

Covid-19 vaccination and employment relationships in Italy. The vaccination obligation pursuant to Law Decree April 1st, 2021, no. 44 and the general employer's duty to ensure safety at work

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1. Introduction. 2. Covid-19 vaccination obligation and employment relationships *before* Law Decree April 1st, 2021, no. 44. 3. Covid-19 vaccination obligation and employment relationships *after* Law Decree April 1st, 2021, no. 44. 4. Conclusions.

Abstract

The paper aims at offering, in the form of a theoretical analysis, an overview regarding the approach adopted by Italian law and Italian case law with reference to the relationship between vaccination against Covid-19 and employment relationship. The analysis starts from the general obligation of the employer to protect employees' health and safety pursuant to article 2087 of the Italian Civil Code, that makes mandatory for the employer to adopt any measure necessary to protect the health and safety of the employee in the workplace. From this point of view the paper offers an overview of the debate that animated the labour law community immediately after the start of the pandemic, when it emerged the Covid-19 vaccination can be considered a protection measure against the risk of Covid-19 infection. The paper then analysis the specific provisions adopted on this matter by Italian legal system, namely that contained in Law Decree 1st April 2021, no. 44 offering an overview on the contents of the abovementioned law and on the decisions of the judges, after a theoretical and systematic classification of the matter.

Keywords: Covid-19 vaccination; employment relationship; health and safety; vaccination obligation.

1. Introduction.

Since the beginning of the spread of the Covid-19 infection in Italy, among the labour law community, the debate has ignited on what was necessary to do, within the workplace, to protect employees from the risk of contagion and contribute to the fight against the pandemic. The law has promoted remote work for all the employees who carry out duties that allow it, providing for the possibility of resorting to this type of work performance in a

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simplified manner and, in particular, without the need to stipulate the individual agreement required by law no. 81/2017.¹

With reference to the adoption of security measures against the virus in the workplace, the Government, trade unions and employers' associations have signed on March 2020 a protocol that identifies the behavioral rules and the safety measures to be followed in the workplace, only with reference to the management of a case of contagion from Covid-19.²

As a general remark it should be highlighted that, in the Italian legal system, the protection of employees' health and safety is an obligation of the employer which derives directly from the employment contract.

According to article 2087 of the Italian Civil Code, in fact, the employer has a general obligation to adopt any measure necessary to protect the health and safety of the employee and his/her moral personality in the workplace “*according to the particularity of the work, experience and technique*”.

The abovementioned protocol of March 2020, updated in April 2021, was, therefore, of fundamental importance as its application represented – on the basis of an express provision of the law³ – the fulfillment of the general safety obligation pursuant to art. 2087 of the Italian Civil Code with specific reference to the prevention from Covid-19.

It should be noted also that, especially with reference to the healthcare sector, the safety obligation does not relate only to employees but also covers the users of health services, considering the right to health provided for by article 32 of the Italian Constitution.

The initial debate therefore assumed that Covid-19 vaccination can be considered a protection measure against the risk of Covid-19 infection⁴ because, on the basis of the scientific information present at the moment, from an individual point of view, the vaccination protects the employee from contagion from Covid-19 or, at least, shall guarantee

¹ See art. 90, Law Decree May 19, 2020, n. 34, converted, with modifications, by Law, July 17, 2020, n. 77. This simplified regime was last extended up to June 30, 2022 (see art. 10, Law Decree, March 24, 2022, n. 24).

² The first protocol dates back to March 14, 2020, the last update is April 6, 2021. Among the first commentators of the protocols see Marazza M., *L'art. 2087 nella pandemia COVID-19 (e oltre)*, in *Rivista Italiana di Diritto del Lavoro*, 2, 2020, 267 ff.; Pascucci P., *Coronavirus e sicurezza sul lavoro, tra raccomandazione e protocolli. Verso una dimensione del sistema di prevenzione aziendale?*, in *Diritto della Sicurezza sul Lavoro*, 2019, 98; Pascucci P., *Ancora su coronavirus e sicurezza sul lavoro: novità e conferme nello ius superveniens del d.P.C.M. 22 marzo 2020 e soprattutto del d.l. n. 19/2020*, in *Diritto della Sicurezza sul Lavoro*, 2020, 117; Tursi A., *Rischio Covid-19 e obbligo di sicurezza del datore di lavoro: l'ennesima sfida della pandemia al diritto del lavoro*, in *Variazioni su Temi di Diritto del Lavoro*, 2, 2020, 849 ff.; Buoso S., *Principio di prevenzione e sicurezza sul lavoro*, Torino, 2020; Mattei A., *La salute dei lavoratori nella pandemia e l'impronta dello Statuto*, in *Lavoro e Diritto*, 4, 2020, 633 ff.

³ Reference is made to Art. 29-bis of Law Decree n. 23/2020, converted with amendments by law n. 40/2020 which establishes that “for the purposes of protection against the risk of contagion from COVID-19, public and private employers comply to the obligation referred to in Article 2087 of the Civil Code through the application of the provisions contained in the protocol”. The importance of this provision has been highlighted by Amendola F., *Covid-19 e responsabilità del datore di lavoro*, Cacucci, Bari, 2020, 63 ff., who points out that with the introduction of art. 29-bis there is a change of perspective with respect to the application of the art. 2087 of the Italian Civil Code which, from an open clause, is transformed into a ‘container’ aimed at collecting only the preventive measures indicate in the protocols. Otherwise, according to Marazza M., *Gli effetti giuslavoristici della mancata vaccinazione*, in *Giustizia Civile*, July 23, 2021, the reference to the protocol is not closed but also open to possible additional protocols signed at company level.

⁴ Ferraro F., *Dibattito istantaneo su vaccini anti-covid e rapporto di lavoro: l'opinione di Fabrizio Ferraro*, in *Labor*, February 10, 2021, noted that “This is a data to be assumed as assumption for the debate on the ‘responsibilities’ of the subjects of the employment relationship and on the related consequences, otherwise any interest in dealing with the topic would be lacking”.

him/her a less serious disease in case of contagion and, from a collective point of view, vaccination reduces the risk of contagion within the company community and protects the health of the workers in a collective sense.

This assumption throws up some fundamental questions with which the labor law community had to confront: can the Covid-19 vaccination obligation for access to the workplace be provided for only by law or can it also be introduced by the employer as a preventive measure, in the exercise of the duty of protection provided for by art. 2087 of the Italian Civil Code? And what measures can the employer adopt if an employee refuses vaccination against Covid-19?

Legal doctrine gave answers on this matter assuming different possible solutions⁵ which must be read taking into account the sensitivity of the issue and the need to put in place a difficult balance, essential in the light of the dramatic economic-social situation that the Italy has experienced, especially in the first pandemic phase, between the continuation of economic-productive activities and the safeguarding of safety of people who work. As we will see, lot of the intuitions of the legal doctrine, elaborated when there was no specific law on the matter, were confirmed as correct also in the light of the first decisions of the Labour Courts.

2. Covid-19 vaccination obligation and employment relationships before Law Decree April 1, 2021, no. 44.

Even before the entry into force of the vaccination obligation referred to in Law Decree no. 44/2021 (that, in any case, only concerns the vaccination obligation for employees employed in the healthcare sector and other specific sectors, *see* § 3), and in particular since the news of a possible vaccine against Covid-19 began to spread, legal doctrine and case law wondered about the relationship between Covid-19 vaccination and access to the workplace

⁵ With reference to the positions of the legal doctrine on the relationship between Covid-19 vaccination and employment relationship *see*, among others, Bellomo S., Maresca A., Santoro Passarelli G. (eds.), *Lavoro e tutele al tempo del Covid-19*, Giappichelli, Torino, 2020; Pellacani G., *La vaccinazione contro il Coronavirus (SARS-CoV-2) negli ambienti di lavoro tra norme generali in tema di prevenzione e tutela della salute e sicurezza, disciplina emergenziale per la pandemia COVID-19 e prospettive di intervento del legislatore*, in *Lavoro Diritti Europa*, 1, 2021; Albi P., *Sicurezza sul lavoro e pandemia*, in *Lavoro Diritti Europa*, 2, 2021; Albi P., Bellomo S., Cester C., Ferrante V., Ferraro F., Gragnoli E., Maresca A., Mazzotta O., Perulli A., Pessi R., Di Zumbo A., De Matteis A., Poso V. A., Romei R., Villalon J. C., Zoppoli L., *Dibattito istantaneo su vaccini anti-Covid e rapporto di lavoro*, in *Labor*, 2021; Maresca A., Rivero R., Sordi P., Zoppoli L., *Il vaccino anti Covid, scomoda novità per gli equilibri del rapporto di lavoro subordinato*, in *Giustizia insieme*, 22 gennaio 2021; Gragnoli E., *L'epidemia, la vaccinazione, il rifiuto e l'ultimo provvedimento normativo*, in *Lavoro Diritti Europa*, 1, 2021; Guariniello R., *Sorveglianza sanitaria: vaccino obbligatorio per i lavoratori?*, in *Diritto e Pratica del Lavoro*, 1, 2021, 31; Maio V., *Licenziamento e vaccino anti Covid-19. Perché serviva il Decreto Legge n. 44 del 2021 per obbligare gli operatori sanitari e cosa cambia ora*, in *Argomenti di Diritto del Lavoro*, 2, 2021, 292 ff.; Marinelli M., *Il vaccino anti-Covid e l'obbligazione di sicurezza del datore di lavoro*, in *Il lavoro nella giurisprudenza*, 4, 2021, 329 ff.; Menghini L., *Covid, sicurezza, vaccini: rappresentanze e partecipazione*, in *Lavoro Diritti Europa*, 2, 2021; Mocella M., *Vaccini e diritti costituzionali: una prospettiva europea*, in *dirittifondamentali.it*, 2, 2021; Pascucci P., Lazzari C., *Prime considerazioni di tipo sistematico sul d.l. 1 aprile 2021, n. 44*, in *Diritto della Sicurezza sul Lavoro*, 1, I, 2021, 152 ff.; Verzaro M., *Ecce Lex! L'obbligo di vaccinazione per gli operatori sanitari*, in *Lavoro Diritti Europa*, 2, 2021; Mattei A., *Obbligo vaccinale e rapporto di lavoro*, in *WP CSDLE 'Massimo D'Antona'.IT*, 442, 2021; Pascucci P., *SARS-CoV-2 e obbligo dei lavoratori di vaccinarsi*, in *Lavoro Diritti Europa*, 3, 2021.

and, in particular, about the possibility for the employer to impose on employees the vaccination against Covid-19 as a preventive measure.

In the absence of a specific vaccination obligation required by law, the voluntariness (or not) to undergo the vaccination was at the center of the labor law debate up to April 2021, *id est* the date in which the vaccination obligation for a limited category of employees (please see *infra* § 3) came into force.

Preliminarily it should be noted that the absence of a specific vaccination obligation against Covid-19 provided for directly by the law was an essential element in this debate since, based on art. 32 of the Italian Constitution, health is a fundamental right of the individual and of the community and health treatments (as the vaccination⁶) can only be ordered by law and must, in any case, respect the human person.

Nevertheless, part of the doctrine has argued that, due to the close relationship between art. 2087 of the Italian Civil Code and art. 32 of the Italian Constitution, the employer may impose on employees the vaccination against Covid-19, as vaccination is useful to prevent harm both to employees and third parties.⁷ According to this opinion, art. 2087 of the Italian Civil Code has an extended scope of application and may constitute implementation of the constitutional principle that vaccination must have a legislative basis. According to this position, the employee can refuse vaccination only if he has a valid reason, in lack of which he may be suspended from work without pay but not dismissed for justified objective reason nor for disciplinary reason.

On a opposite front, it has been argued that the constitutional principle that vaccination must have a legislative basis, pursuant to art. 32 of the Constitution, requires a specific law providing for the vaccination obligation against Covid-19 and it cannot be circumvented by means of an individual contract or by collective agreement; and not even referring to art. 2087 of the Italian Civil Code and the relevant regulations of health and safety in the workplace pursuant to art. 18, par. 1, lett. d) and f), 20, 41, 42 and 279, par. 2, lett. a), Legislative Decree no. 81/2008.⁸ Therefore, according to this interpretation, art. 2087 of the Italian Civil Code should be considered as a general rule and does not have the level of specificity required by the principle of the supremacy of the rule of law pursuant to art. 32 of the Constitution.

⁶ According to a consolidated orientation of the Constitutional Court, the vaccinations provided for by the law respond to an interest of the community and can be counted among health treatments mandatory, aimed at protecting health, pursuant to art. 32 of the Constitution. Among the most relevant decisions on the subject, see Constitutional Court n. 307/1990, n. 210/1992, n. 132/1992, n. 118/1996, n. 258/1994. With reference to the constitutional law doctrine see Vincenzi Amato D., *Tutela della salute e libertà individuale*, in *Giurisprudenza costituzionale*, 12, 1982, 2479 ff.; Marinelli F., *Lineamenti di diritto sanitario*, Pacini giuridica, Pisa, 2016, 29 ff.

⁷ Ichino P., *Vaccino anti-Covid: può il datore di lavoro imporlo e, in caso di rifiuto, licenziare il lavoratore? Pro*, in *Il Quotidiano Giuridico*, Ipsa, January 8, 2021.

⁸ Reference is made to the position of, among others, Maresca A., *Dibattito istantaneo su vaccini anti-covid e rapporto di lavoro: l'opinione di Arturo Maresca*, in *Labor*, January 22, 2021; Mazzotta O., *Vaccino anti-Covid: può il datore di lavoro imporlo e, in caso di rifiuto, licenziare il lavoratore?* in *Il Quotidiano Giuridico*, 2021; Pellacani G., nt. (5), according to which the vaccination obligation may be provided only by the law due to the fact that “the task of achieving the balance between the complex of interests and constitutional rights in game, of the community, of workers and third parties, also by defining a new point of balance between themselves is a task that is primarily up to the legislator, not the employers”; Ferraro F., nt. (4), according to which art. 2087 of the Italian Civil Code is not a specific enough provision to respect the legal reservation provided for by art. 32 of the Constitution.

Moreover, as already highlighted (*see* footnote no. 3), it should be noted that with specific reference to the protection against the risk of contagion from COVID-19, the law provides that the security obligation provided for by art. 2087 of the Italian Civil Code is not an open rule, which the employer must fill with content, but a closed rule, which must be fulfilled by following only the specific measures indicated in the protocols against Covid-19 signed by the Government and the Social Bodies. Following this opinion, the employer is not entitled to introduce security measures against Covid-19 that are not contained in the above-mentioned protocols.⁹

It has also been pointed out that the provisions of the Consolidated Act on health and safety at work (Legislative Decree no. 81/2008, in particular articles 18, co. 1, lett. d) and f), 20, 41, 42 and 279, co. 2, lett. a) cannot be considered as a legal source of the vaccination obligation, for different reasons.

First of all, because all these rules are general and therefore are not able to constitute a valid source of the vaccination obligation pursuant to article 32 of the Italian Constitution.

Furthermore, art. 279, par. 2, lett. a), Legislative Decree no. 81/2008 only provides for the employer “to make effective vaccines available” and does not seem to provide an obligation for the employee to undergo the vaccine, but a voluntary faculty as clarified by the same art. 279, par. 5 which significantly specifies “the occupational doctor provides workers with adequate information on the health checks they are subjected to ... as well as on the advantages and disadvantages of vaccination and *non-vaccination*” (italics added).¹⁰

But above all, in a particularly effective way, it has been noted that the reference to the provisions of the Consolidated Act on health and safety at work and, in particular, to the art. 279 and the measures that can be adopted in application of this provision¹¹ appears pertinent with reference only to activities, such as those carried out in the health sector, in which the possible exposure to Covid-19 viral infection can be configured as a specific biological risk, as also confirmed by EU Directive 2020/739 of June 3, 2020 and the implementing provision

⁹ This opinion has been agreed also by the jurisprudence; *see* Court of Florence, decision of March 4, 2022 n. 155, in *olympus.uniurb.it*, that has condemned a company to compensation for damages in favour of an employee obliged to own and show the so called ‘green pass’ to access the workplace, despite the lack of a legal obligation according to the legislation in force at the time. In particular, the Judge based the decision on art. 29 *bis*, Law Decree n. 23/2020 which at the time established as protection against the risk of contagion in the workplace the respect for employers of the requirements contained in the protocol of 24.4.2020 that did not provide for any obligation to have a green pass – which would only take effect on October 15, 2021, with the Law Decree n. 105/2021 – and in the absence of a provision by the authority or an express request of the company doctor, the imposition of the employer must be considered illegitimate.

¹⁰ Maresca A., nt. (8). This interpretation of art. 279, Legislative Decree n. 81/2008, however, is not peaceful. According to Guariniello R., nt. (5), from the same provision derives the possibility for the employer to impose the vaccination obligation on employees. According to Ferraro F., nt. (4), art. 279, Legislative Decree n. 81/2008 is not able to constitute a valid source of the vaccination obligation also because this rule provides that the vaccine is administered “by the occupational doctor”, a circumstance impossible to occur in a context of centralized management (at a state and regional level) of vaccination operations against Covid-19.

¹¹ Reference is made to article 42 of the Consolidated Act on health and safety at work according to which the employer implements the measures indicated by the occupational doctor and if the same provide for unsuitability for the specific task, he must remove the worker from the tasks for which he is unsuitable and assign him, where possible, to equivalent tasks or, failing that, to tasks of a lower level guaranteeing the economic treatment corresponding to the duties of origin.

contained in art. 17 of the Law Decree no. 149 of 2020 and art. 4, Law Decree no. 125/2020.¹²

It should be, in any case, added that the reference to the rules of the Consolidated Act on health and safety at work would never allow the employer to introduce a generalized obligation to vaccinate, having in any case to assess, case by case, the situation of individual employee on the basis of the occupational doctor's instructions.

From this point of view, therefore, the lawfulness of a possible vaccination obligation introduced by the employer must be verified by distinguishing between work environments in which the Coronavirus is intentionally introduced into the production cycle (such as in laboratories) or in which the presence of the same cannot be avoided (as in the case of health facilities) from other work environments¹³ and, in any case, general measures that do not take into account the specific duties performed by the employee and the specific associated risks must be excluded.

Despite many differences of views on this sensitive matter, most of the legal doctrine has agreed on the exclusion of disciplinary consequences (which can lead to disciplinary dismissal) for the employee who refuses to be vaccinated¹⁴ and on the relevant need to investigate the consequences of this refusal only in the context of the objective impossibility of receiving the working performance of the unvaccinated employee.¹⁵

Having clarified the positions of the legal doctrine, the most important decisions of Labour Courts adopted in the absence of a legal vaccination obligation are described below.

On the basis of the information available, the first decision on this matter has been adopted by the Labour Court of Belluno on March 19, 2021,¹⁶ therefore prior to the entry into force of the aforementioned vaccination obligation. This, in short, the story. The company management of a healthcare facility had decided to place some employees (social health operators) on forced holidays due to their refusal to be vaccinated against Covid-19 and the declaration of unsuitability for the performance of the working activity issued by the occupational doctor. The employees brought a lawsuit against the employer before the Labour Court of Belluno challenging the company's decision to suspend their employment.

The Judge established the lawfulness of the employer's decision due to the fact that employees carry out tasks that entail a high risk of contagion from Covid-19 and the

¹² Bellomo S., *Dibattito istantaneo su vaccini anti-covid e rapporto di lavoro: l'opinione di Stefano Bellomo*, in *Labor*, January 23, 2021.

¹³ Pellacani G., nt. (5).

¹⁴ See, among others, Gragnoli E., *Dibattito istantaneo su vaccini anti-covid e rapporto di lavoro: l'opinione di Enrico Gragnoli*, in *Labor*, January 22, 2021; Maresca A., nt. (8); Ferraro F., nt. (4); Ichino P., nt. (7), according to which the employee's refusal to vaccinate is in abstract susceptible to being treated in the same way as the refusal of any other safety measure, which in the most serious cases can lead to disciplinary dismissal.

¹⁵ According to Ferraro F., *ibid.*, in our legal system there is a constitutionally guaranteed freedom and not an obligation to vaccinate which entails the exclusion of the disciplinary relevance of the refusal but it can be configured an employee's duty to vaccinate whose failure does not entail disciplinary sanctions, but constitutes a prerequisite for the unsuitability for the performance of the working activity in light of the workplace safety system and in particular to health surveillance.

¹⁶ See Biasi M., *La collocazione in ferie del personale socio-sanitario renitente al vaccino anti-Covid: un (più che) ragionevole compromesso*, in *Diritto delle Relazioni Industriali*, 3, 2021, 812 ff.; Pisani C., *Rifiuto del vaccino e ferie forzate per gli operatori sanitari in attesa del decreto legge*, in *Guida al lavoro*, n. 16/2021, 30-32; Taschini L., *Il vaccino anti Covid nel rapporto di lavoro. Dalle prime pronunce di merito al d.l. n. 44 del 2021*, in *Lavoro Diritti Europa*, 2, 2021; Mattei A., nt. (5).

vaccination prevent the negative evolution of the disease caused by the SARS-CoV-2 virus. Furthermore, the permanence of the employees in the workplace would involve for the employer the violation of the obligation pursuant to art. 2087 of the Italian Civil Code which requires the employer to take all necessary measures to protect the physical integrity of its employees pursuant to art. 2087 of the Italian Civil Code.

Finally, the Judge argued that art. 2109 of the Italian Civil Code provides that the employer establishes the period of use of the holidays, taking into account the needs of the company and the interests of the employee¹⁷ and, in this case, the employer's need to comply with the protection obligation pursuant to art. 2087 of the Italian Civil Code prevails over the possible interest of the employee to take vacations in a different period.¹⁸

The decision of the Labour Court of Belluno cannot, in any case, be interpreted as a confirmation of the fact that the vaccination obligation can be introduced by the employer pursuant to the art. 2087 of the Italian Civil Code. This for a number of reasons.

First of all, the decision is conditioned by the fact that the employer had limited himself to placing the employees on vacation, without adopting suspensions or dismissals. Under this point of view, it should be considered that, since the first phase of the pandemic, the placement on holidays has been considered among the measures recommended to counter the spread of the virus.¹⁹

Secondly, the decision was influenced by the awareness that, shortly thereafter, the vaccination obligation for healthcare personnel would come into force.

Finally – and in my opinion this is a key point – the employer has decided to place the employees on vacation because they were declared unsuitable for the performance of the working activity by the occupational doctor in the field of the health surveillance in the workplace.

It is therefore particularly interesting to verify what conclusions the Courts have reached in cases in which the employer has not only put the employee on vacation but has suspended him/her from the work without pay.

On this point it appears useful to recall three decisions. The first is a decision of the Labour Court of Verona²⁰ which confirmed the lawfulness of the employer's provision of

¹⁷ With reference to the employer's power to identify the period of use of holidays *see* Bellomo S., *Orario di lavoro, riposi, ferie: i principi costituzionali, la normativa europea ed il quadro regolativo definito dal d.lgs. 8.4.2003, n. 66*, in Santoro-Passarelli G. (ed.), *Diritto e processo del lavoro e della previdenza sociale. Privato e pubblico*, Utet, 2020, tomo I, 1290 ff.

¹⁸ This argument has been agreed also by Labour Court of Pavia, July 20, 2021 n. 530, in *olympus.uniurb.it*, which declared lawful the behavior of the employer who, in exercising his prerogatives deriving from art. 2109 of the Italian Civil Code, placed the worker who refused to be vaccinated on vacation. According to the judge, the employer acted with good faith and fairness, assuming that his choice, even assuming that it resulted in an alleged 'sacrifice' on the part of the employee, is certainly justified by the maintenance of the right to remuneration and constitutes a more favorable treatment for the worker than that which could have applied them under art. 4, law decree n. 44/2021, suspending her from service and salary.

¹⁹ As provided for by art. 1, par. 7, lett. b, of Prime Ministerial Decree March 11, 2020. *See* Biasi M., nt. (16).

²⁰ Labour Court of Verona, May 24, 2021, in *dejure.it*. For a comment of the decision *see* Guarini G., *Rifiuto del vaccino anti Covid 19 e conseguenze giuridiche per il personale sanitario nelle recenti sentenze di Verona e Modena*, in *Il Giuslavorista*, August 4, 2021; De Matteis A., *L'ordinanza del Tribunale di Verona sull'onere di vaccinazione a carico dei lavoratori*, in *Il Giuslavorista*, July 29, 2021.

placement on unpaid leave for temporary unfitnes to perform her duties adopted against a social health operator who refused vaccination.

The second is a decision of the Court of Modena²¹ related, as in the case examined by the Court of Verona, to the decision of the employer to adopt the precautionary suspension from service and salary towards the unvaccinated employee, *id est* a measure with has an undoubtedly greater impact on the position of the worker compared to placement in holidays. The Court of Modena stated that the insertion of unvaccinated workers into a work environment in which fragile subjects (such as patients of the residence) and other workers are present, involves a danger to the health of the latter, requiring the use of preventive measures by the employer. In light of the above, the Court of Modena confirms the full legitimacy – and indeed the duty – of the employer’s decision, in light of the centrality of the duties of preserving the safety of patients of the healthcare facility and of employees (including suspended workers).

Noteworthy is the reference, contained in the decision of the Court of Modena, to the duty of the employee to collaborate in the creation of a healthy and safe working environment.²² This obligation, according to the judge, is an integral part of the exchange underlying the employment contract (*id est* a synallagmatic agreement),²³ especially in contexts (such as healthcare facilities) where it is necessary to protect the health of third parties (*id est* the patients). According to the judge, it follows that the employee’s failure to comply with the security duty legitimizes the reaction of the employer, who has no interest in receiving the service. Such reaction may include also the inhibition in the continuation of the relationship. The employer’s decision has been considered reasonable and proportional also because it does not irreparably cancel the relationship but only temporarily suspends its effects.

The third decision relating to the suspension from work and from pay of the *no-vax* employee adopted by the employer before the vaccination obligation came into force was adopted by the Court of Milan²⁴ and, contrary to the courts of Verona and Modena, found

²¹ Labour Court of Modena, July 23, 2021, n. 2467 commented by Biasi M., *Ancora sul personale socio-sanitario renitente al vaccino anti-Covid: la legittimità della sospensione senza retribuzione disposta anteriormente al d.l. n. 44/2021*, in *Diritto delle Relazioni Industriali*, 4, 2021, 1149 ff. With this decision the Court of Modena confirmed in appeal a previous decision issued by the same Court on May 19, 2021, with a note of Nannetti C., *Obbligo vaccinale e conseguenze sul rapporto di lavoro in caso di rifiuto del lavoratore pre e post d.l. 44/2021*, in *Il Giuslavorista*, June 14, 2021. The decision has been recalled also by Court of Rome, July 28, 2021, n. 18441, in *bollettinoadapt.it*.

²² The decision makes reference to art. 20 of the Consolidated Act on health and safety at work regarding the duties of the employee. Such provision provides that every employee must take care of his own health and safety and that of the other people present in the workplace, who are affected by his actions or omissions, in accordance with his training, instructions and means provided by the employer.

²³ In this passage the decision recalls the doctrine that identifies, in the context of the contractual responsibility of the employee, the preparatory obligation for the performance. In this sense, the request for vaccination, regardless of an obligation vaccination established by law, could be considered collectible in terms of contractual fulfillment. The behavior to protect health, entering into the cause of the employment contract, it also becomes the object of the required work performance. In this respect *see* Mazzotta O., nt. (5); Mancini G. F., *La responsabilità contrattuale del prestatore di lavoro*, Milano, 1957, 151, recalled from Pisani C., *Vaccino anti-Covid: oneri e obblighi del lavoratore alla luce del decreto per gli operatori sanitari*, in *Massimario di Giurisprudenza del Lavoro*, 1, 2021, 149-163 and from Mattei A., nt. (5).

²⁴ Court of Milan, September 15, 2021, in *dejure.it*, with comments of Apa S., *Personale ASA non vaccinato: collocamento in aspettativa non retribuita ed onere di repêchage*, in *Il Giuslavorista*, October 8, 2021. The decision is also referred to by Biasi M., nt. (21).

the provision of the employer unlawful since – although it is theoretically legitimate to adopt this measure to protect the health of employees and patients – the healthcare facility had not demonstrated the impossibility of relocating employees to other, even lower, duties, compatible with the protection of the health of the environment and the safety of the patients of the structure.

This decision can be criticized because it is based on the assumption that the suspension of the employee from work and pay is an *extrema ratio* and that, therefore, there is a general obligation of the employer to verify the possibility of a relocation of the worker in other duties before adopting the suspension.

However, the law (*id est* art. 42 of the Consolidated Act on health and safety at work) requires the employer to assign the employee to equivalent duties or, failing that, to lower duties only if the occupational doctor certifies that he is unsuitable for the specific tasks performed. In the case decided by the Court of Milan, however, it does not seem that the suspension adopted by the employer was preceded by a judgment of unsuitability of the doctor. Nor is there a general principle of jurisprudential derivation which makes the suspension from the service subject to the previous verification of the possibility to relocate the employee to other tasks.²⁵

As a matter of fact, the so called ‘duty of *repechage*’ was elaborated by the jurisprudence starting from the concept of economic dismissal for “*reasons inherent to the productive activity, to the organization of the work and to the regular functioning of it*” pursuant to art. 3 of the law no. 604/1966 and therefore cannot be applied beyond the scope of the dismissal unless there are explicit provisions of the law that provide for it.

3. Covid-19 vaccination obligation and employment relationships after Law Decree April 1, 2021, no. 44.

With the law decree no. 44/2021, which entered into force on April 1, 2021, the situation has been resolved at least in part through the introduction by law of the vaccination obligation for those employees who exercise the health professions and for operators of health interest.²⁶

²⁵ Indeed the employee’s right to be assigned to alternative tasks has been recognized by the jurisprudence only in case of definitive unfitness for work as an alternative to dismissal for justified objective reason (*See* Cass., S.U., August 7, 1998, n. 7755, in *Massimario Giuridico del Lavoro*, 1998, 876, with comment of Papaleoni M.) and, moreover, the previous jurisprudence denied the existence of such an employer burden also in this case (*see* Cass. December 13, 2000, n. 15688; Cass. December 13, 1996, n. 11127, both in *dejure.it*). In this respect *see* Del Punta R., *La sospensione della prestazione di lavoro*, in Vallebona A., *I contratti di lavoro*, I, Trattato Rescigno – Gabrielli, UTET, Torino, 2009, 813 ff.

²⁶ For the first comments on the provision *see*, amongst many other, Maio V., nt. (5), 292 ff.; Pascucci P., Lazzari C., nt. (5), 152 ff.; Scarpelli F., *Arriva l’obbligo del vaccino (solo) per gli operatori sanitari: la disciplina e i suoi problemi interpretativi*, in *Conversazioni sul lavoro a distanza da agosto 2020 a marzo 2021 promosse e coordinate da Vincenzo Antonio Poso*, 3, 4, 2021; Rivero R., *Note in tema di individuazione dei soggetti obbligati ai vaccini a seguito del decreto-legge n. 44/2021*, both in Poso V. A., *Conversazioni sul lavoro dedicate a Giuseppe Pera dai suoi allievi*, in www.fondazionegiuseppera.it; Mocella M., nt. (5), 69; Ferraro F., *Sulle conseguenze della mancata vaccinazione dopo il d.l. 44*, in *Lavoro Diritti Europa*, 3, 2021.

First of all, it should be noted that the obligation is limited to some categories specifically provided for by the law and is not extended in a generalized manner.

The categories subject to the Covid-19 vaccination obligation have been increased over time but,²⁷ as a result of the latest measures,²⁸ a real vaccination obligation for access to the workplace currently exists only for the healthcare sector,²⁹ that are subject to the vaccination obligation up to December 31, 2022.

The most important provision from the point of view of labor law is article 4 which provides for a specific procedure with which healthcare companies, through dialogue with professional orders, can verify which are the members of the professional categories affected by the vaccination obligation and ascertain any non-compliance with the obligation. In this case, the local health authority immediately informs the employee, the employer and the professional association to which they belong in writing. The adoption of the assessment act by the local health company determines the suspension of the right to perform services or tasks that involve interpersonal contacts or determine, in any other form, the risk of spreading the infection from SARS-CoV-2. Upon receipt of this provision, the employer, if possible, can assign the employee to different, even lower, duties, or suspend him without pay until the vaccination obligation is fulfilled and, in any case, within the maximum deadline of December 31, 2022.³⁰

The provision pursues a twofold objective: the protection of the public health and the maintenance of adequate safety conditions in the provision of care and assistance services.

As already said, if the employee, falling within the professional categories identified by the law decree, does not comply with the vaccination obligation, unless it is justified by a danger to health and in the absence of alternative duties available, even lower, capable of excluding interpersonal or risk contacts spread of the infection from Covid-19, this non-fulfillment

²⁷ Reference is made to the categories provided for by art. 4-*ter* 1 of law decree n. 44/2021 (school personnel; personnel of the defense, security and public rescue sector, local police, staff of the National Cybersecurity Agency; personnel who carry out their work in any capacity under the Penitentiary Administration Department or the Department for Juvenile Justice; personnel of universities, institutions of higher artistic, musical and dance training and of higher technical institutes, as well as personnel of the forestry corps of the regions with special status) and the people over fifty years old (art. 4-*quater* of law decree n. 44/2021). However, these categories are subject to the vaccination obligation up to June 15, 2022 only for administrative sanctions purposes. As a matter of fact, starting from April 1st, 2022, as a consequence of Law Decree n. 24/2022, these categories are no longer obliged to possess the green pass obtained with the vaccination for access to the workplace, being able to access the job even with the green pass obtained from the negative test, and we can therefore say that vaccination against Covid-19 is returned to be a requirement for access to work only for workers in the healthcare sector.

²⁸ See Law Decree March 24 2022, n. 24.

²⁹ In particular for subjects exercising the health professions and operators of health interest; students of degree courses engaged in carrying out practical-evaluation internships aimed at obtaining the qualification to exercise the health professions (art. 4 of law decree n. 44/2021); all subjects, including external ones, who carry out their work for any reason in residential, social-welfare, social-health and hospice structures (art. 4-*bis* of law decree n. 44/2021); personnel who carry out their work for any reason in the structures referred to in article 8-*ter* of the Legislative Decree, n. 502/1992, with the exception of those who work with external contracts (art. 4-*ter* of law decree n. 44/2021).

³⁰ This procedure is provided for by art. 4, par. 3-5, of law decree n. 44/2021. The legal doctrine has criticized this procedure for the inconsistencies and cumbersome on the level of 'chain' of communications. See Mattei A., nt. (5); Scarpelli F., nt. (26); Pisani C., nt. (23) 152.

determines the suspension from the service and salary, until the vaccination obligation or the vaccination plan is fulfilled and, in any case, no later than December 31, 2022.

The suspension is an objective measure and has no disciplinary nature, as highlighted by case law³¹ and part of the legal doctrine. Otherwise, it has been argued that the measure of the suspension without pay, where it is not possible to be assigned to different, even lower, duties, it represents a measure with *sui generis* sanctions profiles other than those that the employer can adopt at the end of a disciplinary procedure pursuant to art. 7 of law no. 300/1970.³² I do not believe, in any case, that this interpretation may allow the employer to adopt more serious sanctions against the unvaccinated employee (e.g. dismissal for just cause) because it is quite clear that the legislator, in the difficult balance of interests underlying the law decree no. 44/2021, has decided to provide for a specific measure for the unvaccinated employee – *id est* the suspension from work and pay – who maintains the employment relationship while temporarily suspending its effects.

The exclusion from the obligation operates only for those employees who have an ascertained danger to health, in relation to specific clinical conditions certified by the general practitioner. In this limited hypothesis, vaccination is not mandatory and can be omitted or deferred.³³ As for the consequences, there is a difference in treatment between those who are obliged, but are justified in not getting vaccinated, and those who, otherwise, have no justifications.

The common element is that in both cases the employee must be assigned to tasks that do not involve risks of spreading the infection.

The distinction between the two hypotheses concerns the legal effects of the failure to comply with the vaccination obligation. The employee who has a justified reason to refuse the vaccine is assigned to different tasks without reducing the salary.³⁴ Otherwise, those employees who do not have a justified reason are likely to be assigned to duties even of a lower professional level with the corresponding (therefore lower) remuneration treatment; furthermore, if it is impossible for them to be relocated to duties that do not involve the risk of spreading the infection, the relationship is suspended without salary. This measure is effective until the vaccination obligation is fulfilled, or, failing that, until the completion of the national vaccination plan and, in any case, no later than 31 December 2022.

However, it should be highlighted that, according to the labour court of Velletri, the exclusion from the vaccination obligation does not operate only for those employees who have an ascertained danger to health, but the work performance of the healthcare employee

³¹ Reference is made to the decision adopted by T.A.R. Lazio n. 3725/2022, in *giustizia-amministrativa.it*. According to the Court the suspension of unvaccinated military personnel falls outside the scope of criminal or disciplinary relevance.

³² Mattei A., nt. (5); Pisani C., nt. (23), 159. According to Court of Verona, June 16, 2021 “It seems difficult to argue that an unjustified refusal to undergo the vaccination is devoid of disciplinary relevance, especially in some specific conditions, especially once that the worker is aware of the complications that his own conduct involves for the employer organization”.

³³ Art. 4, par. 2, of law decree n. 44/2021.

³⁴ Art. 4, par. 7, of law decree n. 44/2021 provides that for the period in which the vaccination is omitted or deferred, the employer assigns the subjects referred to in paragraph 2 to different tasks, *without reducing the salary*, in order to avoid the risk of spreading the infection from SARS-CoV-2 (*italics added*).

would be prohibited only where it would affect public health and adequate safety conditions in the provision of care and assistance services.³⁵

The first case law of labour Courts has clarified, first of all, that the vaccination obligation introduced by law decree no. 44/2021 does not conflict with the Constitution. The Court of Belluno, with a decision of May 2021, found the question of constitutionality raised regarding the obligation introduced by law decree no. 44/2021 to be groundless on the basis of previous decisions of the Constitutional Court.³⁶

More recently, however, different positions have been taken. As a matter of fact, various administrative and labour courts have proposed a possible contrast between the vaccination obligation, on the one hand, and the Italian Constitution (in particular, art. 32) and European law on the other.

Reference is made, in particular, to:

(i) the decision of T.A.R. Lombardia, no. 192/2022³⁷ by which the Court announced that he would have to raise the question of the constitutionality of art. 4, par. 4, of the law decree no. 44/2021, in the part in which it provides the suspension from the exercise of the health professions in case of non-fulfillment of the vaccination obligation;

(ii) the order of the Labor Court of Padua of 7 December 2021³⁸ which ordered the preliminary ruling to the Court of Justice of the European Union, with reference to compatibility with regulation (EU) no. 953/2021 and the principles of proportionality and non-discrimination of the anti-Covid vaccination obligation of health personnel, having regard, among other things, to the doubt about the continuing validity of the conditional authorizations relating to vaccines, once alternative treatments for SAR-Cov-2 virus infection are approved, as well as about the legitimacy of the vaccination obligation for health

³⁵ Labour Court of Velletri, December 14, 2021, in *olympus.uniurb.it*, that has revoked the suspension from work and pay of the employee, ordering the employer to entrust the worker with the performance of tasks compatible with the type or manner of carrying out with the need to protect public health; with the obligation to pay remuneration until such tasks are identified.

³⁶ Cf. Constitutional Court, January 18, 2018, n. 5, in *dirittoeggiustizia.it*, 19 gennaio 2018, with comment of Marino G., *Vaccini: obbligo o raccomandazione è il legislatore che decide*; Constitutional Court, December 14, 2017, n. 268, in *ridare.it*, 26 febbraio 2018, with comment of Lombardo C., *Il sacrificio del singolo per la collettività va indennizzato anche in caso di vaccino antinfluenzale non obbligatorio*; Constitutional Court, June 26, 2002, n. 282, in *Giustizia Civile*, 2003, n. 2-3, I, 294; Constitutional Court, June 23, 1994, n. 258, in *Foro Italiano*, 1995, n. 5, I, c. 1451; EDU Court, April 8, 2021, n. 47621/2013, *Vavříčka and others vs. Repubblica Ceca*, in *lanpluralism.unimib.it*. All these decisions have been mentioned by Biasi M., nt. (16), which highlights that the Court of Belluno affirmed that law decree n. 44/2021 would not be in violation of art. 32 of the Constitution because the treatment was aimed not only at improving the health of those who had been subjected to the vaccination obligation, but also that of others, and because the obligation had not negatively affected the state of health of the individual, except for the tolerable consequences or normal. The choice of the methods for the prevention of infectious diseases and of the measures, including sanctions, through which to guarantee the effectiveness of the vaccination obligation, fall within the discretion of the legislator and, in this perspective, with art. 4 of the law decree n. 44/2021 the legislator has legitimately assigned a prevalence to the right to health of fragile subjects destined to come into contact with social and health personnel and, more generally, to the right to health of the community over the freedom of those who do not intend to undergo vaccination against COVID-19. On the other hand, the balance of interests underlying law decree n. 44/2021 appeared – using the expression of Constitutional Court n. 5/2018, “fair and reasonable” – also in terms of the consequences of refusing vaccination, identified by the legislator in measures of a conservative nature (suspension) that do not affect the existence of the employment (as in case of dismissal).

³⁷ T.A.R. Lombardia, n. 192/2022 in *giustizia-amministrativa.it*, 2022.

³⁸ Labor Court of Padua, 7 December 2021.

professionals already infected, who have therefore reached a natural immunization, or who oppose the vaccination obligation in relation to contraindications;

(iii) the decision of Administrative Court of Sicilia Region March 22, 2022 no. 351:³⁹ according to the court, the vaccination obligation provided for by law decree no. 44/2021 could conflict with art. 32 of the Constitution due to the adverse reactions that the Covid-19 vaccine can have for the person it is inoculated to.⁴⁰ The court recalls the orientation of the Constitutional Court according to which the law imposing a health treatment it is not incompatible with art. 32 of the Constitution provided, among other things, that the vaccine does not affect negatively on the state of health of the one who is obliged, except for those consequences only “that appear normal and, therefore, tolerable”.⁴¹

(iv) the decisions with which the T.A.R. of Lazio⁴² – making reference to the decision of Administrative Court of Sicilia Region March 22, 2022 no. 351– raised the question of the constitutional legitimacy of all the decree laws and laws relating to the vaccination obligation and of 106 suspension measures against military and police employees, as well as notes and circulars based on the same rules;

(v) the order of the Labor Court of Firenze of July 6, 2022 by which the Court has revoked the order by which the Order of Psychologists of Tuscany had prohibited the employee from practising as a psychologist until she had received the Covid-19 vaccine for different reasons and, in particular, because “Dr. (...) cannot be forced, in order to support herself and her family, to undergo these experimental injection treatments that are so invasive that they insinuate themselves into her DNA, altering it in a way that could be irreversible, with effects on her life and health that cannot be foreseen to date”;

³⁹ Administrative Court of Sicilia Region, 22 March 2022, n. 351, in *giustizia-amministrativa.it.*, 2022.

⁴⁰ On the basis of his reasoning, the court recalls the collection of data emerging from the consultation of the European database (EudraVigilance) that allows to detect that at the end January 2022, 570 million doses were administered in the EU / EEA (full cycle and booster) of the Cominarty vaccine (BioNTech and Pfizer), in relation to which they rejoice acquired 582,074 reports of adverse events, of which 7,023 with fatal outcome; as for the *Vaxzevria* vaccine (AstraZeneca), compared to 69 million doses there were 244,603 reports of adverse events, of which 1447 with a fatal outcome; as for the *Spikevax* vaccine (Moderna), compared to 139 million doses 150,807 adverse events were reported, of which 834 with fatal outcome; as for Covid-19 Vaccine Janssen, compared to 19 million doses, there were 40,766 reports, of which 279 with fatal outcome. According to the court, undoubtedly, most of the side effects listed in the database show symptoms modest and transient; the most serious adverse events include disorders and diseases affecting the systems circulatory (including thrombosis, ischemia, immune thrombocytopenia), lymphatic, cardiovascular (including myocarditis), endocrine, immune system, connective and musculoskeletal tissues, nervous, renal, respiratory systems; neoplasms. Obviously, serious pathologies, such as from compromising, in some cases irreversibly, the state of health of the vaccinated person, causing disability or, in the most unfortunate cases, death. Therefore, according to the court, it is doubtful whether drugs against which reports of such effects are being collected collaterals satisfy the aforementioned constitutional parameter.

⁴¹ Constitutional Court n. 258/1994, in *giurcost.org*, according to which the compatibility between the law providing for the vaccination obligation and art. 32 of the Italian Constitution it occurs when – among the other requirements – there is the “provision that it does not negatively affect the state of health of the person subjected to it, except for those consequences only, which, due to their temporariness and insignificance, appear normal any health intervention and, therefore, tolerable”. On this point see Vincenzi Amato D., nt. (6), 2479 ff.; Politi F., *La tutela del diritto alla salute nella Costituzione italiana*, in Marinelli F., nt. (6), 29 ff.; Patanè A., *La costituzionalità dell'obbligo vaccinale all'interno del difficile equilibrio tra tutele e vincoli nello svolgimento dell'attività lavorativa*, in *Lavoro Diritti Europa*, 2, 2021.

⁴² T.A.R. of Lazio, decisions n. 3793, 3805, 3806, 3807 e 3808 of April 1st, 2022, in *giustizia-amministrativa.it.*

(vi) the order of the Labor Court of Brescia of August 22, 2022 by which the Court announced that he would have to raise the question of the constitutionality of two provisions of law decree no. 44/2021, namely: (a) Article 4, par. 7, in so far as it provides that only persons exempted from the vaccination requirement or those who have obtained a deferral of vaccination are entitled to be assigned to different duties, without any reduction in pay, while excluding those who (like the employee who brought the action in question) had not undergone the so-called third dose; (b) Article 4, par. 5, in so far as it provides that during the period of suspension ordered for failure to comply with the vaccination obligation, no pay or other remuneration or emolument, however named, is due.

In particular, according to the Judge, the first censured provision could be contrary to the principle of equality under Article 3 of the Constitution, in so far as it provides for so-called *repechage* obligation only for certain categories of employees, thus introducing unreasonable unequal treatment.

To find out if these decisions will lead to a declaration of unconstitutionality of law decree no. 44/2021 it is necessary to wait for the rulings of the Constitutional Court. What is certain is that, in the meantime, the legislator has achieved the desired result, namely, guaranteeing, in the midst of the pandemic, in some specific contexts, access to work only by vaccinated personnel.

From a substantive point of view, the majority of case law considered to be lawful both the vaccination obligation introduced by the law and, consequently, the suspension from work and pay measures adopted by the employer against unvaccinated health employees.⁴³

In particular, these decisions affirmed the compatibility between the vaccination obligation introduced by the law decree no. 44/2021 and the interpretation of art. 32 of the Italian Constitution provided by the Constitutional Court and the prudent balancing of values carried out by the legislator was enhanced. There have been, however, jurisdictional problems relating to the challenge of the specific measures with which the suspension from work is ordered, following the procedure provided for by art. 4, par. 3-5, of law decree no. 44/2021. The decisions of the jurisprudence have clarified that the deeds of assessment adopted by the health company and the professional order with which the lack of vaccination is ascertained and the suspension from the health profession is ordered are subject to the jurisdiction of the administrative courts while the act with which suspension from work and remuneration is ordered is subject to the jurisdiction of the labour courts.⁴⁴

⁴³ On this point the following decisions should be pointed out: Court of Verona, June 16, 2021, in *ilgiuslavorista.it*; T.A.R. Lecce, (Apulia) section II, August 5, 2021, n. 480, in *giustizia-amministrativa.it*; Court of Rome, 20 August 2021, n. 79835, in *olympus.uniurb.it*; Court of Ivrea, August 23, 2021, n. 300, in *olympus.uniurb.it*; T.A.R. Trieste, (Friuli-Venezia Giulia) section I, September 10, 2021, n. 261, in *giustizia-amministrativa.it*; Court of Genoa October 6, 2021, in *olympus.uniurb.it*; Council of State, section III, October 20, 2021, n. 7045, Council of State January 28, 2022, n. 416 and Council of State, February 4, 2022, n. 583, all in *giustizia-amministrativa.it*; Court of Bari, March 15, 2022 and Court of Milan, March 16, 2022, n. 684, in *olympus.uniurb.it*; Court of Venezia, July 5, 2022, n. 443, in *rivistalabor.it*; T.A.R. Emilia Romagna, Section 2, September 22, 2022, n. 473, in *giustizia-amministrativa.it*.

⁴⁴ T.A.R. Friuli Venezia Giulia, n. 262/2021, in *giustizia-amministrativa.it*; Court of Genova, December 1, 2021, in *dejure.it*; Court of Milan, March 16, 2022, n. 684, in *olympus.uniurb.it*. On this point see also Siccardi F., *La linea di confine tra giurisdizione ordinaria ed amministrativa in caso di provvedimenti accertativi della non ottemperanza all'obbligo vaccinale*, in *Il Giuslavorista*, February 24, 2022.

In terms of the subjective scope of application, considering that the law uses terms such as ‘employers’ and ‘remuneration’, the doubt arises whether all workers present in these structures are included in the vaccination obligation, regardless of the existence of subordinate employment relationships, such as for example those who work in temporary employment, or those who have an autonomous collaboration contract pursuant to art. 409, co. 3 of the Code of Civil Procedure; medical specialists who work under a specialist training contract that does not lead to the establishment of an employment relationship; or, again, freelancers with a VAT number that release an invoice for the services rendered.⁴⁵

Finally, it should be noted that, outside the health sector, the law,⁴⁶ while not introducing a direct vaccination obligation, introduced (until May 1st, 2022) the obligation for public and private sector employees to own and show the so called ‘green pass’ – that certifies the fact that the employee has been vaccinated or is in possession of a negative buffer still in force – for access to the workplace. Otherwise, the employee is considered absent without justification and without pay.

It does not appear possible, in this context, to examine also this aspect in detail as it is not directly connected to the vaccination obligation.⁴⁷ As a matter of fact, even if part of the doctrine highlighted that the introduction of the so called green pass only apparently exceeds the theme of the vaccination obligation in relation to the employment relationship, representing the green pass an indirect obligation, in the form of an incentive to vaccinate,⁴⁸ it has also been convincingly argued that the green pass regulation does not entail any vaccination obligation, as the employee can choose to undergo Covid-19 tests, in order to access the workplace, as an alternative to the vaccination.⁴⁹

4. Conclusions.

The issue of the relationship between Covid-19 vaccination and employment relationship is extremely sensitive because it involves fundamental rights and freedoms, at constitutional level, which need to be carefully balanced. In our legal system, in fact, there are no ‘tyrannical rights’ and, even when the right to health is considered (article 32 of the Constitution), no constitutional right is destined to prevail over the other, canceling it.

⁴⁵ The interpretative doubt is highlighted by Mattei A., nt. (5), 20, according to which, for self-employed workers, the suspension of collaboration without compensation could be hypothesized.

⁴⁶ Law Decree 21 September 2021, n. 127, converted into law November 19 2021 n. 165.

⁴⁷ With reference to the most important comments of legal doctrine concerning the so called green pass see Benincasa G., Pigliararmi G., *Green Pass e rapporti di lavoro*, in *WP Salus*, 7, 2021; Ingraio A., *Pandemia, protezione dei dati personali, accertamenti sanitari, vaccini, green pass e dintorni*, in *Lavoro Diritti Europa*, 3, 2021; Emiliani S.P., *Obblighi di sicurezza e pericoli derivanti dalla presenza sul luogo di lavoro di persone prive di ‘Green Pass’*, in *Lavoro Diritti Europa*, 4, 2021; Iervolino P., *Spigolature sul Green Pass per i luoghi di lavoro*, in *Labor*, September 29, 2021.

⁴⁸ This is the opinion expressed by Mattei A., nt. (5), 28.

⁴⁹ According to T.A.R. Lazio, September 2, 2021, n. 4531 in *giustizia-amministrativa.it*, the right of the employee to avoid the vaccination is in any case recognized by the legislator who introduced the green pass as the law alternatively provides for the production of a rapid molecular or antigenic test with a negative result for the Sars-Cov 2 virus as an alternative of the certificate proving the vaccination, respecting in this way the right of the employee not to undergo vaccination. For a comment of this decision see Zappia T., *Green pass non è sinonimo di obbligo di vaccinarsi*, in *Il Giuslavorista*, November 22, 2021.

For this reason, in the light of the above considerations, it must be considered that, apart from the cases in which the vaccination obligation is provided for by law, the employer may not impose the vaccine on employees as a safety measure. The inoculation of the Covid-19 vaccine as a condition to work can derive only from the decision (adopted specifically, case by case) of the company doctor – and therefore in the field of the health surveillance – or from a specific provision of the anti-Covid protocols signed with the social bodies.⁵⁰

In the same way, the prudence and balance with which the legislator has introduced the vaccination obligation referred to in the law decree no. 44/2021 must be appreciated.

In fact, it is evident the strenuous will to limit individual freedom pursuant to art. 32 of the Italian Constitution to a minimum, restricting the scope of application of the obligation only to personnel working in sectors where the health of third parties must be protected (principle of solidarity); providing for the obligation to verify the possibility of assignment to other duties and, in any case, preserving the continuity of the employment relationship, which is not terminated but only suspended.

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⁵⁰ This opinion has been shared by Marazza M., nt. (3), according to which the legal reference of art. 29-*bis* law decree n. 23 of 2020, according to which “For the purposes of protecting against the risk of contagion from Covid-19, public and private employers fulfill the obligation referred to in Article 2087 of the Italian Civil Code by applying the provisions contained in the shared protocol regulating the measures to combat and contain the spread of Covid-19 in the workplace, signed on April 24, 2020 between the Government and the social partners, and subsequent amendments and additions” must be understood as a referral extended, in addition to the security measures expressly typified by the Protocol, also to those dynamically identified or identifiable in the necessary process of adapting the national Protocols to company contexts. With the centrality of the role of the competent doctor, in compliance with the procedures provided for in the agreements (starting with the involvement of the company or territorial committee) and with the involvement of the subjects envisaged therein.

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