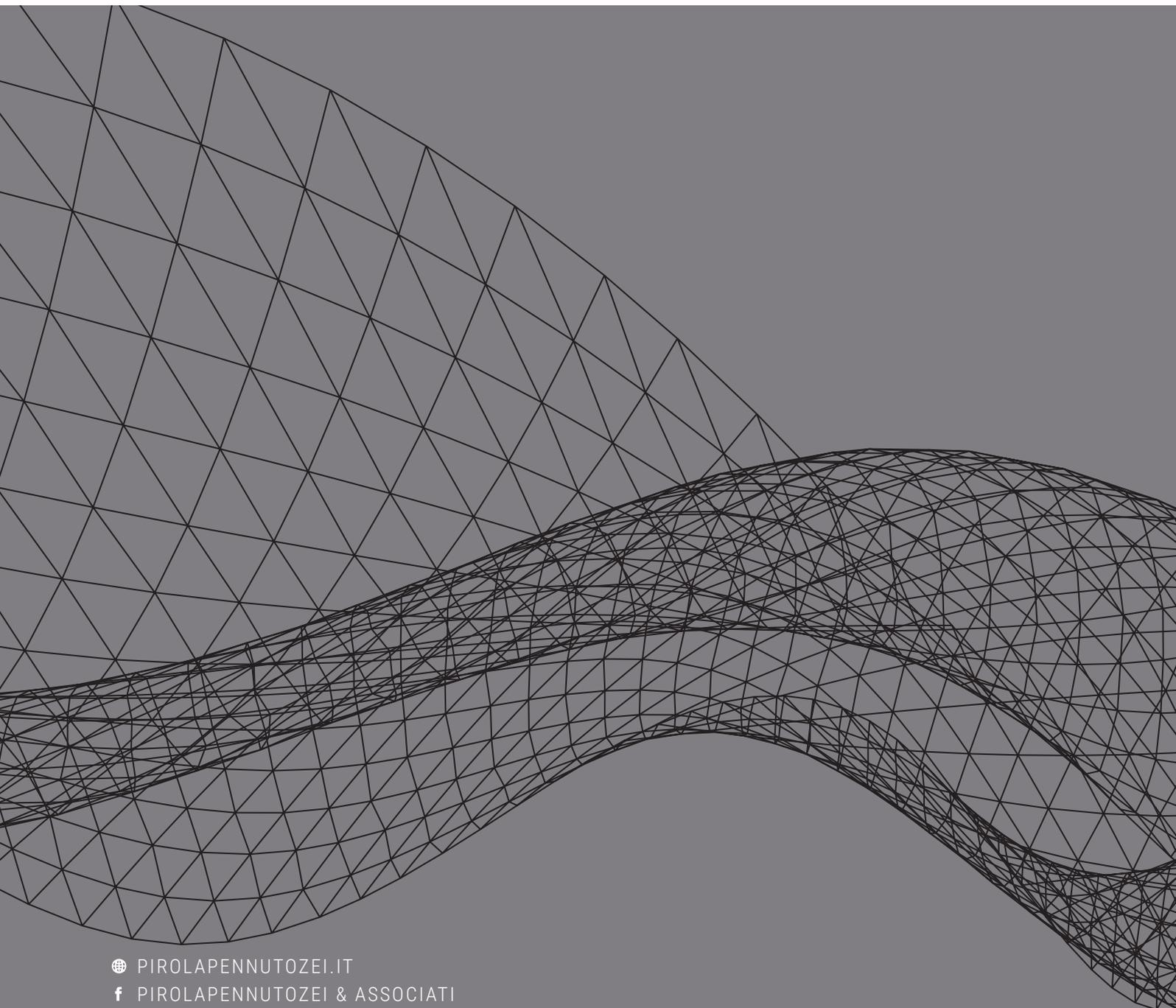


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COMPLIANCE

NEWSLETTER / FEBRUARY 2018



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LEGISLATION

1.1.....	3
Safety at work - ISO 45001: 2018 standard approved	

GUIDANCE

2.1.....	4
EU Data Protection authorities: the wording of the guidelines on " <i>Personal data breach notification</i> " and " <i>Automated decision-making and Profiling</i> " adopted	
2.2	4
Data Protection Authority: check of corporate SIMs is authorised but solely to verify consumption	
2.3	5
Bankitalia: guidance on anti-money laundering obligations for intermediaries	
2.4.....	6
The A.N.AC. application system for whistleblowers is online	
2.5.....	7
National Labour Inspectorate: video surveillance systems can be installed in accordance with the principles stated by the Data Protection Authority	

COURT DECISIONS

3.1.....	8
Safety at work: employer's liability excluded in the event of the worker's irregular conduct	
3.2.....	8
Safety at work, the employer is liable if he/she does not prevent the causes for a worker's death	
3.3.....	9
Safety at work: the employer is liable for failure to deliver anti-injury material	

LEGISLATION

1.1

Safety at work - ISO 45001: 2018 standard approved

The new 2018 ISO 45001 standard on *Occupational Health and Safety Management Systems – Requirements with guidance for use* has been finally approved by the International Standard Organisation.

Official publication is expected by the end of March and will include some clarifications by UNI regarding the specific Italian legislation on the matter.

The new standard is based on the same structure as the environmental management standards (ISO 9001, ISO 14001) and will replace OHSAS 18001: 2007, which will be repealed.

Companies will have to comply with ISO 45001: 2018 within three years of its publication.

On 18 January last the International Accreditation Forum issued a document (IAF MD 21: 2018) specifically providing guidance and requirements for the passage from the previous certification to the new one.

GUIDANCE

2.1

EU Data Protection authorities: the wording of the guidelines on “*Personal data breach notification*” and “*Automated decision-making and Profiling*” adopted

On 6 February last the Article 29 Data Protection Working Party adopted some important provisions, useful for a uniform interpretation of Regulation 2016/679 across all the European Union Countries, in view of the full application due on 25 May 2018.

As specified by the Italian Data Protection Authority, the “*Personal data breach notification*” guidelines have been finally approved providing clarification on the notion of breach notified and recommendations on the measures and processes to be adopted to ensure a protection level adequate to the potential risk of personal data breach.

The “*Automated decision-making and Profiling*” guidelines have also been adopted. They clarify the scope of application of the regulatory provisions concerning automated individual decision-making processing, i.e. a process in which the human being is excluded from the influence and change of the final result, and based on profiling.

Pursuant to Article 22 of the GDPR “*the data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her*”, with some exceptions which the long-awaited WP29 guidelines apply to concrete cases.

2.2

Data Protection Authority: check of corporate SIMs is authorised but solely to verify consumption

The Data Protection Authority has authorised a multinational company to use a system to check corporate telephone consumption on the SIMs given to workers.

However, the data may be collected exclusively for corporate cost cutting purposes and to evaluate the adequacy of the contract concluded with the telephone service provider.

Data can be stored for a maximum of six months and the employer shall adequately inform employees adopting an internal disciplinary code to regulate the SIM usage conditions. In view of the possibility of potential and indirect remote control on the employees' activity, a specific agreement will have to be concluded.

The company processing the data will have to be designated as Data Processor, agreeing to give the consumption analysis results back to the data controller. In case of "*irregular consumption*", the company will find the cause and where necessary will communicate within the company itself the need to control corporate costs, but the data shall not be processed for disciplinary purposes.

2.3

Bankitalia: guidance on anti-money laundering obligations for intermediaries

On 9 February last the Bank of Italy has issued guidance on compliance with the anti-money laundering obligations laid down in Legislative Decree 231/2007, as amended by Legislative Decree 90/2017. The guidance regards both the legally-prescribed transitional period (expiring on 31 March 2018), and the subsequent period (until the entry into force of the new Bank of Italy enactment rules). The guidance has had an impact on the further enactments.

It is aimed, inter alia, at "*SIMs (Italian investment firms); asset management companies (SGRs); SICAVs; SICAFs*".

With regard to compliance with the adequate client verification obligations the Bank of Italy states that the addressees must follow the rules introduced by Legislative Decree 90/2017.

Therefore, the content of Bank of Italy Enactment dated 3 April 2013 ("*Enactment provisions concerning the adequate client verification in accordance with art. 7, par. 2 of Legislative Decree no. 231 of 21 November 2007*"), will only be applied "*to the extent that it specifies matters which the new provisions govern in line with the abrogated provisions*".

Thus for example the rules on "*client profiling; scope of application; collection of information on the purpose and nature of the continuous relationship; constant control of the relationship; stricter adequate*

verification obligations, including the provisions on remote activity, except for the part on domestic politically exposed persons” remain in force.

Conversely, the *“Third Part: simplified adequate verification measures”* and *“Annex 1: identification of the Ultimate Beneficiary pursuant to par. 2”* of the 2013 Enactment are not applicable because they are incompatible with the new provisions of law.

For a correct compliance with anti-money laundering obligations, also the joint guidance on adequate verification of clients and risk factors of the European Regulatory Authorities, published on 4 January 2018, will have to be taken into consideration.

2.4

The A.N.AC. application system for whistleblowers is online

The Italian Anti-Bribery Agency has made available an online whistleblowing application system for employees of private entities subject to public control and workers and independent workers of private enterprises providing goods, services and work to public authorities.

Anyone intending to report conduct against the law has access to the system and can submit a report using a key code obtained during registration.

The procedure consists in completing sections providing the Authority with all the necessary information, including information useful to check that facts are true (and the relevant documentation will have to be attached).

Under the encrypted system for data transfer, the key code will allow exchange with A.N.AC. in anonymous form with a higher secrecy level than using the previous means of communication.

If the Authority considers the report to be well-founded in accordance with the guidelines (resolution no. 6/2015) it may *“start an exchange with the Bribery Prevention and Transparency Manager of the Authorities in respect of which the report has been submitted or send the report to the competent*

institutions, such as the Inspectorate for Public Service, the Court of Auditors, the Judicial Authorities, the Italian financial Police”.

2.5

National Labour Inspectorate: video surveillance systems can be installed in accordance with the principles stated by the Data Protection Authority

By circular no. 5/2018, the Italian National Labour Inspectorate has provided operating guidance on the installation and use of audiovisual systems and other equipment for control in the workplace, following the recent rules amending article 4 of the Workers’ Bill of Rights.

With specific reference to the introduction of the protection of corporate assets as a reason justifying the installation of video surveillance, the Inspectorate in its Circular states that in the event of a request for the installation of equipment to operate in the presence of personnel, the existence of the aimed purpose will have to be checked, as well as compliance with the *“principles of proportionality, specificity, correctness and non-excessiveness of the purpose sought”* provided for by the Data Protection Authority (see the Enactment of 8 April 2010), thus limiting intrusive control to the least, solely in the event of specific irregularities and, in any case, only after implementing other preventive measures which are less restrictive of workers’ rights.

The Circular deals with the video surveillance systems introduced most recently, utilising new technology, allowing the video and audio digital data to be transferred between computers on the internet. It is specified that with a view to protection of the individuals filmed, remote access to real time images will have to be authorized only in specially justified cases and access to recorded images (both from a remote location and on-site) *“has to be tracked through special-purpose applications which kept a record of access logs for no less than six months”*.

COURT DECISIONS

3.1

Safety at work: employer's liability excluded in the event of the worker's irregular conduct

The safety control obligations for the employer are not limited to ascertaining the practice followed in the company but include a specific analysis regarding the single employees carried out (through managers) at each risky working stage.

This was stated by the Court of Cassation in its decision no. 1764/2018 in a trial concerning damages due by a company to one of its workers for an accident occurred during work.

The judges reiterated that the employer is to be considered always liable for the accident occurred to a worker including where the event is the consequence not only of carelessness, but also inability, negligence and imprudence.

Pursuant to article 2087 of the Civil Code, the employer is subject to information obligations that are not complied with merely by providing generic information since in that case the worker would have the burden of identifying the necessary prevention measures and this is unacceptable for the Court.

On the contrary, the worker will be considered liable for an injury if he/she *"has engaged in a conduct that is irregular, unpredictable and outside the scope of the working process and the instructions received, and is thus the sole cause for the event and has created risk conditions that are not typical of the usual manner in which work is done"*.

3.2

Safety at work, the employer is liable if he/she does not prevent the causes for a worker's death

By decision no. 4560/2018 the Court of Cassation has confirmed the sentence on executives and operating managers of a thermal power plant accused of multiple manslaughter aggravated by the breach of safety at work rules.

They were accused of having caused the death of four employees, who had developed pleural mesothelioma as a result of long-term exposure to asbestos during processing in and maintenance of the plant.

In the case dealt with in the decision at issue the judges rule that there is a causal link between exposure to asbestos that took place in the period in which the three defendants (who knew well the seriously harmful effect of the material) managed the thermal power plant, and the employees' death.

The defendants would have been in a position to adopt adequate "*protection measures (from suction equipment to protection masks, to workers' training on the risks of exposure to asbestos) to prevent the inhalation of asbestos fibres*". Such measures were adopted not before the '80s, after several decades of exposure to the material.

3.3

Safety at work: the employer is liable for failure to deliver anti-injury material

To be free from any criminal liability a sole director of a cooperative must demonstrate the alleged complex structure of the cooperative and the assignment of the employer role to a third party, specifically the branch manager.

This is stated in Court of Cassation decision no. 8404/2018, lodged on 21 February last, dealing with a director sentenced to pay a euro two thousand fine for not having provided the anti-injury shoes to a worker (pursuant to art. 18, par. 1, letter d, of Legislative Decree 81/2008).

Making reference to the legal definition of "*employer*" as "*the entity holding the working relationship with the worker or in any case the entity who, depending on the type and structure of the organisation in which the worker renders his/her activity, is responsible for the organization or the production unit as he/she exercises decision-making and spending powers*", the judges have excluded that the branch manager can be identified as such in view of the functions performed and the absence of a written delegation of powers.

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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.
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