GREEN PASS DECREE - Q&A

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Italian Labor, Employment, and Workplace Safety Alert

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On 21 September 2021, the Official Government Gazette published the Decree Law No. 127/2021 regarding urgent measures for access to public and private workplaces.

This document aims to provide some answers to the most frequent questions regarding the implementation of the new Green Pass legislation.

WHAT IS THE GREEN PASS?

The Green Pass Is a Document Alternatively Certifying:

- The COVID-19 vaccination;
- The recovery from COVID-19 disease;
- The swab test (molecular or antigenic) with negative results conducted no more than 72 or 48 hours earlier, depending on the case.

Who Is Required to Own the Green Pass to Access the Workplace?

Anyone who is carrying out working, training, or participating in volunteer activities must own the Green Pass to access the company and/or any premises, offices, and any other workplace.

This rule applies both to the public and the private sector, as well as to employees, self-employees, collaborators, trainees, posted workers or employees working under a service contract, and household employees.

Performance of the working activity is subject to owning and showing the Green Pass upon request of the individuals in charge of the verification.

Only the following individuals are excluded from the scope of the Green Pass obligation:

- Subjects exempt from the vaccination campaign on the basis of appropriate medical certification issued according to the criteria set forth by a note of the Ministry of Health (the so-called “fragile subjects”);
- People under 12;
- Teleworkers, who by definition perform their working activity remotely and do not access the workplace.

According to the guidelines released by Confindustria, where individuals accessed the workplace due to reasons other than working purposes, the Green Pass is not required.
Therefore, the Green Pass should be required only by individuals accessing the workplace in execution of a contract.

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When Does the Obligation Come Into Force and How Long Does It Last?

The obligation comes into force on 15 October 2021, and will apply until 31 December 2021, i.e., at the same time as the end of the state of emergency in Italy, unless extended.

Who Is Required to Carry Out the Verification?

Both employers and principals are required to verify that employees and workers accessing the workplace own the Green Pass.

To this end, by 15 October 2021, employers are required to:

- Issue and implement verification procedures, to be carried out even on a random basis and possibly upon access to the workplace;
- Formally appoint (through a written power of attorney) the individuals in charge of verification and reporting any violations.

Can a Third-Party Be Appointed As the Person in Charge of the Verification?

The law does not clearly specify it. However, given the lack of a clear prohibition, third-parties (legal entities included) could be appointed as subject in charge of the checks.
Under such scenario, the legal entity will be appointed as “Data Processor” (Responsabile del Trattamento) and required to identify an individual in charge of actually carrying out the Green Pass checks.

How Should the Appointment Be Drafted and Issued?

The appointment should be detailed and include procedures to carry out the checks and to report any detected violation. In addition, the designated person shall accept the appointment in writing.

Is the Company Doctor Entitled to Carry Out the Verifications Over the Employees?

No, he or she is not, unless formally appointed as the individual in charge of the checks.

May the Employer Apply Disciplinary Sanctions to the Employee in Charge of the Checks, in Case of Failed or Incorrect Control?

The law does not specify anything in this regard.

However, the appointment of an employee as the individual in charge of the checks is in addition to the employment agreement. As a result, we would believe that the employer should not be entitled to trigger any disciplinary procedure vis à vis the employee in charge of the checks.

Nevertheless, in the event of willful misconduct or gross negligence, the employer may seek compensation for damages.

Is the Person in Charge of the Checks Required to Own the Green Pass?

Yes, if he or she carries out the checks within the company premises.

In Case of Service Contract Performed Within the Company Premises, Who Is Required to Control the Contractor's Employees?

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Both principal and contractor should carry out such checks. On the one hand, the principal must control the contractor's employees in its capacity as entity required to monitor anyone who enters its premises to perform working activity; on the other hand, the contractor will be required to monitor its own employees, in its capacity as employer.

In Case of Staff-Leasing and Temporary Workers, Who Is Required to Verify the Green Pass? The Staff-Leasing Agency or the User?

The Green Pass should be verified by the user company only and not by the staff-leasing agency. In fact:

- The user company is the only entity with the power to manage and control the employees provided by the staff-leasing company;
- Such employees are subject to equal treatment in respect of the user company's employees;

However, staff leasing agencies should inform their employees on the obligation to own and show the Green Pass when entering the workplace.

How Shall Checks Be Implemented?

The law provides that:

- Check of the Green Pass must be carried out exclusively by reading the two-dimensional barcode shown on the document, using the application “VerificaC19;'
- The holder of the Green Pass must show, upon request, his or her passport or ID card;
- Checks are preferably carried out when entering the workplace;
- Checks may also be carried out on a random basis.

No additional details have been provided for. However, we deem advisable to perform the checks on a daily basis.

We recommend implementing appropriate monitoring procedures to specify the methods, timing, and extent of the checks, as well as adequate reporting lines. In addition, we suggest that any such procedures are disclosed to employees through a dedicated policy.

What Is Meant by Verifications on a Sample Basis?

Random and non-discriminatory checks are performed on few employees.

Checks on a random basis must be carried out in compliance with organizational models establishing a verification standard and a fair number of individuals to be controlled on a daily basis, based on the size of the company (e.g. 50%).

How Can the Employer Prove Compliance With the Obligation to Check the Green Pass?

- Adoption of procedures identifying the methods of verifications.
- Adoption of proper policies shared both with the employees and the individuals in charge of the checks.

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- Adoption of a specific register recording the time and number of daily checks and the results on an anonymous basis.
- In case the employer is subject to an audit, employees may testify as to whether the controls are carried out. In addition, showing such working tools used for the checks and on which the VerifyC19 app is downloaded, may be helpful.
- Where appropriate, evaluate with the Company Doctor the inclusion of Green Pass monitoring procedures in the Risk Assessment Document (the so-called “DVR”).

Can the Employer Ask Employees in Advance If They Own the Green Pass?

Green Pass possession is a mandatory requirement to perform working activities within the workplace. Therefore, the employer may ask employees in advance whether they are able to perform their working activity or not. However, please note that such request may not involve the collection of health and sensitive data. Therefore, we suggest that the employer provides the employee with an advanced communication asking the latter to confirm whether, between 15 October and 31 December 2021, he or she is able to perform his or her working activities in the workplace. The employer is not entitled to ask employees whether they are vaccinated or not.

Is an Employee, Who Has Already Reported in Advance That He or She Does Not Own the Green Pass, Required to Come to the Workplace Anyhow?

No. The employee who informed in advance the employer that he or she does not own the Green Pass is not required to go to the workplace. As a matter of fact, he or she will be considered as unjustified absent until he or she provides such certification and, in any case, no later than 31 December 2021

If an Employee Owns the Green Pass but Had Close Contacts With an Infected Individual, Can He or She Still Enter the Workplace?

No. The Green Pass is not a health document certifying that the holder is not infected at the time of display. Therefore, the employer shall exclude the employee from the workplace and invite him or her to undergo the quarantine period provided for by the law, after which the employee, in order to be authorized to enter the workplace, must show a certificate attesting the negative result of the swab.

What Happens If the Employee Shows an Expired Green Pass, or Whose Expiration Falls Within the Working Hours?

If the Green Pass is already expired at the time the employee tries to enter the workplace, he or she is not entitled to access.

If the employee shows a Green Pass expiring during his or her working hours but, in any case, after his or her access to the workplace (for example, in the case of a swab with a negative result whose duration is 48 or 72 hours), the employee may be entitled to remain within the workplace until the end of the working day.

Can the Employer Retain a Copy of the Employee's Green Pass and/or Its Expiration Date?

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No, this is not possible.

The check may only be conducted on the authenticity, validity, or integrity of the Green Pass and may not involve the collection (and, therefore, also the retention) of the holder's data in any form.

Therefore, collection of information regarding the requirements - vaccine, recovery, from COVID-19 disease, or negative swab - that led to the issuance of the certification or to its expiration date, is forbidden, as well as the request of copies of the certifications at hand.

The Italian Data Protection Authority has clarified that retaining a copy of the certificate and/or the indication of the expiration date is a breach of the rules on the protection of personal data. In particular, according to the Italian Data Protection Authority, compliance with the principle of minimization, which involves the collection of data strictly necessary to achieve the pursued purposes (i.e. control of the possession of the Green Pass), does not allow the collection of data exceeding these ends, such as those relating to the health condition of the individual.

What Happens If the Employee, When Required to Show the Green Pass, Does Not Own or Refuses to Show It?

Employees not owning the Green Pass or refusing to show it shall be considered as unjustified absents, with no right to salary until 31 December 2021 and, however, until the Green Pass is shown.

Unjustified absent employees are entitled to keep their job and cannot be subject to disciplinary actions.

In companies employing less than 15 people, after five days of unjustified absence the employer may temporarily suspend and replace the employee not owning the Green Pass or refusing to show it for a period no longer than 10 days, renewable once, and however no later than 31 December 2021.

If an Employee Does Not Own the Green Pass at the Time of the Check and, Therefore, Cannot Access the Workplace, What Is the Person in Charge of the Check Required to Do? What Does the Employer Have to Do?

The person in charge of the check must invite the employee to leave the workplace and remind him or her that, should he or she access the workplace without the Green Pass, then he or she may be subject to disciplinary procedure by the employer. The employer shall also notify the competent public authorities so that the relevant administrative sanctions are triggered.

The person in charge of the verification shall also notify the employer of the name of the employee not owning the Green Pass, in order to allow the employer to fulfill its mandatory obligations.

What Happens If an Employee Accesses the Workplace Without the Green Pass?

Employees who access the workplace without the Green Pass (for example, when the verification is carried out on a random basis) may be subject both to disciplinary procedures by the employer and an administrative sanction ranging from € 600 to € 1,500 (doubled in case of repeated violations). The person in charge of the check must report the violation to the competent public authorities.

Are Companies Employing More Than 14 Employees Entitled to Replace the Unjustified Absent Employee?

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The law does not specify that. However, pursuant to the general principle enabling employers to temporarily replace absent employees, we would deem that the answer is yes.

Nevertheless, the replaced employee will be entitled to return to work as soon as he or she obtains the Green Pass.

What Happens If the Employer Does Not Implement Proper Monitoring Procedures, or Does Not Carry Out the Checks?

The employer will be subject to administrative sanctions ranging from € 400 to a € 1,000.

Is an Employee Who Does Not Own the Green Pass Entitled to Work Remotely?

The employee not owning the Green Pass is not entitled to ask the employer to work remotely. However, nothing prevents the employer from allowing such employee to do so.

However, where the employee working remotely was required to work at the company premises a certain number of days per week, and he and she cannot access the workplace in the absence of the Green Pass, the relevant working days shall be considered as unjustified absences.

Are the Certifications Issued by Extra EU Countries and Similar to the Green Pass Valid for Access to the Workplace?

Certifications issued by the health authorities of Canada, Japan, Israel, United Kingdom, Northern Ireland, and the United States of America have the same effects as the Green Pass and, therefore, enable the holder to access the workplace.

Does Entering Into Force of the Green Pass Obligation Enable the Employer to Amend and Soften the Health and Safety Measures Already Adopted?

No, unless specific guidelines are issued and/or new safety protocols come into effect.

Does the Employer Need to Draft an Internal Policy?

The law requires the employer to define proper monitoring procedures according to which audits will be carried out.

As a consequence, we would believe that a dedicated internal policy should be issued.

During an Interview, Is It Possible to Ask the Candidate Whether He or She Owns the Green Pass? Can the Hiring of an Employee be Subject to Owning the Green Pass?

Although the Green Pass is not a “health data,” a request of the kind could be considered as discriminatory.

However, we would deem that the candidate may be asked to confirm whether he or she would be able to perform his or her working activity within the company premises until 31 December 2021.

On the other hand, the candidate cannot be asked whether he or she is vaccinated.

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What If the So-Called "External" Workers (e.g., Consultants, Workers Accessing the Workplace Under a Service Contract) Do Not Own the Green Pass?

For the time being, no particular consequences other than the prohibition to access the workplace have been provided for in case the "external workers" do not own the Green Pass.

However, as far as a service contract is concerned, it is recommended to incorporate penalty clauses aimed at protecting the principal from possible damages resulting from the non-compliance of the "external workers" with the Green Pass obligation.

In addition, the parties to the service contract may enter into specific clauses according to which the contractor undertakes to promptly replace its employees not owning the Green Pass.

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