THE PANDEMIC IN ITALY: FROM RED (AREAS FOR QUARANTINE) TO GREEN (PASS FOR VACCINATED WORKERS)

Vincenzo Ferrante[1]

INTRODUCTION

At the beginning of 2020, the COVID virus was thought to be a novelty born in China but spread around the world by the Italians, like spaghetti. Joking aside, Italy was the first country in Europe to call a halt to commercial flights between China and Italy, to identify an outbreak of the disease, and to have experienced a total lockdown from March 9, 2020.

The presence of the COVID-19 virus was first recorded in Italy on February 21, 2020, with a few cases in a small city near Milan. None of the patients had recently visited China. In the following days, more than sixty people fell ill. Identifying the Sars Covid 19 virus was easy because on February 1, 2020 virologists at the Spallanzani Institute in Rome had sequenced its genome after two Chinese tourists had been hospitalized in Italy. On February 27, after two further cases in the small town of Vò near Padua, the Veneto health authorities ordered all residents to be tested. This meant it was possible to launch an epidemiological study, which in the months to come proved to be important in the battle against the disease.

By March 2, 2020, there was at least one infected patient in every region of Italy, and at that point, it became clear that the virus had already been circulating in Italy since December 2019, well before it had been discovered in Lombardy and the Veneto. The decision to call a halt to all work except for essential services was inevitable at that point because it appeared to be the only way to stop the virus spreading.

Despite these measures, which were reintroduced in the winter of 2021–2021, the pandemic has been devastating (and it is still too early to judge its overall effects because at the time of writing, cases are still rising, some with fatal consequences, despite the fact that the disease has become less powerful). However, when contagion was at its peak, on April 18, 2021 there had been a total of 15.7 million cases and 161,687 deaths in the country. As

[1] Università Cattolica del S. Cuore di Milano, Italy.

at the same date, approximately 50 million people (84.08% of the total population of Italy) had been vaccinated against COVID-19, and 39 million people had received their second (booster) dose. This made Italy the sixth country in the European Union (EU) for the percentage fully vaccinated people.

Despite these figures, a significant number of workers and residents not only denied the existence of the pandemic, but also refused to accept the efficacy of the vaccination, believing that it was still being tested and that their refusal was totally justified, as they did not want to be used as guinea pigs. In many cases the courts followed up these protests, either (in very few cases) ruling that employers had to pay people who were not at work, or (more justly) questioning the legitimacy before the Constitutional Court of the laws that required people to have a "green pass" in order to access their place of work, public transport, and any public areas.

Recently, as discussed in more detail below, the Constitutional Court has confirmed that the regulations applied to doctors, nurses, and all other providers of essential services (such as food production, transport, energy, etc.) were wholly legal. However, it has not ruled on Parliament's right to impose a country-wide vaccination campaign (as is the case for the vaccination of children under six against diphtheria, tetanus, and whooping cough).

In actual fact, the Italian Constitution of 1947, which solemnly proclaims that health is an individual's right, but also an interest of the community as a whole, [2] undoubtedly covers mandatory vaccination, establishing a solid and precise legal foundation for the possibility that, for health reasons, individual freedoms may be temporarily restricted or suspended.[3]

However, as in all other legal systems, the issue was not solely one of the individual freedoms, but also of employment, because, in a situation in which the entire population was in quarantine, work was the main source of contagion. In the absence of specific instructions from the Government in this regard, it was left to companies and trade unions to work together to identify the most suitable measures for preventing transmission of the virus and thus protect everyone's health.

However, in order to comprehend the adaptations required of the individual and collective organisation of employment relationships due to the

2. Art. 32 COSTITUZIONE [COST.] (It.): "The Republic safeguards health as a fundamental right of the individual and as a collective interest, and guarantees free medical care to the indigent. // No one may be obliged to undergo any given health treatment except under the provisions of the law. The law cannot under any circumstances violate the limits imposed by respect for the human person".

3. It should be noted that the Constitution of the Kingdom of the Two Sicilies, created in Palermo in 1812, stated that it was mandatory to be vaccinated against smallpox in order to apply for public offices, with the provision under Heading XI of the part dedicated to "freedoms, rights and duties of the citizen".

pandemic, we first need to describe the Italian legal framework governing health and safety at work and the role of workers' representatives in the system (see paragraphs 2 to 4). This is based on a system of principles shared by all EU countries, as it is the product of the transposition since 1980 of a large number of directives.

2. WORKERS' HEALTH PROTECTIONS IN THE ITALIAN LEGAL SYSTEM: GENERAL PRINCIPLES

The Italian legal system has contained a number of regulations to safeguard health for over a century, some of which have been incorporated into the Constitution. However, the transposition of Framework Directive 89/391/EEC brought about a profound changed in approach. The system moved from one based on compensation obligations, due to the mandatory requirement to insure against accidents at work first introduced in 1898, to a model requiring specific risk assessment, prevention, and individual employee training.[4]

In fact, in addition to the aforementioned article 32, immediately after solemnly proclaiming the freedom to exercise *private-sector economic initiative*, the Italian Constitution adds that this "*cannot be conducted in conflict with social usefulness or in such a manner that could damage health, the environment, safety, liberty, and human dignity*" (article 41, paragraphs 1 and 2 of the Constitution)[5] As a result, health and safety in the workplace are a precise condition for carrying on production activities, as freedom of enterprise cannot be called upon to justify organizational choices that could comprise the physical and mental health of workers.

Constitutional case law has repeatedly declared that this is a primary, absolute, and unquestionable right, even though it may be weighed up alongside other values protected by the Constitution[6] The provisions of the law safeguard a multitude of subjective situations affecting the individual, such as (i) the (negative) expectation that third parties must abstain from behavior detrimental to their health (*neminem laedere*); (ii) the positive expectation that "the Republic" should put in place an apparatus and means

4. For a general overview of the Italian legal system on health and safety issues, see LUIGI MONTUSCHI, LA NUOVA SICUREZZA SUL LAVORO (2011); FRANCESCA MALZANI, AMBIENTE DI LAVORO E TUTELA DELLA PERSONA. DIRITTI E RIMEDI (2014); PAOLA BELLOCCHI (edited by), LA SICUREZZA NEI LUOGHI DI LAVORO E IL JOBS ACT, (2016); MARCO LAI, IL DIRITTO DELLA SICUREZZA SUL LAVORO TRA CONFERME E SVILUPPI 3 (2017), Luigi Menghini, L'evoluzione degli strumenti giuridici volti a favorire l'effettività della prevenzione, DIRITTO DELLA SICUREZZA SUL LAVORO, 2017/2; PAOLO PASCUCCI ET AA., LA TUTELA DELLA SALUTE E DELLA SICUREZZA SUL LAVORO (2017); GAETANO NATULLO, AMBIENTE DI LAVORO E TUTELA DELLA SALUTE 2 (2021).

5. The limitations of health and the environment are recent additions (see Const. Act no. 1/2022): specifying concepts that could already come under the umbrella of safety.

6. *See* Italian Constitutional Court judg. no. 365/1983 and no. 309/1999.

of treatment necessary to ensure appropriate care for all, free of charge to the poor; (iii) the (negative) expectation that they should not be forced to receive healthcare, except for mandatory treatment for the purpose of safeguarding the community.

In accordance with the provision of article 2 of the Constitution, according to which the Italian Republic "*recognizes and guarantees the inviolable rights of the person, as an individual and in the social groups where human personality is expressed*," the right to health is safeguarded not only as the right to physical and mental health, but also, in a broader sense, as the right to a healthy environment.

In the Italian legal system legal principle is established by article 2087 of the 1942 civil code, which required entrepreneurs to "*adopt in the conducting of their business the measures that, according to the specific nature of the work, experience and methods, are necessary to safeguard the physical safety and moral personality of their workers*." This sets out a very exacting "safety obligation" with regard both to the diligence required, which applies regardless of the size of the enterprise, and the places safeguarded.

In other words, article 2087 of the civil code obliges employers to achieve a specific result, ensuring that workers can go home at the end of their working day in the same condition in which they arrived at their factory or office. This particularly broad formulation of the situation which workers have the right to enjoy has enabled case law to adapt the rule, without making any formal changes, to the well-known definition of the World Health Organisation (WHO), according to which health is not merely the absence of disease or infirmity, but is a "state of complete physical, mental and social well-being." In fact, the regulation has not needed any modifications to incorporate protection against issues that have attracted public attention in more recent years, such as sexual harassment, bullying or work-related stress.[7]

The rule is also applied when assessing criminal liability, for example in the case of manslaughter or personal injury. This means that case law, essentially following the common law model, is able to complete the technical rules of prevention which, inevitably, cannot foresee all the possibilities that could take place in everyday life[8] By identifying the well-being of workers as its goal, the safety requirement of the civil code thus compels enterprises, in accordance with the general principles of civil

7. Marco Peruzzi, *La Valutazione del Rischio da Stress Lavoro-Correlato ai sensi dell'art. 28 del D.Lgs. 81/2008*, 2 I WORKING PAPERS DI OLYMPUS (2011); ROBERTA NUNIN, LA PREVENZIONE DELLO STRESS LAVORO-CORRELATO. PROFILI NORMATIVI E RESPONSABILITÀ DEL DATORE DI LAVORO (2012).

8. GAETANO NATULLO, LA TUTELA DELL'AMBIENTE DI LAVORO 23 (1995).

liability, to find the best solutions to ensure that they safeguard the health and safety of their workers (again, see paragraph 3 below).

It should therefore come as no surprise that, with a law modeled on the German system of social security that has remained essentially unchanged for more than a century, enterprises have been required to insure their employees with an entity specially created by law (INAIL[9]), thus resulting in an entirely public system.

As the European Court of Justice has noted[10], this Institute cannot be considered as an enterprise (which would be subject to the ban on public monopolies), because the amount of the premiums employers are required to pay is not correlated to the probability of an accident taking place (like in the case of private insurance). In other words, as regards the individual worker, there is no link between the premiums to be paid and the money needed to pay claims. This is because, despite being calculated in relation to different classes of risk, the premiums are correlated to the pay of the individual workers, according to a principle of solidarity, which means that those with the most means pay the more and which avoids the risk of adverse selection.

The employer is solely responsible for paying the premium, and the law recognizes the rights of those who are insured (or contract an occupational disease) to receive a monthly payment until they are fully recovered or, in the event of permanent disability, for the rest of their life (and if married, until their spouse dies). However, the payments can be modest, because full compensation is not guaranteed. Rather it is a payout calculated in a standardised way based on the severity of the permanent disability and the worker's average salary.

Whereas initially it was thought that the monthly payment from the public institute exonerated entrepreneurs from the obligation to pay compensation, over the last decades case law has established that the payments do not offset the rights of workers that have suffered damages to obtain full compensation. The part not met by the payments made by the Institute now falls entirely to the enterprises (which sometimes take out a second insurance policy with private companies, to avoid having to meet "differential" compensation costs, which can often be high).

It should also be noted that, in the event that an accident is the result of negligence on the part of an employer who is then convicted in a criminal court, the Institute has the right to ask the enterprise to repay what it has paid the worker (or presumably will pay them in the future). This means the

9. INAIL, Istituto Nazionale per l'Assicurazione contro gli Infortuni sul Lavoro (National Institute for Insurance against Accidents at Work).

10. See case C-218/00, *CISAL c. INAIL,* E.C.J. judg. of 22 January 2002; see also Stefano Giubboni, *L'assicurazione contro gli Infortuni sul Lavoro e le Malattie Professionali nel Prisma della Costituzione Economica dell'Unione Europea*, 3 RIVISTA DEGLI INFORTUNI E DELLE MALATTIE PROFESSIONALI (2015).

enterprise is required to pay the damages in full and cannot derive any benefit from the payment made to the injured party directly by the public insurance body.

To conclude this general description of the system, it should be noted that the Constitution has recently been amended (Constitutional Law 3/2001) to encourage a general decentralization of legislative and administrative responsibilities towards the twenty Regions into which Italy is divided (Italy has a population of just under 60 million). This means that "*job protection and safety*" (article 117, paragraph 3 of the Constitution) is the joint responsibility of the State and the Regions[11] However, it is difficult to understand exactly what role the latter might play, given that central legislative power is in any case responsible for ensuring that fundamental constitutional rights are safeguarded, and these require standard application throughout the country (article 117, paragraph 2, letters *e* and *m* of the Constitution).[12]

It is no coincidence that in more recent years Parliament amended the Constitution to return this issue to the exclusive legislative competence of the State, due also to the standard nature of criminal law, which acts as a guarantee for compliance with all laws on safety,[13] and to the need to ensure the proper transposition of the many European safety directives applicable in EU countries[14] However, this amendment was rejected in 2016 following a referendum called to approve a wide-ranging amendment of the Constitution (which included this provision). In reality, despite the fact that the text of the Constitution has remained unchanged, the Regions play a pretty modest role, mainly concerning employee training.

The system is completed by a supervisory function that has been reorganized and reinforced in recent years with the establishment of a single national agency (the "National Labour Inspectorate: INL"). In 2021 alone the agency hired more than two thousand new inspectors. Inspectors are responsible for checking compliance with the law on construction sites, in companies and in any other workplace. Transgressions are punished by fines and, in more serious cases, inspectors can close the workplace and report to the judicial authority responsible for carrying out criminal investigations.

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11. According to the COSTITUZIONE [COST.] (It.) (Italian Constitution), "the State has exclusive legislative powers" in certain subject matters; on the contrary "concurring legislation" applies to … job protection and safety".

12. On this topic, see GAETANO NATULLO, AMBIENTE DI LAVORO E TUTELA DELLA SALUTE (2021).

13. MARCO LAI, FLESSIBILITÀ' E SICUREZZA DEL LAVORO 218 (2006).

14. According to the COSTITUZIONE [COST.] (It.), "the Regions and autonomous provinces […] take part in preparatory decision making process of EU legislative acts in the areas that fall within their responsibilities. They are also responsible for the implementation of international agreements and EU measures, subject to the rules set out in State law which regulate the exercise of subsidiary powers by the State in the case of non-performance by the Regions and autonomous provinces" (art. 117, paragraphs 5 and 6 of the Constitution).

3. FROM COMPENSATION TO PREVENTION.

Early on, the provisions of the civil code were supplemented by a detailed series of "technical" regulations[15] (setting requirements such as the height, cubic meters and surface area of workplaces, minimum standards for lighting, humidity and air circulation, and technical requirements for staircases, parapets, etc.). Breach of these regulations leads to fines and criminal penalties even in the absence of harm to workers' health. Even where there have been no victims, particularly serious cases can lead to criminal sentences for the employers and their staff.

This change to the civil code dates back to the mid-1950s. As a result, the purely compensatory logic began to be abandoned in favor of effective prevention of harm to workers' health. However, it was not until almost four decades later that prevention became a central rule governing individual employment relationships.

In fact, thanks to the changes brought about by the Single European Act (SEA) of 1987 to the Treaty establishing the European Community, attention was shifted from the moment in which the safety obligation was breached to the logically earlier moment of compliance, for which the employer is responsible. The concept of prevention thus became central to the entire legal system.

It is common knowledge that the interest of the European Community (as it was at the time) is not only due to the importance of the issue itself (and the impact of safety requirements on the final price of goods exchanged within the single European market), but also due to the fact that approval of the SEA had identified an area in which directives could be adopted by a qualified majority. This overcame British Prime Minister Thatcher's opposition to the expansion of European powers, which thirty years later resulted in Brexit.

In this sense, the addition of article 118A to the Treaty of Rome (see now article 153 of the TFEU) can be considered a milestone, because from then onwards the production of European regulations governing occupational health and safety intensified[16] This "new" judicial basis led to the adoption of numerous directives aiming to require Member States to comply with "minimum requirements" for improving workplaces.

Thus, following the Framework Directive 89/391/EEC of 12 June 1989, "*on the introduction of measures to encourage improvements in the safety and health of workers at work,*" the legal systems of the individual European

15. See Decreto Presidente della Repubblica [D.P.R.] (Presidential Decree) 547/1955, 164/1956, 302 & 303/1956.

16. On this point, ROCCELLA M., TREU T., DIRITTO DEL LAVORO DELL'UNIONE EUROPEA 355 (2019), also for more references to the action of the Community up to 1987. STEFANIA BUOSO, PRINCIPIO DI PREVENZIONE E SICUREZZA SUL LAVORO 30-34 (2020).

Union member states were considerably expanded and gradually harmonized. This initial directive was followed by various directives belonging to the same "family," which aimed to regulate specific aspects of production by means of "minimum requirements," which the individual Member States have been required to transpose to their own legal systems by means of domestic law. It should also be noted in this regard that the European Court of Justice has repeatedly stated that the requirements, which aim to dictate minimum forms of protection, allow Member States to adopt stricter rules than those of the European directives.[17]

In this context, given that their responsibilities are of a contractual nature, Italian employers must, therefore take action to put in place the measures required to safeguard workers' health and safety. As already mentioned above, they must do so by adopting all the necessary measures according to the "*specific nature of the work,*" "*experience,*" and "*methods*" in accordance with a formula recently confirmed by the law, when all the main provisions on occupational health and safety were consolidated in legislative decree n. 81/2008 (a detailed Act which represents a sort of "code" on health and safety in the workplace). [18]

As a result, the safety measures employers are required to adopt are not only those expressly set out in special legislation or specific ("named") administrative requirements but also those deemed reasonable and necessary according to the safety standards ordinarily complied with and generally practiced, the efficacy of which is an acquired fact from the current state of science and methods, and that comply with professional diligence ("unnamed" measures)[19] The limitations of the predictability of damage remain, as it is unanimously agreed that article 2087 of the civil code does not constitute "objective" liability of the employer. In other words, to use the language of case law, the provisions of the civil code

> "cannot imply the requirement of an absolute obligation to take every possible and unnamed direct precaution to avoid any damage, with the consequence that an employer is held liable every time damage *has occurred*. Instead, the event must always be relatable *to their liability*, due to breaches of conduct required by law-based regulations or those suggested by working methods, but practically identified."[20]

17. See Case C-84/94, United Kingdom v. Council,1996, E.C.J. On Directive 89/391/EEC, see on this topic Edoardo Ales, in INTERNATIONAL AND EUROPEAN LABOR LAW ARTICLE-BY-ARTICLE COMMENTARY 1210 (Edoardo Ales, et al eds. 2018).

18. See in this regard art. 2, para. 1, letter *n* of legislative decree 81/2008.

19. See Corte di Cassazione (Cass.) (Court of Cassation) judg. no. 12445/2006.

20. See further, Cass. judg. 8710/2007 and more recently, Cass. 11546/2020 (italics added).

According to the prevailing opinion, the "specific nature of the work" is a concept that refers to the practical methods of organizing work within a company and the type of production cycle of individual enterprises, while "experience" and "methods" refer to external parameters of a general nature on which employers must base their preventive action.[21] In particular, the criterion of experience required the employer to adopt protective measures that have already proven to be effective, based on events that have already happened and dangers that have already been assessed, not only in their own company but in other companies with the same safety issues.[22] Finally, the reference to methods requires employers to constantly adapt their health and safety mechanisms to progress in science and technology.[23]

Since the regulatory system first came into being, this last parameter has raised the delicate question of the precise scope of the employer's safety obligation. In this regard the principle best guaranteeing the "*maximum safety technologically possible*" has become consolidated. According to this principle, the obligation to adopt all the measures necessary under the provisions of the civil code extends to the limit represented by their "technological feasibility." In practical terms, this principle has translated into two basic lending criteria. On the one hand, the employer is required to constantly update their preventive measures, taking into account any new technical and scientific advances. On the other, this obligation cannot be avoided due to any economic or organizational reasons of the company.[24]

In this way, the employer's safety obligations could not be adapted to the company's economic and organizational needs or to the number of its employees (this would be the criterion of the "*maximum safety reasonably practicable*").

However, understanding the scope of "technological feasibility" is not a straightforward matter; the Constitutional Court has pronounced on the issue, stating the need to considerably restrict discretion in the interpretation of provisions that may constitute criminal law. It has specified that "when the legislator talks about "*practically implementable*" measures, they are referring to measures which, in the various industries and types of processing, are "*generally practiced technological applications*" and generally accepted expedients. Therefore, only employers, whose conduct deviated from the safety standards, in practical terms accepted in the various production

21. MARCO LAI, IL DIRITTO DELLA SICUREZZA SUL LAVORO TRA CONFERME E SVILUPPI 13 (2017).

22. CARLO SMURAGLIA, LA SICUREZZA DEL LAVORO E LA SUA TUTELA PENALE 85 (1974).

23. Thus Cass. judg. 10164/1994, according to which "the employer must base their conduct on the acquisitions of the best science and experience to ensure that the worker is placed in a position to be able to work in absolute safety".

24. See, among many, Criminal Court of Cassation judg. no. 108/1993, according to which "the possibility of measures is not conditional on economic factors, or at the mere discretion of the employer, but on the real needs for protection and the effective prevention offered by the technical instruments".

activities, may be censured in criminal terms. The judge must, therefore, ascertain "not so much whether a given measure is included in the corpus of experience in the various fields, but whether it has been incorporated into the standards of industrial production, or specifically prohibited."[25]

With these terms, the Constitutional Court seems to refer to the measures generally practised or accepted in the specific industry concerned. However, in subsequent case law the principle has been interpreted in the sense of making the adoption of the best available technology on the market mandatory, regardless of its application in the industry to which the company belongs.

4. HEALTH AS AN INDIVIDUAL RIGHT AND COLLECTIVE INTEREST. THE ROLE OF WORKERS' REPRESENTATIVES

To return to the Constitution, article 32 safeguards health not only as an individual right, but also as a "*collective interest,*" and therefore this interest belongs both to the population as a whole (and is safeguarded by the public supervisory offices), as well as to specific groups of people brought together by the fact that they are responsible for processing functions in which they work side by side. This uses the concept of "risk community" as an element that brings together a group of people exposed to the same danger of being involved in a common accident[26] It is the basis for the right of workers recognized by article 9 of the "Workers' Statute" (Law 300/1970) to monitor the application of health and safety regulations by means of their representatives and to promote the research into, development and implementation of all the appropriate measures to safeguard their health.[27]

Despite its importance, this provision has undoubtedly remained in the background in the context of the plan for reform and innovation contained in the "Workers' Statute." This is because the simultaneous introduction of general representation for workers deprived it of meaning, assigning to the works councils all direct roles in limiting the power of company management. It is also due to the fact that the meaning of the provision has never been fully clarified, given the sweeping obligations already imposed on employers by the civil code.

Specifically, the right to monitor the application of health and safety regulations has been perceived only as a right to access company premises, rarely requested in real life, despite the fact that its implementation has been

25. Cass. judg. no. 312/1996 (italics added).

26. FULVIO BIANCHI D'URSO, PROFILI GIURIDICI DELLA SICUREZZA NEI LUOGHI DI LAVORO 203 (1980); MARCO LAI, IL DIRITTO DELLA SICUREZZA SUL LAVORO TRA CONFERME E SVILUPPI 29 (2017).

27. See further, Luigi Menghini, *Le Rappresentanze dei Lavoratori per la Sicurezza: dall'art. 9 dello Statuto alla Prevenzione del Covid-19: Riaffiora una Nuova "Soggettività Operaia"?,* 1 DIRITTO DELLA SICUREZZA SUL LAVORO 3 (2021) https://journals.uniurb.it/index.php/dsl/article/view/2405.

guaranteed by the possibility of exercising the power to ask a judge for an injunction to do so, in line with the US Wagner Act model.

However, on the whole, it is clear that the provision has rarely been implemented, and hardly any workers' representatives permitted by article 9 of the Workers' Statute have been appointed. In fact, in smaller enterprises, where the "statute" did not include the right for employees to choose representatives, the workers had no control function at all.

This was to a certain extent, inevitable, given that the demanding provisions of the 1970 law, which allowed workers to promote safety by researching and developing appropriate means, had never been accompanied by widespread practical training. This would have helped workers (and their representatives) to develop the necessary technical skills to be able to carry out their tasks autonomously and independently.[28]

Furthermore, it is clear that a participatory role in the company's organization, assigned to the workers' representatives by law, was a long way from the traditionally "conflictual" relationships of the time, which made it difficult for workers to put themselves forward as interlocutors of the personnel managers in a constructive manner.

The reform of the issue resulting from the 1989 European directive (firstly with article 18 et seq. of legislative decree 626/1994, and since 2008 with articles 47 et seq. of legislative decree 81/2008) finally forced an awareness of the inadequacy of the vague formula provided for by the above-mentioned article 9 of the Statute. As a result of incorporating the European participatory spirit into the legal system more analytical regulations were introduced, identifying the specific powers of Workers' Health and Safety Representatives (articles 47-50 of legislative decree 81/2008), guaranteeing coordination with the more general company representatives (Works Councils) and so embracing the legacy of the representatives provided by the Workers' Statute.

Taking into account the small size of many Italian enterprises, which does not allow Works Councils to be set up by force of law, legislative decree 81/2008 added an "area" (or sector) representative and a "production site" representative to the figure of the company plant-level representative. The "area" representative is "a person elected or appointed to represent workers with respect to workplace health and safety" and is nominated from amongst its members by the trade union. Their role is to monitor relatively limited areas (such as small manufacturing, construction or agricultural enterprises in a given district). The "production site" representative is invested with all the work carried out in sites that bring together people from different

28. The Supreme Court has ruled out the possibility of including people from outside of the company in the representative body,but has allowed the possibility of consulting external advisors subject to a specific mandate from the workers. See Cass. judg. no. 6339/1980.

companies, temporarily (or also on a quasi-permanent basis) working side by side (in construction sites, logistics centers, ports, steel works, etc.).

In companies or production units the Health and Safety Representative (HSR) is "*normally*" directly elected by the workers[29] according to the methods and criteria established by collective bargaining (or, if none have been agreed, by ministerial decree[30]).

In companies with more than fifteen workers, where by law employees have the right to designate Works Councils, the Health and Safety Representative has to be elected or appointed by the workers within the Council members. Only if there is no such body, for whatever reason, they have to be elected directly by plant-level workers, according to the methods established by collective bargaining[31] This is a specific feature of the Italian legal system, which rules out the establishment of specific representatives specialized only in health and safety[32], thus imposing a close link with the workers' unions.

Legislative decree 81/2008 extends and specifies the tasks of HSRs, to be carried out according to methods established by national collective bargaining. It covered rights to information and consultation[33], with respect to risk assessment, the appointment of experts acting on behalf of the business owner and the organization of training. It also confirmed the right to access workplaces, and the power to monitor and take initiative in the development, identification, and implementation of preventive measures.[34]

The act recognized the representative's right to request a copy of the risk assessment document that every employer is required to adopt, and a copy of any official documents from the competent authorities following inspections or compliance requests (and in the event of on-site inspections, the representative is consulted). Representative is in any case required to comply with industrial secrecy regulations covering the information in any document of which they receive a copy, as well as any working processes they become aware of in the course of their duties.

It is important to point out that, even if the health and safety representative is required by law to inform the company about any risk

29. Unlike in the past, legislative decree 81/2008 no longer only referees to employees, but to "workers", in the broad sense referred to in art. 4 of the same decree. This means representatives could also be appointed from among workers who are not properly dependent employees or who are on short-term contracts: Paolo Pascucci & Silvano Costanzi, *Il Rappresentante dei Lavoratori per la Sicurezza nell'ordinamento Italiano*, I WORKING PAPERS DI OLYMPUS para. 3 (2010).

30. See art. 47, para. 3 and 48, para. 2 of legislative decree 81/2015.

31. See art. 47, paras 4 and 5 of legislative decree 81/2015.

32. See the 2018 Interconfederal Agreement, which rules out the possibility for the Health and Safety Representative to be a person external to the trade union/works council. It should be added that for more than twenty years all Works Councils have been elected from among all the workers in a production unit.

33. Art. 50 of legislative decree 81/2008.

34. See GAETANO NATULLO, AMBIENTE DI LAVORO E TUTELA DELLA SALUTE 79-80 (2021).

situations that come to their attention that have not already been mapped when the preventive risk assessment is carried out (article 50, letter *n*), their role does not include supervising and monitoring compliance with accident prevention regulations by the workers[35] Whereas this is not the case for experts working for the company (freely appointed by the owner and with the only requirement being effective technical skills). In fact, the Health and Safety Representatives are not subject to any criminal penalties, as they do not have any management and decision-making powers with respect to preventive measures. However, in order to safeguard the representative's autonomy, it is not possible to appoint people that work directly with the employer as health and safety experts (such as the manager or person in charge of the company accident prevention and safety protection service).[36]

It should be noted that, while the representative may call upon the powers of inspection of the relevant public authority (article 50, letter o), collective bargaining seems to have limited this ability, by requiring a prior joint examination of the issue, with the clear aim of taking measures to discourage this right being exercised.[37]

It is important to note here that, generally speaking, unions have always had the right to take legal action, either to ask for an injunction to ensure that individual and collective means of protection are brought into line with legal requirements, or in the criminal court, to request damages following an accident. However, on the whole such rights are rarely exercised, and only in particularly serious cases.

There are several reasons for such diffidence. Firstly, it must be recognized that until very recently (see above), the public authority had so few personnel that it was not always able to follow up on reports from the workers' organizations, even when the situations alleged were particularly serious (such as the widespread use of undeclared labor). Secondly, except in the case of sexual harassment, the Italian legal system does not have a form of proxy that allow unions officers to appear in lawsuits on behalf of their members. Therefore, a trade union only has the right to intervene in a court case when the rights safeguarded are its own, such as when there is an agreement by which the company undertakes to introduce specific measures, or (more frequently in real life) when the breaches of law are so systematic that the trade union considers its role as an association that acts to safeguard collective interests has been harmed.

35. LORENZO FANTINI & ANGELO GIULIANI, SALUTE E SICUREZZA NEI LUOGHI DI LAVORO 396 (2015).

36. Art. 50, para. 7, legislative decree no. 81/2008.

37. See Marco Lai, La tutela dell'ambiente di lavoro, in TIZIANO TREU (edited by) COMMENTARIO AL CONTRATTO COLLETTIVO DEI METALMECCANICI (2022), 201 ff.

In recent years, given the difficulties in disseminating and consolidating the forms of company representation for health and safety, the law has offered larger worker and company trade unions the option to set up "bilateral bodies"[38], to plan training and develop and collect good practice for accident prevention purposes and any other health and safety activity or function assigned to them by law or by the relevant collective bargaining agreements.[39]

Article 51 of legislative decree 81/2008 provides for their setting up throughout the country, and the recent introduction of paragraph 1-*bis* by Act 215/2021 requires the establishment of a national register[40] in order to avoid abuse and scams. In fact, findings have shown that this provision could be helpful in combating the spread of minor bodies which, especially in training, do not reflect effectively representative employer or trade union associations, genuinely focused on safeguarding workers' and companies' interests.[41]

The legal formula clearly shows that the role of these bodies is both collaborative and promotional [42] The legislator recognizes they as conciliators in (any) disputes arising over the application of rights of representation, information and training provided for by law, and as providers of training and support for the company in identifying technical and organizational solutions to guarantee and improve health and safety in the workplace.

The bilateral bodies may carry out inspections in the workplaces within the areas and industries assigned to them, providing they have personnel with specific technical expertise in occupational health and safety (article 51, paragraph 6). They may also issue certifications for support activities carried out, including a statement that the safety organization and management models referred to by the law have been adopted and effectively implemented. The public supervisory bodies may take into account this certification when planning their activities.[43]

To complete the overview of the Italian occupational health and safety system we should set out the risk assessment obligations for employers and

38. See art. 2, paragraph 1, letter ee and art. 51, legislative decree no. 81/2008.

39. Marco Lai, *Gli Organismi Paritetici*, in IL TESTO UNICO DELLA SALUTE E SICUREZZA SUL LAVORO DOPO IL CORRETTIVO 493 (Michele Tiraboschi & Lorenzo Fantini eds. 2009).

40. Having consulted the employers' associations and workers' trade unions that are the most representative for the industry nationwide.

41. See Marco Lai, *Le Novità in Materia di Salute e Sicurezza del Lavoro nella Legge n. 215/2021*, LAVORO DIRITTI EUROPA 9 (2022) https://www.lavorodirittieuropa.it/dottrina/sicurezza-e-ambiente-di-lavoro/945-le-novita-in-materia-di-salute-e-sicurezza-del-lavoro-nella-legge-n-215-2021.

42. On this point, see the findings of Chiara Lazzari, *Gli Organismi Paritetici nel Decreto Legislativo 9 Aprile 2008, n. 81*, 21 5 I WORKING PAPERS DI OLYMPUS 5 (2013).

43. In this regard, see Angelo Delogu, *L'asseverazione Dei Modelli di Organizzazione e di Gestione della Sicurezza sul Lavoro di cui all'art. 30 del D. Lgs. N. 81/2008: Analisi e Prospettive*, in *DSL*, 1/2018, p. 7 et seq. https://journals.uniurb.it/index.php/dsl/article/view/1793/1624; Paolo Pascucci, *L'asseverazione dei Modelli di Organizzazione e di Gestione*, 43 I WORKING PAPERS DI OLYMPUS (2015).

the experts that assist them in this task. The regulations are the same throughout the EU, and we will assume that the system for the self-assessment of risks is familiar to the reader. The following paragraph therefore, describes the changes brought about by the COVID-19 pandemic since early 2020.

5. THE ARRIVAL OF THE PANDEMIC. THE ROLE OF THE GOVERNMENT.

When observed from the specific point of legal sources, the pandemic poses delicate constitutional questions, because the risk of contagion led to a slowdown in normal institutional communication, focusing decision-making powers on the Government. Parliament remained inactive for quite some time, and then decided to continue its work only thanks to a smaller number of MPs present in the chamber, while respecting the principle of proportionality, which protected the party equilibriums established when the vote of confidence gave rise to the coalition Government in charge at the time.

In this sense, it should be noted first of all that the numerous measures adopted by Government acts (i.e. Prime Ministerial decrees: DPCMs), may be considered to have exercised the power to dictate "urgent" measures for reasons of health or danger to public safety, which is based in legal terms in the historic "Public Health Consolidated Act" of 1934[44] According to this, "having consulted the National Council of Health, the Health Minister decides with an administrative act which infectious and contagious diseases give rise to the adoption of the health measures and the measures applicable to each of them."[45]

In fact, Government decrees have always been adopted at the proposal of the Ministry of Health, and have served to dictate "measures", i.e. acts with specific content (rather than general content, as in the case of legal regulations in the strict sense), and have always been provisional or temporary.[46]

This guaranteed, to a certain extent, that the legal system was protected from changes dictated by the emergency. Meanwhile, the most important provisions, such as the ban on dismissing employees and the provision of

44. See the still applicable art. 253 of Royal Decree 1265 of July 27, 1934, designed specifically for epidemics (e.g. cholera).

45. We should also mention art. 261, according to which "when an infectious disease of an epidemic nature develops in the country, the Ministry of Health may issue social orders for houses to be visited and disinfected, for the organization of services and medical aid and for precautionary measures to avoid the spread of disease".

46. The resolution of the Council of Ministers of Jan. 31, 2020, based on the provisions of the "civil protection code" (article 24, legislative decree 1 of Jan. 2, 2018), declared "a state of emergency due to the health risk related to the emergence of disease caused by transmissible viral agents" for six months. The measure was referred to by all the subsequent decrees and only lifted on July 30, 2022.

almost universal financial benefits (also containing the budget appropriations) were adopted by means of emergency decrees. These inevitably involved the President (who had to signs the acts), and obviously Parliament (which was called upon to ratify the decree by means of a conversion law within sixty days of the decree being issued). It is, therefore evident that the Chamber and the Senate always provided full political and constitutional validation of the Government's action, albeit *a posteriori*.[47]

Closer examination of the provisions contained in the various decrees confirms that they were regulations to a certain extent also only limited to the indication of objectives, almost as if they were "guideline" acts for the country's entire body of administrative institutions. And due to this nature of the regulatory provisions, it was as if everything was turned upside down. In a situation of general contagion, as the virus had insinuated itself both inside and outside the workplace, enterprises and business organisations were the main vehicles of contagion, so by restricting contact between work colleagues, occupational health and safety ultimately adopted measures that in turn benefited workers' families and the entire Italian population.

With respect to the regulation of health and safety at the workplace, two serious actions appear to have followed the same sequence. However, in the first case the time interval between the single measures was very short due to the speed at which COVID-19 was spreading, while the second case covered a longer period of time and involved a number of interconnected sources cross-referencing each.

Above all, the lynch-pin was decree law 18 of March 17, 2020, which was converted into law 27 of April 24, 2020. This followed on from a previous government decree of March 11, 2020, which contained a series of measures to suspend commercial and professional business and identified the methods by which all activities indispensable for ensuring healthcare, mobility and the production of primary foodstuffs would be able to continue.

The "recommendation" was to work from home (known as "streamlined" or "smart working"), to take unused leave, to suspend work in company departments that were not indispensable to production, and to adopt "anti-contagion safety measures" agreed with the trade unions involving social distancing of one metre "as the main containment measure" and the adoption of personal protection devices.

This decree was followed shortly afterwards by the first "Shared Protocol" on safe working, applicable nationwide and signed at the invitation of the Government on March 14, 2020 by the three leading trade unions (and large numbers of business associations). In the main this replicated the same

47. Still useful to the considerations of this paragraph: COSTANTINO MORTATI, ISTITUZIONI DI DIRITTO PUBBLICO, VOL. II 712 (1976), on the declaration of a "state of public danger".

instructions, already contained in the aforementioned government decree and referred to above.

In fact the signatory organizations declared that they wanted to see a measure to implement the decree, where (at point 9) it called for agreement between the trade unions, establishing "shared guidelines between the Parties to encourage the adoption of anti-contagion safety measures in enterprises". The Protocol was followed by an *addendum* signed by the parties insisting on the need for a shared approach.

This sequence was repeated in April 2020. An initial government decree of April 10, 2020 confirming the suspension of business and expressly referring to the Trade Unions Protocol of March 14, (article 2, paragraph 10) was followed by a new Protocol, signed on April 24, by a larger number of business associations. This developed additional provisions concerning worker participation. It was followed by another government decree (DPCM of April 26) which not only referred to the signed agreement but actually attached the text to the decree (sub no. 6).

For a long time the Protocol was the only set of rules identifying the measures for continuing to work while limiting the risk of contagion. The only official state documents in this regard were the instructions issued by the aforementioned INAIL (the National Institute which not only acts as a sort of insurance company for occupational damages but also is in charge of the prevention of accidents at work) in circulars 13 and 22 of 2020) together with a check-list prepared by the INL (National Work Inspectorate) entirely modeled on the provisions of the shared Protocol of April 24, 2020. These are all administrative measures, because for a long time Parliament passed no laws at all.

The issues to discuss in the following paragraphs are, therefore the type and judicial value of the anti-contagion protocols signed by the social partners the responsibilities of employers with respect to the generic (exogenous) and specific (endogenous) risk of COVID-19 contagion. In addition to these issues, which emerged during the early stages of the emergency in 2020, another, hotly debated, issue emerged during the early days of the vaccination campaign in January 2021, about whether or not workers were legally required to be vaccinated against COVID-19 and the possible consequences in the event of their refusal.

6. THE ANTI-CONTAGION SAFETY MEASURES AGREED BY BUSINESS OWNERS AND WORKERS

Having agreed to the Government's broad guidelines, on March 14, 2020 the three leading trade unions (CGIL, CISL and UIL) together with all the main business associations, signed a Protocol. This was amended on

several occasions, to adapt its provisions to developments in transmission of the disease. It was last amended on June 30, 2022. By signing the Protocol, the parties aimed "*to provide up-to-date operational directions to guarantee the efficacy of the precautionary containment measures adopted to combat the COVID-19 epidemic in non-healthcare workplaces"*. For this purpose it indicated "*guidelines agreed by the Parties to assist companies in updating the anti-contagion safety measures*."

The approach adopted by the Protocol was inspired by a clear criterion of precaution, based on a logic of prudence, necessary due to the situation of scientific uncertainty about transmission of the disease and the negative consequence of COVID-19[48] This logic implied that, whenever the risk factors for people's health are unknown, "action by the public powers must translate into prevention in advance of consolidation of the scientific knowledge."[49]

The Protocol, which refers to the various measures adopted by the government, contains a list of hygiene and health provisions and organizational actions that employers are required to adopt within their companies in order to ensure "*adequate levels of protection.*" These comprise information for individual workers; the methods of entry into the company premises for employees and external contractors; air cleaning, sanitization and exchange; personal hygiene precautions; the provision of personal protection breathing equipment; management of shared spaces; management of employee entry and exit; treatment of symptomatic company personnel; health surveillance; and remote working—not just for "fragile" workers, i.e. those at risk of death from contagion due to existing bad health conditions.

In addition to these provisions, when the protocol was renewed on April 24, the signatories took as reference some of the elements initially contained in the protocol of March 14, and the subsequent *addendum*, and developed the participatory aspects, with the establishment of "Application and Monitoring Committees," i.e.:

(I) A *Company* Committee for applying and monitoring compliance with the rules of the protocol, with the joint involvement of Workers Councils and Health and Safety Representatives (thus correcting the model of legislative decree 81/2008, but in any case seemingly respecting the spirit thereof); or

(II) a *Local* Committee involving the "area" Health and Safety Representatives and bilateral bodies (and again, the collective indications do

48. Patrizia Tullini, *Tutela Della Salute Dei Lavoratori E Valutazione Del Rischio Biologico: Alcune Questioni Giuridiche*, 2 RIVISTA DI DIRITTO DELLA SICUREZZA SOCIALE 343 (2020). On this point, see also Paolo Pascucci, *Ancora su Coronavirus e Sicurezza sul Lavoro: Novità e Conferme nello Ius Superveniens*, 1 DIRITTO SIC. LAVORO 131 (2020), at: journals.uniurb.it/index.php/dsl/article/view/2193.

49. In this sense, Council of State, section III, judg. no. 6655/2019. See, among many, Council of State, section IV, judg. no. 5525/2014, and section V, judg. no. 2495/2015.

not seem to be far from the set-up of legislative decree 81/2008, with, as stated above, the issue being essentially the responsibility of these bilateral bodies for businesses with fewer than fifteen employees);

(III) Committees involving local health public authorities and the other institutional bodies.

This last provision appears to propose an innovative solution in that it seemingly restricts the power of the INAIL or the local health authority (unless adequately justified) to adopt subsequent specific measures not in line with instructions previously issued by the Committee (which remains a private entity). In practice, no committees of this third type appear to have been set up, so it appears that the provision has not been implemented in practice.

The Protocol contains measures that are the result of dynamic, not static indications, [50] leaving broad margins of discretion, [51] as they may be integrated by the employer with measures that are "*equivalent or stricter"* (taking into account the way the company is organized and developments in the pandemic)[52]. Many of the technical regulations jointly provided by the Protocol that aim to reduce the risk of contagion appear to mirror and confirm the indications of the INAIL. Both sources suggest changing the way work is organized by adopting "differential working hours to promote social distancing" by using remote working and by providing incentives for commuters to travel using private means, as a preventive measure against contagion.[53]

As the indications provided by the INAIL already consolidated a rule requiring prudential behaviour based on the safety obligation set out in article 2087 of the civil code, which aimed to identify the diligence required of employers, we must conclude that the significance of the Protocol lies above all in the agreement between the parties. It was a means of sharing the necessary measures for preventing contagion and contains the commitment of all the parties to comply with the rules that have been identified as those most able to safeguard everyone's health. It also served to provide authoritative guidelines and to combat people's confusion and scepticisms towards the (not always unequivocal) indications from medical science by means of the press and the media.

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50. Arturo Maresca, *Il Rischio di Contagio da COVID-19 nei Luoghi di Lavoro*, 2 DIRITTO DELLA SICUREZZA SUL LAVORO 4 (2020); Marco Marazza, *L'art. 2087 c.c. nella pandemia COVID-19 (e oltre)*, in 2 RIVISTA ITALIANA DI DIRITTO DEL LAVORO 270 (2020).

51. In this regard, Vincenzo MONGILLO, *Salute e Sicurezza nei Luoghi di Lavoro in Tempi di Pandemia*, GIUGNO (2020), DIRITTO PENALE CONTEMPORANEO, at sistemapenale.it/it/articolo/mongillo-salute-sicurezza-lavoro-pandemia-responsabilita-individuo-ed-ente-covid-19.

52. See the version of the shared Protocol of June 30, 2022.

53. In this regard, see Mario Napoli, *Congedi Parentali, Formativi e Tempi delle Città*, NUOVE LEGGI CIVILI COMMENTATE 1236 (2001).

In this sense, the Protocol appears to comply in full with the provisions of legislative decree 81/2008, which require individual monitoring and regular check-ups for workers. These make it mandatory to take into account the subjective conditions of the individual in question, i.e. whether they are able to carry out their specific job (article 42), and when to take "regular breaks" if their work lasts more than six hours a day.

t is important to note that the Protocol does not contain any truly innovative provisions affecting company management rights, which would have been the case had it been necessary to adapt working organization to employees' individual needs, taking into account the highly unusual situation of constraint in which everyone was forced to live.

Beyond what has been said above with respect to the goal of moral suasion, the legal value of the Protocol is not fully clear. It is undoubtedly a document that, unlike other collective agreements, was highly publicized. This is because, as mentioned above, the updated version was signed on April 24. was not only expressly referred to in the government decree (DPCM) of April 26, but attached to it in the Official Journal, which publishes all the official acts issued by the public authorities and in the last fifty years had never published a trade union agreement. It is also important to note that the government decree was of a temporary nature, and has since expired and that the subsequent updates to the Protocol were not so widely publicized.

What is certain is that the fact that the Protocol was attached to the Prime Ministerial Decree of April 26, 2020, gives it the value of an act that completes the decree. It thus took on the value of a measure to be enforced by the administration. Proof of this lies in the fact that if an authority confirms that it has been breached it must suspend the illegal business activity (see article 2, paragraph 6 of the Prime Ministerial Decree) until the conditions for preventing the risk of contagion have been restored. In this sense, the Protocol can be said to have efficacy *erga omnes*, as if it identifies in practical terms the rules of diligence that everyone is required to comply with. The mechanism is comparable to that on which the Constitutional Court had previously issued a judgment on. In that case, the court was asked to examine collective agreements identifying indispensable services within the context of the law on strikes affecting essential public services that also apply to workers not belonging to the trade unions that signed the agreement. The Court found that this was compatible with the constitutional rules on trade union freedom.[54]

Therefore, when the government measure lapsed due to changes in public health conditions, this did not affect the Protocol, which still applies

54. *See* Italian Constitutional Court judg. Oct. 18, 1996, no. 344.

to the signatories as it is an agreement that determines the obligations between individual and collective parties.

The model of legislative decree 81/2008 (and the 1989 directive before that) was therefore partially modified, because the trade union came to play a direct role. However, this adjustment can be explained by the authoritative nature of the parties that signed it (the national secretaries of the three leading trade unions) as well as the need to take urgent steps and, ultimately, because the principles do not apply to a specific production cycle and consequently can tolerate solutions that are to a certain extent standard across all types of private or public production.[55]

Employers wishing to continue to operate are therefore required to comply closely with the provisions of the Protocol, without prejudice to the power to adapt them, especially where the participatory measures mentioned above have been implemented. A more detailed examination of these follows below.

Some have interpreted these participatory provisions as measures designed to revive the participatory project referred to in article 46 of the Constitution. Actually, despite the fact that the Committee can also manage timesheets and "smart" working, the issue open to joint consultation does not seem capable of launching a period of shared organization such as that of the *Mitbestimmung* committees in the German legal system (which, not by chance, are separate from the special bodies working in the specific area of health and safety[56]).

In truth it could be said that joint management focuses on the organisation of the business, and issues such as hours, shifts, tasks and above all salary, whereas health protection takes the form of individual rights that the employer is required to protect, based on a principle of "unavailability" (which means that some fundamental rights cannot be matter of waiver, exchange or agreement under any circumstances[57]). This type of constraint leaves little room for the negotiation of management powers which, on the

55. The first version of the Protocol already states that: "COVID-19 is a generic biological risk for which uniform measures must be adopted for the whole population. This Protocol therefore also contain measures that apply the logic of precaution and comply with and implement the provisions of law and indications of the health authority".

56. For which the acronym is ASA, written about by Axel Herbst, *Der Arbeitsschutzausschussin der betrieblichen Praxis*, Arbeitspapier no. 288 of the Hans Böckler Foundation (Sep. 2013), available at www.boeckler.de/de/faust-detail.htm?sync_id=6820, who incidentally complains about a lack of attention from the workers' representatives. On the opposite side, see Marcello Pedrazzoli, *Crisi da Pandemia e Costituzione Economica del Lavoro: il Caso dell'art. 46 Cost*., in DIRITTO DEL LAVORO ED EMERGENZA PANDEMICA 229 ff (Oronzo Mazzotta ed. 2021).

57. Luigi Montuschi, *I Principi Generali Del D. Lgs. n. 626/1994*, in AMBIENTE, SALUTE E SICUREZZA. PER UNA GESTIONE INTEGRATA DEI RISCHI DA LAVORO 37 (1997).

contrary, without participatory regulations, is the exclusive prerogative of the employer (and can, therefore be negotiated[58]).

If anything, the role of the committees described above, as mentioned, lies in the need to adopt behaviours agreed by everyone. Thus the involvement of the largest possible number of people in drawing up the rules of conduct ultimately raises individual awareness, within a perspective of healthy self-regulation, as shared by European Framework Directive 89/391 and by national legislation in legislative decree n. 81/2008.

7. RESPONSIBILITY OF THE EMPLOYER IN THE EVENT OF CONTAGION IN THE COMPANY. COVID AS AN OCCUPATIONAL ACCIDENT

The reference to the Protocol contained in the government decree of 26 April 2020 suggests that business owners wishing to restart operations are required to scrupulously comply with all its provisions. The INL prepared a check-list to facilitate compliance with the contractual text.

In the opinion of the author, such compliance must include all of the headings, given that it seems clear that all the provisions are inter-linked. It remains to be added that the heading concerning the involvement of workers' representatives in defining prevention measures, as discussed above, appears to require a specific initiative on the part of the workers for the establishment of the committees. Thus, in the absence of an express request be summoned by the unions, an employer that has not autonomously proceeded to set up the joint committees in question cannot be deemed to have breached the Protocol. In fact, this would be generally considered to go against the freedom of association and would be repressed by means of a court injunction, as the employer would be deemed to have interfered in an area of the exclusive competence of the workers.

Having set out this premise, we are left with the most important issue. This is the case in which, despite scrupulously complying with the Protocol, someone catches the disease in the workplace from a colleague or a customer. There have been many different responses to this problem.[59]

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58. For an effective summary of the issue, see Valentina Pasquarella, *Brevi Riflessioni sul Ruolo della Contrattazione Collettiva dal D. Lgs. N. 626/94 al D. Lgs. n. 81/2008*, LIBER AMICORUM, SPUNTI DI DIRITTO DEL LAVORO IN DIALOGO CON BRUNO VENEZIANI 243-247 (2012).

59. Specifically, see Maria Teresa Carinci, *Back To Work Al Tempo del Coronavirus e Obbligo di Sicurezza del Datore di Lavoro. I Test Sierologici Rapidi*, 3 WORKING PAPER ADAPT (2020) https://moodle.adaptland.it/pluginfile.php/55163/mod_resource/content/0/wp_2020_3_carinci.pdf; Marco Marazza, Franco Scarpelli & Paolo Sordi, *I Giuslavoristi di Fronte All'emergenza Covid-19*, GIUSTIZIACIVILE.COM (Mar. 17, 2020); Pasquale Sandulli, Angelo Pandolfo & Michele Faioli, *Coronavirus, Regresso e Danno Differenziale. Contributo al Dibattito*, 420 WORKING PAPER D'Antona, (May 25, 2020), at https://csdle.lex.unict.it/working-papers/wp-csdle-m-dantona-it/coronavirus-regresso-e-danno-differenziale-contributo-al (see also Vincenzo Ferrante, *COVID-19 E Infortunio Sul Lavoro: Come Provare L'esonero Da Responsabilità* in QUOTIDIANO, IPSOA (May 21, 2020), at ipsoa.it/documents/quotidiano/2020/05/21/covid-19-infortunio-lavoro-provare-esonero-responsabilita.

It has been noted in this regard that attributing liability to the employer would be an unlikely outcome, because in any case it would be difficult to prove that the contagion took place in the workplace and not in vehicles or elsewhere, from contacts in the worker's daily life. However, this conclusion does not hold the employer harmless in cases where, conversely, it is possible to identify and reconstruct the chain of infection (when, for example, this has been the subject of an epidemiological investigation conducted by the health authority to reconstruct all the recent "close contacts" the patient has had; or when several people have been infected within a group of workers all operating in the same place; or, finally, when the worker can demonstrate that they walk to work and that, apart from their family members and their colleagues at the workplace, they have not had any contact with other people).

Some have even claimed that, where there is a risk affecting the entire population, the regulations dictated by law or by collective bargaining constitute a special regimen and an exception to the ordinary principles. This would make the employer free of any liability even were it proven that the contagion took place in the workplace, providing they could demonstrate that they had followed the anti-COVID protocols to the letter.[60]

However, it is highly unrealistic that a trade union agreement could ever have the power to change the rule of diligence indelibly written into the safety obligation required by the civil code. This is because, according to established case law, a categorical right such as individual health can only be waived in accordance with the general rules of representation, i.e. after the parties signing such a waiver have been assigned an express power to do so. It is clear that in this case this did not happen, either by an expressed provision of law or at the specific request of the workers.

Therefore, in the absence of specific waivers, the only option is to apply the general rules contained in the civil code. As stated above, these not only impose a general duty of prevention but also specify the cases in which a business is required to pay damages to a worker who has suffered harm. In fact, even if the Shared Protocol is applied, it is clear that this provides specifications and adaptations of the existing general rules for restricting contagion, in light of the characteristics of the new risk, and does not express a will on the part of the collective parties to grant the employer an exemption to these fundamental rules.

The conclusion is that when it has been confirmed that contagion with SARS-CoV-2 has taken place in the workplace, in order for an employer to not be held liable for compensation, they must be able to prove that they had

60. Auturo Maresca, *Il Rischio di Contagio da COVID-19 nei Luoghi di Lavoro*, 2 DIRITTO DELLA SICUREZZA SUL LAVORO 5 (2020), at https://journals.uniurb.it/index.php/dsl/article/view/2273.

taken all the appropriate precautions, based on experience and technical knowhow, to avoid the spread of the disease. This means that enterprises are required not only to comply with all the provisions of the shared Protocol of 24 April 2020 but also to adapt its content to the way their business is organized, at the same time taking into account any new precautions that may be required to avoid contagion.[61]

This was an onerous task, not least because it was not totally clear what the appropriate measures to prevent contagion were (since masks only offered partial protection, as shown by the fact that doctors use completely different types of protection when in close contact with patients), although not much more onerous than the task faced elsewhere due to the general rules.

This conclusion is confirmed by the fact that decree law 18/2020, acknowledged that contagion with coronavirus in the workplace must be treated as an accident in the workplace, and therefore eligible for compensation by the compulsory social insurance system provided by the law[62] It is impossible not to note that the INAIL measure is an important factor in determining the responsibility of employers, not just in a general sense, but also from a practical point of view, when it comes to reconstructing the facts and proving them, although it is true that acknowledging an accident does not in itself imply the automatic attribution of civil or criminal liability to the employer.

In fact the National Institute applies logics that partially differ from those of the regulations governing compensation for damages, as it also intervenes in the event of the fault being confirmed as that of the worker (except in cases when the damage is caused by a voluntary action that could not have been predicted by the employer). It does not aim to compensate the employee for all the harm caused by the accident, but, as explained above, only to guarantee them an allowance calculated based on a presumptive method, which in many cases means the employer is liable for further (differential) damage that is neither compensated or covered by the INAIL insurance.

8. THE ISSUE OF THE OBLIGATION FOR WORKERS TO BE VACCINATED AND CONSEQUENCES FOR RECALCITRANT WORKERS.

As soon as the vaccinations against COVID-19 became available and the prophylaxis campaign began, a widespread and complex debate began about the obligation (or otherwise) for workers exposed to the risk of contagion to be vaccinated and about the possible consequences for their

61. See INAIL circular 22 of May 20, 2020. These regional Protocols have been introduced in order to further reinforce the sharing of the rules.

62. Again see INAIL circular 22 of May 20, 2020.

employment in the event of their refusal to be vaccinated. The debate took place during two periods of time, tied to the developments in medical research. The first vaccinations became available in early 2021, whereas the vaccination obligation for a small group of workers was only introduced by decree law 44 of April 1, 2021.[63]

The discussion was sparked by article 32 of the Italian Constitution, already mentioned above, which recognizes health as an individual right and collective interest, and also states that "*no one may be obliged to undergo any given health treatment except under the provisions of the law*," and the latter cannot "*under any circumstances violate the limits imposed by respect for the human person*" (paragraph 2). There is no question that vaccinations are health treatments. The expression is used in constitutional jurisprudence to refer to any diagnostic or therapeutic activity aiming to prevent or to treat illnesses.

Scholars immediately identified the potential conflict between the two dimensions of the (individual and collective) right to health, underlining the usefulness of the indications provided by the Constitutional Court on the need to "reconcile the right to health of the individual (including in its negative sense of not being forced to receive health treatments they have not requested or agreed to) with the co-existing and reciprocal right of each individual (judgment 218, 1994) and with the health of the community as a whole (judgment 307, 1990)"[64] A reconciliation that, according to the Constitution, must be the task of a "provision of the law."

Indeed, the issue follows on precisely from the lack of a legal provision making vaccination against coronavirus mandatory (whereas there are numerous examples of vaccinations against other diseases imposed by law[65]). The Government preferred to use "recommendation"[66] as a way to encourage people to take part in the vaccination campaign, implementing a policy of moral suasion, but also recognizing the right to compensation for anyone suffering harm as a result of the vaccination.[67]

As regards the workplace, on the other hand, the question concerned whether or not employers had the right to expect their employers to be

63. An obligation initially applicable only to healthcare professionals (also due to a lack of vaccines) and subsequently extended, as explained below in the text, to other categories of workers (see decree law 22 of Sep. 10, 2021 and decree law 172 of Nov. 26, 2021), and then to the over-50s, whether workers or not (see decree law 1 of Jan. 7, 2022).

64. See in this sense, Italian Constitutional Court judg. no. 258/1994 and also judg. no. 218/1994.

65. For example, the vaccinations against diphtheria (law 891/1939); tetanus (vaccination introduced by law. 292/1963 for some categories of workers, then extended to everyone by law 166/1981); polio (law 51/1966); tuberculosis (article 93, paragraph 2 of law 388/2000), hepatitis B (law 165/1991); whooping cough, polio, measles, chicken pox, etc. (decree law 73/2017, converted into law 119/2017).

66. Budget law 178/2020 (especially articles 457 et seq.) and the consequent "National Strategic Vaccination Plan to prevent *SARS-CoV-2 infections"*, designed to "ensure the maximum level of vaccination coverage in the country".

67. *See* Italian Constitutional Court judg. no. 107/2012.

vaccinated, in order to safeguard not only their own health but also that of anyone working within the company organisation.

According to an initial orientation, it is possible to impose mandatory vaccination in the workplace, without specific action on the part of lawmakers, based on the existing provisions on health and safety in the workplace[68] In truth, this was the opinion of a minority, as the majority of case law has claimed that none of the laws referred to could be considered as an enacting provision of the legal requirement under article 32, paragraph 2 of the Constitution, and a specific provision introducing an express requirement to be vaccinated against COVID-19 for all or for specific categories of workers was necessary.[69]

To support the first hypothesis (therefore that underlying mandatory vaccination), reference was made first and foremost to the aforementioned article 2087 of the civil code, deemed a provision that enables employers to adopt all the necessary measures (including vaccinations) to safeguard the health of workers, including any discovered and recommended by science and technology after the Protocols were signed (which omitted to comment on the matter).[70]

According to this opinion, in accordance with the dynamic nature of the safety obligation under article 2087 of the civil code, when an employer considers that, with respect to the specific nature of their organization, vaccination is a useful safety measure to prevent contagion within the workplace, they should require it of their employees as part of the contractual

68. Pietro Ichino, *Perché e Come L'obbligo di Vaccinazione Può Nascere Anche Solo da un Contratto di Diritto Privato*, 1 LAVORO DIRITTI EUROPA (2021); Raffaele Guariniello, *Covid-19: L'azienda Può Obbligare i Lavoratori a Vaccinarsi?*, in QUOTIDIANO IPSOA (28 Dec. 2020); Roberto Riverso, *Vaccini e Rapporto di Lavoro: Obblighi, Responsabilità e Tutele*, (Jan. 18 2021), https://www.rassegnadirittolavoro.it/wp-content/uploads/2021/03/Roberto-Riverso-Vaccini-e-rapporto-di-lavoro-Conversazioni-sul-lavoro-a-distanza-15-3-2021.pdf; Vincenzo A. Poso, *Dibattito Istantaneo su Vaccini Anti-covid e Rapporto di Lavoro*, in LABOR (Jan. 25, 2021).

69. Oronzo Mazzotta, *Dibattito Istantaneo su Vaccini Anti-Covid e Rapporto di Lavoro*, in LABOR (Jan. 28 2021). In a similar vein, without claiming to be exhaustive, see Paolo Pascucci & Angelo Delogu, *L'ennesima Sfida della Pandemia COVID-19*, DIRITTO DELLA SICUREZZA SUL LAVORO (Feb. 27, 2021), https://journals.uniurb.it/index.php/dsl/article/view/2448; Marco LAI, *Obbligo di Vaccinazione e Rapporto Di Lavoro: Prime Riflessioni*, in BOLLETTINO ADAPT, no. 3 (June 25, 2021); Arturo Maresca, *La Vaccinazione Volontaria Anti Covid nel Rapporto di Lavoro*, in FEDERALISMI.IT, no. 8/2021; Adalberto Perulli, *Dibattito Istantaneo su Vaccini Anti-Covid e Rapporto di Lavoro*, in LABOR (Jan. 25, 2021); Guido Zampini, *L'Obbligo di Vaccinazione Anti SARS-Cov-2 Tra Evidenze Scientifiche E Stato di Diritto*, in Il LAVORO NELLA GIURISPRUDENZA, no. 4/2021, 225 et seq.

70. A. DE MATTEIS, *Dibattito Istantaneo su Vaccini Anti-Covid e Rapporto di Lavoro*, in LABOR (Feb. 23, 2021) 5, which specifies that "there can be no doubt, in the light of established case law on article 2087 and its dynamic nature, that the employer is required to adopt the vaccination that has been created, and that the worker must cooperate in accordance with article 20 of legislative decree 81/2008 and article 32 of the Constitution. The protocols did not fundamentally alter the dynamic precepts of article 2087 of the civil code. Their value lies only in certifying at the time of their issue that the measures they contained were the most suggested by science and technology at the time to avoid contagion in the workplace, thus completing the precepts of article 2087 on a given date".

obligation that binds them (except, obviously, in the case or a valid health-related justification).

In other words, the vaccination obligation could be a consequence of the employment contract and the regulations that govern it, without a specific law being issued, as the only suitable means for limiting the spread of contagion, while reducing current and future pressure on hospital emergency services (and intensive care wards), and combating the lethal effects of the illness, once it has been caught.

This direction was also supported by article 279 of legislative decree 81/2008 on biological agents[71] After requiring workers exposed to biological agents to be put under medical surveillance, the decree also requires the employer to "*offer effective vaccinations to workers who are not already immune to the biological agent present in the workplace, to be administered by the company by the occupational health physician*". Despite being formulated in a not unambiguous manner, the regulation can only be interpreted as an obligation for workers to be vaccinated, where it requires the employer to "*temporarily remove the worker*" if unvaccinated, referring to the regulations covering becoming unfit to carry out the job (and this result would appear to apply also to the COVID virus given also that the employer is required to evaluate risks of "agents coming from the outside, such as atmospheric agents to which employees could be exposed" while working[72]).

The last of the provisions in which the basis for mandatory vaccination was identified is article 20 of Legislative Decree 81/2008, which requires the worker not only to take of their own health and safety, but also that "*of the other persons present in the workplace, on whom the effects of their acts or omissions fall*".

Finally, to further confront the argument against the theory of the lawfulness of the employer's request, it must be noted that, as article 32 of the Constitution is included among the ethical/social rights, the assumption that the constitutional provision requires a specific law to impose a health treatment appears to refer without a doubt to the situation of all citizens (with respect to bioethical issues), and cannot be construed as recognizing workers' rights to exempt themselves from the system defined by health and safety laws.

However, the issue that has most kept labor law scholars occupied has been the possible consequences for the employment contract, in the event that a worker should refuse to be vaccinated. This was more of a theoretical than

71. Raffaele Guariniello, *Covid-19: L'azienda Può Obbligare I Lavoratori A Vaccinarsi?*, cit., 1 et seq.; Riverso, *supra* note 70.

72. On this, ICHINO P, *supra* note 70. In the same vein, Aldo De Matteis, *Dibattito istantaneo*, in LABOR (Feb. 23), https://www.rivistalabor.it; Vincenzo Ferrante, *Dibattito Istantaneo su Vaccini Anti-Covide Rapporto Di Lavoro*, in LABOR 3 (Jan. 22 2021).

a practical discussion (at least until a specific law was passed: see paragraph 9 below), because a prohibition on dismissal was soon passed to protect the population hit by the pandemic.[73]

It should come as no surprise that those who supported the existence of an obligation to be vaccinated for workers, as a measure to benefit their colleagues and free the employer from liability for damages, have come to the conclusion, based on the same legal foundation, that there is a right to penalize a continued refusal on the part of the employee by terminating their employment, dismissing them either with notice for justified objective reasons, or with just cause, where there are no other practicable solutions[74] In fact, some authors have qualified recalcitrant behavior by workers in disciplinary terms, referring to the obligation to take care not only of their own health but also that of their workmates, especially when the worker made it clear that they had absolutely no intention of receiving a vaccination.[75]

Conversely, the dismissal of a worker who has refused to be vaccinated by those who equated the refusal to be vaccinated with a condition of being unfit to carry out their job, creating a temporary impossibility, was not considered legitimate[76]. In this regard it has been posited that dismissal would not be the immediate solution, and could only take place once the time passed was such that it could no longer be considered in the interest of the employer to continue the employment relationship.

There were concerns about the possibility of equating the refusal to be vaccinated with unfitness for work. It was easy to show that the situations are totally different. The former is dependent on factors outside of the individual's volition, i.e. a disease, whereas the latter is a purely individual choice not a subjective right safeguarded by law[77] Indeed the law clearly requires a business owner to transfer a worker to another production unit, or to modify their tasks, solely in the case of "*workers affected by physical or*

73. Art. 46 of decree law 18/2020, amended by decree law 34/2020 (article 80) made it illegal for individual or collective dismissals for objective just cause. These two laws were followed by other provisions extending the ban until Dec. 31, 2021, progressively watering it down. See Scarpelli F., *I Licenziamenti Economici Come (Temporanea)* Extrema Ratio*: La Proroga Del Blocco Nel D.L. 104/2020*; Arturo Maresca, *La flessibilità del Divieto di Licenziamento per Covid (prime osservazioni sull'art. 14, DL n. 104/2020)*; Matteo Verzaro, *Il Licenziamento per Giustificato Motivo Oggettivo ai tempi del Covid-19*, in DIRITTO DEL LAVORO ED EMERGENZA PANDEMICA 133 (Oronzo Mazzotta ed.).

74. The issue obviously does not affect workers who were unable to be vaccinated for proven medical/health reasons (such as illnesses that were incompatible or could worsen after being vaccinated) or workers operating in isolated places and therefore where there was no risk of contagion for workers or third parties.

75. See, *Dibattito Istantaneo su Vaccini Anti-covid e Rapporto di Lavoro: l'opinione di Luigi de Angelis*, (Feb. 17 2021), https://www.rivistalabor.it/dibattito-istantaneo-vaccini-anti-covid-rapporto-lavoro-lopinione-luigi-de-angelis/; Dibattito istantaneo su vaccini anti-covid e rapporto di lavoro: l'opinione di Carlo Cester (Jan. 23, 2021), https://www.rivistalabor.it/dibattito-istantaneo-vaccini-anti-covid-rapporto-lavoro-lopinione-carlo-cester.

76. See Giuseppe Pellacani, *Vi Spiego Perché Non Si Può Licenziare Chi Non Si Vaccina Contro Il Covid-19* (Jan. 1, 2021), https://www.startmag.it/mondo/vaccino-covid-19-licenziamento/.

77. DE ANGELIS L., *supra* note 77.

mental diseases that make them temporarily and partially unfit to work", while it is perfectly legitimate for an employer to take different action in the event of refusal by an individual worker, as the law could not be extended under an application "by analogy", the legal reasons at the basis of the two provisions being different.[78]

9. MANDATORY VACCINATION FOR WORKERS

Both the issues dealt with thus far, the first on the existence of a vaccination obligation within the employment relationship, and the second on the consequences in the event of refusal on the part of a worker to be vaccinated were resolved by article 4 of decree law 44 of 1 April 2021 (converted with amendments into law 76/2021). This introduced the obligation, from 1 April 2021 until the vaccination program had been fully rolled out, or in any case until 31 December 2021[79], to be vaccinated against COVID-19 for "*healthcare professionals and healthcare operators working in healthcare, social and social care facilities, whether in the public or the private sector, pharmacies or clinics."*

The provision was then progressively extended (by decree law 122/2021 and law 133/2021) also to workers not working in the healthcare professions, but working in hospitals and residential care homes. Not long afterwards, when the vaccination campaign had been extended to the entire population (starting with the elderly) decree law 172/2021 came into effect, including mandatory vaccination for those working in schools; the armed forces, police and the rescue services as well as workers in adult and juvenile prisons (new article art. 4-*ter, of decree-law* n. 44/2021). Finally, decree law 1/2022 made vaccination mandatory for all over-50s (whether employed or not), who were identified as "fragile", i.e. people most at risk at being hospitalized if they caught COVID-19.

For this category, the health treatment was expressly described as an "*essential requirement for carrying on their profession and for carrying out their work duties.*"[80]

The introduction of mandatory vaccination was justified not only by the need to "*protect public health*", but also to "*maintain adequate safety conditions in the provision of care and assistance*" [81] In this way, as emphasized, the administration of the vaccine also became a "measure,

78. In this sense, Arturo Maresca, *Dibattito Istantaneo su Vaccini Anti-covid e Rapporto di lavoro, in* LABOR, at rivistalabor.it/dibattito-istantaneo-vaccini-anti-covid-rapporto-lavoro-lopinione-arturo-maresca/.

79. Extended to Dec. 31 2022 by article 8, decree law 24 of Mar. 24 2022.

80. See art. 4, para. 1 of decree law 44/2021.

81. Thus, explicitly, art. 4, para. 1 of decree law 44/2021.

codified by law, for complying with the safety obligation provided for by article 2087 of the civil code"[82]

An administrative procedure was put in place to assess the legitimacy of refusal by any of the interested parties. This aimed to confirm the workers' vaccination status and overall state of health extremely rapidly. It required close cooperation between professionals, employers, regional governments, and local health authorities.

Very basically, the procedure required each professional body to send a list of its members to the regional governments and the employers to send them a list of their employees qualified as "healthcare-related operators". The regional and provincial governments then cross-referenced the date received and checked the vaccination status of each individual included in the lists, immediately reporting the names of those who were not vaccinated to the health authority. Employers who had refused to provide adequate documentation to justify their refusal to be vaccinated were formally invited to have their vaccination by a date in the immediate future. Once this period had elapsed, the health authority checked their compliance and if they had not complied, immediately informed the interested party, employer and professional body to which they belonged.[83]

In the absence of available alternative tasks, failure to comply with the vaccination obligation confirmed by the outcome of the above procedure resulted in suspension without pay "*from the right to carry out work or tasks that involve interpersonal contact or lead, in any other form, to the risk of spreading SARS-CoV-2*, and the loss of the right to their salary and to any "*other payment or emolument, however named"* (see article 4, paragraphs 6 and 8, decree law 44/2021).

Subsequently, from April 22, 2021, on the back of provisions by the European Union, a "green pass" was introduced to prove "*that the person had been vaccinated against SARS-CoV-2 or had recovered from SARS-CoV-2, or had taken a rapid antigen or molecular test* [. . .] *for the SARS-CoV-2 virus with a negative result"*[84] The certification issued by the health authority based on the results contained in the national vaccination databases was necessary to access a number of public services (including hospitality, theatre and museums, sports centers, etc.) and to all workplaces in the public and the private sector.

82. Carlo Pisani, *Vaccino anti-covid: Oneri e Obblighi del Lavoratore alla Luce del Decreto per gli Operatori Sanitari*, 1 MASSIMARIO DI GIURISPRUDENZA DEL LAVORO 151 (2021).

83. See art. 4, para. 3, 4, 5 and 6 of decree law 44/2021.

84. The green pass was introduced for the first time by decree law 52/2021 and made compulsory by decree law 105/2021. Depending on the way it was obtained, a "basic" green pass lasted for different periods: nine months if obtained after completing the vaccination programme; six months after recovering from the virus; 72 hours if obtained after a negative molecular test; and 48 hours if obtained after a rapid antigen test.

In the same way as for the specific categories described above, this regulation meant that, with the exception of those exempted from the vaccination campaign with appropriate medical certification, workers without a COVID-19 green pass were deemed to be unjustifiably absent until they presented the above certification, or, at least until April 30, 2022[85], lost their salary (or other payment or emolument however named) but without any other disciplinary consequence and retaining the right to keep their job[86] Suspended workers had the right to return to work immediately as soon as they had the necessary certification, provided (in the private sector only) the employer had not already hired another person to replace them.[87]

The COVID-19 certification framework described above did not formally introduce blanket mandatory vaccination. This is proved by the fact that the certification could be issued, albeit with very different periods of validity depending on the type, not only to those who had been vaccinated, but also to those who had received a negative result from a rapid antigen or a molecular test. This led to long queues outside the pharmacies and vaccination centers, which in many cases facilitated contagion. Workers who had fallen ill with the virus and then recovered were also able to obtain a green pass (but there were many cases in which anti-vaccination activists paid for their refusal to be vaccinated with their lives, after having contracted the disease).

Therefore, in the end it was decided to introduce a "super" green pass, which was issued solely to those who had been vaccinated or recovered from the COVID-19 virus, no longer showing the result of a rapid antigen or molecular test. Decree law 1/2022 introduced compulsory vaccination from January 8, 2022 for all (Italian, EU and non-EU) citizens aged over 50 and, at the same time, the super green pass became mandatory in order to access the workplace from February 15, for all over the fifties employed in the public or private sector. As for the consequences on their employment status, salaries were once more suspended, but without disciplinary consequences and with the right to keep their job until they could present a super green pass, and in any case until June 15, 2022.[88]

The various provisions set out above, which effectively gradually extended the vaccination obligation to all workers, ensuring that the spread of the pandemic was contained, were applied in practice. As a result, there

85. The term was originally Mar. 31 2022, when the state of emergency was lifted, but then extended by decree law 24/2022.

86. See art. 9-*quinquies*, para. 6 and art. 9-*septies*, para. 6. On the subject, see funditus, Umberto Gargiulo, *Considerazioni "Pragmatiche" su* Green Pass *e Obblighi del Lavoratore*, in DIRITTO SICUREZZA SUL LAVORO, no. 1/2022, 52, at journals.uniurb.it/index.php/dsl/article/view/3241.

87. See art. 9-*septies*, para. 7.

88. However, with art. 8 of decree law 24/2022 the requirement for a super green pass was removed and replaced by the obligation to have a basic green pass, until Apr. 2022.

were many cases in which those required to be vaccinated applied to the courts to ask for the issue to be referred to the Constitutional Court, so that it could rule both on the legitimacy of the obligation (in accordance with the claim of individual liberty and compliance with the principle by which certain matters can only by governed by Parliament), and on the proportionality of the penalty (because requests had been made to be able to receive "maintenance" payments that, in some cases, are paid to some categories of public workers when they are suspended in order to be able to carry out investigations prior to criminal proceedings).

All the claims have been unsuccessful and in February 2023 the Constitutional Court confirmed the full legitimacy of all the provisions described (Judgments 14 and 15).

It has been confirmed that the provisions of article 32 of the Italian Constitution already resolve the issue of the lawful nature of mandatory health treatments, so the 2021 decision by the legislator cannot be considered unreasonable or disproportionate, given the benefits of the vaccination to the population as a whole.

The Court has stated (in paragraph 5.3) that "the remote risk of adverse events, including severe ones, cannot be deemed intolerable, by its very nature". It legitimizes the obligation and instead establishes the right to financial compensation for the worker or their heirs from the State. In light of this conclusion, the rule suspending payment of their salary to those who did not want to be vaccinated is also deemed to be lawful, based on the fact that the law allowed individuals to be free and that, as it was voluntary, the status of those who refused to be vaccinated cannot be considered equal to that of those who have the right to the payment of an allowance because they are ill or have been suspended from work because they are involved in judicial proceedings.[89]

[89] On a similar issue, but with a different solution, see Alan Hyde, *US Employers Can't Be Required to Test or Vaccinate for Covid – Tough Road Ahead for Workplace Regulation*, 1 THE ITALIAN L. J. (2022), https://www.theitalianlawjournal.it/hyde/.