

COVID VACCINATION AND PRIVACY

Covid-19 vaccines, which are being proposed and administered for the time being to certain sections of the Italian population, are raising issues and doubts related to privacy. On the one hand, there are those who would like to exploit the fact that they have been vaccinated in order to have free and safe access to certain places and activities (e.g. to stadiums and airports, but there are many other possibilities), and on the other hand, there are those who fear discrimination because they have or have not been vaccinated: in most cases, it will be the choice not to be vaccinated or the impossibility of doing so (think of people who, because of previous health problems or allergies, will not be able to receive the vaccine).

The first premise, which is necessary, is that there is no Italian law that imposes the Covid-19 vaccination as an obligation.

The second premise, which is necessary to understand the subject, concerns the Electronic Health File (*Fascicolo Sanitario Elettronico* - FSE), i.e. the electronic system that can be consulted online, in which “*digital data and documents relating to a person’s entire medical history*” generated by both public and private health structures are entered, including those relating to the Covid-19 vaccination. It is important to understand the prerequisites for supplying and consulting this file, which represents, therefore, in itself, a very valuable database of data relating to the vaccination of the Italian population.

The FSE is now fed automatically and, therefore, the annotation of the Covid-19 vaccination takes place independently of the consent of the person concerned.

This is the situation following the Italian decree-law no. 34/2020, whose Article 11 has repealed Article 12, paragraph 3-bis of Italian decree-law 179/2012, i.e. the provision that the FSE could “*be fed exclusively on the basis of free and informed consent by the (concerned) person*”. It follows that the annotation in the FSE of any data or document relating to the person’s medical history cannot be prevented in any way, either by a revocation of consent that is no longer required, or by requests to oppose treatment or similar.

Instead, access to and consultation of the FSE is subject to the granting of the consent of the person concerned, which is, therefore, necessary to allow health professionals to access (i) for treatment purposes and (ii) in cases of health emergency, serious, imminent and irreparable risk to such person’s health or physical safety. It is also possible not to give consent for consultation by third parties, so that the FSE remains consultable only by the data subject.

Without the consent of the data subject, there is only the possibility for the Italian Regions and the Ministry of Health to access it for government and research purposes, but without the direct identification of the person and in compliance with the principles of indispensability, necessity, relevance and non-excessiveness (enshrined in the well-known GDPR).

Therefore, as pointed out by the Italian Data Protection Supervisor, “*experts, insurance companies, employers, medical examiners, unauthorized third parties*” cannot access the FSE in any way. It follows that the individual is the only one who can dispose of the information about his Covid-19 vaccination, possibly giving appropriate consent to its treatment, for precise and indicated purposes.

A final consideration concerning the consequences of vaccination in the workplace, which is a very topical issue in this period.

Can the employer ask the employee directly about the vaccination and process this information with the employee’s explicit consent?

The answer is no, because, in the workplace, the provision of consent by the employee is not considered an appropriate legal basis for the processing of his/her data. Consent cannot constitute a valid condition of lawfulness in this context because of the imbalance in the relationship between data controller (employer) and data subject (employee) in the employment context, which leads to the assumption that any consent given by the employee could never be free and unconditional.

And so, it was recently clarified by the Italian Data Protection Supervisor, in special FAQ published on 17 February 2021 on the “*Treatment of data relating to vaccination against Covid-19 in the context of workplace*”.

The employer cannot, therefore, ask his employees to provide information on their vaccination status or copies of documents proving that they have been vaccinated against Covid-19. Similarly, the competent doctor (if he has been informed) cannot inform the employer of the names of the vaccinated employees. In fact, only the competent doctor can process the employee’ health data and, among these, if necessary, the information relating to the vaccination, in the context of health surveillance and when verifying suitability for the specific task (Articles 25, 39, paragraph 5 and 41, paragraph 4, Italian Legislative Decree no. 81/2008). On the other hand, according to the regulatory framework in force, the employer can only acquire the judgements of suitability for the specific task and any prescriptions and/or limitations contained therein (e.g. Article 18, paragraph 1, lett. c), g) and bb) of Italian Legislative Decree no. 81/2008).

The employer shall, therefore, limit him/herself to implementing the measures indicated by the competent doctor in cases of judgement of partial or temporary unfitness for the task to which the employee is assigned.