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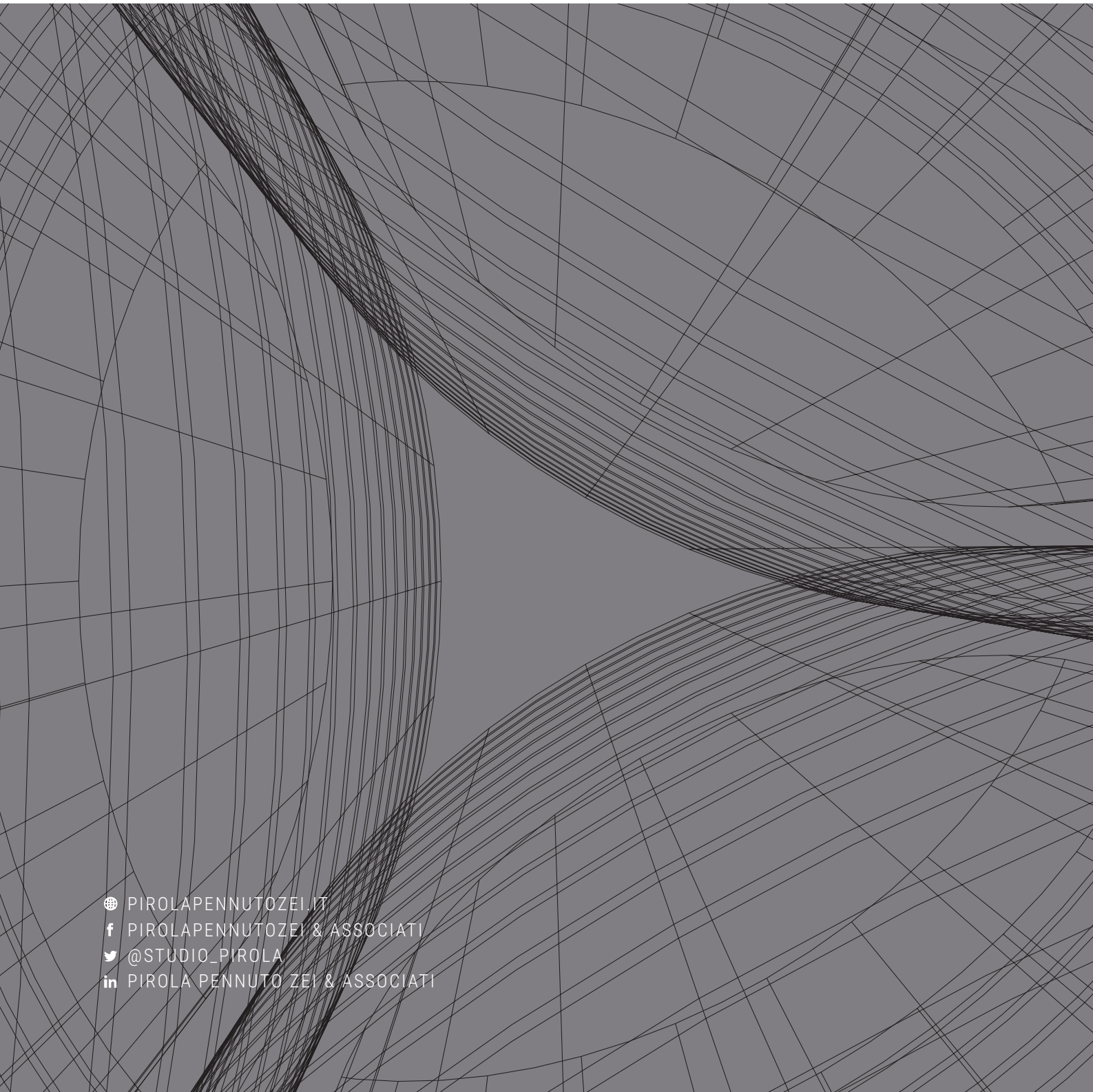

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GUIDANCE

1.1

National Labor Inspectorate Circular No 3 of 11 February 2019 – Guidance on the identification of the offence of fraudulent staff leasing ("*somministrazione fraudolenta*")

The National Labor Inspectorate issued operating guidance to its inspectors on the identification of the offence of fraudulent staff leasing (*somministrazione fraudolenta*) - in cases of violation of the rules on contracts and staff leasing – introduced by article 38*bis* of legislative decree No 81/2015 which defines fraudulent staff leasing as staff leasing put in place solely with a view to avoiding the application of mandatory provisions of law or of the national collective bargaining agreement.

This offence is punishable by a 20-euro criminal fine for each worker involved and for each day of work, as well as by a 60-euro administrative fine per day (pursuant to article 18 of legislative decree No 276/2003) payable by both the entity providing and the entity using the leased workers.

The National Labor Inspectorate (pursuant to a Labor Ministry Circular), authorized its inspectors to take appropriate action against:

- the alleged principal and the alleged contractor, by ordering them to cease their fraudulent actions forthwith;
- the fraudulent principal, by ordering it to regularize the workers' position and to pay any amounts owed to the staff involved in the contract work as unpaid remuneration differences.

In its Circular, the National Labor Inspectorate also stated that an illegal contract – and the leasing of staff other than in accordance with the law – constitutes per se a sign of fraudulent intent, i.e. the avoidance of mandatory provisions of law or of the applicable collective bargaining agreement.

In a conservative perspective, the National Labor Inspectorate is of the opinion that the existence of the fraudulent intent must be substantiated by additional evidence, such as for instance the principal's unfavorable financial position.

The offence of fraudulent staff leasing resulting from the violation of staff leasing rules may be committed by involving authorized staff leasing agencies or by putting in place "*fake*" secondment arrangements.

Fraudulent staff leasing occurs, for instance, if an employer dismisses an employee only to hire him/her back through an agency, in breach of the law and of the collective bargaining agreement.

According to the National Labor Inspectorate's circular, if inspectors identify illegal contract and secondment arrangements with a fraudulent intent, they will report the criminal conduct and impose the administrative penalty mentioned above as well as require the principal to hire the workers throughout the duration of the contract.

1.2

Ruling No 1 of 8 February 2019 by the Ministry of Labor and Social Policies – "*Solidarity contracts*" and new employer following change of contract

In its ruling, the Ministry of Labor and Social Policies replied to a query raised by employers' associations and trade unions concerning the length of payment of the income support benefit under the "*solidarity contract*" (pursuant to article 21(1)(c) of Legislative Decree No 148 del 2015).

In particular, they asked whether in the event of change of contractor, the new company could qualify for the solidarity contract if the old contractor's staff was already eligible for this income-support benefit, and whether the maximum 5-year term allowed by law for the implementation of solidarity contracts could start anew.

In the Ministry's opinion, in the event of change of contractor in a company benefiting from a solidarity contract arrangement, the new contractor had to re-apply for the benefit and therefore the company taking over the contract could take advantage of the maximum period allowed by legislative decree 148/2015.

1.3

Italian Revenue Agency guidance (*Principio di diritto* No 6/2019) – Tax treatment of the use of more than 8 luncheon vouchers

The Italian Revenue Agency has stated that the prohibition to use more than eight luncheon vouchers a

day does not affect the amount exempt from employment income tax provided by the Italian Income Tax Code – i.e. 5.29 euro for hard-copy and 7 euro for electronic luncheon vouchers. Therefore, the exemption applies regardless of the number of luncheon vouchers used.

Therefore, the exemption limit will apply having regard to the nominal value of the luncheon vouchers given to employees.

1.4

INPS (Italian social security authority) Circular No 36 of 5/03/2019 – Voluntary payment of social security contributions to fill gaps in the national insurance record in order to qualify for full state pension

INPS (Italian social security authority) Circular No 36 of 5/03/2019 provides clarification on the possibility for workers who at 31 December 1995 had not yet reached the required number of qualifying years (and who did not yet receive pension payments) to make voluntary payments of social security contributions to fill gaps in their national insurance record in order to qualify for state pension, covering a maximum of 5 years. The period to be covered must be included between the date of the first and that of the last qualifying payment to any of the social security schemes identified by the Italian law (legislative decree No 4/2019).
This opportunity is not available to retirees. For workers who are not yet eligible for retirement pension, the effective date of payment of the benefits cannot be earlier than the date of the request to make voluntary social security payments.

1.5

National Labor Inspectorate Note No 1438 of 14/02/2019 – Determination of overtime for night workers

The Inspectorate provided clarification on how to calculate the average number of hours of night work in order to determine overtime, if any. Article 13 of legislative decree 66/2003 states that (unless otherwise provided by national or corporate collective bargaining agreements) the number of hours of night work cannot exceed 8 out of 24 hours (that is to say one third). Unless expressly provided for by the law or a collective bargaining agreement, the working week should be considered as a 6-day week and therefore

if a company works over 5 days, the sixth day shall be considered as a 0-hour working day and taken into account for the calculation of the number of hours worked in a week.

1.6

INPS message No 591 of 13/02/2019 – Clarification on the mandatory paternity leave

Law 92/2012 had experimentally introduced mandatory paternity leave; the Finance Act 2019 has confirmed the application of the rules also for 2019. INPS message No 591/2019 states that the manner of application for paternity leave differs depending on whether paternity benefits are paid by the employer on behalf of the social security authority or directly by the latter. In the former case, the father shall submit a written request the employer stating his proposed dates of leave (at no less than a 15-day notice); if the application concerns the optional paternity leave, a declaration by the mother will also be required, specifying the number of days during which she will not benefit from her leave (which must be equivalent to the paternity leave requested by the father).
If, instead, the benefits are paid directly by the social security authority (INPS), the application will have to be submitted by the father, or an authorized intermediary, directly to the authority, jointly with the mother's declaration that she will not take maternity leave for a corresponding length of time.

1.7

Italian Revenue Agency, Reply No 10 of 25/01/2019 – Corporate welfare is extended also to personnel under staff leasing contracts and interns

In its Reply No 10 of 25/01/2019, the Italian Revenue Agency specified that a company's corporate welfare measures for employees may be extended also personnel under staff leasing contracts and interns, since the condition for receiving the welfare benefits is that workers are paid employment income. Although workers under staff leasing contracts are employed by a company other than the one they carry out work for, based on the principle of parity of treatment with the employees of the user company where the leased staff works, they are eligible for the user company's welfare benefits.

As for interns, although they are not regarded as employees, they receive income equivalent to employment income pursuant to article 50(c) of the Italian Income Tax Code and therefore in the Revenue Agency's opinion they qualify for the benefits.

CASE LAW

2.1

Italian Supreme Court – Labor section – decision No 3899 of 11 February 2019. Even if a company closed down, it is unlawful to dismiss a female worker during the protected after-birth period where it can be proved that she actually worked for a company related to the formal employer company

The supreme court ruled that it is unlawful to terminate a female worker during the protected after-birth period, even if the company which had hired her closed down (although pursuant to article 4(3) of legislative decree 151/2001 this is generally speaking sufficient basis for dismissal), where it can be proved in court that there is a functional link between the employer and the other companies which concurrently used the worker's services.

In this case, the worker had appealed against her termination as she was able to prove to the lower court and to the court of appeals that she had only been formally hired by the company which had ceased to do business but that, in fact, she worked also for companies related to the latter which were therefore jointly liable with her employer.

Although there was no actual group of companies, the Supreme Court identified the existence of "*co-employers*" and confirmed the principle according to which, when the same individual works for two employers at the same time in such a way that it is not possible to separate the work done in the interest of one employer from that done in the interest of the other employer, both employers are liable for the obligations arising from such work relationship.

Based on the foregoing, the Supreme Court - having ascertained that all companies using the worker's services could be regarded as *de facto* employers and that therefore the cessation of business of the formal employer did not constitute sufficient basis for the worker's dismissal - ruled that this was a case of unfair termination and that all companies involved were jointly liable and had an obligation to reinstate the female worker to her previous position.

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LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 28 FEBRUARY 2019.
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