

October 2021

Following in the footsteps of Italy: will the right to work in Romania be conditional upon holding a Covid-19 Green Pass?

A new draft law¹ in Romania would prevent access to the workplace for employees without a Covid-19 Green Pass. The new measures are applicable during the state of alert for, among others, all employers (public or private) which have offices in buildings where there are more than 50 people at a time².

Up until now, the Romanian trend concerning measures combating the pandemic in the workplace revolved around traditional measures, e.g. social distancing, epidemiologic triage, wearing of masks, observational / clinical triage, etc. As of yet, the country did not officially embrace the use of a Covid-19 Green Pass or mandatory vaccination in the workplace (either in the legislation or as a custom / trend).

With the pandemic evolving quite quickly in Romania since September 2021, spurred on by a very low vaccination rate³, some argued that the state should take more drastic measures to incentivise or even require mandatory vaccination. The draft law 454/2021 is the outcome of this push.

The initial version of the law was much narrower in scope, being applicable primarily to certain public institutions which are involved in the handling of the pandemic. The only private entities covered were health institutions and laboratories. In a matter of days, the scope of the draft law enlarged to cover more and more categories of public and private employers.

¹ L454/2021 *Propunere legislativă privind stabilirea unor măsuri în domeniul sanitar, pe perioada stării de alertă, pentru personalul din cadrul unor unități publice și private* – progress in the Senate can be followed [Here](#)

² The list of public entities where the Covid-19 Green Pass is mandatory according to this draft law is longer and includes, among others, all health institutions (be it public or private), all medical and medical devices laboratories and all entities under the coordination of the National Health Authority, of the General Inspectorate for Emergency Situations, General Inspectorate for Aviation of the Ministry of Internal Affairs, etc., irrespective of the number of employees.

³ Per Reuters' statistical reports, there have been 1,587,880 infections and 45,503 coronavirus-related deaths reported in the country since the pandemic began. [Romania: the latest coronavirus counts, charts and maps \(reuters.com\)](#). Per Our world in Data 38% have been fully vaccinated against Covid and 11% partially vaccinated [Coronavirus \(COVID-19\) Vaccinations - Statistics and Research - Our World in Data](#)

So, what is the current draft law about?

In Romania, an individual can obtain a Covid-19 Green Pass if they: (i) have been fully vaccinated (10 days have lapsed after the final dose); (ii) hold a negative PCR test within 72 hours or rapid antigen test within 48 hours; or (iii) recovered from the disease in the past six months.

Until now, any scrutiny regarding the use of the Covid-19 Green Pass in the workplace was answered with reservation, mostly based on the fact that (i) there is no legal ground to make it mandatory and hence (ii) employers may be exposed to accusations of discrimination and/or (iii) exposed to great costs, being obligated to financially cover regular testing of employees. While potential discrimination debates would have most likely arisen in relation to mandatory vaccination, apparently the use of the Covid-19 Green Pass was not vetoed by the National Council fighting Against Discrimination (NCAD), at least not in relation to the initial "softer" version of the draft law, much narrower in scope (we cannot confirm which version of the draft law the NCAD considered).

The main provisions of the draft law are summarised below, along with some of our comments either providing certain explanations or anticipating potential issues.

| MAIN PROVISION | COMMENTS |
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| <ul style="list-style-type: none"> ✚ The Covid-19 Green Pass becomes mandatory for many categories of employees, both in the public and private systems; most relevant for the private sector is the provision under which the Covid-19 Green Pass becomes mandatory for all employees working in office buildings where there are more than 50 people at a time. ✚ The obligation to present a Covid-19 Green Pass is also applicable to any individual accessing any of the offices of the entities described above. | <ul style="list-style-type: none"> ✚ This provision is rather poorly drafted because the extent of this obligation is debatable when it comes to determining the actual number of people inside an office building. Specifically, it is unclear how this obligation is interpreted: (i) in abstract – i.e. where an office building can accommodate 50 people at a time or (ii) in particular – where (and when) there are 50 people at the same time? If the latter interpretation is favoured, then it means that for the first 50 people coming to the office the Covid-19 Green Pass is not mandatory which seems to defeat the purpose of the law. ✚ Also, does this obligation apply to other spaces such as factories or plants? ✚ Another issue is that in Romania remote work is mandatory for at least 50% of the headcount, except when the nature of the activity (per the employer's own interpretation and narrative) dictates that the employee must come to the office; therefore, if the Covid-19 Green Pass becomes mandatory, we anticipate an increase in requests from the employees to work remotely or an increased number of objections and conflicts if employees are requested to return to work. |
| <ul style="list-style-type: none"> ✚ These obligations do not apply to courts of law or other authorities in the justice system. | <ul style="list-style-type: none"> ✚ The right to justice would have been otherwise infringed. |
| <ul style="list-style-type: none"> ✚ The costs for testing (PCR or antigen) to obtain the Covid-19 Green Pass will be borne by the employees in the public | <ul style="list-style-type: none"> ✚ Mandating the Covid-19 Green Pass as well as having the employees bear their own testing costs may create significant |

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| sector, while private employers may determine their own rules. The notable exception from these rules is when the employees in question have a medical condition making vaccination dangerous, when costs are covered by the employer. | employee relations issue and affect retention, motivation or even turnover rate. |
| ✚ The management of public or private entities should implement methods to verify Covid-19 Green Passes through the app "Check DCC". | ✚ From a data protection perspective, it might be recommendable that this kind of data is only accessed, but not stored. |
| ✚ Employees who fail to present a Covid-19 Green Pass (either initially or for whom the pass expired) will be suspended by virtue of law for 30 days via a written decision. Suspension ends when the Covid-19 Green Pass is provided to the employer. | ✚ This is an exceptional case of automatic and by virtue of law suspension of the individual employment contract. |
| ✚ The accrual of suspension days is in turn suspended for employees having been vaccinated with the first dose, subject to completing the vaccination scheme. Between the first and second dose the employee in scope will be tested at the employer's cost. | ✚ The 30 days of suspension may be accrued even if not consecutive; therefore, the employee must always make sure to have an updated Covid-19 Green Pass. |
| ✚ If an employee from the public system accrues 30 suspension days, their contract will terminate by virtue of law. In the private system, the employer may either extend the suspension for another 30 days or may terminate the contract. | ✚ New termination ground derogating from the Labour Code. |
| ✚ Failure to observe these provisions leads to significant fines applicable, as the case may be, to the legal entities, their management and the relevant employees in breach. | |

Status

On 27 October the Senate already rejected the draft law 454/2021. However, the draft law will be sent to the Chamber of Deputies for final decision. Even if rejected by the decisional forum, in our view the most significant effects to date of this draft law are the findings of NCAD which stated that the right to work is not absolute and can be limited under certain conditions provided that the restrictions are temporary, proportional and aim to achieve a legitimate purpose defined by the Romanian Constitution, among which is to protect the public health.

From our point of view, while use of Covid-19 Green Pass could have been subject to discrimination or unequal treatment charges, it may seem that NCAD considers that the right to work can be conditional upon certain medical criteria. Once more, we cannot confirm the version of the draft law based on which the NCAD expressed this view. Notwithstanding all of the above, the NCAD arguments may actually be the basis on which private entities may choose to opt for mandatory Covid-19 Green Passes in the workplace.

The results of this legislative effort are still subject to debate. While the above are only mere approximations of this draft law, certain other legal issues may arise from the provisions of the draft law.

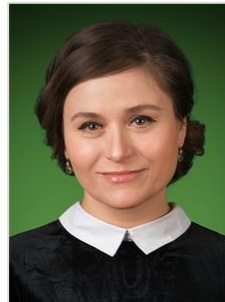
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