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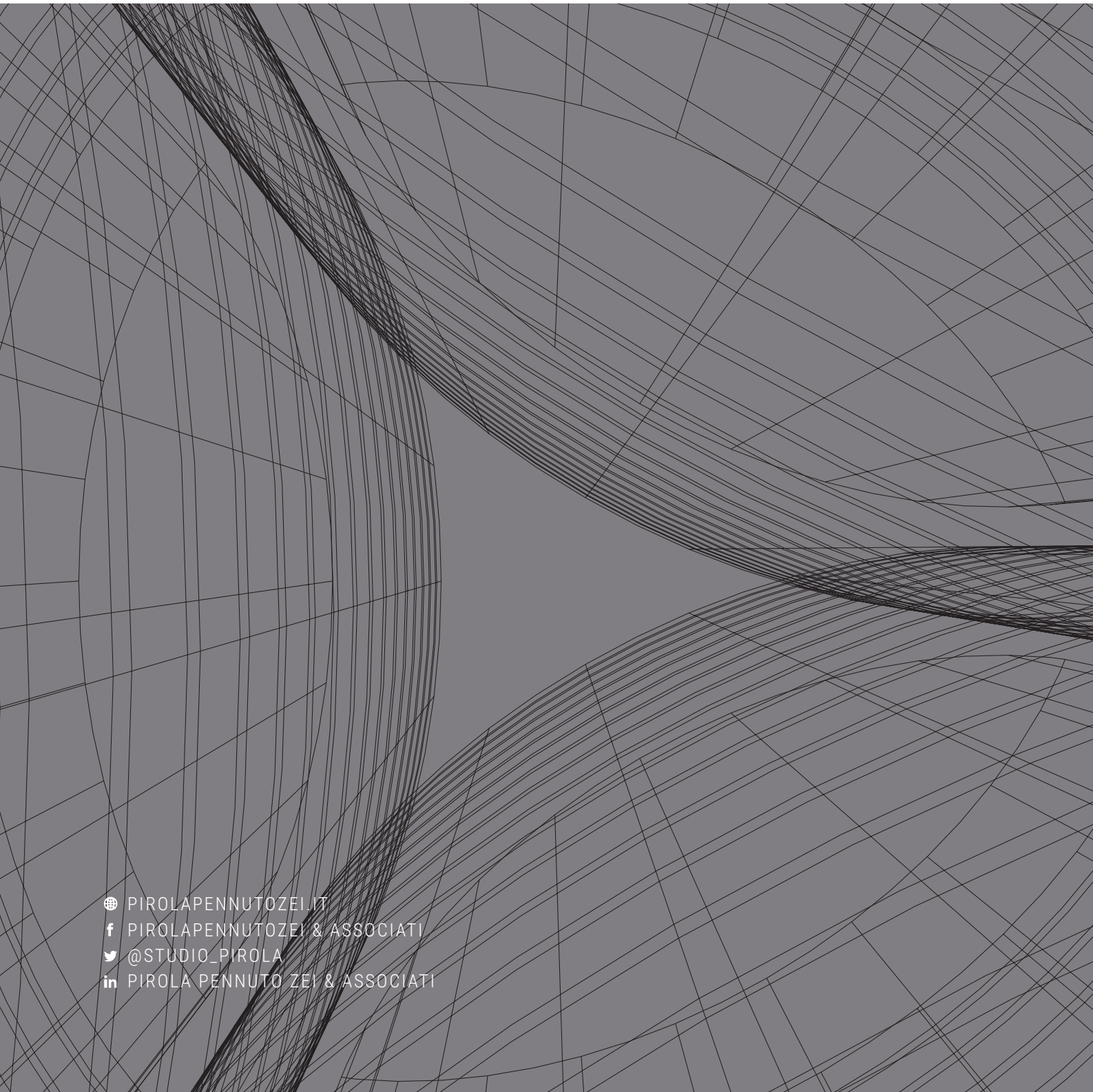
NEWSLETTER / MAY 2018



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INDEX

LEGISLATION

1.1 4
The decree for the protection of the employees of confiscated companies has been approved – Council of Ministers' session No. 84 of 16 May 2018

1.2 5
"*Report on the status of male and female employees*" – Ministerial Decree of 3 May 2018

GUIDANCE

2.1 6
It is possible for non-resident citizens to carry out work in Italy pending the issue of the stay permit for family reasons – Italian National Inspectorate of Labor Note No. 4079 of 7 May 2018

2.2 6
The incentives for the increase in new hires in connection with the hiring of personnel under staff leasing arrangements are granted to the company engaging the staff – Ruling No. 3 dated 29 May 2018 by the Ministry of Labor and Social Policies

2.3 6
Measures for the protection of self-employed (other than entrepreneurs) - Inps Circular 69 of 11 May 2018

CASE LAW

3.1 9
There is no need for constant surveillance of expert workers – *Palermo* Appeals Court decision No. 225 of 6 April 2018

BACK TO TABLE OF CONTENTS ↑

Pirola Pennuto Zei & Associati
studio di consulenza tributaria e legale

INDEX

3.2..... 9
A General Manager not subject to the employer's managerial powers is not an employee – Italian Supreme Court decision No. 12335 of 18 May 2018

3.3..... 10
It is acceptable to check PCs for disciplinary reasons - Italian Supreme Court decision No. 28 May 2018 No. 13266

BACK TO TABLE OF CONTENTS

LEGISLATION

1.1
The decree for the protection of the employees of confiscated companies has been approved – Council of Ministers' session No. 84 of 16 May 2018

In their 16 May 2018 session, the Council of Ministers approved the decree introducing provisions for the protection of the workers of seized and confiscated companies under judicial receivership (*amministrazione giudiziaria*), to regularize jobs and combat illegal staff leasing and labor exploitation and, if possible, offering workers income support benefits and programs.

A Government's press release specified that the new provisions are designed to support the continuation or the relaunch of the confiscated businesses placed under judicial receivership, with a view to combating the presence of organized crime in the economy, offering actual work opportunities, facilitating the preservation and development of professional skills, and preventing the companies confiscated from organized crime associations from going bankrupt.

The decree has introduced in particular a number of income support measures:

- employees who are not eligible for ordinary income support programs, will receive specific income support benefits for up to 12 months over a three-year period;
- employees who are not eligible for the NaSpI (*Nuova Assicurazione Sociale per l'Impiego*) benefits, will receive monthly unemployment benefits for a period of four months in an amount corresponding to half the maximum monthly NaSpI benefit;
- extension of the company incentives provided by law no. 208 of 2015.

The decree has also introduced specific rules concerning the Certificate of regular social security payments (*Documento unico di regolarità contributiva – DURC*).

1.2

"*Report on the status of male and female employees*" – Ministerial Decree of 3 May 2018

By ministerial decree of 3 May 2018, the Labor Ministry provided specific guidance on the procedure to be followed for the preparation and transmission of the periodical report on the status of male and female employees pursuant to article 46 of legislative decree no 198 of 11 April 2006 (the Italian Code of equal opportunities).

The new deadline for the electronic delivery of the two-year 2016/2017 report on the status of staff has been set at 30 June 2018. The reporting obligation applies to public and private companies with more than 100 employees. The report must contain the information regarding each profession, the status of the recruitment process, training, promotions, employment levels, any payments under the wage guarantee fund, dismissals, retirement and early retirement plans and remuneration actually paid.

The report must be electronically filed using the software made available by the Ministry of Labor and Social Policies to this effect. Non-filing of the report triggersadministrative penalties. In the most severe cases, any social security benefits may be suspended.

GUIDANCE

2.1

It is possible for non-resident citizens to carry out work in Italy pending the issue of the stay permit for family reasons – Italian National Inspectorate of Labor Note No. 4079 of 7 May 2018

In its Note No. 4079, the Italian National Inspectorate of Labor provided clarification on the possibility for foreign citizens to carry out work pending the issue of the stay permit for family reasons.

On the basis that holders of a stay permit for family reasons are authorized to work in Italy without obtaining an employment permit as well, anyone who has applied for a stay permit for family reasons may produce the relevant post office receipt as proof that they are legally staying in the country for the purpose of being employed in Italy – in accordance with the conditions and obligations imposed by current legislation.

2.2

The incentives for the increase in new hires in connection with the hiring of personnel under staff leasing arrangements are granted to the company engaging the staff – Ruling No. 3 dated 29 May 2018 by the Ministry of Labor and Social Policies

Following the ruling request submitted by the Italian national association of employment agencies (*Associazione Nazionale delle Agenzie per il Lavoro*), on whether the net increase in average headcount in connection with the recruitment of labor under staff leasing arrangements was to be determined with respect to the company engaging the staff or to the employment agency, the Labor Ministry specified that "*the net staff increase compared to the prior twelve-month period in connection with the hiring of staff under staff leasing arrangements to be determined in order to qualify for the related employment benefits – provided that the relevant conditions are met – must be referred to the company engaging the staff*".

2.3

Measures for the protection of self-employed (other than entrepreneurs) - Inps Circular 69 of 11 May 2018

In its circular, the Italian social security authority issued operating instructions regarding articles 1, 14

and 15 of law No. 81 of 22 May 2017 which have granted maternity, illness and accident benefits to quasi-employees (workers under an agreement for coordinated and continuous cooperation).

Article 1 of the law provides that the new legislation applies to the self-employed contracts referred to in Title III, Book V of the civil code, i.e.:

- independent worke pursuant to article 2222 of the civil code, i.e. works carried out or services provided in exchange for consideration on the independent contractor's own account and without subordination to the principal;
- intellectual professions (article 2229 of the civil code);
- performance of intellectual work (article 2230 c.c.);
- relationships regulated by special rules.

The legislation applies to both "*regulated*" intellectual professions, which require registration with a specific list, and non-regulated intellectual professions.

Instead, entrepreneurs, including small businessmen, fall outside the scope of the rule (article 1(2)).

Article 15(1) of the law amended article 409(3), providing the legal definition of *collaborazione coordinata e continuativa* (coordinated and continuous cooperation). Instead, the tax and social security treatment of the arrangement has remained unchanged (article 2(26 of law 335/95, regarding registration with *Gestione separata* INPS, and article 50(1)(c-*bis*) of the Italian Income tax code).

The INPS circular mentions that law 81/2017 introduced specific forms of social security protection for self-employed workers, other than entrepreneurs, who provide autonomous services to the benefit of a principal, including the following:

- extension of the social security conditions to qualify for the DIS-COLL unemployment benefit to quasi-employees (*collaboratori coordinati e continuativi* – workers under an agreement for coordinated and continuous employment), scholarship-funded research fellows and PhD students;
- parental leave: a maximum of 6 months' parental leave is granted to workers registered with the

separate national social security scheme for self-employed (Gestione Separata INPS), who do not receive pension benefits or are insured with another obligatory social security scheme.

- the maternity allowance granted under the relevant maternity legislation (*Testo Unico sulla Maternità* - legislative decree 151/2001) has been extended to self-employed female workers registered with *Gestione separata INPS*;
- suspension without pay for a period not exceeding 150 days in a calendar year and possibility for the self-employed female workers on maternity leave to be replaced by other self-employed workers who are known to her and to the shareholders and have the necessary professional skills; the female worker and her substitute may be present at work at the same time, in accordance with the provisions of article 4(5) of legislative decree 151/2001;
- finally, in cases of severe illness or accident, payment of the social security contributions may be suspended, pursuant to article 14 of law 81/2017, throughout the period of sickness or injury up to a maximum of two years, after which the worker shall be required to pay the contributions and insurance premiums accrued during the period of suspension from work in a number of monthly installments corresponding to three times the number of months of suspension.

CASE LAW

3.1

There is no need for constant surveillance of expert workers – *Palermo* Appeals Court decision No. 225 of 6 April 2018

The *Palermo* Appeals Court, by decision filed on 6 April, decreed that if a worker is proved to be highly professional and knowledgeable of safety systems, the employer is not required to carry out constant surveillance.

In this case, a worker who had suffered an eye injury while using a brush cutter, claimed that the employer was liable for failing to give him the necessary personal protective equipment and for the fact that the brush cutter "*lacked the relevant protection carter, or mounted a damaged carter that did not work*".

After ruling out the employer's responsibility for giving the worker an inadequate and dangerous tool due to lack of evidence to this effect, the Appeals court considered the fact that "*the worker was proficient with the use of the brush cutter since he had been working for the company for at least 4 years and had been trained to know the risks in connection with its use*". Furthermore, the worker "*had been appointed as employees' safety representative, and was therefore well aware of the hazards of his job and of the obligation to use the personal protection equipment provided by the employer*".

Finally, the Appeals Court, quoting a Court of Cassation decision, stated that "*the employer's obligation to prove that it did its best to avoid the injury is met by demonstrating that the employee in charge of a given task was highly professional and knowledgeable of the safety systems, such that no constant surveillance by the employer or other employees was necessary*".

3.2

A General Manager not subject to the employer's managerial powers is not an employee – Italian Supreme Court decision No. 12335 of 18 May 2018

In its decision No. 12335, the Italian supreme court pronounced on the appeal submitted by a manager to obtain recognition of his work relationship – carried out pursuant to consulting agreements – as an employment contract, to the effect that a General Manager not subject to the control, authority or power to discipline of a corporate body is not an employee but a self-employed.

In particular, the Supreme Court specified that "*the key element of employment – which distinguishes it from self-employment – is subordination, i.e. the worker's subjection to the employer's managing power, which relates to the manner in which the work is carried out and not just to the outcome of the work, whereas other elements of the work relationship (such as cooperation, fixed working hours, continuity in the performance of work, the fact that the position held is included in the company's organization chart and coordination with the business activities, the lack of risks for the worker and the form of remuneration) have an ancillary and circumstantial character.*"

3.3

It is acceptable to check PCs for disciplinary reasons - Italian Supreme Court decision No. 28 May 2018 No. 13266

"*On the matter of employees' rights, the case where the employer implemented controls to ascertain the commission by the employee of illegal acts which have harmful consequences for the company's assets and image or – after the employee has committed an offence – where de facto elements have arisen justifying a retrospective investigation rather than mere surveillance on the performance of the work by employees to ascertain the commission by them of illegal acts, falls outside the scope of the protection granted by article 4 of law No. 300 of 20 May 1970*".

By this decision, the Italian supreme court has confirmed the well-known principle according to which tracking checks carried out on a worker's computer by the employer *ex post* with a view to ascertaining whether the worker adopted illicit behavior having harmful consequences for the company's assets and image, do not constitute remote controls pursuant to article 4 of Law 300/70.

The case examined by the Supreme Court consisted of the disciplinary dismissal of an employee following retrospective controls on his PC. Since the company suspected that he was using it for non-business reasons (the technical director having surprised him playing Free-Cell), it had started a well-targeted IT check which established the employee's misconduct.

In the Supreme Court's opinion, the information was gathered in accordance with the law since the employed had conducted the checks designed to ascertain whether misconduct harmful to the company's assets and image had been committed only after the worker had actually committed them, and after factual

elements had arisen which justified the start of a retrospective investigation "*not as mere surveillance of the workers' performance but to ascertain whether illicit acts (which were eventually identified) had been committed by such workers (Supreme Court decision No. 10955 of 27 May 2015*)".

The Italian Supreme Court stated that the rules on remote controls – designed to contain the exercise of the employer's organizational and management powers in a way that could be harmful to the worker's person, dignity and right to confidentiality – do not apply when "*the employees' misconduct is unrelated to the proper performance of their employment obligation but is in connection with the protection of other interests, in an attempt at ensuring a – sometimes difficult – balance, to be evaluated based on the circumstances of the case, between the protection of the company's assets and interests in connection with the freedom of economic initiative, and the unavoidable protection of the worker's dignity and right to confidentiality*".

As specified by the Supreme Court, the judge must balance the employer's need to protect corporate assets and interests and the right to protect the worker's dignity and confidentiality, since the worker is asked to provide information on the possible checks of its PC. Consequently, if the worker's browsing information or emails are extracted in order to protect the company's assets, image etc., they can be legally used in disciplinary proceedings.

In accordance with these principles, the Supreme Court denied that the guarantees under article 3 of law 300/1970 had been violated and confirmed that the employee's disciplinary termination was lawful.

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LABOUR NEWSLETTER | MAY 2018

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 31 MAY 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