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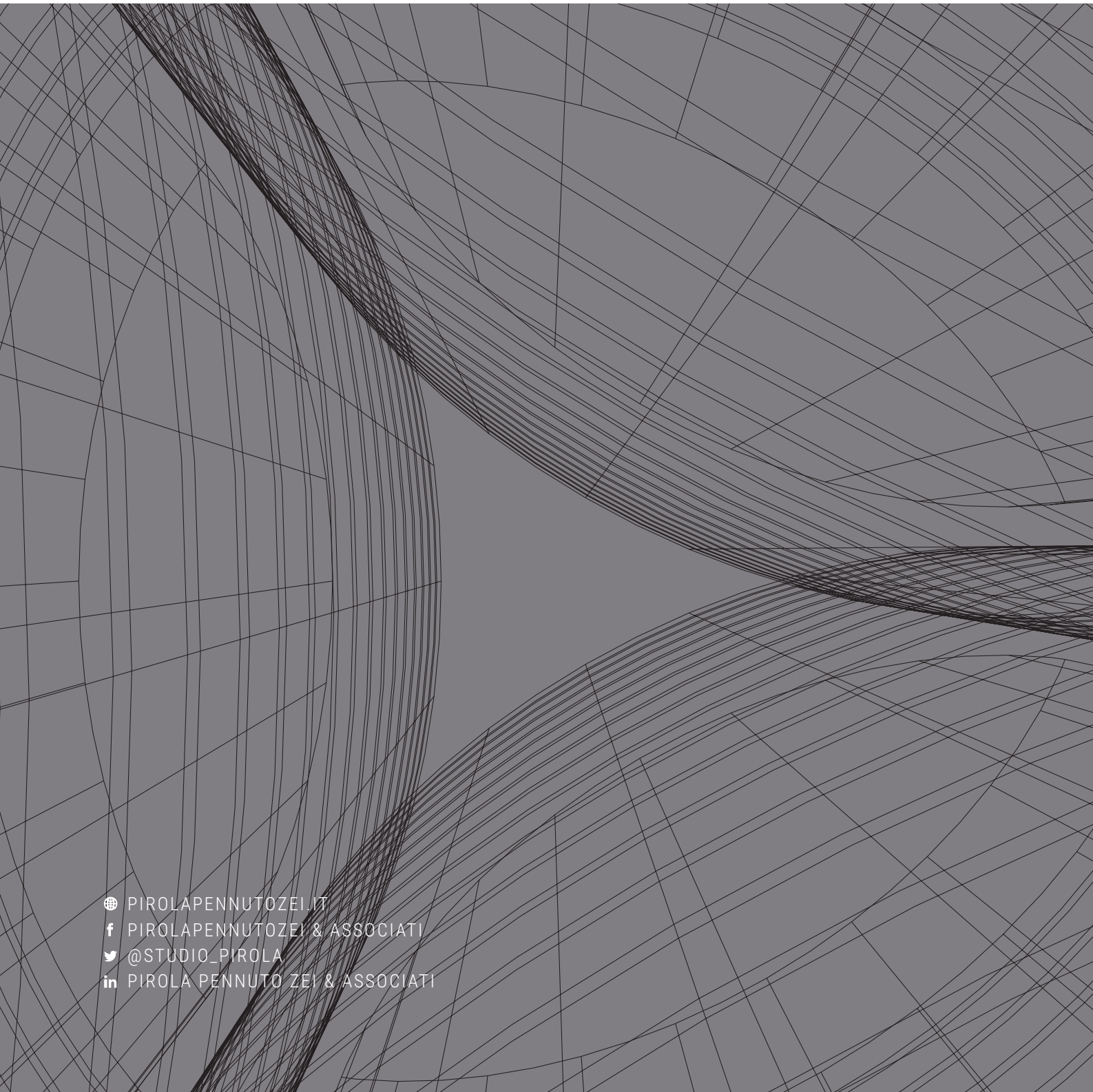
# LABOUR

## NEWSLETTER / SEPTEMBER 2018



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# LEGISLATION

## 1.1

**Extraordinary wage guarantee fund (*Cassa Integrazione Guadagni Straordinaria*) program in connection with a company crisis - Decree Law No 109 of 28 September 2018 and Ministry of Labor and Social Policies Circular No 15 of 4 October 2018**

Decree law No 109/2018 containing "*Urgent provisions for the city of Genova, the safety of the national infrastructure and transport network, the 2016 and 2017 earthquakes and other emergencies*" was published in the Italian Official Journal on 28 September 2018.

With regard to labor matters, article 44 provides that, starting from the date of entry into force of the decree (29 September 2018) and for FYs 2019 and 2020, payments under the extraordinary wage guarantee fund in connection with a company crisis may be authorized for companies that have ceased their manufacturing activity and have the possibility to sell their business to safeguard jobs, or if a re-industrialization plan of the manufacturing site may be implemented or, as an alternative, pursuant to active labor policy programs put in place by the Region concerned.

In particular, as specified by the Ministry of Labor and Social Policies Circular No 15/2018, the business sale plan must be structured in such a way as to safeguard as many jobs as possible.

After identifying the prospective buyers, the company which is ceasing to do business will have to enter into an agreement with the social partners before the Labor Ministry; also the Ministry for Economic Development and the Region Concerned may be parties to the agreement.

In the agreement the Ministry for Economic Development may specify how the workers' suspension plan is linked to the proposed sale of business, in terms of timing and procedure. On that occasion, it will be necessary to submit a well-structured plan for the hiring of the suspended staff.

If instead the request for payments under the extraordinary wage guarantee fund is justified by the proposed reindustrialization of the manufacturing site, the business plan may be submitted by the selling company, the purchasing company or the Ministry for Economic Development.

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In circular No 15/2018, the Ministry specified that payments under the extraordinary wage guarantee program may be requested as income support for employees made redundant and involved in specific active labor policy initiatives submitted by the Region concerned or by the Regions where the manufacturing sites which are ceasing to do business are established. In these cases, the Region (or Regions) concerned must be parties to the agreement.

# GUIDANCE

## 2.1

**No need to be resident in Italy to issue the declaration of immediate availability for work – ANPAL Circular No 4 of 29 August 2018**

In Circular No 4/2018, the Italian National Agency for Active Labor Market Policies (*Agenzia Nazionale per le Politiche Attive del Lavoro* - ANPAL) provided clarification on the issue of "*residence*" and the possibility for EU citizens to issue the declaration of immediate availability pursuant to article 19 of legislative decree 150/2015.

First of all, ANPAL specified that the free circulation of workers is one of the key principles of the European Union pursuant to which the citizens of a Member State are entitled to look for a job in another Member State in accordance with the rules applicable to the latter's citizens. In particular, there shall be no discrimination based on nationality and foreign citizens shall be entitled to receive the same assistance that employment offices offer to nationals of the Member State concerned.

Therefore, to ensure protection of the rights of all nationals circulating within the EU to find a job it is necessary to put at their disposal the facilities and instruments which each States make available to its citizens, such as support with outplacement programs.

In the light of this regulatory framework, ANPAL concluded by saying that all EU citizens living on Italian territory may issue the declaration of immediate availability for work and benefit from active labor policy services and measures: thus, the reference to "*residence*", under article 11(1)(c) of legislative decree 150/2015, must be necessarily construed in relation to the principle of the free circulation of workers within the EU and of the principles stated above, and may not constitute an obstacle to the protection of EU citizen and the parity of treatment.

## 2.2

**Collective bargaining and joint liability – Ministry of Labor and Social Policies ruling No 5 of 13 September 2018**

By a ruling of 13 September, the Labor Ministry replied to a request for clarification by *UGL Terziario* (trade

union for companies in the services sector) on the proper interpretation of article 29(2) of legislative decree 276/2003, as amended by article 2 of Decree Law No 25/2017 and in particular on the scope of application and possible retrospective effect of article 2 following abrogation of article 29(2) according to which collective bargaining agreements could derogate from the principle of joint liability of the principal for unpaid remuneration due to employees hired by the contractor, where the relevant collective bargaining agreement identified methods and procedures for controlling and assessing the overall regularity of contracts.

First of all, the Ministry specified that the abrogation of the period concerning the possibility for the collective bargaining agreement to derogate from the joint liability in contract was effective as of 17 March 2017 (date of entry into force) and that no transitional rules had been issued regarding the impact on collective agreements in force or contracts subject to control measures pursuant to collective bargaining provisions implementing the abrogated provision. It was therefore necessary to check the effects of the abrogation on the collective agreements which had introduced procedures to verify the regularity of contracts, in the light of the principle of non-retrospective effect of the law stipulated by the civil code.

First of all, the elimination of the possibility to derogate from the principle granted to collective bargaining agreements applies to new collective agreements, which in future may no longer establish provisions departing from the principal-contractor joint liability principle.

Furthermore, the provisions contained in collective agreements in force at 17 March 2017 which derogate from the joint liability principle do not apply to contracts entered into after that date.

The new provision applies to circumstances and/or facts which, at the time of the entry into force of Decree Law No 25/2017 had not yet arisen and the relevant elements had not yet been determined. Accordingly, the provision excluding joint liability could only apply in respect of accounts receivable accrued in the period prior to the entry into force of Decree Law 25/2017 (provided that the relevant conditions apply).

## 2.3

**Contributions paid are deductible from aggregate income up to Euro 5,164.57 p.a. – 17 September 2018 communiqué by *Previndai* (pension scheme for industrial sector managers/executives)**

In its 17 September 2018 communiqué, Previndai confirmed that the contributions paid are deductible from aggregate income in an annual amount, including voluntary contributions, not exceeding Euro 5,164.57.

Any amount in excess of the above limit will be tax exempt upon payment of the benefits, provided that Previndai is notified of the amounts not deducted. The declaration of contributions not deducted for FY 2017 will have to be submitted by 31 December 2018. Previndai suggested that the declaration be prepared using function "*059: Contr. non dedotti*" in the reserved area of the Previndai website. Signed form 059 will have to be uploaded on the website or faxed to the numbers provided on the form.

# CASE LAW

## 3.1

**Accident-at-work liability will have to be assessed on the basis of the tasks actually carried out – Italian Supreme Court, Criminal section - Decision No 39324 dated 31 May 2018**

Italian Supreme Court decision No 39324/2018, filed at the Clerk's Office on 31 August, stated that the persons liable for the obligations imposed by accident-at-work legislation are not to be identified on the basis of the role held but on the tasks actually carried out, which prevail over the formal functions attributed to the person in charge.
In particular, the Court stipulated that "f*or the purpose of identifying the person in charge in complex business structures, reference should be made to the expressly designated risk manager*", specifying that the following persons would be respectively liable for the following events:

- the *preposto* (person in charge) for accidents caused by the performance of work;
- the *dirigente* (manager/executive) for accidents related to the specific organization of the work;
- the employer for accidents caused by basic management choices.

## 3.2

**Dismissal after the deadline stated by the national collective labor agreement – Italian Supreme Court decision No 21569 of 3 September 2018**

By decision 21569, the Italian Supreme Court stated that disciplinary dismissal after the relevant deadline established by the collective agreement is unlawful.

On the matter of disciplinary measures, the National Collective Labor Agreement provides that if the measure is not issued within 10 business days after receiving the employee's counter-statement, the employee's justifications will be considered as having been accepted.

The Court emphasized that - in the light of the collective agreement provisions and of the principles of good faith and integrity at the basis of the employment relationship stated by articles 1175 and 1375 of the Italian civil code - consciously letting the deadline for taking disciplinary action expire can only mean that the employer has accepted the employee's arguments.

Therefore, the Supreme Court concluded by saying that dismissal was unlawful since the complaints raised against the employee had lost efficacy as a result of the employer's implicit admission that no punishable illegal conduct had been committed.

## 3.3

**Milan Court – Labor section – decision No 1853 of 10 September 2018: riders are not employees**

By this decision, the Milan Court confirmed the case law principle previously stipulated by the Court of Turin, according to which riders are not employees.

The case examined by the lower court concerned the recharacterization of the legal nature of the relationship (employment v. self-employment) of a worker making home deliveries based on an online smartphone app created by the plaintiff to facilitate the exchange of goods through a network of business operators.

In particular, in the application originating proceedings, it is said that the appellant delivered meals and other consumables:

- "*on a full-time basis, throughout the entire period, being at the employer's disposal eight hours a day, at times to be periodically agreed, seven days a week*";
- using "*an insulated food container and a portable battery charger made available by the employer*";
- complying with "*the instructions and policies on the work to be carried out and the deliveries to be made during the relevant working time slot, issued by the plaintiff by messages mainly transmitted via an app*";
- informing the company's contact persons "*of any absences or delays or non-availability during the working hours, providing appropriate justification*".

However, in the judge's opinion, based on the documentation produced and the outcome of the hearings, there was no proof of employment since:

- the agreement entered into between the parties (*collaborazione coordinata e continuativa* – coordinated and continuous cooperation) stated that "*the worker, with the broadest level of autonomy*

*and at his/her discretion, will open the application to notify that he/she is prepared to make a delivery, there being no obligation for him/her to be available and to work a minimum length of time per day, week or year*";

- the deliverypersons had to install an app on their smartphone;
- using this app, they could specify in a calendar prepared by the company the days and times during which they were available to work;
- the calendar could be accessed initially once a week and subsequently every three days and the deliverypersons could choose their preferred working time slot with the same frequency;
- it was therefore up to the rider to accept or refuse the delivery, there being no minimum number of acceptances;
- the app did not send the request for work to a single deliveryperson but to all those who stated their availability on the app and who at that time were in a position to provide the service specified;
- after stating their availability to carry out the service, if assigned to them, workers would make their best efforts to complete the activity specified in the app;
- the worker's refusal or non-acceptance of an assignment and a negative feedback from the customer would only result in a possibly restriction of the working time slot.

In the light of the above factual elements, the lower court judge ruled that this form of work, as structured, did not fall within the scope of article 2 of legislative decree 81/2015 (work contracts considered to be equivalent to employment contracts), on the basis that the worker was free to decide whether or not to accept the request notified via the app. Furthermore, in the Milan Court's opinion, the secondary elements established by prevailing court decisions as suggestive of employment - i.e. continuity of the relationship, permanent inclusion of the worker in the company's production cycle, lack of risk for the worker, observance of pre-determined working hours, payment of a fixed remuneration – were not significant enough in this case for the relationship with the riders to be regarded as employment.

## 3.4

### Constitutional court: issues concerning the unlawful basis for the determination of compensation for unfair termination

In its communiqué of 26 September 2018, the Constitutional Court stated that article 3(1) of legislative decree 23/2015, concerning the non-flexible determination of employees' compensation for unfair

termination under an indefinite-term employment agreement a *tutele crescenti*, was unlawful. According to the Court, determining an increase in the compensation solely based on the employee's seniority was against the principles of reasonableness and equality and with the right to and the protection of work stipulated by articles 4 and 35 of the Constitution.

The decision will be filed in the next few weeks.

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# LABOUR NEWSLETTER | SEPTEMBER 2018

LEGISLATION, MINISTERIAL GUIDANCE AND CASE LAW AT 30 SEPTEMBER 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