ALTA Advocates

ALTA Insight

Judicial Review Update

Judicial Review Update – Future of Workers Protection in Indonesia

Law No. 3 of 2003 on Employment ("**Employment Law**") serves as the basis for employer-employee relationship in Indonesia. This aligns not only law of contracts, but also the constitutional obligation of the state of Indonesia to ensure citizens' rights to proper living conditions.

Despite such purpose of the Employment Law, it has undergone extensive changes, notably through the Law No. 6 of 2023 on Enactment of Regulation of the Government in Lieu of Law Number 2 of 2022 on Job Creation as Law ("**Job Creation Law**"),[1] which is an "omnibus law" amending other laws across the Indonesian legal system. Other than the Job Creation Law, the Employment Law has also gone through 37 judicial review proposals since its inception in 2003 until 2024 to the Constitutional Court (*Mahkamah Konstitusi*) of the Republic of Indonesia ("**MK**").[2] The MK has decided 13 times that the Employment Law contains several conditions which are unconstitutional.[3] Recently, this would be the Decision No. 168/PUU/XXI/2023 dated 1 November 2024 ("**MK Decision 168/2023**") which acceded to the unconstitutional nature of seven different matters of the Employment Law which was amended by the Job Creation Law.

The MK Decision 168/2023 decided that the Job Creation Law had instead created a limbo of uncertainty over the protection of employment rights.[4] Both employers and employees must rely on two legal instruments, the Employment Law and the Job Creation Law, for their protection of interest. Moreover, the Job Creation Law did not address the conditions under the Employment Law which were already decided as unconstitutional prior to 2023. The MK concluded that the Employment Law should be considered incomplete and needs a complete overhaul.[5] Therefore, the legislators (i.e. the House of Representatives) must draft and issue a new employment law within two years, which would revoke the Employment Law including amendments and decisions related to it.

In the interim, employers and employees may still rely on the current Employment Law in its incomplete state, together with its amendments by the Job Creation Law, and its multiple MK decisions, for their employment engagement until a new employment law is issued and becomes effective. Among others, employers and employees must be aware of its rights and obligations which were amended by the MK Decision 168/2023, and employers must adjust their employment policies according to such amendments, which encompasses changes to: (a) prioritisation of local talent, (b) fixed-term

---

[1] Job Creation Law, Article 81.
[2] Constitutional Court Decision No. 168/PUU-XXI/2023, page 675.
[3] Constitutional Court Decisions Nos. 012/PUU-I/2003, 115/PUU-VII/2009, 37/PUU-IX/2011, 27/PUU-IX/2011, 19/PUU-IX/2011, 58/PUU-IX/2011, 100/PUU-X/2012, 67/PUU-XI/2013, 7/PUU-XII/2014, 72/PUU-XIII/2015, 13/PUU-XV/2017, and 168/PUU-XXI/2023.
[4] Constitutional Court Decision No. 168/PUU-XXI/2023, page 675.
[5] Constitutional Court Decision No. 168/PUU-XXI/2023, page 675-676.

employment agreement, (c) outsourcing arrangement, (d) wages, (e) mandatory rest days, (f) termination of employment, and (g) severance payment.

A. Prioritisation of local talent[6]

The MK reconfirms and reassures that the Employment Law and its implementing regulations have set out that local talents (i.e. Indonesian citizens) must be prioritised prior to engaging any foreign talents. An Indonesian employer must first submit a foreign labour utilisation plan (*rencana penggunaan tenaga kerja asing,* "**RPTKA**") to appoint a foreigner. This RPTKA shall be obtained by submitting, among others, justification for hiring foreign workers; the duration of employment; work location; and the employer's plan for local labour absorption. The RPTKA shall be submitted to the Minister of Manpower (*Menteri Tenaga Kerja*).[7]

In line with the above, employers intending to engage foreign citizens as employees in Indonesia must ensure that:

(1) it has obtained sufficient licenses to do so from the Minister of Manpower, including RPTKA, and industry specific permits; and

(2) it demonstrates efforts to prioritise local talents before engaging foreigners.

B. Fixed-term employment agreement[8]

The MK decision establishes that all forms of *Perjanjian Kerja Waktu Tertentu* ("**PKWT**"), including those for specific projects or tasks, are subject to a maximum duration of five years, inclusive of any extensions. Additionally, all PKWT agreements must be documented in writing, using the Indonesian language and the Latin alphabet. The MK decision also clarifies that any PKWT made before the Job Creation Law that were not made in writing are to be considered as *Perjanjian Kerja Waktu Tidak Tertentu* ("**PKWTT**"). Employers must formalize unwritten PKWT entered into after the Job Creation Law by immediately converting such agreements into written PKWT.

These stipulations aim to promote transparency and clarity in employment agreements, protecting the interests of both employers and employees.

C. Outsourcing arrangement[9]

Terms on outsourcing arrangement in the Employment Law as amended by the Job Creation Law is determined to have been ambiguous, because it lacks clarity on which type of work maybe outsourced.[10] Government Regulation No. 35 of 2021 ("**GR 35**") only elaborate and address formalities of the outsource requirements or agreement.[11] The MK has decided that the Minister of Manpower must determine the types of work that is allowed to be outsourced in a ministerial instrument (instead of a government regulation). We can expect this instrument to come online in the near future.

In the interim, employers should closely monitor the development of this instrument and ensure that its outsourcing arrangement is in line with such forthcoming regulations stipulating permissible outsourcing upon issuance.

D. Wages[12]

The MK had extensively gone through several terms on wages in the Employment Law which were amended by the Job Creation Law. Essentially, the MK reassures that everyone has the right to a living

---

[6] Constitutional Court Decision No. 168/PUU-XXI/2023, pages 550-561.
[7] Employment Law (as amended), Article 42.
[8] Constitutional Court Decision No. 168/PUU-XXI/2023, pages 561-575.
[9] Constitutional Court Decision No. 168/PUU-XXI/2023, pages 575-587.
[10] Employment Law (before amendment), Articles 64-66.
[11] GR 35, Articles 18-20.
[12] Constitutional Court Decision No. 168/PUU-XXI/2023, pages 595-646.

wage, i.e., income that fulfils a decent living quality for everyone and their family. This obligation falls to the employers to provide a proper income and government to provide sufficient legal instrument.

In engaging with employees, employers must:

(1) ensure that the wages it provides to its employees can fulfil each employee's and their family's right to decent living, including food, drink, clothing, housing, education, health, recreation, and retirement security;

(2) when determining wages higher than the minimum wage, reach an agreement with its employees and/or labour union or involve them in the process;

(3) establish a wage structure and scale by taking in consideration of company's ability, productivity, class, position, length of service, education, and competence of employees; and

(4) prioritise the rights of employees in the event of bankruptcy and liquidation.

E. Mandatory rest days[13]

The MK has decided to reinstate the obligation by employers to determine their work week structure, either six working days with one rest day or five working days with two rest days in the Employment Law.[14] The MK also reinstated the obligation for employers to give its employees the right to a long break, as stipulated in the employment agreement, company regulation, or collective labour agreement.

F. Termination of employment[15]

The Job Creation Law stipulated that if bipartite negotiations during a dispute because of termination of employment failed to reach an agreement, such dispute shall be carried out to the "next stage" pursuant to the Industrial Relations Dispute settlement mechanism. However, the law is silent on what it means by the next stage leaving it ambiguous. The MK decision clarified that the Job Creation Law should be amended to be interpreted as, if bipartite negotiations failed to reach an agreement, the termination of employment can only occur after obtaining a decision from an industrial relations dispute settlement institution whose decision is legally binding. Employers must still respect rights of employees until a final and binding decision is given by the court.

G. Severance payment[16]

The MK reinstated the original severance payment provisions of the Employment Law which stipulated on the calculation of severance payment a company must make upon the termination of employment, in which the calculation given by regulation shall be seen as the minimum baseline where employers may exceed, but not reduce the stipulated amount.[17]

---

[13] Constitutional Court Decision No. 168/PUU-XXI/2023, pages 587-595.
[14] Employment Law (as amended), Article 79.
[15] Constitutional Court Decision No. 168/PUU-XXI/2023, pages 646-663.
[16] Constitutional Court Decision No. 168/PUU-XXI/2023, pages 663-674.
[17] Employment Law (as amended), Article 156 paragraph (2).

Contact Us

Dimas Triandhanu Utomo

Managing Partner
dimas.triandhanu@altaadvocates.com

Dyah Ayu Saraswati

Associate
dyah@altaadvocates.com