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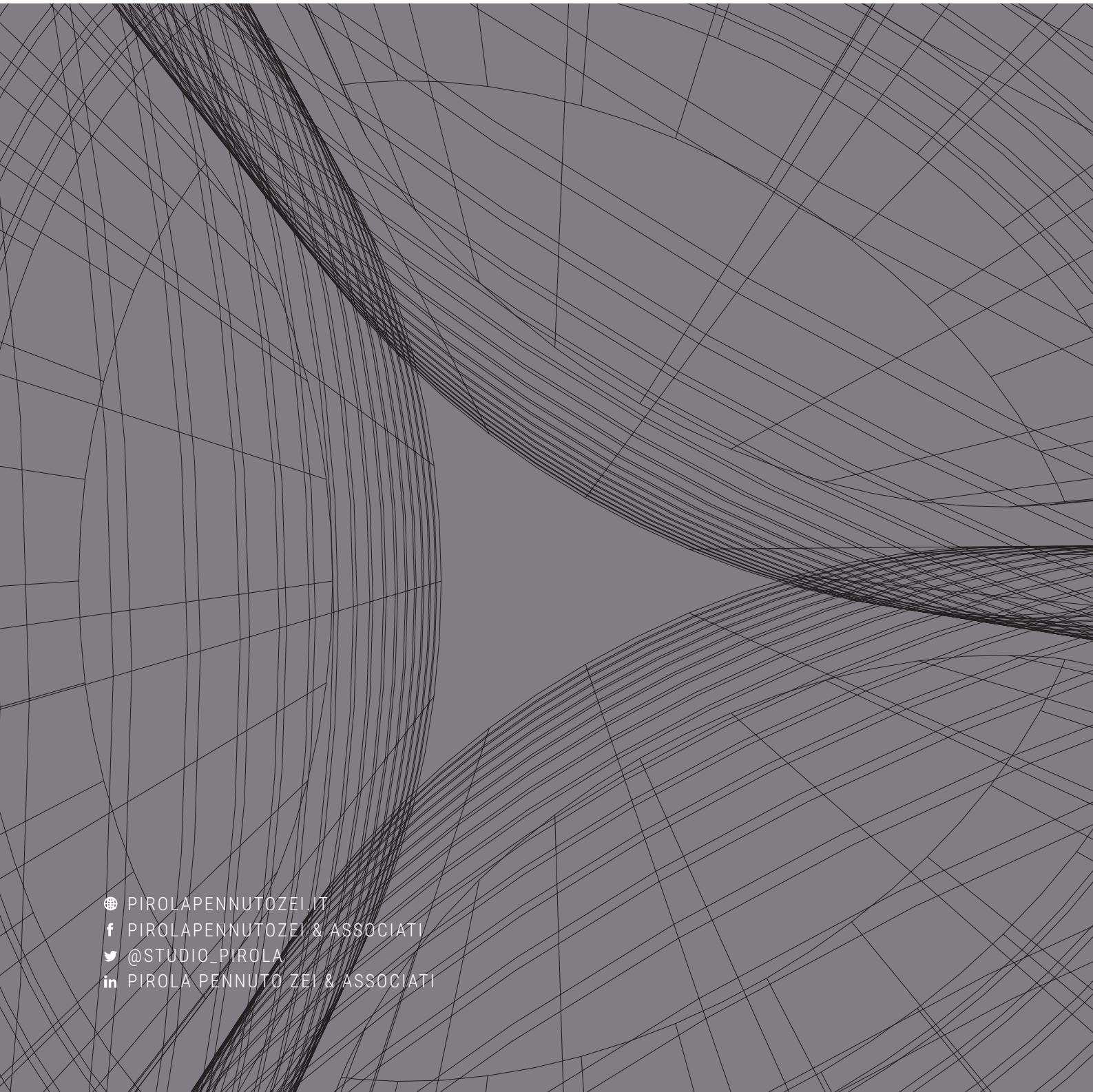

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LEGISLATION

1.1

Decree Law 87/2018 ("*Decreto Dignità*")

In the 7 August session, the Italian Senate approved the bill converting decree law 87/2018 ("*Decreto Dignità*"), containing "*Urgent provisions for the dignity of workers, for enterprises and for tax simplification*" including, *inter alia*, measures against long-term precarious employment and delocalization by companies carrying on business in Italy.

First of all, *Decreto Dignità* has introduced new rules on fixed-term employment contracts, allowing the execution of fixed-term contracts without stating a specific reason provided that they do not last more than 12 months. Instead, in the following cases there is an obligation to specify the reason for entering int a fixed-term contract:
(i) renewal of the fixed-term contract (including if the first contract lasted less than 12 months);
(ii) expected or de facto duration of the fixed-term employment contract exceeding 12 months;
(iii) extension of the fixed-term contract so that the employment relationship last more than 12 months.

Finally, the maximum duration of fixed-term employment contracts has been reduced from 36 to 24 months.

The reasons for entering into this type of contracts introduced by article 1 of Decree Law 87/2018 significantly differ from those stated in the past by Law 368/01, as amended, and, in addition to the need to replace other workers, include: *(i) temporary and objective requirements, other than the need to deal with ordinary activities; (ii) requirements in connection with temporary, significant and unexpected increases in ordinary activities.*

If the contract is entered into for a period of more than 12 months for reasons other than the above, article 1 *bis* provides that after the 12-month period has elapsed the contract is automatically transformed into an indefinite-term contract.

Decreto Dignità has reduced the maximum number of extensions from 5 to 4 over a 24-month period and

increased the additional contribution due by the employer upon each successive renewal of a fixed-term employment contract (including staff leasing contracts) by 0.5 %. The surcharge however does not apply to housework contracts.

The above changes apply to fixed-term contracts entered into after 14 July 2018 and to any renewals and extensions[1] made after 31 October 2018.

Finally, the term for appealing against fixed-term contracts has been raised from 120 to 180 days.
The Decree has also introduced significant changes to staff leasing contracts, as follows:

- relationships between staff leasing agencies and workers are regulated by fixed-term employment contract rules, with the exception of the provisions on the right of precedence for workers hired under one or more fixed-term contracts and those regarding the percentage limit of fixed-term contracts over total open-term contracts, which rose from 20% to 30%;
- only users have an obligation to state in writing in the agreement one of the reasons provided by article 1 of decree law 87/2018;
- the offense of "*fraudulent*" staff leasing has been re-introduced, in connection with staff leasing contracts entered into to circumvent mandatory rules of the law or the applicable collective bargaining agreement, which trigger a €20 fine per day per worker payable by both the user (company) and the staff leasing agency.

Decree law 87/2018 also amended the amount of the compensation due to an employee in the event of unfair termination, which has been increased from between 4 and 24 monthly salaries to between 6 and 36 monthly salaries.

Likewise, the compensation payable under a conciliation procedure pursuant to article 6 of legislative decree 23/2015 which the employer may offer to workers as an alternative dispute resolution method, has been raised to a minimum of 3 (from 2) and a maximum of 27 (from 18) monthly salaries.

1 "*Renewal*" refers to the execution of successive fixed-term contracts for the maximum duration established by the law, with pre-established interruptions between each renewal ("*stop & go*"), whereas "*extension*" means the extension of the initial term of the agreement to the maximum allowable term prescribed by the law

The decree introduced a number of significant measures against "*delocalization*", i.e. the transfer abroad of Italian or foreign companies doing business in Italy after receiving State aid to carry out productive investments.

Decreto Dignità provides that if such companies delocalize their business to non-EU member states (with the exception of States that are member of the European Economic Area), or if companies which received State aid to carry out productive investments in a pre-established territory subsequently delocalize their business to a site falling outside the scope of the territory - whether in Italy, the EU or the EEA - in the five years subsequent to the conclusion of the investment, they will lose the entitlement to such aid and shall be subject to a fine in an amount ranging from 2 to 4 times the aid received, payable to the authority which originally granted such aid.

Furthermore, an enterprise which - in the five years subsequent to the conclusion of the investment subsidized by State aid granted for the purpose of a valuation of the job-creation impact - has reduced the number of employees working at the manufacturing business unit or the activity qualifying for the benefit, shall lose the entitlement to such aid in an amount proportional to the staff reduction (if exceeding 10%) or in full where such staff reduction exceeds 50%. In addition to losing the benefit, the company shall also be required to repay to the granting authority an amount corresponding to the aid received plus interest at the official rate in force at the date of payment or use of the aid, increased by 5 percentage points.

Article 1-*bis* also provides for social security incentives for companies that in the two-year period 2019 and 2020 will enter into an employment agreement with youth under 35 years of age who have never before been hired under an open-term employment contract. The incentive consists in a 50% exemption from social security contributions, for a maximum of € 3,000 per year and over a maximum period of 36 months.

Finally, with regard to the occasional services under article 54-*bis* of decree law 50/2017, the Decree provides that the *voucher* payment service may be used not only by principals in the farming business but also by hotel businesses with up to 8 employees.

GUIDANCE

2.1

National Labor Inspectorate Circular No 10 dated 11 July 2018, n. 10

In its circular, the National Labor Inspectorate provided practical guidance in the case of non-payment of the salary and contributions by a contractor to workers engaged in the performance of a non-genuine contract.

The Circular specifies that the inspectors can take action against the user of the services to claim payment of the salary to the workers concerned only if the latter have taken legal action to request recognition of an employment relationship with it, since the user's obligation arises only following a court decision attesting to the existence of a user-worker employment relationship.

If no such action is taken, the inspectors may take action only against the "*pseudo-contractor*" to demand that it make payment to the workers illegally involved in carrying out the work under the contract.

For social security purposes, however, the Circular specifies that INPS can take direct action against the user, regardless of whether or not the worker initiated legal action for recognition of a work relationship between them, on the principle that social security contributions are payable in connection with *de facto* employment and therefore regardless of a Court order ascertaining the existence of a work contract.

The Circular concluded by confirming that INPS may also take action against the pseudo-contractor, for instance if the action taken against the user was unsuccessful, in accordance with the principle of joint liability for social security contributions between principal and contractor.

2.2

The penalty for the failure to hire workers with disabilities starts applying from the 61st day – National Labor Inspectorate Note No. 6316 dated 18 July 2018

In its Note No. 6316 dated 18 July 2018, the National Labor Inspectorate clarified that the failure to hire workers with disabilities or other protected classes of workers becomes an offense (by omission – i.e.

failure to comply with an obligation within the legally prescribed term) sixty days after the relevant obligation arises and triggers the payment of an administrative fine to the Regional fund for the employment of disabled persons (*Fondo regionale per l'occupazione dei disabili*) of an amount five times the contribution for each worker with disabilities for each working day on which the required number of protected-class workers was not hired. At present, the contribution amounts to Euro 30.64 (which multiplied by five gives a Euro 153.20 penalty per working day).

The penalty will be calculated starting from the 61st day subsequent to that on which the obligation arose but no request to hire a protected-class worker was submitted with the competent office, or from the day subsequent to that on which an employer, who filed the request, subsequently failed to hire the worker.

Needless to say, the employer will not be liable for the failure to hire the worker on expiry of the legally prescribed term if the competent office is responsible for the delay.

Therefore, the punishable omission arises when the person with the legal obligation to act (i.e., to hire a worker with disabilities by the 60th day after the relevant obligation arose) has not complied with its obligation within the legally prescribed term.

2.3

Use of paid leave (for workers with disabilities or to care for disabled family member) under law 104/1992 and legislative decree 151/2001- INPS Message No. 3114 of 7 August 2018

In its Message No. 3114 of 7 August 2018, INPS provided clarification on the use of paid leave under law 104/1992 and legislative decree 151/2001 for employees with non-standard working hours (part-time or shift workers).

In particular, for workers entitled to such paid leave who work in shifts which span over two calendar days or which include a holiday, INPS specified that:

- paid leave may be taken on a shift which includes Sunday;
- paid leave taken during a shift which spans over two calendar days is considered as a single day of paid leave.

The social security authority has also provided the formula for the proportional recalculation of the 3-day monthly leave for workers under a "*vertical*" or a mixed part-time contract (although the leave does not have to be prorated during the periods in which the employee works on a full time basis): "*average weekly working hours to be theoretically worked by the part-time employee"/ average weekly working hours to be theoretically worked on a full-time basis" x 3.*

No recalculation need be made for workers under a "*horizontal*" part-time contract (under which employees work a reduced number of hours each day).

INPS has also stated the formula for the proportional recalculation of the 3-day paid leave in case this is broken down into hours (instead of days) for part-time employees: "*average weekly working hours to be theoretically worked by the part-time employee"/ average weekly number of days (or shifts) for full-time workers" x 3.*

Finally, INPS specified that the paid leave under article 42(5) of legislative decree 151/2001 may be taken – during the same month but on different days - together with either the paid leave under article 33 of law 104/92 or the paid leave under article 33(1) of legislative 151/2001 (3-day monthly paid leave, extended parental leave or hours of rest alternative to the extended parental leave).

Instead, the 3-day monthly paid leave, the extended parental leave or the hours of rest alternative to the extended parental leave are mutually exclusive.

CASE LAW

3.1

Extension of a fixed-term contract for the replacement of a worker – civil court of cassation, labor division, decision No. 19860 of 26 July 2018

The Italian Supreme Court ruled on a case of extension of a fixed-term contract entered into with a worker to replace another on maternity leave, confirming the possibility for the employer to provide a reason for the extension other than that stated at the time of the execution of the original fixed-term contract.

In the case submitted to the Italian Supreme Court, the worker demanded transformation of her fixed-term employment contract into an open-term contract, since the originally agreed term had been extended and she had continued to work even after the return of the employee on maternity leave she had been hired to replace.

The Court however rejected the worker's claims and confirmed the appeals court decision on the grounds that it was in line with the case law according to which, where an employee is hired on a fixed-term basis to replace another, it is lawful to set a variable ending date due to the uncertainty as to when the replaced worker will come back to work, and it is also acceptable to extend the employment for a reason other than the replacement of the employee temporarily absent as specified in the contract, provided that the reason for the extension is included among those provided by law in connection with fixed-term employment contracts.

3.2

Workers cannot refuse to do a job – Italian Supreme Court decision No. 21036 of 23 August 2018

By its decision No. 21036/2018, the Supreme Court reiterated that a worker cannot refuse, *a priori* and without judicial approval, to do a job assigned by the employer on the grounds that he/she deems that the task assigned is not in line with his/her contractual qualification.

In particular, in the case under examination, a first-level document researcher had refused to carry out a

task assigned by his supervisor (i.e. searching for and delivering a music CD requested by a journalist) claiming that it was an activity for unskilled workers and fell outside the scope of his role.

The Supreme Court confirmed that, based on established case law, a worker may request a court to demand that the company assign to him/her tasks falling within the scope of his/her qualification but is not allowed - *a priori* and without judicial approval - to refuse to perform a job required of him/her, since he/she must comply with the provisions regarding the execution of the work assigned by the employer; the employee may lawfully invoke article 1460 of the Civil Code, and fail to meet his/her obligations, solely in the event of the other party's non-compliance.

3.3

The employer's failure to notify the worker that the protected period has been exceeded does not constitute a violation of the principles of good faith and fairness – Italian Supreme court decision No. 20761 of 17 August 2018

By decision No. 20761 of 17 August, the Supreme Court maintained, based *inter alia* on previous case law, that there is no obligation for the employer to notify an employee on sick leave that the contractually stated protected period is coming to an end.

In particular, the Supreme Court specified that in the event of termination of employment on the grounds of an employee's absence for health reasons (either a single uninterrupted period or successive periods of absence), termination is justified by the employee's partial impossibility to comply with his/her obligations. Accordingly, if the employee does not know when the protected period will end, the employer's failure to notify him/her in the absence of a contractual obligation for the employer to do so, does not constitute a violation of the principles of good faith and fairness (since if an employee were notified, he/she could take dilatory actions such as asking for holiday or unpaid leave).

Along the same lines, the Supreme Court in decision No. 13396/2002, stated that "*an employee who was dismissed due to the fact that the length of his/her absence exceeded the protected period cannot claim that the employer failed to put him/her in a position to exercise the right to ask for unpaid leave at the end of the protected period since the employer is not expected to encourage employees to ask for unpaid*

leave and, moreover, both parties to the relationship are expected to be acquainted with the relevant legislation and contractual provisions".

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LABOUR NEWSLETTER | AUGUST 2018

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 31 AUGUST 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