

## No-Green Pass, how can we manage them?

### Expert's opinion

**The decisions of the legislator do not breach the Constitution**

**Eugenio Leoni**

Partner Leoni & Partners

On the one side, the right to work and to receive a remuneration, established under the Italian Constitution; on the other side, the safeguard of "collective health", which is provided under the Constitution, too. This is the main cause for discussion – not only at an institutional level – concerning the principles provided under art. 32 of the Italian Constitution. Although the article provides that nobody can be forced to undergo a certain health treatment unless established by the law, it also provides that the Italian Republic safeguards health as a fundamental right of individuals and interest of the community. Therefore, the need to safeguard the community conflicts with an individual right and both are on the same level of the juridical...

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### Overview

#### A look at the legislation

**Paolo Vecchiotti**

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In the period between 15 October 2021 and 31 December 2021, which is currently the last day of the COVID-19 state of emergency, all workers in the private sector are required to have and show, upon request, the so-called Green Pass in order to access the workplace. This provision also applies to all people who carry out, at any title, their working, training or voluntary activity in the workplace, also based on external contracts. Therefore, by way of example, even professionals, directors, business owners, shareholders, agency-supplied workers, contractors, interns, trainees...

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### Focus on...

**Green Pass for domestic labour employers**

**Giovanni Natale**

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As originally mentioned during the press conference anticipating the provisions introducing the Green Pass obligation starting from 15/10/2021 and as confirmed in the FAQ of the Minister published on the institutional website, domestic labour is also subject to the provisions of Law Decree no. 127/2021. Therefore, domestic labour employers will be also subject to the obligation to check that their collaborators (carers, domestic helpers, baby sitters, etc.) have a Green Pass. This time, the provisions on the Green Pass do not admit exceptions. As known, domestic labour, due to its peculiarities, was exempted from the compliance with the obligations and the sub...

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## Overview

### A look at the legislation

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Law Decree no. 127/2021 was published in the Official Gazette on 21 September, introducing new urgent measures to ensure the safe performance of working activities in the private and public sector, by extending the scope of the Covid-19 Green Pass obligation. The following articles provide an analysis of the measures concerning the private sector.

#### Nature of the obligation

In the period between 15 October 2021 and 31 December 2021, which is currently the last day of the COVID-19 state of emergency, all workers in the private sector are required to have and show, upon request, the so-called Green Pass in order to access the workplace. This provision also applies to all people who carry out, at any title, their working, training or voluntary activity in the workplace, also based on external contracts.

Therefore, by way of example, even professionals, directors, business owners, shareholders, agency-supplied workers, contractors, interns, trainees, maintenance service providers, salespeople, etc. must hold a Green Pass. The Ministry of Labour recently confirmed that also the employers of domestic workers are subject to the Green Pass verification obligation.

As a result, domestic workers (domestic help, caretakers, babysitters, etc.), when accessing their workplace, will be subject to the verification of their Green Pass. The Ministry of Labour also specified that people working remotely are not subject to the Green Pass verification: nonetheless, the Ministry pointed out that the use of the so-called smart working must not be a way to avoid the Green Pass obligation.

#### Obligations and verification

Within their obligations and functions, employers need to define by 15 October 2021 the operational procedures to organise the verification of the Green Pass requirements of their workers, formalising them in writing for the purposes of proof, also with the aim of avoiding possible sanctions.

Although employers can proceed with sample verifications at a later time, it is advisable to check the possession of the Green Pass of all workers when they access the workplace. The verification will take place according to the indications provided by Prime Ministerial Decree dated 17 June 2021, i.e. using the “VerificaC19” app.

It is specified that those workers exempted from the vaccination campaign are not subject to the Green Pass obligation, provided that they have a proper medical certification issued based on the criteria defined under the circular letter of the Ministry of Health. This certification will have to be shown upon verification, unless the information is already contained in the Green Pass.



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Verification of the Green Pass requirements by employers must also include people providing services under external agreements (contract, travel, etc.) and the verification procedure will have to be specified in the company's procedure, requiring, for example, the external providers to only send workers holding a Green Pass and to immediately notify the company of a possible negative outcome of the Green Pass verification. As concerns agency-supplied workers, it is deemed that the verification can be carried out solely by the benefitting company. It is nonetheless advisable to coordinate with the supplying agency, which could introduce - in its capacity as employer - sample checks on their supplied employees. The person in charge of the verification can be either the employer or one or more delegates. The delegates will have to be appointed with a formal written deed and to be provided with guidelines outlining the tasks entrusted to them, such as for example the task of filling in a register of the checks carried out, aimed at demonstrating the actual performance of the required verifications.

The introduction of the Green Pass requirement to perform working activities does not remove the obligation for companies to comply with the measures provided for by the safety protocol dated 24 April 2020 entered into by the Government and social parties, such as distancing, use of masks, etc. As a final note, we suggest, when adopting the procedures above, involving the person in charge of safety at work and the data protection officer, for the matters pertaining to them.

### **Absence of Green Pass and effects on the working relationship**

Should workers notify the company that they do not hold a Green Pass, or should they not have it when accessing the workplace, they will be considered as unjustified absentees until they can show it and, in any case, no later than 31 December 2021, without disciplinary consequences and with the right to keep their jobs. It is not necessary to formalise the unjustified absence in writing to the employees, since this is automatic by Decree.

For the duration of the unjustified absence, no wage, nor any other compensation or remuneration is due to the employee. In case of companies with less than 15 employees, the employer can suspend the worker after the fifth day of unjustified absence for a period corresponding to that of the employment contract entered into for his/her replacement, in any case not longer than 10 days, renewable only once, and not beyond 31 December 2021.

In this case, it is deemed that the suspension should be formalised to the worker and that the absence from work applies for the whole suspension period, regardless of the early obtainment of the Green Pass by the worker.



## Fines

The access of workers without Green Pass to the workplace is sanctioned with a fine ranging from Euro 600.00 to Euro 1,500.00, doubled in case of repeated violation. Workers could also be subject to disciplinary measures.

Employers who do not comply with the required verifications, i.e., who will not implement the organisational measures to ascertain that the workers hold a Green Pass by 15 October 2021 will be subject to a fine ranging from Euro 400.00 to Euro 1,000.00, doubled in case of repeated violation. Fines can be ascertained by all designated inspection bodies and are imposed by the Prefect.

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## Latest updates

On 8 October 2021, Law Decree no. 139/2021 was published in the Official Gazette, introducing urgent measures to regulate the access to cultural, sports and leisure activities and integrating the provisions on the Green Pass requirement already contained in Law Decree no. 127/2021, regulating the access to the workplace effective from 15 October 2021.

In order to facilitate the verification of the Green Pass requirements, the Decree provides that in case of request by the employer, due to specific organisational needs aimed at guaranteeing an effective planning of the working activity, workers are required to provide feedback with a sufficient notice to meet the abovementioned organisational needs.

In short, employers are authorised to ask workers if they hold a Green Pass before 15 October 2021 or with reference to future needs, in order to best organise their business activities.

It is deemed that workers, in compliance with the principles of diligence, fairness and good faith, are obliged to reply within the set terms and that in case of their failure to do so, they could be subject to disciplinary procedures by the employers.

It is worth mentioning, as a final note, that the technical experts of the Ministry, in order to facilitate the verifications, are fine-tuning an update of the “VerificaC19” app, which should allow employers to check the Green Pass of their workers in advance and in great numbers. It is currently not yet known whether the new procedure will already be available on 15 October as, in addition to technical issues, the new procedure will also need to receive approval by the Data Protection Authority.



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On the one side, the right to work and to receive a remuneration, established under the Italian Constitution; on the other side, the safeguard of “collective health”, which is provided under the Constitution, too. This is the main cause for discussion – not only at an institutional level – concerning the principles provided under art. 32 of the Italian Constitution. Although the article provides that nobody can be forced to undergo a certain health treatment unless established by the law, it also provides that the Italian Republic safeguards health as a fundamental right of individuals and interest of the community. Therefore, the need to safeguard the community conflicts with an individual right and both are on the same level of the juridical hierarchy. Moreover, both must be coordinated with other constitutional rights, sanctioning the right to equality, to a job and to a remuneration (Articles 3, 4 e 36 of the Constitution).

It is subsequently difficult to find a way to coordinate both rights, although it is clear that any decision would have generated discussions and debates.



Eventually, the intention of the Government to safeguard the need for “public health” prevailed, by progressively introducing different provisions, which, although they do not provide a real vaccination obligation, they indirectly do, according to many, as they subordinate the performance of the working activity to the possession of the Green Pass. The declared objective is therefore that of preventing the spread of Sars-Cov-2 virus by promoting the vaccination campaign and ensure the full recovery of production activities and services, avoiding possible new restrictions that our economy cannot afford any more.







Alternatively, the legislator, without prejudice to the safeguard of people exempted from vaccination – who, due to health reasons are not obliged to have a Green Pass – allows to obtain the Green Pass also through swabs, which, however, are not free.

This generated many protests and further constitutionality doubts by some jurists, as it burdens workers with the “cost” of the Green Pass, establishing it as the only alternative to the free vaccination. It is clear that in this particular historical moment, some contradictions are physiological and doubts are still many, though the necessary clarifications will arrive soon. But the important thing is the final objective.

Regardless of personal opinions, it is worth to point out the courage of the Italian legislator, as it is showing to the international community the way to contrast the pandemic. Appreciable is also the fact that the measures have been introduced progressively, so to gradually stimulate that part of the population that is most resistant to vaccination. This is an audacious decision that will hopefully reward the efforts of the community and, most of all, is a regulation that does not breach the Constitution, as it is based on the need to safeguard public health.



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## Focus on

### Green Pass for domestic labour employers

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As originally mentioned during the press conference anticipating the provisions introducing the Green Pass obligation starting from 15/10/2021 and as confirmed in the FAQ of the Minister published on the institutional website, domestic labour is also subject to the provisions of Law Decree no. 127/2021. Therefore, domestic labour employers will be also subject to the obligation to check that their collaborators (carers, domestic helpers, baby sitters, etc.) have a Green Pass.

This time, the provisions on the Green Pass do not admit exceptions. As known, domestic labour, due to its peculiarities, was exempted from the compliance with the obligations and the subsequent penalties, which concerned the overall world of work (provisions on safety under Legislative Decree no. 81/2008, penalties on undeclared work, etc.).

This means that the need to safeguard public health has prevailed on the flexibility and favour granted to this particular sector. The decision, however, could not only be aimed to equalize all workers before the law, but also to prevent possible objections due to the breach of equality principles.

The critical issues related to this decision have been well pointed out, considering that a great part of domestic labour employers is represented by non-self-sufficient elderly people, who are not so willing to follow technology innovation. However, they will have to check for the possession of the Green Pass, presumably by delegating family members or friends.

Therefore, considered the above, with reference to domestic labour, the following can be stated:

- if domestic helpers, carers or baby sitters do not have a Green Pass or do not show a valid Green Pass, they should be considered as unjustified absentees, unless they show a valid certification. Workers cannot perform their working activity and, although they have the right to keep their job, they will not receive any remuneration up to 31/12/2021, at the latest. Those who cannot be vaccinated or cannot complete their vaccination due to health reasons are exempted, provided that they have a proper medical certification issued according to the criteria defined in the circular letter of the Ministry of Health;
- lacking a Green Pass, domestic labour employers can hire substitute workers. Penalties are the same: fines are provided both in case of omitted controls by employers (from Euro 400.00 to Euro 1,000.00) and in case of breach of the Green Pass obligation by workers (from Euro 600.00 to Euro 1,500.00);



- since the Law Decree explicitly provides that workers have the right to keep their job, even if they are unjustified absentees, employers cannot dismiss workers due to the lack of the Green Pass. However, failing a mutual trust relationship between the parties, a worker can be dismissed and dismissals can occur without a specific reason in this sector, though without prejudice to the period of notice.

Doubts concerning this particular sector are still many and hopefully will be clarified soon.

Just to mention some of these uncertainties: if cohabiting domestic helpers do not have a Green Pass, do they still have the right to stay in the employer's house, even if they are not allowed to perform their working activity? How will domestic labour employers act in relation to domestic helpers who do not have a regular employment contract or a residence permit in Italy? In consideration, among other factors, of the personal and affective relationship that often characterizes these working relationships, the fear is that many will ignore controls, which, however, should be performed to safeguard the health of the community.

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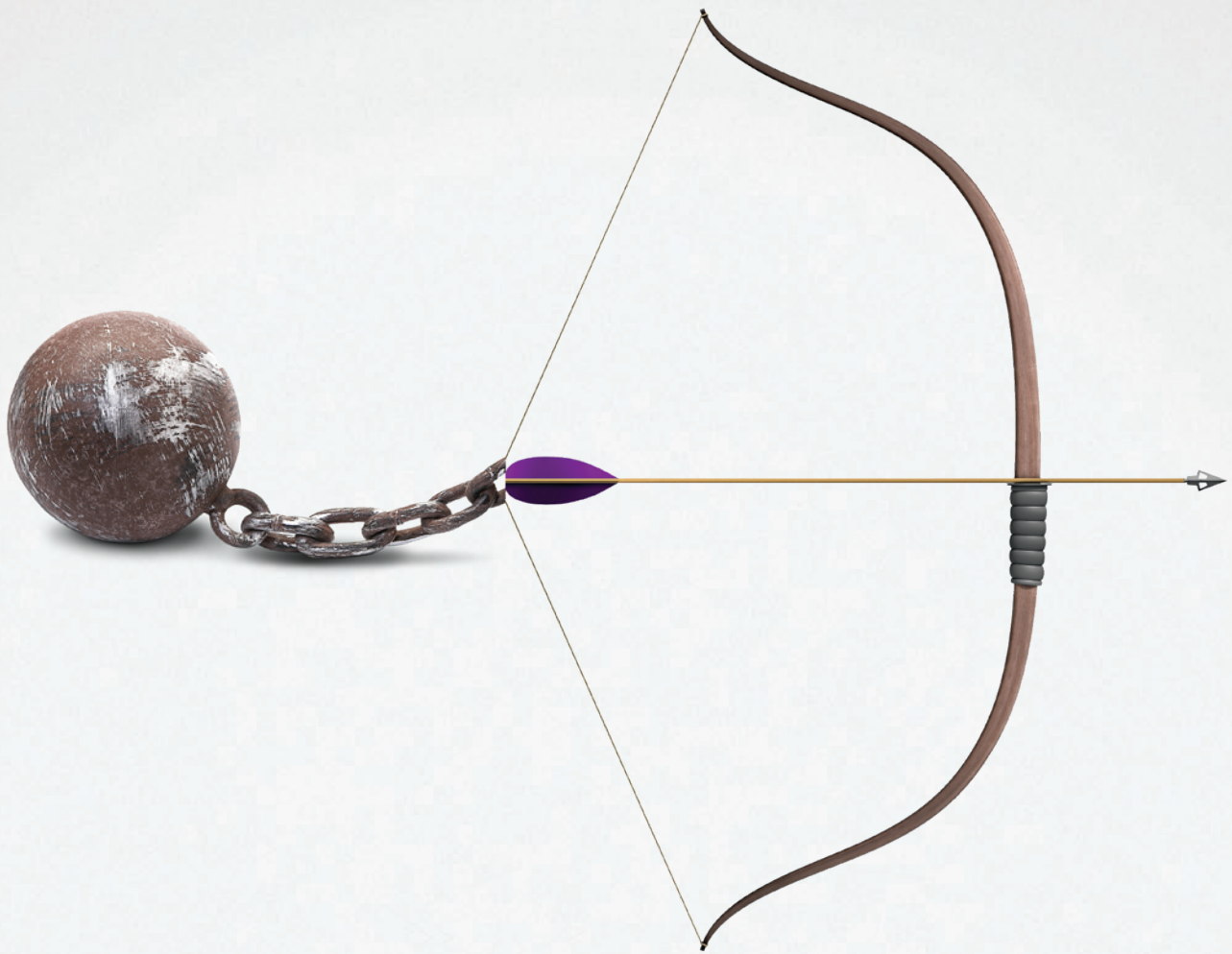
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