLETTER / NOVEMBER 2018



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LEGISLATION

1.1

Draft legislative decree adjusting domestic legislation to the European regulation on personal protective equipment (PPE) – Government enactment No 57; Council of Ministers session of 20 November 2018

In their session of 20 November 2018, the Council of Ministries approved a draft legislative decree composed of 5 articles, adjusting the current Italian legislation (legislative decree No 475/1992) on the use of personal protective equipment (PPE) to Regulation EU 2016/245.

We summarize below the main changes introduced by the draft decree which, if definitively approved, will significantly amend the wording of Legislative Decree No 475/1992.

First of all, the following fall outside the scope of the new legislation: equipment *(i)* specifically designed for use by the armed forces or in the maintenance of law and order; *(ii)* designed to be used for self-defense, with the exception of PPE intended for sporting activities; *(iii)* designed for private use to protect against atmospheric conditions that are not of an extreme nature; *(iv)* for exclusive use on seagoing vessels or aircraft that are subject to the relevant international treaties applicable in Member States; *(v)* for head, face or eye protection of users, covered by Regulation No 22 of the United Nations Economic Commission for Europe.

Furthermore, according to the draft decree, Italian legislative bodies have an obligation to consult the most representative trade union organizations of employers and workers before drafting the harmonized rules.

Having said this, one of the key changes introduced by the draft decree concerns the market entry of the PPE which may be sold *(i)* if properly maintained; *(ii)* if used for its intended purposes; *(iii)* provided that it does not endanger the health or safety of persons, domestic animals or property and, finally, *(iv)* provided that it complies with the applicable essential health and safety requirements. With regard to the last condition, PPE is considered to be compliant to the essential requirements if it carries the CE marking.

The draft legislative decree provides that, prior to the sale of PPE, the manufacturer will have to conduct a conformity assessment to be certified by a test report to be produced to the market surveillance authority upon request.

Furthermore, in order to obtain the EU declaration of conformity, the draft decree expressly provides that the assessment of conformity with regard to product quality and manufacturing process is reserved to the authorized notified bodies.

In any case, the manufacturer will have to affix visibly, legibly and indelibly the CE marking to the PPE before it enters the market and, where that is not possible, to the packaging and to the documents accompanying the PPE.

Finally, the draft decree has adjusted the penalties imposed by Italian legislation for non-conformity, introducing pecuniary administrative penalties for manufacturers and importers who produce or import PPE not compliant with the essential safety requirements.

In conclusion, if the decree is definitively approved, before delivering the personal protective equipment to workers, the employer appointed for safety purposes pursuant to legislative decree 81/2008 will have to make sure that it is compliant with EU legislation and included in the legislation and that the conformance tests provided therein have been conducted.

GUIDANCE

2.1

Trade union membership information constitutes sensitive data – Privacy Authority Newsletter no. 447/2018

In the above mentioned newsletter, the Privacy Authority pointed out that the employer must protect employees' trade union membership information, since this falls within the category of sensitive data.

In particular, the Privacy Authority has upheld the complaint filed by some employees in respect of the employer's conduct which, in order to enable the previous trade union association to complete the revocation and cancellation of the related membership form, had notified the latter of the name of the new trade union association to which the employees had subscribed.

According to the Privacy Authority, the information regarding an employee's trade union membership falls within the category of personal data and, in particular, within the category of "*sensitive*" data, since such information reveals the employee's political and trade union views.

In view of the foregoing, the employer may lawfully process such information solely for the purposes of complying with the specific legal or contractual obligations (e.g. in order to pay the membership fees to the trade unions as delegated by the employee) and must avoid processing it if its use may lead to workplace discrimination of the employee.

In conclusion, in the Privacy Authority's opinion, the employer should have solely notified the previous trade union association of the fact that the employee had chosen to join another trade union association without disclosing the name of the new association: this constitutes a case of unlawful processing of personal data, which is protected by specific legislation.

CASE LAW

3.1

Oral withdrawal from supplementary company bargaining agreements is lawful – Italian civil supreme court – labor section, decision No 30264 of 22 November 2018

The Italian Supreme Court confirmed the principle of freedom to choose the form of supplementary company bargaining agreements by stating that oral termination or termination by implicit or tacit consent are lawful and valid.

In the case at issue, the employer had verbally withdrawn from the corporate bargaining agreement and therefore had not paid his employees the bonus provided therein.
The employer had informed the workers of the termination of the corporate bargaining agreement at a meeting during which the parties agreed that written notification to this effect would be sent to each worker.

The Appeals court acceded to the workers' appeal as it recognized the employer's obligation to pay the bonus on the basis that withdrawal from the agreement had been made other than as agreed during the meeting, i.e., orally, and had taken place after the deadline stated in the agreement.

Instead, the Supreme Court stated the well-known principle of freedom of choosing the form of a contract, including collective or corporate bargaining agreements, and the form of the relevant termination notice. The Supreme Court applied this principle to the withdrawal from the agreement, which may therefore be made orally or by implicit or tacit consent, unless otherwise agreed by the parties in writing before the date of termination.

3.2

The satisfaction of the obligation to find an alternative job/position for dismissed employees by the worker concerned does not rule out the same obligation for the employer – civil supreme court, labor section, decision No 30259 of 22 November 2018

The Supreme Court has ruled once again on the obligation to find an alternative job/position for an

employee made redundant, especially where the worker, in filing his own appeal, specified the positions available within the company at the time of his termination which he could have been appointed to.

The case consisted of a worker who appealed against wrongful termination due to the lack of the objective reasons for termination and for violation of the employer's obligation to find an alternative job/position for the employee made redundant. The Supreme Court, however, rejected the worker's claims as to the alleged lack of the objective reasons for termination since, in its opinion, there was sufficient proof of the state of economic crisis which had been claimed as reason for termination, it having been ascertained that there had been a permanent reduction of the company's core activities and that the company had applied for payment of the benefits under the extraordinary wage guarantee fund - (*Cassa Integrazione Guadagni Straordinaria*).

Secondly, the Supreme Court considered that it was lawful for the company to reallocate the tasks of the employee made redundant among the remaining staff, on the basis that in order for a dismissal to be valid it was not necessary for all of the former employee's tasks to have been suppressed.

Thus, the Supreme Court ruling is in line with prior case law according to which dismissal for a justified objective reason is acceptable both if the employer's decision is justified by the need for greater business efficiency and if, as a result of eliminating the position of the employee made redundant, the employer decides to allocate his tasks among the remaining personnel.

As regards the alleged violation of the obligation to find an alternative job/position for employees to be made redundant, the Supreme Court's decision is innovative for two different reasons: on the one hand, an employee is able to point out the positions which, in his or her discretion, are available at the time of dismissal and, on the other hand, the employer is not discharged from the obligation to demonstrate that the employee could not be reassigned to such positions. This means that the employer is required to meet the obligation to find an alternative position solely with respect to the positions pointed out by the employee, with no need to extend the search for possible jobs to the company as a whole.

3.3

Succession of fixed-term agreements and probation – Italian civil supreme court, labor section, decision No 28252 of 6 November 2018

The Italian Supreme Court considered it acceptable for an indefinite-term agreement to contain a probation clause although the agreement was entered into following an employment relationship between the same parties and covering the same tasks, on the basis that the new contract was concluded in a different environment.

The employee had appealed against the unlawful inclusion of the probation clause in his indefinite-term employment contract, on the grounds that the clause did not take into account his prior employment contacts for the performance of the same tasks.

However, the Italian Supreme Court rejected the worker's claims and considered the probation clause included in the indefinite-term employment contract to be lawful, even though it covered the same tasks the employee had carried out under the prior contracts, on the assumption that the purpose of a probation period is to assess not only the worker's professional abilities and skills but also his conduct and personality in the performance of his duties, which may change over time, depending on the social environment in which they are carried out.

Pirola
Pennuto
Zei
& Associati
studio di consulenza
tributaria e legale

Via Vittor Pisani, 20
20124 Milano

T. +39.02.669951
F. +39.02.6691800

info@studiopirola.com
www.pirolapennutozei.it

LABOUR NEWSLETTER | NOVEMBER 2018

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 30 NOVEMBER 2018.
THIS NEWSLETTER IS INTENDED AS A SUMMARY OF KEY DEVELOPMENTS AND HIGHLIGHTS MATTERS OF GENERAL INTEREST, AND THEREFORE SHOULD NOT BE USED AS A BASIS FOR DECISION-MAKING.
FOR FURTHER DETAILS AND INFORMATION, PLEASE CONTACT YOUR RELATED PARTNER OR SEND AN EMAIL TO UFFICIOSTUDI@STUDIOPIROLA.COM