

# PEDERSOLI

— STUDIO LEGALE —

LABOUR LAW

*September 2021*

## 1. GREEN PASS IN THE PRIVATE EMPLOYMENT SECTOR

The Law Decree no. 127/2021, approved by the Council of Ministers on 16 September 2021 and published in the Official Gazette on 21 September 2021 (hereinafter, the “**Decree**”), has introduced the requirement of the “green certification” pursuant to Law Decree no. 52/2021 (the so-called “**Green Pass**”) also in the context of employment in public administrations, independent authorities and private sector.

The table below focus on the rules contained in the Decree for the employers of private sector.

**WHICH IS THE REQUIREMENT UNDER THE DECREE?**

Pursuant to article 3, paragraph 1, of the Decree, “*anyone carrying out a work activity in the private sector is required, in order to access places where the said activity is carried out, to hold and show, upon request the Green Pass*”.

**WHICH IS THE VALIDITY PERIOD OF THE REQUIREMENT UNDER THE DECREE?**

As of today, the requirement is in force between **15 October 2021** and **31 December 2021** (termination date of the emergency status).

**WHO IS SUBJECT TO THE REQUIREMENT?**

Anyone, who accesses a workplace for work, training or voluntary activities, regardless of the type of contractual relationship, including anyone who performs its work activity in the context of procurement or supply contracts.

This requirement does not apply to people excluded from the vaccination campaign, *i.e.* people who cannot be vaccinated according to a specific medical certification and children under 12 years of age.

**WHICH ARE THE OBLIGATIONS OF THE EMPLOYER?**

Employers must:

- Check the Green Pass, before any access to workplaces, including by sample check;
- By 15 October 2021, “*formally*” appoint the subjects who will be responsible for verifying

possession of the Green Pass and for carrying out checks to ascertain any breach by employees to such requirement;

- By 15 October 2021, determine operational procedures for the performance of Green Pass checks, in accordance with the provisions of the Prime Ministerial Decree dated 17 June 2021.

**WHICH SANCTIONS IS THE EMPLOYER SUBJECT TO?**

For any failure to carry out the checks or to adopt organisational measures relating to the performance of checks, employers will be subject to an administrative sanction ranging between EUR 400 up to EUR 1,000, doubled in the event of repeated breach.

**WHICH ARE THE CONSEQUENCES FOR AN EMPLOYEE WITHOUT A GREEN PASS?**

An employee without a Green Pass:

- Is not allowed to access the workplace and, if access has already occurred, must be required to leave the workplace;
- Will be considered as absent from work without a valid justification until Green Pass is obtained, without entitlement to salary;
- Cannot be subject to disciplinary proceedings (for not having Green Pass) and will be entitled to maintain his/her job.

**WHICH ARE THE CONSEQUENCES FOR AN EMPLOYEE WHO ACCESSES THE WORKPLACE WITHOUT A GREEN PASS CIRCUMVENTING CONTROLS?**

An employee who accesses the workplace without Green Pass can:

- Be subject to disciplinary proceedings;
- Be subject to administrative sanctions ranging between EUR 600 up to EUR 1,500.

## SMALL EMPLOYERS

Employees working at entities having less than 15 employees:

- Are subject to the same obligations for employees in general provided for in the Decree;
- Are subject to the same disciplinary consequences and sanctions provided for access to the workplace without Green Pass;
- May be suspended from work and salary only after the 5th day of unjustified absence due to the lack of Green Pass. The suspension will expire upon termination of the agreement signed by the employer to replace the employee, up to 10 days that may be extended only once.

## 2. APPLICATION ISSUES, FIRST ANSWERS AND INTERPRETATION DOUBTS

### ARE EXTERNAL WORKERS REQUIRED TO HOLD AND SHOW A GREEN PASS?

Yes. Article 3, paragraph 2 of the Decree, requires that anyone accessing the workplace holds and shows his/her Green Pass.

### HOW IS THE GREEN PASS CHECK CARRIED OUT FOR EXTERNAL WORKERS?

External workers are subject to controls made by their employer and those of the employer who owns the workplace where the work is carried out.

The solution is not easy to apply in relation to temporary workers, who are unlikely to be controlled by the employment agency (*i.e.* their employer). The employment agency may carry out “sample checks” (*e.g.* by accessing the workplace from time to time or by requesting the worker to go to the

nearest territorial employment agency for a check).

The same remarks apply also to contractors' employees who carry out the activity at the principal's premises. In this case, the principal may be supported by the contracting entity to carry out checks on contractors' employees, for example, prior to their access to the principal's premises or by sending a person directly to the workplace.

**WHEN SHOULD THE EMPLOYER CARRY OUT GREEN PASS CHECKS?**

As a priority and if possible upon access at the workplace, *i.e.* before entrance. It is clear that checking after accessing the workplace could increase the risk of contagion that may occur in the meantime, resulting in possible liabilities for the employer in terms of health and safety at the workplace.

**HOW CAN THE EMPLOYER CONTROL EMPLOYEES WHO ARE CONSTANTLY WORKING AWAY FROM HOME (E.G. SALESPeOPLE, SECONDED EMPLOYEES)?**

The Decree does not provide any specification. In this case, the employer may carry out sample checks, requesting the employee to go to the offices or branches for a check.

**DOES THE REQUIREMENT TO HOLD AND SHOW GREEN PASS APPLY ALSO TO SMART WORKERS?**

According to a strict interpretation of the Decree, the answer is no. The requirement to hold and show Green Pass under the Decree is connected to access to workplaces, a circumstance which does not occur for smart working.

The requirement to hold and show Green Pass applies when the employee will be present at the workplace (so in this case it may concern the position of a remote worker e.g. because he / she is required to attend the office for a meeting).

**MAY AN EMPLOYEE WITHOUT GREEN PASS**

The employer is not obliged to accept the application for remote working submitted by an employee who does not hold Green Pass. Therefore, the employer may assess an application for remote

**APPLY FOR REMOTE WORKING?**

working at its own discretion.

**IS A CERTIFICATION ISSUED BY A NON-EU COUNTRY VALID?**

Yes. According to the Order issued by the Ministry of Health on 29 July 2021, certifications issued by the United Kingdom, Northern Ireland, Canada, Japan, Israel and the United States are equivalent to those issued by EU countries.

**WHICH TOOLS CAN BE USED BY THE EMPLOYER TO CHECK GREEN PASS?**

By “Verification C-19” app, which allows reading the QR code associated with the Green Pass, certifying its validity.

It is forbidden to request employees to provide a copy of their Green Pass, also according to the clarifications set forth by the Data Protection Authority. The Decree does not specify methods and timing for data storage (*i.e.* whether the employee holds a Green Pass), especially in view of the necessary transmission of information to external professionals who may be appointed to carry out payroll activities and to the competent Prefecture Office for enforcement of sanctions.

From an operational point of view, while awaiting clarifications from the Data Protection Authority, it is recommended to prepare an operating policy to reduce data processing (*i.e.* possession of Green Pass) to a limited number of specifically appointed company representatives, prior consultation, if possible, with the DPO.

**CAN THE CONTROL PROCEDURE BE AUTOMATED?**

The Decree does not provide any specification on this item. It’s reasonable to argue that the employer can use an automated system to check the possession of Green Pass and at the same time to prevent access of employees who does not hold it (*e.g.* a “barrier” with a QR code scanner together with “Verification C-19” app); the employer must in any case arrange the access in order to protect each single employee’s privacy.

**IS COMPLIANCE WITH COVID-19 PROTOCOL STILL REQUIRED?**

Yes. Green Pass does not exempt workers from complying and employers from enforcing the provisions of the shared Covid-19 Protocol (latest version of 26 April 2021), as implemented by internal protocols.

Therefore, mitigation measures in force as of today, still apply, in particular:

- employer's possibility to measure body temperature at the entrance;
- Obligation for the employee not to go to the workplace in presence of symptoms of infection and to leave the workplace in presence of symptoms after access;
- Obligation to wear masks;
- Obligation to maintain interpersonal distance.

**IS IT REQUIRED THAT THE EMPLOYER UPDATES THE INTERNAL COVID-19 PROTOCOL?**

The Decree does not provide any specification on the matter. However, it is recommended that employers update their Covid-19 protocol, especially to govern the methods of Green Pass check upon access to the workplace, avoiding any gathering (without limitation, it is recommended to stagger the entrance time of staff).