

CORONAVIRUS OVERCOMING THE DIFFICULTIES

ANTI SARS-CoV-2/COVID 19 VACCINE AT WORK

DE BERTI JACCHIA FRANCHINI FORLANI
STUDIO LEGALE

On April 1st, 2021 it entered into force Law Decree no. 44/2021 containing "*urgent measures in matter of anti SARS-Cov-2 vaccine, justice and public tenders, aimed at limiting the COVID-19 epidemic*" ("**Covid Decree**").

On April 6th, 2021 the Italian Government and the Trade Unions agreed upon a National Protocol for the setting up of workplace anti Covid-19 vaccine clinics ("**the Protocol on Workplace Vaccine Clinics**").

Both the Covid Decree and the Protocol on Workplace Vaccine Clinics drew a line within the debate as to the possibility for employers to enforce the anti Covid-19 vaccine on their employees.

In particular, the Covid Decree made anti Covid-19 vaccine compulsory for healthcare workers. Whereas, the Protocol on Onsite Vaccine Clinics set the rules for employers to offer on-site vaccinations to those employees who voluntarily decide to join the initiative.

Moreover, the Covid Decree put certain limits to the criminal liability of those healthcare workers who administer the anti Covid-19 vaccine.

The main provisions in this respect may be summarised as follows.

1. MANDATORY ANTI COVID-19 VACCINATION FOR HEALTHCARE WORKERS (Section 4 of the Covid Decree)

The anti Covid-19 vaccine is mandatory for "*healthcare workers and professionals discharging their duties in hospitals and other social structures both of the public and private sector, as well as in pharmacies and private medical offices*", unless the vaccine may result detrimental for their health, such risk to be certified and attested.

A failure of health-care workers to undergo the vaccine may result in their being prevented from discharging duties implying a contact with the public or in general the risk to spread the infection. This "*until the health workers concerned undertake vaccination or, failing that, until the national vaccination campaign is completed and, in any case, no later than December 31st, 2021*".

In this case, the employer may assign such workers duties other (and even lower) than those generally assigned to them provided that such new duties do not imply the risk of spreading the virus. The workers concerned would be entitled to the remuneration corresponding to such new duties (i.e. even to a lower remuneration). If there are no compatible duties, the employer may suspend those workers refusing to undertake the vaccine without them being entitled to any remuneration.

Those healthcare workers who are exempted from the obligation to undergo the vaccine (see above) may be required to work from remote or, if such pattern is not compatible with their tasks, they may be assigned duties other (and even lower) than those generally assigned to them. In such case, however, the workers concerned would be entitled to their normal remuneration.

2. CRIMINAL LIABILITY OF HEALTHCARE WORKERS ADMINISTERING THE ANTI COVID-19 VACCINE (Section 3 of the Covid Decree)

Those healthcare workers who are in charge of administering the anti Covid-19 vaccine may not be convicted of medical manslaughter or personal injuries for facts occurred in connection with the administration of the anti Covid-19 vaccine provided that in doing so they complied with all the guidelines and recommendations of the competent Health Authorities.

However, healthcare workers could be found liable from a civil law standpoint.

3. PROTOCOL ON WORKPLACE VACCINE CLINICS

The Protocol on Workplace Vaccine Clinics aims at involving employers in carrying out the vaccination campaign both in order to speed it up and to "*increase the level of safety in the workplaces*".

In particular, according to the Protocol employers may cooperate in two different ways.

3.1 WORKPLACE VACCINE CLINICS

Employers, even organised in groups, may develop and implement **a plan for the setting up of an on-site vaccine clinic.**

- the **plan** is to be drafted: **(i)** taking into consideration the specific features of each working environment; **and (ii)** in compliance with the requirements set by the competent Authorities. To this end, employers have to consult with the Company Doctor and with the other key actors of health and safety and Covid-19 prevention at work;
- the plan is then to be proposed to the local Health Authority specifying the number of vaccines to order based on the number of employees who voluntarily applied for receiving the vaccination.
- all workers discharging their duties in favour of the employer, regardless of their type of contract, who voluntarily joined the initiative as well as the employer itself **may receive the vaccination.**

- the **application procedure for workers** to join the initiative must ensure the confidentiality and security of the information collected and must be structured so as to avoid any form of discrimination.
- the **costs** for the implementation of the plan, including the costs for the administration of the vaccines, will be borne by the employer. Whereas, the supply of the vaccines and of the devices for their administration will be at the expense of the competent Regional Health Authorities.

3.2 AGREEMENT WITH PRIVATE MEDICAL CENTER/ INAIL

As an alternative, employers may **enter into an agreement with a private medical center to offer vaccinations to their workers**. The costs connected with such agreement will have to be borne by the employers.

If an employer is not under a legal duty to appoint a Company Doctor or if it is not entitled to enter into an agreement with a private medical center, it may enter into a like agreement with the Italian National Institute for Workers Compensation and Industrial Accidents Insurance (in Italian "**INAIL**"). In this case, relevant costs will be borne by INAIL.

4. CONCLUSIONS

There is still a pending question: indeed, the above provisions do not address the issue of the employee who does not fall within the definition of healthcare worker and refuses to undergo the anti Covid-19 vaccine.

In our opinion, the fact that the Protocol on Workplace Vaccine Clinics clearly indicates the voluntary nature of the Covid-19 vaccine for the above employees does not prevent employers from giving access to the workplace to those employees only who accept to be vaccinated.

In fact, Sect. 2087 of the Italian Civil Code mandates employers to adopt any and all measures that "*are appropriate to protect the physical integrity and the moral personality of its employees, taking into consideration the nature of the activities discharged and the current level of knowledge and technique*" and anti Covid-19 vaccine may be considered as one of these measures.

Under certain circumstance, *eg* if the Company Doctor suggests that anti Covid-19 vaccine is to be considered as a measure necessary for the protection of all employees or some of them only, the employer may suspend from working those employees who elect not to undergo the vaccine without them being entitled to any remuneration.

April 27th, 2021


Il presente articolo ha esclusivamente finalità informative e non costituisce parere legale.


This article is exclusively for information purposes, and should not be considered as legal advice.




Guido Callegari

PARTNER

 g.callegari@dejalex.com

 +39 02 72554.1

 Via San Paolo 7
20121 - Milano




Gaspare Roma

PARTNER

 g.roma@dejalex.com

 +39 02 72554.1


 Via San Paolo 7
20121 - Milano




Isabella Basilico

ASSOCIATE

 i.basilico@dejalex.com

 +39 02 72554.1

 Via San Paolo 7
20121 - Milano

MILANO

Via San Paolo, 7 · 20121 Milano, Italia
T. +39 02 72554.1 · F. +39 02 72554.400
milan@dejalex.com

ROMA

Via Vincenzo Bellini, 24 · 00198 Roma, Italia
T. +39 06 809154.1 · F. +39 06 809154.44
rome@dejalex.com

BRUXELLES

Chaussée de La Hulpe 187 · 1170 Bruxelles, Belgique
T. +32 (0)26455670 · F. +32 (0)27420138
brussels@dejalex.com

MOSCOW

UlitsaBolshayaOrdynka 37/4 · 119017, Moscow, Russia
T. +7 495 792 54 92 · F. +7 495 792 54 93
moscow@dejalex.com