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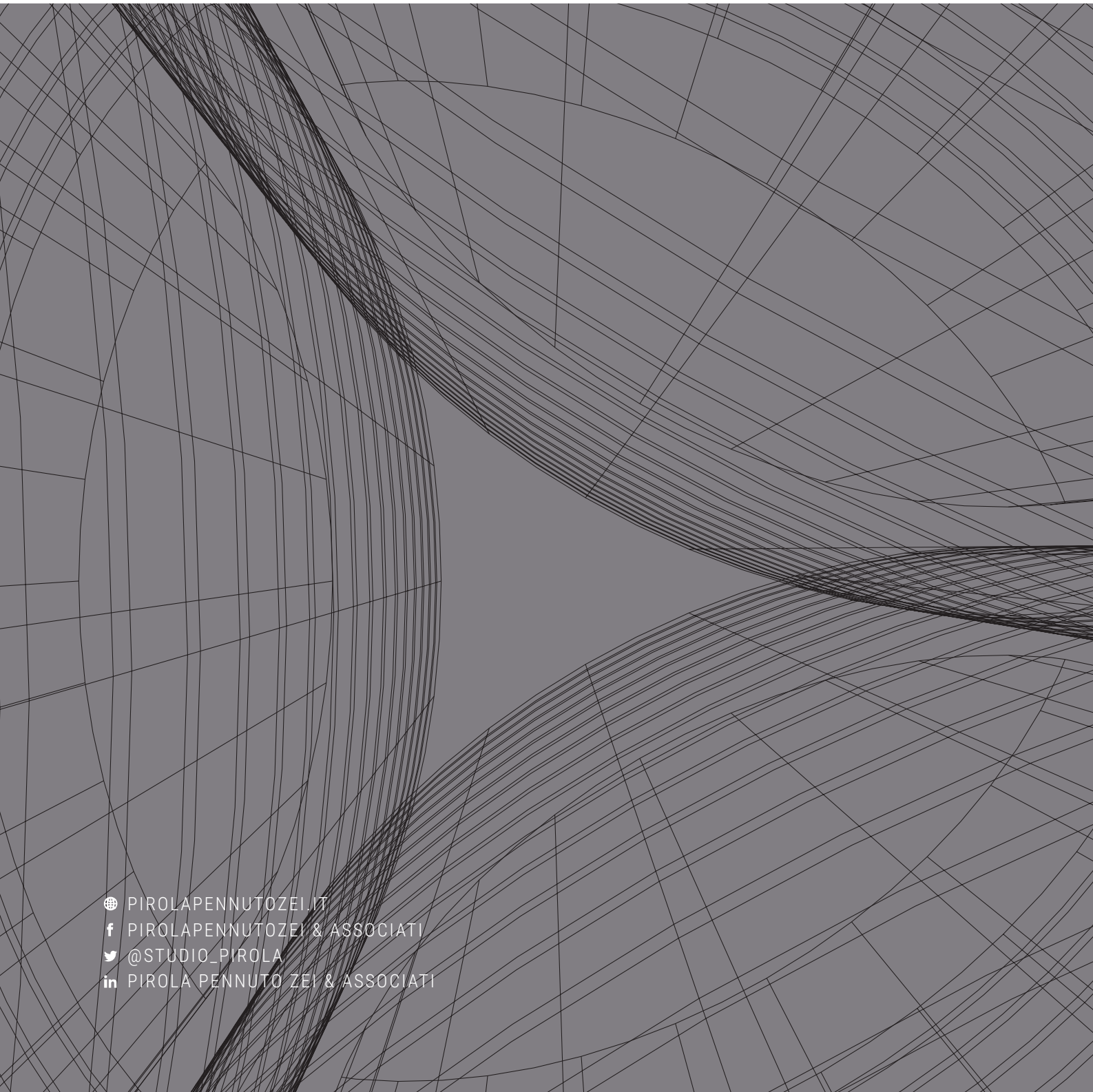
NEWSLETTER / JUNE 2018



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LEGISLATION

1.1

The Council of Ministries has approved the Decree Law containing "*Urgent provisions for the dignity of workers and enterprises*" (updated at 3 July 2018)

The Council of Ministries has approved the Decree Law introducing changes to fixed-term contracts (amending Legislative Decree 15 June 2015 No. 81 and law No. 92 of 28 June 2012) and to employment contracts "*a tutele crescenti*" (amending Legislative Decree No. 4 March 2015).

The Decree has also introduced measures against delocalization by Italian and foreign companies doing business in Italy which received State aid to investment.

The key change regarding fixed-term contracts affects new contracts whose maximum term (previously of thirty-six months) has been reduced to:

- **twelve months** or;
- **twenty-four months**, if justified by either : i) temporary and objective requirements, other than the need to deal with ordinary activities to replace other workers, or ii) requirements in connection with temporary, significant and unexpected increases in ordinary activities.

The reform also affects existing fixed-term contracts as follows:

(a) they may be **renewed** only if justified by any of the above reasons, which will necessarily have to be stated in the new fixed-term agreement, regardless of its duration;

(b) they may be **extended** without justification only during the first 12-month term and subsequently only for one of the above reasons, which will necessarily have to be stated in the extension agreement.

Furthermore, the Decree:

(i) introduced a 0.5% increase in the additional contribution payable by employers upon each contract renewal;

(ii) extended the term for appealing against a fixed-term contract from 120 to 180 days from the contract termination date.

The Decree has also amended the compensation payable to employees pursuant to article 3 of legislative decree No 23/2015 in the event of unfair termination ("*tutele crescenti*"), increasing the minimum and maximum payments due (respectively from 4 to 6 and from 24 to 36 monthly salaries).

*

As regards delocalization, the Decree Law has introduced penalties for Italian and foreign companies doing business in Italy which received State aid to carry out productive investments and which, in the five years subsequent to the conclusion of the investment, delocalize all or part of the business concerned or of a similar business.

The penalties vary depending on whether or not the aid has been granted for investment to be located in a pre-established area:

(a) in the former case, if a company delocalizes its business to a site falling outside the pre-established territory, although still within the national boundaries, it shall lose the entitlement to such aid and shall be required to return the funds received plus interest at the official rate in force at the date of payment or use of the aid, increased by 5 percentage points;

(b) in the latter case, if a company delocalizes its business to non-EU member states, in addition to the above it shall be liable to a fine ranging between two and four times the aid received.

1.2

European Parliament legislative resolution of 29 May 2018 amending Directive 96/71/EC concerning the posting of workers in the framework of the provision of services

The European Parliament approved the proposed changes to Directive 96/71/EC concerning the posting of workers within the EU in the framework of the provision of services.

While confirming the temporary character of posting, the Resolution requires Member States to make arrangements to ensure that in the event of posting exceeding 12 months, the employer is allowed to apply an additional set of "*terms and conditions of employment that are more favourable to the posted*

workers", who shall be entitled to the same terms and conditions of employment applicable to local workers pursuant to legislative, regulatory or administrative rules and/or collective bargaining agreements with regard to:

(a) maximum work periods and minimum rest periods;
(b) minimum paid annual leave;
(c) remuneration, including overtime rates;
(d) the conditions of hiring-out of workers, in particular the supply of workers by temporary employment undertakings;
(e) health, safety and hygiene at work;
(f) protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, of children and of young people;
(g) equality of treatment between men and women and other provisions on non-discrimination;
(h) the conditions of workers' accommodation when provided by the employer to workers away from their regular place of work;
(i) allowances or reimbursement of expenditure to cover travel, board and lodging expenses for workers away from home for professional reasons; this point applies exclusively to travel, board and lodging costs incurred by a posted worker when he/she is required to travel to and from his/her regular place of work in the Member State to which territory he/she is posted, or when he/she is temporarily sent by his/her employer from this workplace to another workplace.

1.3

New salary payment traceability obligation effective from 1 July 2018 – Law No 205 of 27-12-2017

The obligation imposed by Law 205/2017 on employers or principals to pay remuneration or any advances thereon to workers through a bank or post office, entered into force on 1 July 2018.

Payments will be made in any of the following forms:

- bank transfer to the account identified by the worker's IBAN;
- electronic payment instruments;
- cash payment at the bank or post office where the employer has opened a treasury current account with payment order;

- a check delivered directly to the worker or, in the event of the latter's "proven inability" to be present, to his/her appointed delegate. Inability shall be considered to be proven when payment is received by the spouse or civil partner, a blood relative or an in-law of the worker, provided that he/she is not under sixteen years of age.

Therefore, employers or principals will no longer be allowed to pay their employees' salaries in cash, whatever the relationship in place between them, and the worker's signature on the pay envelope shall not constitute proof of payment of the remuneration.

The legislation specifies that the traceability obligation refers to workers hired under employment contracts, quasi-employment contracts ("agreements for coordinated and continuous cooperation") and contracts between cooperative companies and their workers. Instead, the obligation does not extend to work contracts with the public authorities and with domestic workers.

GUIDANCE

2.1

The request for the authorization to install video-surveillance systems for safety at work reasons must be justified by reasons arising from a risk assessment carried out by the employer - National Labor Inspectorate Circular No. 18 June 2018

By this Circular, the National Labor Inspectorate provided clarification on the issue of authorizations pursuant to article 4 of law 300/1970 for the use by employers of instruments related to safety at work requirements, which may result in monitoring workers from a distance.

Pursuant to article 4 of law No. 300/1970, audio-visual surveillance systems and other instruments which may result in monitoring workers from a distance may be installed solely for organizational and manufacturing reasons, for safety at work and for the protection of corporate assets, and lacking an arrangement with the trade unions, the installation requires the prior authorization of the local National Labor Inspectorate office.

The National Labor Inspectorate pointed out that the examination of a case with a view to issuing the authorization focuses on the analysis (i) of the reasons justifying the use of instruments which could result in monitoring employees from a distance, including indirectly, and (ii) of the correlation between the way in which such instruments are used and their intended purpose of ensuring safety at work.

Therefore, the National Labor Inspectorate specified that any requests for authorization in connection with specific workplace health and safety issues would have to include a description and documentary evidence in support of the prevention requirements justifying the installation of audio-visual surveillance systems and other instruments potentially involving the monitoring of workers from a distance.
It is therefore necessary that such requirements be reflected by a risk assessment conducted by the employer pursuant to article 28 of legislative decree 81/2008 and reported in the Risk Assessment Document.
Therefore, any requests for authorization to install video surveillance systems which result in monitoring workers for safety at work reasons submitted to the National Inspectorate of Labor, will have to include the relevant extract of the Risk Assessment Document showing that the installation of such systems is a necessary and adequate measure to reduce the health and safety risks of workers.

2.2
Inspection activities in the presence of certified contracts – National Labor Inspectorate Circular No 9 of 1 June 2018

In Circular No. 9 of 1 June 2018, the National Labor Inspectorate provided operating instructions regarding the possible interference between supervisory and employment contract certification activities. In particular, the authority analyzed the following possible cases:

- Inspection started after the submission of a request for certification: if a request for certification has already been submitted at the time of the inspection but the relevant procedure has not yet been concluded, the inspectors may carry out their activities informing the Certification Committee forthwith, and the Committee will suspend the certification process pending the outcome of the inspection, to ensure appropriate coordination between the inspection and the certification activities. On completion of their audit, the inspectors will inform the Committee of their findings and the Committee will conclude the certification procedure, adopting the relevant decision.
- Inspection started before the submission of a request for certification: in this case, the Authority will immediately inform the Committee of the ongoing inspection, carry out the necessary investigations and adopt the required measures. Again, the inspectors will inform the Commission of the outcome of their audit.
- Inspection in connection with a certification that has already been issued: if in the course of an inspection the audited entity produces a certified employment or procurement contract and the inspection should bring to light (i) an improper legal characterization of the contract or (ii) an inconsistency between the arrangements made between the parties and their actual implementation, the inspectors will have to specify in their report that before the contract may be declared to be null and void it will be necessary to initiate first an obligatory conciliation procedure before the Certification Commission and, if this attempt is unsuccessful, bring an appeal before the competent authority, i.e. the labor court or the administrative court, depending on the nature of the violation identified: the administrative court will be in charge of violations of the rules on the certification process or the exercise of certification powers, whereas the labor court will be in charge in the event of improper legal characterization of the contract or inconsistencies between the arrangements made between the parties and their actual implementation. The court decision to accede to the appeal

will take retrospective effect only in the event of improper legal characterization of the contract; instead, in the event of inconsistencies between the arrangements made between the parties and their actual implementation the court decision will take effect as of the time the inconsistency arose, as ascertained during the court proceedings.

2.3

Operating instructions concerning penalties for health and safety violations – National Labor Inspectorate Circular No. 314 of 22 June 2018

In Circular No. 314/2018, the National Labor Inspectorate provided operating instructions on the increase in the penalties for the violation of health and safety rules.

Decree No. 12 of 6 June 2018 issued by the head of the National Labor Inspectorate provides that "*the penalties for the violation of the rules on health and safety at work prescribed by legislative decree No 81 of 9 April 2008, and by other instruments having legal force, shall be increased by 1.9% with effect from 1 July 2018*".

The increase will be calculated on the penalties currently in force and applies to pecuniary penalties and fines charged in respect of violations committed after 1 July 2018.

Current rules make no express provision for rounding off the final amount of the fine or administrative penalty increased by 1.9%, and therefore the amount resulting from the calculation shall not be rounded off.

Finally, the increase does not apply to the "*additional sums*" due for the revocation of the measures to suspend the business activity, which do not constitute strictly speaking a "*penalty*".

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CASE LAW

3.1

Dismissal for breach of contract ascertained by investigations conducted by a private investigator during working hours and outside corporate premises constitutes unfair termination – Italian Supreme Court – Labor section decision No. 15094 of 11 June 2018

By this decision, the Italian Supreme Court has considered once again the possibility for an employer to engage the service of a private investigator to check up on employees during their regular working hours outside the corporate premises.

The case examined by the Court concerned the dismissal of an employee whose duties (building site inspections) required work outside the company's premises, based on the circumstances ascertained by an investigation agency engaged by the employer to this effect.

The Rome Appeals Court had reversed the lower court decision by stating that dismissal was legitimate since the use of private investigators "*to check the proper performance of a worker's tasks*" was acceptable for work carried out outside the company's premises; in the court's opinion, the case did not fall within the scope of article 2 of law 20 May 1970, No 300, which prohibits the use of private security guards within the company's premises.

The Supreme Court reversed this decision and, in line with its customary approach, confirmed that engaging the services of a private investigation agency to monitor the proper performance of a worker's duties was illegal and that checking up on workers without their knowledge was prohibited even if work was carried out outside the company's premises, with the exception "*of cases where the use of private investigators is aimed at ascertaining whether the worker is engaging in criminal conduct*".

In the light of the above, the Supreme Court declared the employee's dismissal to be illegal and remanded the case to the Rome Appeals Court for a final decision on the merits of the case.

3.2

Legal nature of payment *in lieu* of holiday entitlement – Italian Supreme Court decree No 13473/2018 of 29 May 2018

By decree dated 29 May 2018, the Italian Supreme Court has ruled on the legal nature of the payment *in lieu* of holiday, in line with its prior decisions, according to which "*Payment in lieu of holiday has a mixed nature of remuneration and compensation; therefore, for the purpose of establishing the loss of the relevant right under the Italian statute of limitations, its nature as compensation – for the loss of the employee's entitlement to rest – shall prevail and shall be granted the broadest protection by applying the 10-year term, whereas its nature as remuneration –for the work rendered during a time when the employee was entitled to be paid but was not supposed to work – will be taken into account at the time of determining its impact on the determination of the employee severance pay, any ancillary remuneration or the relevant social security contributions*".

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LABOUR NEWSLETTER | JUNE 2018

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 30 JUNE 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