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LABOUR

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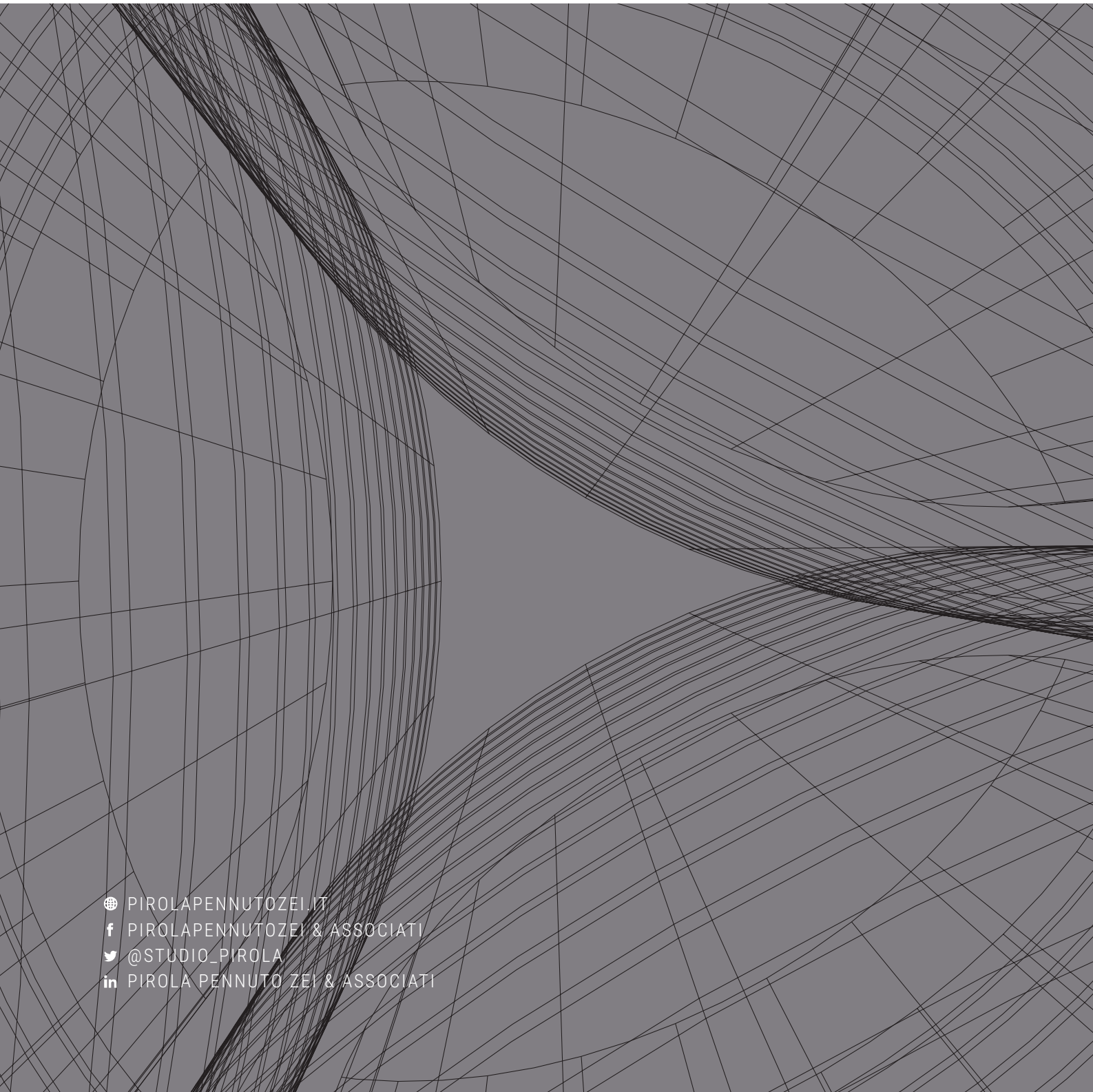

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LEGISLATION

1.1

Communiqué by the Presidency of the Council of Ministries: indexation of the monthly family allowance and monthly maternity allowance for 2018

The Department of Family Policies at the Presidency of the Council of Ministries published in Official Journal No. 36 of 13 February 2018 a *communiqué* on the increase for 2018 of the amount of, and the requirements for entitlement to, the monthly family allowance and the monthly maternity allowance, as follows:

- the full amount of the monthly family allowance payable to eligible persons in 2018 is € 142.85, based on a 2018 ISEE (Indicator of the family's financial situation) of € 8,650.11;
- the full amount of the monthly maternity allowance, payable to eligible persons in 2018, in respect of births, pre-adoption foster care and adoptions without foster care, is € 342.62 based on a 2018 ISEE (Indicator of the family's financial situation) of € 17,141.45.

GUIDANCE

2.1

Labor Ministry notice of 31 January 2018: the forwarding of the report on the hiring of disabled persons has been deferred to 28 February

By notice dated 31 January 2018, the Labor Ministry stated that the deadline for forwarding the report regarding employers' situation with regard to the mandatory hiring of disabled and/or protected-class workers as well as the number of positions and the relevant tasks available, initially set at 31 January 2018, has been postponed to 28 February 2018.

2.2

Inps message No. 536 of 5 February 2018: regularization of social security payments for employees by April 2018

In message No. 536 of 2018, the Italian social security authority (INPS) specified that those employers who were unable to calculate the January 2018 social security contributions on the updated amount of the remuneration subject to contributions, can remedy by making the relevant payment by 16 April 2018.

To this end, those employers who use section "*PosContributiva*" of the *UniEmens* IT system, will calculate the difference between the remuneration subject to social security contributions at 1 January 2018 and that on which the contributions for the same period were actually calculated and add it to the individual remuneration for the month in respect of which the regularization is being made, calculating the contribution due on the total amount thus obtained.

2.3

Operating guidance on the installation and use of video surveillance equipment and other monitoring equipment – National Labor Inspectorate Circular No. 5 of 19 February 2018

The Italian National Labor Inspectorate in Circular No. 5/2018 provided operating guidance on the installation and use of video surveillance and other monitoring equipment at the place of work.

Based on article 4 of Law No. 300/1970 – and after confirming that the rationale of the rule is to combine the employer's work organization and production requirements with the need to protect the dignity and confidentiality of workers – the Inspectorate analyzed the various issues regarding the installation of video surveillance systems.

First of all, it dealt with the reasons justifying the remote control of workers. The Circular specified that the activities preparatory to issuing an authorization to monitor employees from a distance should not involve the Inspectorate's "*technical personnel*" since such activities must be merely focused on checking that the reasons justifying the installation of the equipment and for requesting the authorization exist, i.e. organizational, production, safety at work reasons and protection of corporate assets.

It follows that the conditions imposed by the Inspectorate on the use of the devices must be related to the reasons stated in the request for authorization, without particular and additional technical limitations neutralizing the efficacy of the monitoring equipment.

Furthermore, video-recording of workers can take place only occasionally and on an incidental basis. Nevertheless, if the reasons for carrying out control actually exist (e.g., ensuring safety at work or protecting corporate assets), the worker will have to be recorded clearly, without limitations such as for instance using a specific "*shooting angle*" or "*blurring the face of the worker*". Likewise, it is not essential to specify a pre-determined position for and the exact number of the cameras to be installed, since working places often undergo changes.

Consistently with the above, the Italian Labor Inspectorate specified that the authorization is issued on the basis of the reasons specified in the relevant request; it ensues that the control of workers is lawful if it is strictly in connection with the protection of the declared interest, which cannot be changed at a later time.

Secondly, the Inspectorate analyzed the notion of "*Protection of corporate assets*" as a legitimate reason for installing video surveillance equipment.

The authority noted that "*Protection of corporate assets*" is too wide a notion and is therefore not "*a suitable basis for acceding to the requests for authorization*".

With specific regard to the installation of devices operating while the company's staff is still on the premises (e.g. a video surveillance system), the Inspectorate clarified that the authorization to installation for the "*Protection of corporate assets*" must be justified solely in the event of specific irregularities and, in any case, only after implementing other preventive measures which are less restrictive of workers' rights.

Third, the Inspectorate analyzed the video surveillance systems based on digital technology suitable for network transmission (e.g. via the Internet) of the data gathered and specified that, if the reasons for introducing the video surveillance measure existed, the authorization could cover both remote viewing of the images in real time and viewing of recorded images. Nevertheless, remote access to real time images had to be authorized only in specially justified cases and access to recorded images (both from a remote location and on-site) had to be tracked through special-purpose applications which kept a record of access logs for no less than six months.

As a result, the use of the "*dual physical or logical key*" system will no longer constitute a condition for the issue of the authorization.

Finally, the Inspectorate examined the issue of the use of devices and technologies for the gathering and processing of biometric data, i.e. IT systems whose purpose is to identify a person based on one or more biological feature, such as for instance the analysis of fingerprints.

Pursuant to the Italian Personal Data Authority Enactment published in Italian Official Journal No. 280 of 2 December 2014, the Inspectorate stated that biometric systems based on the processing of fingerprints or handprints may be implemented to restrict access to areas or rooms considered to be "*sensitive*" and which therefore require special and high security levels, or to allow the use of dangerous equipment or machinery solely to authorized personnel in charge.

Therefore, the installation of a biometric recognition system on machinery to prevent use by unauthorized persons and required to operate the equipment, may be considered as an essential tool to "*carry out the work*" pursuant to article 4 of law No. 300/1970. The Inspectorate therefore believes that the installation of any such device does not require either an agreement with the trade union associations or the implementation of the administrative authorization procedure required by the law.

2.4

Inps Message No. 894 of 27 February 2018: paternity leave for employees during 2018

In message No. 894, INPS provided clarification on the obligatory and optional paternity leave for 2018. Pursuant to the 2017 Finance Act, for 2018 paternity leave has been increased to four days to be used until completion of the child's five months of age (or within five months from the adopted/foster child's joining the family or arriving in Italy).

Furthermore, the law has reintroduced the possibility for employed fathers to use an additional day's leave in 2018, with the agreement of and replacing the mother during the term of her maternity leave.
Finally, INPS specified that for adoptions/foster care implemented in 2017, employed fathers are entitled only to two days of mandatory leave, even if the period reached into the early months of 2018.

CASE LAW

3.1

Italian Supreme Court Decision No. 2774 of 5 February 2018: the fixed-term contract must be signed by the employee

In decision No. 2774, the Italian Supreme Court stated that, in order to be legally valid, a fixed-term employment contract must be made in writing. Since the written form is required *ad substantiam* (i.e., for the purpose of the validity of the document), it is not sufficient to deliver to the employee the agreement signed by the employer only, on the basis that "*delivery does not unquestionably imply acceptance of the limited-term of the agreement (acceptance being irrelevant if it is expressed by a conduct implying intent) but, reasonably, reflects the employee's mere will to be a party to an employment contract*".

3.2

European Court of Justice decision in Case C-359/16: the social security certificate may be disregarded if it was fraudulently obtained

The European Court of Justice ruled that the national court may disregard a social security certificate issued by another state if, during a judicial investigation, it were to arise that the certificate was fraudulently obtained and if the home country authority failed to take that evidence into consideration for the purpose of reviewing the grounds for the issue of those certificates.

The Court decision concerned the case of a Belgian building company who had subcontracted its building works to Bulgarian undertakings posting to Belgium workers having E101 or A1 certificates issued by the institution designated by the competent Bulgarian authority.

In such cases, in order to prevent an undertaking established in a Member State from being obliged to register its workers, who will usually be subject to the social security legislation of that State, with the social security system of another Member State where they are sent to perform work of short duration, Article 14(1)(a) of Regulation No. 1408/71 allows the undertaking to maintain its workers' registration under the social security system of the first Member State.

Thus, the Bulgarian workers did not pay Belgian social security contributions since they had certificates attesting their registration with the Bulgarian social security scheme issued by the competent Bulgarian authority. However, after ascertaining that the Bulgarian undertakings did not carry out any significant activity in Bulgaria, the Belgian social inspectorate sent to the Bulgarian authority a reasoned request for review or withdrawal of the E101 or A1 certificates issued to the posted workers but the Bulgarian authority replied by stating that the undertakings met the conditions of posting for administrative purposes.

The Belgian Supreme Court asked the European court of justice whether an E 101 certificate could be annulled or disregarded by a court other than that of the sending Member State if the facts which were submitted for assessment by it supported the conclusion that the certificate was fraudulently obtained or relied on.

The European Court of Justice ruled that the legislation must be interpreted as meaning that, when an institution of a Member State to which workers have been posted "*makes an application to the institution that issued E 101 certificates for the review and withdrawal of those certificates in the light of evidence, collected in the course of a judicial investigation, that supports the conclusion that those certificates were fraudulently obtained or relied on, and the issuing institution fails to take that evidence into consideration for the purpose of reviewing the grounds for the issue of those certificates, a national court may, in the context of proceedings brought against persons suspected of having used posted workers ostensibly covered by such certificates, disregard those certificates if, on the basis of that evidence and with due regard to the safeguards inherent in the right to a fair trial which must be granted to those persons, it finds the existence of such fraud*".

3.3
Italian Supreme Court Decision No. 4069 of 20 February 2018: also part-time workers are entitled to the three-day leave pursuant to law 104

In decision No. 4069 regarding the leave pursuant to law 104/1992 for an employee on a vertical part-time contract (from 8:30 a.m. to 2:30 p.m. from Monday to Thursday), the Italian Supreme Court confirmed that the 3-day monthly leave is not recalculated in proportion to the working hours.

After stating once again that the primary interest protected by the rule is to ensure continuity in the care

of a disabled person and that this measure is designed to safeguard the psycho-physical well-being of the disabled as a fundamental right of human beings (included among the inviolable rights protected by the Republic), the Court confirmed a prior Supreme Court ruling according to which, with a view to an equitable distribution between the employer and the employee of the burden and sacrifice of a part-time employment contract and after "*evaluating the opposite needs of the parties, it seems reasonable to distinguish between a case where the part-time work is structured based on weekly working hours which involve a number of working days exceeding 50% of the standard number of days, and a case where the number of working days is less than that, or even limited to specific periods during the year, and in the former case to grant the full number of days of leave – given the significance of the interests involved and the actual need to protect the disabled*".

3.4

Judges are expected to check whether mistreatment of an employee is the result of the employer's non-compliance with its obligations, although it does not constitute mobbing due to the lack of a persecutory intent – Italian Supreme Court, labor section, decision No. 3871/2018

In its decision, the Italian Supreme Court stated that, where a specific conduct which an employee complained of does not constitute mobbing due to the lack of a common persecutory intent, the lower court judge must in any case ascertain whether it is the result of a violation by the employer of the obligation to protect the health and safety of its employees.

This analysis was spurred by the complaint filed by a female worker who had claimed damages for harm caused to her health by mobbing at the workplace, although she had failed to prove the existence of a persecutory intent of the employer and her colleagues, which is the key condition to demonstrate that mobbing was taking place.

In this regard, the Supreme Court confirmed that the following circumstances must occur in order that a conduct may constitute a case of mobbing:

a)multiple instances of a persecutory conduct which, although individually legal, taken as a whole become unlawful if it turns out that the employee was specifically targeted in a systematic manner over an extended period of time with an intent to cause harm;

b)an event which damages the employee's health or personality;
c)a cause-effect link between the conduct which the employer and/or immediate supervisor have engaged in and the harm to the employee's psycho-physical integrity;
d)the proof of the existence of persecutory intent.

Furthermore, the Court has stated that, even if the worker were unable to prove that all circumstances reported were characterized by a single persecutory intent, in order to ascertain whether they constituted mobbing, and thus pay the employee compensation for harm caused to his/her psycho-physical integrity, the lower court judge is in any case required to evaluate whether or not the employer could be held liable for some of the cases reported.

3.5

The employee has the burden of proving the attainment of the objectives which should have been assigned to him/her according to the principles of integrity and good faith in the performance of the employment contract – Milan Court of Appeal, labor section, decision No. 1721/2017

In this decision, the Milan Appeals Court dealt with the employer's failure to set the objectives which, if reached, would have resulted in payment of a performance bonus to an employee.

According to the Appeals judges, the failure to set the objectives in the prescribed form in the employment contract, constitutes contractual non-compliance by the employer, but not a case of simulation as stipulated by article 1359 of the civil code - which the employee claimed application of - according to which "*the condition* [author's note: the attainment of the objectives] *is considered to be satisfied where it failed to be met for reasons attributable to the party which had an interest in the condition not being fulfilled*".

The Appeals Court ruled that application of article 1359 of the civil code may be claimed only if "*the efficacy of the agreement is stated to be conditional on the occurrence of an uncertain future event*". Instead, the case consisted of a contractual obligation (the setting of targets) ancillary and conducive to the payment of an annual bonus, and therefore relating to a time prior to the start of the simulation pursuant to article 1359 of the civil code: the Judges specified that this provision could be invoked only where – *after setting the employee's targets* – the employer adopts a fraudulent conduct to prevent the employee from reaching them, for instance - for sales-related goals - by rejecting specific orders.

The Court claimed that in this case it falls upon the employee to prove both that the employer has an interest in preventing him/her from attaining the objectives (set by it) and that such objectives would have been attained without the employer's fraudulent conduct.

Furthermore, the Judges stated that, where no objectives have been set at all, with a view to the payment of the bonus, the employee has the onus of proving in court the goals which the employer should have reasonably assigned to him/her, consistently with prior objectives and in the light of the company's potential and with market conditions.

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LABOUR NEWSLETTER | FEBRUARY 2018

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 28 FEBRUARY 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