COUNTRY COMPARATIVE GUIDES 2021

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Indonesia

EMPLOYMENT & LABOUR LAW

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This country-specific Q&A provides an overview of employment & labour law laws and regulations applicable in Indonesia.

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INDONESIA
EMPLOYMENT & LABOUR LAW

1. What measures have been put in place to protect employees or avoid redundancies during the coronavirus pandemic?

The MOM allows employers whose business activities are affected by the government's social restriction policies, to make adjustments to its employee's salary and the manner of salary payment, based on an agreement with the employees. Employers are also permitted to pay in installments or to postpone the payment of mandatory religious holiday allowance.

In addition to the above, the government has also implemented several measures to protect employees' income, namely by providing:

1. direct cash assistance or a salary subsidy of Rp. 600,000 for employees in the private sector with a monthly salary of less than IDR 5 million and are registered with BPJS Ketenagakerjaan;
2. waiver of payment of income tax for employees with certain criteria from April to December 2020.

2. Does an employer need a reason in order to lawfully terminate an employment relationship? If so, state what reasons are lawful in your jurisdiction?

Yes, in principle, Law No. 13 of 2003 on Manpower, as amended by Law No. 11 of 2020 on Job Creation ("**Labor Law**"), discourages the termination of employment. The employer is expected to prevent termination by taking positive measures. However, if termination is inevitable, the employer must notify the employee of the termination and the reason for it.

If the employee rejects termination, the employer should then engage in bipartite negotiation with the employee over the matter. If both parties fail to reach an agreement in the bipartite negotiation, the termination procedure carries on to the next stage in accordance with the industrial relations dispute settlement mechanism.

The reasons for termination of employment by an employer stipulated in the Labor Law are:

1. Merger, consolidation, acquisition, or separation of the employer that causes an employee to terminate the employment, or the employer to reject continuation of the employment;
2. Implementation of cost-efficiency measures, whether or not followed by closure of the business, due to losses suffered by the employer;
3. Closure of business due to continuous losses being incurred for 2 consecutive years;
4. Closure due to *force majeure*;
5. Ongoing debt restructuring carried out by the employer;
6. Bankruptcy of the employer;
7. A request for termination submitted initially by an employee due to the following action by the employer:

(a) abuse, humiliation, or threat to the employee;

(b) persuading or ordering the employee to engage in an unlawful act;

(c) non-payment of wages at the agreed time for 3 consecutive months or more, even though the employer pays wages promptly afterward;

(d) not fulfilling an obligation made to the employee;

(e) ordering the employee to carry out work beyond what was agreed; or

(f) ordering an employee to carry out work that endangers life, safety, health, or the dignity of the employee, while the work was not listed in the employment agreement.

8. A decision by a competent labour dispute settlement institution (the Industrial Relations Court, PHI) that exonerates the employer from an employee's allegations that cite action referred to in point 7 above.
9. Voluntary resignation by the employee, that meet the following requirements:

(a) decision made to resign in writing at least 30 days before the date of resignation;

(b) is not tied to a commitment to work for the company after certain training program or education; and

(c) employee obligations are fulfilled until the date of resignation.

10. Unauthorised absence of the employee.
11. An employee's violation of the Employment Agreement, or Company Regulation/Collective Labor Agreement.
12. Legal proceedings involving the employee.
13. Retirement of the employee
14. Prolonged absence due to illness of the employee
15. Decease of the employee.

Notwithstanding the employer's obligations mentioned above, the following reasons for termination do not require an employer to inform employee(s) or his/her legal heir, of termination if:

a. The employee has voluntarily resigned;

b. The employment is for a definite period and the period has expired;

c. The employee has reached retirement age stipulated in the respective employment agreement, Company Regulation, or Collective Labor Agreement; or

d. The employee has passed away.

3. What, if any, additional considerations apply if large numbers of dismissals (redundancies) are planned? How many employees need to be affected for the additional considerations to apply?

The Labor Law does not specifically regulate the procedure for mass employment termination. Therefore, the termination should follow the procedure for individual termination as provided under the Labor Law. However, should the affected employee is union member, notice of the termination must be addressed to the union.

4. What, if any, additional considerations apply if a worker's employment is terminated in the context of a business sale?

The Labor Law is silent in relation to employment of workers within the context of a business sale, as it only regulates termination for reason of merger, consolidation, acquisition, or separation of the employer that causes an employee to terminate the employment, or the employer to reject continuation of the employment.

In practice, employees who are attached to the business will either be offered (i) a new position in the seller's company, (ii) a transfer of employment to the purchaser (new owner of the business) or (iii) a mutual termination with the seller.

5. What, if any, is the minimum notice period to terminate employment? Are there any categories of employee who typically have a contractual notice entitlement in excess of the minimum period?

The Labor Law stipulates that the employee and/or labor union must be notified in writing at least 14 business days before the termination date or 7 business days, if the termination is to be made during the probationary period. In relation to employee resignation, a written notice must be submitted by the employee at least 30 days before the last day of employment.

6. Is it possible to pay monies out to a worker to end the employment relationship instead of giving notice?

The Labor Law only stipulates that the employer must provide written notice before terminating employment. No other approach to waive the notification obligation of the employer is stipulated. However, in practice, payment in lieu of notice can be made by mutual agreement between the parties.

7. Can an employer require a worker to be on garden leave, that is, continue to employ and pay a worker during his notice period but require him to stay at home and

not participate in any work?

Yes, the Labor Law allows the suspension of employment during the employment termination process (from bipartite negotiation to termination via the PHI), provided the employer pays full salary and benefits to the employee as stipulated in the Employment Agreement, Company Regulation, or Collective Labor Agreement.

8. Does an employer have to follow a prescribed procedure to achieve an effective termination of the employment relationship? If yes, describe the requirements of that procedure or procedures.

Yes, employer must follow a prescribed procedure. In principle, the employer is expected to prevent termination through, among others: re-scheduling of work hours, taking cost-efficiency measures, improving working methods, or providing guidance to develop employee performance. If termination is inevitable, the employer must observe termination procedure under the Labor Law and Industrial Relations Law, before proceeding with termination.

Unilateral employment termination of a permanent employee, for no reason whatsoever, is prohibited under the Labor Law. To terminate employment for reasons not specified in the Labor Law, the employer must negotiate mutual termination with the employee.

If the cause of termination is specified in the Labor Law, the cause and intention to terminate the employment must be notified to the employee and/or labor union at least 14 business days prior to the termination date. Should the employee disagree with the termination, the parties must begin the mandatory bipartite meeting to amicably settle the termination dispute within 30 business days. The settlement process must be continued with mandatory mediation for another 30 business days, if no agreement was reached during the bipartite meeting. Following a failed mediation, either party may submit the termination dispute to the Industrial Relations Court and, ultimately, the Supreme Court. The courts will review the case to determine whether the termination may be carried out and the amount of severance that must be paid.

9. If the employer does not follow any prescribed procedure as described in response to question 8, what are the consequences for the employer?

The Labor Law clearly states that termination of an employment relationship not in accordance with the specified procedure will be deemed null and void. This means that the employer would be obliged to reinstate the employment relationship and continue to pay the employee’s wages and other entitlements.

10. How, if at all, are collective agreements relevant to the termination of employment?

Indonesian companies are required to have an employee handbook (or also known as the Company Regulation) or a Collective Labor Agreement. Both documents may stipulate details for termination procedure applicable to employees of the company, as well as the calculation of severance package, which should not violate the standard prescribed under the Labor Law.

11. Does the employer have to obtain the permission of or inform a third party (e.g local labour authorities or court) before being able to validly terminate the employment relationship? If yes, what are the sanctions for breach of this requirement?

No, the Labor law does not require the employer to obtain permission of or inform a third party before being able to initiate employment termination.

12. What protection from discrimination or harassment are workers entitled to in respect of the termination of employment?

The Labor Law stipulates that an employer is prohibited from terminating an employee for discrimination related to belief, religion, political orientation, ethnicity, colour, race, group, sexual orientation, physical condition or marital status. It also regulates that the employee may apply to the relevant institutions for termination of employment if the employer is abusing, humiliating or threatening the employee.

13. What are the possible consequences for the employer if a worker has suffered discrimination or harassment in the

context of termination of employment?

The employer might be brought before the Industrial Relations Court and ultimately, the Supreme Court, should an employee apply for termination of employment on grounds that a right of the employee has been violated.

In addition, a discriminatory act by an employer might also lead to administrative sanction in the form of a reprimand, written warning, a limitation on certain business activities, a freeze of business activities, and the partial revocation of license or business permit.

14. Are any categories of worker (for example, fixed-term workers or workers on family leave) entitled to specific protection, other than protection from discrimination or harassment, on the termination of employment?

The Labor Law stipulates that the employer is prohibited from terminating the employment of any employee for the following reasons:

a. Absence due to illness for less than 12-consecutive months, as attested to by a written statement from a doctor;

b. Absence due to obligations to the State as required by the applicable laws and regulations;

c. Absence due to a religious obligation;

d. Absence due to the employee's wedding;

e. Absence due to pregnancy, giving birth, experiencing a miscarriage, or breast-feeding;

f. The employee is related by blood or through marriage to another employee of the same employer;

g. The employee establishes, or becomes a member of or an administrator or management of a labor union; the employee carries out labor union activities outside working hours, or during working hours with permission from the employer, or as regulated under the employment agreement, company regulation, or the collective labor agreement;

h. The employee reports an unlawful act or crime committed by the employer to the authorities;

i. The employee is discriminated against for reasons of understanding/belief, religion, political orientation, ethnicity, color, race, sex, physical condition or marital status;

j. The employee is permanently disabled, ill as a result of a work accident, or ill due to an occupational disease whose period for recovery cannot be ascertained, as attested to by a written statement from a doctor.

15. Are workers who have made disclosures in the public interest (whistleblowers) entitled to any special protection from termination of employment?

Law No. 13 of 2006 on Protection of Witnesses and Victims ("**Protection of Witness and Victim Law**") protects an employee who becomes a witness (in the public interest) in a case. The law stipulates that a person who causes a witness, a victim or their family to lose their job because the witness or victim testifies in a court proceeding, will be liable to imprisonment and a fine.

Specifically, under the Labor Law, should an employee make a disclosure/report to an institution that their employer committed a crime, the employer is prohibited from firing that employee.

16. What financial compensation is required under law or custom to terminate the employment relationship? How is such compensation calculated?

Under the Labor Law certain types of employment termination require the payment of a severance package to the employee. A severance package consists of three components: (a) severance pay, (b) service appreciation pay, and (c) compensation. The calculation of each must be made by using formulas stipulated in the Labor Law, the amount of which will vary depending on based on the length of service, latest salary, fixed allowance and balance of annual leave. An employer may provide a different formula to calculate a severance package as stipulated under its Company Regulation or Collective Labor Agreement (but it must not be less than that prescribed by law).

17. Can an employer reach agreement with a worker on the termination of employment in which the employee validly waives his rights in return for a payment? If yes, describe any limitations that apply,

including in respect of non-disclosure or confidentiality clauses.

Yes, it is possible for both parties to mutually terminate the employment relationship in return for a severance package. The amount of severance will depend on the agreement of both parties.

18. Is it possible to restrict a worker from working for competitors after the termination of employment? If yes, describe any relevant requirements or limitations.

Yes, it is possible. However, the restriction must be based on an agreement between the parties to be applicable.

Although the Labor Law is silent on this matter, the Indonesian Civil Code ("ICC") stipulates a general term on post-employment restrictions, including a non-competition clause. Article 1601 (x) of the ICC provides that an employer may restrict an employee from performing work in a certain manner after their employment with the employer has ended, provided the following are observed:

1. The agreement must be made in writing;
2. The court is allowed to nullify all or part of the agreement if a claim is made by an employee, for the reason that the employee is damaged unfairly by the agreement. In this situation, the worst-case scenario for an employer is that a judge nullifies the non-competition clause as agreed between the parties.

In practice, a non-competition clause in an employment agreement between an employer and employee, or a standalone agreement between the parties, may be waived. If the non-competition clause is to be stated in the employment agreement, it needs to survive termination of the agreement. This is to avoid any misunderstanding that all clauses of the employment agreement, are terminated because the employment relationship itself has ended.

Further, the agreed terms and conditions will be binding upon the parties (*pacta sunt servanda* principle), and Indonesian Courts should honor, apply, and uphold such agreed terms and conditions, should the employee breach the agreement on non-competition and the employer seek monetary damages/compensation. Nevertheless, in practice the enforcement of the violation of the restriction is difficult to implement. If an employer files a court claim on the basis of breach of contract, they should provide evidence of having suffered a loss based on the violation. In reality, losses thus incurred by an employer would be hard to identify, leaving the employer limited protection from an employee's breach of the restriction.

19. Can an employer require a worker to keep information relating to the employer confidential after the termination of employment?

Yes. The requirement must be based on an agreement between the parties. In practice, it is common that a non-disclosure agreement is provided under an employment agreement, or is agreed by the parties under a separate non-disclosure agreement.

However, the same issue still applies to enforcement of the confidentiality provisions as for other post-restriction agreements, i.e., the employer should provide evidence that the employer has suffered losses based on the breach of the agreement on confidentiality. Please refer to our answer to No. 16 for more detail on this issue.

Nonetheless, should disclosure of an employer's confidential information occur via an electronic medium of whatever type, the employee concerned may be subject to sanctions stipulated under the law and regulations on electronic information, as well as on data privacy.

Minister of Communication and Informatics (MCIT) Regulation No. 20 of 2016 on Personal Data Protection in Electronic Systems ("MCIT Reg. 20/2016") defines Personal Data as genuine, factual information that is inherent and may be related, either directly or indirectly, to an individual, and is kept and maintained, and whose confidentiality is safeguarded and protected. Although MCIT Reg. 20/2016 is silent on who would qualify as an individual, we are of the view that the definition "individual" may stretch to a legal entity as a separate body. Given this interpretation, companies should also be considered as individuals, and genuine, factual information that might be used against it would be confidential.

Further, under Law No. 11 of 2008 on Electronic Information and Transactions, as amended by Law No. 19 of 2016 ("Law 11/2008"), an item of personal data must only be disclosed following consent of the data owner. The owner may file a lawsuit over material or non-material harm caused by violation or failure to protect such confidential information by the disclosing party.

This may also be true, to the extent applicable, for any party involved in aiding the disclosure of such information. In addition, Law 11/208 prohibits anyone from transmitting electronic information or documents that do not belong to them without prior permission from their owner. A violation could lead to criminal sanction of 8 years' imprisonment or penalty of up maximum of IDR2 billion.

20. Are employers obliged to provide references to new employers if these are requested? If so, what information must the reference include?

The employers are not obliged to provide references to the new employers.

21. What, in your opinion, are the most common difficulties faced by employers in your jurisdiction when terminating employment and how do you consider employers can mitigate these?

The cause of termination under the Labor Law is not exhaustive, which leaves certain condition unregulated, e.g., redundancy. Consequently, to terminate redundant employees, the employer must negotiate mutual termination and the amount of severance with the affected employee. In some cases, the employees may be reluctant to accept a mutual termination offer for many reasons, e.g., job safety, disagreement over the amount of severance, etc. Should the employer wish to continue with the termination, they must obtain the employee consent during the bipartite or mediation process or seek termination approval from the Industrial Relations Court or Supreme Court, which is time-consuming and costly. To mitigate the issue, the employer should include redundancy as a cause of termination and the severance package under their company regulations or collective labor agreement. These documents will be the legal basis for the termination of employment.

22. Are any legal changes planned that are likely to impact on the way employers in your jurisdiction approach termination of employment? If so, please describe what impact you foresee from such changes and how employers can prepare for them?

The Indonesian Government has issued the Job Creation Law, which amends and eliminates general provisions on termination that were previously stipulated by the Labor Law. The implementing regulations will specify the general rules provided under the Job Creation Law.

It is advisable for companies to prepare amendments to their company regulations or collective labor agreements, as well as their employment agreement templates for new employees, to be in accordance with the new law and its implementing regulations.

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