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Employment 2021

Indonesia
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INDONESIA

Law and Practice

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1. INTRODUCTION

1.1 Main Changes in the Past Year

Law No 13 of 2003 on Manpower (the "Manpower Law"), formerly the principal piece of legislation in the manpower sector, was amended extensively by Law No 11 of 2020 on Job Creation (colloquially, the "Omnibus Law"). This was issued in November 2020, in line with the government's commitment to boosting the country's ease-of-doing-business ranking, encouraging investment and increasing employment opportunities. Apart from the Manpower Law, the Omnibus Law has also amended the laws on the national social security system, the National Social Security Agency, and the protection of Indonesian migrant workers.

To give effect to those amendments, in February 2021, the government issued four Government Regulations, the key aspects of which cover expatriates, fixed-term employment contracts, outsourcing, working hours and rest entitlement, termination of employment, wages and job loss security.

Several petitions for judicial review of the Omnibus Law have been submitted to the Constitutional Court, mostly by labour unions. These cases are currently undergoing examination by the Court. Should the Court decide in their favour, amendments to the law will take effect immediately.

1.2 COVID-19 Crisis

Several measures were taken in response to the COVID-19 crisis in Indonesia. However, they are considered only an emergency response to the pandemic and are not permanent. The legal measures include:

- employees that fulfilled certain criteria were exempt from income tax for the period April to December 2020;
- cash subsidies of IDR600,000 per month (approximately USD42) for private-sector employees with monthly salaries of less than IDR5 million and actively enrolled in the manpower social security programme;
- dispensation over the mechanism and amount in payment of mandatory religious holiday allowance for employees; and
- recognition of COVID-19 as an occupational disease so that it can be covered by the work accident security scheme under the employment social security programme.

2. TERMS OF EMPLOYMENT

2.1 Status of Employee

Indonesian employment law does not distinguish between blue- and white-collar workers. The only distinction is made over the period of an employment agreement: whether it is permanent or for a fixed term.

2.2 Contractual Relationship

An employment agreement for a specified period (fixed term) must be in writing with a maximum cumulative period of five years (including any extension thereof). However, an employment agreement for a permanent employee may be made orally or in writing. If the former, the employer must issue an appointment letter to the employee to confirm the permanent employment, which contains: (i) name and address of the employee; (ii) starting date of employment; (iii) type of work; and (iv) the wage.

The terms and conditions that must be included in an employment agreement include:

- name, address and line of business of the employer;
- name, gender, age and address of the employee;

- title or type of work;
- location of workplace;
- the wage and how it will be paid;
- terms of work, stating the rights and obligations of both employer and employee;
- effective date and validity period of the employment agreement;
- place and date where the employment agreement is made; and
- signatures of the parties.

2.3 Working Hours

Normal working hours are:

- seven hours per day and 40 hours per week for six working days per week; or
- eight hours per day and 40 hours per week for five working days per week.

Flexible working hour arrangements are possible, subject to agreement between the parties.

An employment is considered part time if the working hours are fewer than seven hours per day and fewer than 35 hours per week. Wages for part time employees may be calculated on hourly basis.

Overtime work can only be performed on an order of an employer and consent of the employee, which must be given in hard copy or digitally. Overtime can be worked for a maximum four hours per day and 18 hours per week.

Overtime pay is based on hourly rates calculated as 1/173 x monthly wages (basic salary and fixed allowance). Apart from overtime wages, after four hours of overtime or more, employees must be provided with food and beverages with a calorific value of at least 1,400 kcal.

The working hours that exceed the maximum daily and weekly limits are only applicable in specific sectors and for specific positions, including energy and mineral resources, mining, upstream oil and gas, agribusiness and horticulture, and fisheries.

2.4 Compensation

Minimum wages vary between provinces and only apply to employees with service of less than one year with a particular company. Minimum wages are stipulated by the governor of a province based on suggestions and consideration of a Wages Council. The governor in a province may also set minimum wages for cities or regencies (districts).

There is no mandatory 13th month for employees in the private sector. Further, incentives, bonuses, or reimbursement of work facilities are based on an agreement between an employer and employee, as well as the employer's policy.

No Government intervention takes place over compensation, pay increases, etc, aside from the minimum wage stipulation.

Additionally, Indonesian employment law recognises a mandatory religious holiday allowance of one month's wage for employees with 12 months of consecutive service. For those with service periods of one to 12 months, the allowance is paid pro rata. The allowance should be paid at least seven days before the religious holiday.

2.5 Other Terms of Employment

Employees are entitled to paid annual leave of at least 12 days upon completion of 12 consecutive months of service.

Paid maternity leave lasts for one and a half months prior to delivery and the same duration after delivery, as estimated by an obstetrician or midwife. In practice, though, most employers will allow maternity leave to be taken as a single period of three months after delivery.

Maternity leave may be extended if required, as confirmed in a written statement from an obstetrician or midwife either prior to or just after delivery. Paid paternity leave is two days, exclusive of annual leave.

Additionally, employees are entitled to paid leave in the event of:

- marriage of an employee – three days;
- marriage of employee's child – two days;
- circumcision of employee's child – two days;
- baptism of employee's child – two days;
- passing away of employee's spouse, parents, in-laws, child or child-in-law – two days; and
- passing away of a member of employee's household – one day.

No specific regulations exist on confidentiality or non-disparagement under Indonesian employment law. Its applicability depends on the agreement between an employer and employee.

There is no specific limitation on employee liability under the law. Pursuant to the Indonesian Civil Code, employers are liable for losses or damage caused by their employees. However, under the employment law, employers may make a deduction of up to 50% from an employee's salary, to compensate for the loss or damage suffered by the employer.

3. RESTRICTIVE COVENANTS

3.1 Non-competition Clauses

Indonesian employment law does not specifically regulate non-compete clauses. Non-compete clauses can be agreed, in practice, by an employer and employee in an employment agreement. Given that there is no specific regulation on non-compete clauses, the validity and enforcement of non-compete clauses are subject to general contract law. It can be enforced should a breach occurs.

3.2 Non-solicitation Clauses – Enforceability/Standards

As with non-compete clauses, Indonesian employment law does not expressly contain non-solicitation clauses. The matter is agreed upon in an employment agreement. The validity and enforcement of non-solicitation clauses are also subject to general contract law. Non-solicitation can be enforced should a breach occur.

4. DATA PRIVACY LAW

4.1 General Overview

There is currently no specific data privacy law or regulation in the employment sphere.

In so far as an individual's private or personal data or information is used, collected, processed, analysed, stored, displayed, sent, shared, destroyed, or transferred via electronic media, Law No 11 of 2008 on Electronic Information and Transactions, as amended by Law No 19 of 2016 (the "EIT Law"), which set the principal standard for the handling of general electronic information, applies.

An implementing regulation of the EIT Law is Ministry of Communications and Informatics ("MOCI") Regulation No 20 of 2016 on Protection of Personal Data in Electronic Systems ("MOCI Regulation No 20/2016"), which, in essence, stipulates that a party domiciled in Indonesia that wishes to affect an offshore transfer of personal data must coordinate with MOCI or an authorised official/institution.

5. FOREIGN WORKERS

5.1 Limitations on the Use of Foreign Workers

Expatriates can only be employed under a fixed-term employment agreement, subject to their work permit. Expatriates cannot be employed for multiple positions in the same company, and are prohibited from holding positions that involve responsibility for employment matters. The holding of multiple positions is permissible at different companies, provided the positions are at board of director or commissioner levels.

5.2 Registration Requirements

Registration requirements that apply to the use of foreign workers include:

- a written application to the Ministry of Manpower, outlining the identity of the employer, reasons for use of the expatriate, role or position of the expatriate in the organisational structure, number of expatriates, periods of use of expatriates, identity of local counterpart employees for transfer of knowledge, and annual work plan for deployment of expatriates;
- corporate documents of the employer;
- a draft of expatriate's employment agreement;
- a chart that illustrates employer's organisational structure;
- an undertaking to facilitate Indonesian language lessons for expatriates; and
- the expatriate's personal data.

6. COLLECTIVE RELATIONS

6.1 Status/Role of Unions

Rules related to labour unions are contained primarily in Law No 21 of 2000 on Employees/Labour Unions. In order for a labour union to be recognised, following its establishment, a labour union must:

- register itself in writing with the local office of the Manpower Agency; and
- notify the employer of its establishment and registration number, which the employer is obliged to accept.

A recognised labour union is entitled to:

- negotiate a collective labour agreement with company management;
- represent employees in industrial relations dispute settlements;
- represent employees in manpower institutions;
- establish an institution or carry out activities related to efforts to improve employee welfare;
- carry out other manpower or employment-related activities that do not violate the prevailing law or regulations;
- establish and become a member of a labour union federation; and
- affiliate or co-operate with an international labour union or other international organisation.

6.2 Employee Representative Bodies

Other than labour unions, Indonesian employment law also recognises bipartite co-operation bodies ("BCB"). Employers that employ more than 50 employees are obliged to establish a BCB.

A BCB functions as a communication and consultative forum between an employer and representatives of a labour union and employees, in order to improve industrial relations.

Members of a BCB comprise representatives of the employer and employees/labour union (with equal composition, and at least six members).

6.3 Collective Bargaining Agreements

Indonesian employment law recognises collective labour agreements as an instrument for collective bargaining between a registered labour union or several registered labour unions with an employer, or several employers or employer organisations. Collective labour agreements are valid for two years from execution, extendable for one year. Collective labour agreements must be registered with the Manpower Agency with jurisdiction over the work location.

Collective labour agreements contain the rights and obligations of the employer, labour union and employees, but in more detail. As a general rule, the quality and quantity of the conditions of employment stipulated in the collective labour agreements must not be less beneficial than those regulated under the prevailing laws and regulations.

Although there are some instances where bargaining takes place at industry level, the majority of bargaining over collective labour agreements takes place within companies.

7. TERMINATION OF EMPLOYMENT

7.1 Grounds for Termination

Reason for termination of employment must be clearly stated in the written notice for termination. An employer may initiate termination of an employee for reasons related to an individual employee or for business-related reasons.

For Reasons Related to an Individual Employee

- At the request of the employee for reasons that the employer:
  - (a) assaulted, violently insulted or threatened the employee; persuaded or ordered the employee to act in contravention of the law;
  - (b) did not pay his or her salary on time for three consecutive months or more;
  - (c) did not perform its obligations to the employee as agreed;
  - (d) ordered the employee to work outside the agreed scope of work;
  - (e) assigned work that endangered the life, safety, health, or morality of the employee, outside the agreed scope of work;
- the existence of a final and binding court decision declaring that the employer did not act as stated in the preceding paragraph, and the employer decided to terminate the employment;
- resignation;
- absence for five consecutive days or more without written notification accompanied by valid evidence, despite being properly summoned by the employer twice;
- violation of the employment agreement, company regulations or collective labour agreements, after having received warning letters;
- detention by the authorities for at least six months;
- prolonged illness or disability due to work accident, for more than 12 consecutive months;
- reaching retirement age; and
- the employee has passed away.

For Business-Related Reasons

- Merger, consolidation, acquisition, or spin-off of the employer, and the employees are not willing to continue the employment, or the employer is not willing to accept the employee; redundancy, whether or not followed by closure of the employer's business due to losses, or their prevention;
- employer permanently closes down the business due to continuous losses for two years;
- employer permanently closes down the business due to force majeure;
- employer is under a state of suspension of payment; and

• employer is declared bankrupt.

There are no different procedures for specific grounds for termination. All terminations will experience the same procedure, including collective redundancy.

7.2 Notice Periods/Severance

A written notification of termination must be served by the employer on the employee and labour union at least 14 business days prior to the intended date of termination. The employee may reject the termination in writing, within seven business days of receipt of the notice of termination.

If, after being notified, the employee rejects termination, settlement must be reached by way of bipartite negotiation; if that fails, it is subject to the industrial relations dispute settlement mechanism under law (mediation at the local office of Manpower Agency or conciliation by a private conciliator, and, if necessary, court proceedings at the Industrial Relations Court, and ultimately, at the Supreme Court).

Employees are entitled to compensation upon termination, comprising severance pay, service appreciation pay, and compensation of entitlements. The amount in compensation depends on the length of service and the reason for termination.

Employees may be suspended on full pay during a termination process.

7.3 Dismissal For (Serious) Cause (Summary Dismissal)

Indonesian employment law recognises termination of employment for reasons of urgency, which must be further detailed in the employment agreement, company regulations or collective labour agreements. Urgent reasons may include serious cause, or even a criminal act.

Unlike regular termination of employment, termination for reasons of urgency does not require a notice of termination or minimum notice period. Employees terminated for urgent reasons will not be entitled to severance pay and service appreciation pay.

7.4 Termination Agreements

Termination agreements are permissible under Indonesian law and, upon execution, must be registered with the Industrial Relations Court. There are no specific requirements or limitations on the terms of a termination agreement.

7.5 Protected Employees

There is no specific protection against dismissal for particular categories of employee. However, employees cannot be terminated for the following reasons:

- prolonged illness not exceeding 12 months;
- fulfilment of a state obligation;
- adherence to a religious obligation; marriage;
- pregnancy, giving birth, miscarriage, or nursing a baby;
- being related by blood or through marriage to another employee in the company;
- establishing, becoming a member or management of a labour union, participating in labour union activities outside working hours (or during working hours in accordance with an employment agreement, company regulations or a collective labour agreement);
- reporting the employer to the authorities for crimes allegedly committed;
- differences over understanding religion, political orientation, ethnicity, colour, race, gender, physical condition or marital status; and
- permanent disability, illness due to work accident, or illness due to occupational disease, for which the period of recovery cannot be ascertained, as attested to by a physician.

8. EMPLOYMENT DISPUTES

8.1 Wrongful Dismissal Claims

Wrongful dismissal is regarded as termination of employment without valid reasons (as stipulated under the Omnibus Law) or if the termination is not carried out through proper procedure.

The consequences of wrongful dismissal claims may include payment of the maximum amount of severance package, payment of wages during the period between termination and a final and binding court decision being issued, or reinstatement of the employee in his or her previous position.

8.2 Anti-discrimination Issues

Indonesia has ratified ILO Convention No 111 of 1958 on Discrimination in Respect of Employment and Occupation. Thus, discrimination regulated in this Convention is sufficient grounds for an anti-discrimination claim. In other instances, it can encompass:

- discrimination over the opportunity to a job and equal treatment from an employer;
- discrimination over salary of male and female employees doing the same job; and
- discrimination against an employee with HIV/AIDS.

The burden of proof for anti-discrimination claims follows the general civil procedural law, as it lies with the claimant.

Under the Manpower Law, anyone available for a job has the same opportunity to obtain a job without being discriminated against on grounds of gender, ethnicity, race, religion, or political orientation, in accordance with the person's interest and capability. Equal treatment also applies to persons with disabilities. Further, employees have the right to receive equal treatment without discrimination from their employer, and employers are under an obligation to provide their employees equal rights and responsibilities without discrimination on gender, ethnicity, race, religion, skin colour or political orientation.

Indonesian employment law imposes administrative sanctions on the violation of the discrimination rules. However, it does not specifically stipulate the damages/relief applicable in an anti-discrimination claim. Nevertheless, under a general tort provision in the Indonesian Civil Code, a person who commits an unlawful act that causes harm to another person must compensate that person for the damages caused.

Alternatively, if an employee opts to file an employment termination claim with an Industrial Relations Court, they may receive a severance package should the claim be accepted by that court.

9. DISPUTE RESOLUTION

9.1 Judicial Procedures

Industrial relations disputes are settled via a three-tier mechanism: (i) bipartite meeting; (ii) mediation at the local office of Manpower Agency or conciliation by a private conciliator; or (iii) court proceedings at an Industrial Relations Court specifically established to hear and examine industrial relations disputes. An appeal to the Supreme Court may be filed by any of the parties against a decision of the Industrial Relations Court.

There are no specific rules on class action for an employment dispute, nor has this ever been tested via class action. However, in regular Industrial Relations Court proceedings, there is no limitation on the number of plaintiffs. In practice, it could be hundreds in a mass termination case.

Parties to an industrial relations dispute may act on their own behalf, be represented by attorneys, or by a labour union or an employer's organisation of which they are a member.

9.2 Alternative Dispute Resolution

Arbitration is a possible alternative resolution method for settlement of an industrial relations dispute, however, it is only allowed specifically for a dispute on the drafting and amendment of the terms and conditions of work (normally in a collective labour agreement negotiation) and a dispute between different labour unions in one company.

As a matter of general Indonesian arbitration law, pre-dispute arbitration agreements are enforceable. Nevertheless, agreements to arbitrate, post-dispute, are also recognised.

9.3 Awarding Attorney's Fees

Attorney's fees cannot be awarded to the other party; under procedural law, attorneys' fees are borne by those who utilise them.

ABNR Counsellors at Law was founded in 1967 and is Indonesia's longest-established law firm. ABNR pioneered the development of international commercial law in the country, following the reopening of its economy to foreign investment after a period of isolation in the early 1960s. With over 100 partners and lawyers (including two foreign counsel), ABNR is the largest independent, full-service law firm in Indonesia and one of the country's top-three law firms by number of fee earners, giving it the scale needed to simultaneously handle large and complex transnational deals across a range of practice areas. It also has global reach as it has been the exclusive Lex Mundi (LM) member firm for Indonesia since 1991. LM is the world's leading network of independent law firms, with members in more than 100 countries.

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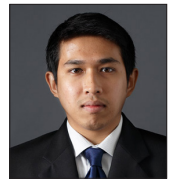
Indra Setiawan is a leading figure in ABNR's labour and employment practice. He has advised a long list of blue-chip domestic and multinational corporations across the entire spectrum of manpower law, including in connection with employment contracts; the complex rules governing the employment of expatriates in Indonesia; the use of agency/contract labour; termination policies, strategies and their execution; employee benefits and entitlements; and regulatory and compliance issues. He frequently represents employers directly during negotiations with employees and labour unions in relation to industrial disputes and strikes, and proposed terminations. In contentious manpower matters, he regularly acts for clients at mediation, before the Industrial Relations Court and on appeal at the Supreme Court.



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