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Guide to Restructuring a Cross-Border Workforce

Indonesia

Contributor:

ABNR

COUNSELLORS AT LAW

Indonesia

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A.Reduction in Workforce

1. Is there a concept of redundancy - based on a shortage of work or other economic reasons - as a justified reason to dismiss employees in your jurisdiction? If so, how is it defined?

Prevailing Indonesian labour law and regulations discourage termination of employment. Employers, employees, labour unions, and the government must make every possible effort to avoid it. If termination is inevitable despite all of these efforts, it must be effected by following stipulated procedures and it must be based on a valid basis for termination, as specified in the law, collective labour agreements, company regulations, or the employment agreement.

While Government Regulation No. 35 of 2021 on Definite-Term Employment Agreements, Outsourcing, Work and Rest Hours, and Termination of Employment (GR 35/2021) stipulates any valid basis for termination, it is silent on termination due to a shortage of work. However, it does specify certain economic or business reasons the employer may use as a valid basis for termination (eg, if the employer is seeking improvements in business efficiency due to losses already incurred, or to prevent future losses).

2. In brief, what is the required process for making someone redundant?

The following process is required in the event of termination for any valid reason, except resignation, the end of a definite-term contract, retirement, death of an employee, termination for reasons of urgency, and mutual termination.

Article 37(2) GR 35/2021 stipulates that if termination is inevitable, the employer must supply the employee and the company's labour union (if the employee is a member) with written notice of termination at least 14 business days before the intended termination date or seven business days if termination is during the probationary period. If the employee receives notice and does not object to it, the employer must report the termination to the Ministry of Manpower (MoM) or the local Manpower Office with jurisdiction over the employee's work location.

However, if the employee objects to the termination, the employee's rejection must be conveyed to the employer in writing with reasons within seven business days of receiving the notice. The dispute must then be resolved through bipartite negotiation between the employer, and the employee or the labor union.

Should the parties fail to reach an agreement in the bipartite meeting, they must undergo mediation at the local Manpower Office and, if mediation fails, the dispute may be escalated to court proceedings at the Industrial Relations Court or, in certain cases, the Supreme Court

Notwithstanding the above, regardless of the employer's stated basis for terminating the employee, the employment relationship can be terminated by mutual agreement, formalised in a Mutual Employment Termination Agreement (META).

3. Does this process change where there is a "collective redundancy"? If so, what is the employee number threshold that triggers a collective redundancy?

The procedure to terminate multiple employees must follow the procedure as explained in question 2.

4. Do employers need to consult with unions or employee representatives at any stage of the redundancy process? If there is a requirement to consult, does agreement need to be reached with the union/employee representatives at the end of the consultation?

The employer does not need to consult or reach an agreement with the labour union or employee representatives to terminate employees.

However, the employer must notify the labour union (if the employee in question is a union member). See question 2.

The labour union is entitled to accompany or represent its members throughout the termination process, as well as during the industrial relations dispute settlement process (ie, bipartite negotiation, mediation and court proceedings) if termination is rejected by the employee in question.

5. If agreement is not reached, can the restructure be delayed or prevented? If so, by whom?

If any employees affected by a business restructuring reject the unilateral termination or refuse to enter into a META (in a mutual termination), the rejection or disagreement would not affect the validity and completion of the business restructuring.

However, the employment relationship between the employer and employees will continue to be valid until they reach a mutual agreement, or there is a final and binding court decision declaring that the employment relationship has been validly terminated.

6. What does any required consultation process involve (ie, when should it commence, how long should it last, what needs to be covered)? If an employer fails to comply with its consultation obligations, what remedies are available?

There is no statutory consultation process under Indonesian law. Please see question 4.

7. Do employers need to present an economic business rationale as part of the consultation with unions/employee representatives? If so, can this be challenged and how would such a challenge normally be made?

There is no statutory consultation process under Indonesian law. See question 6.

Regarding presenting an economic business rationale, under GR 35/2021, if the termination is due to the employer suffering losses, it needs to prove the existence of such losses via financial reporting.

Further, to conduct terminations for efficiency reasons to prevent losses, the employer must be able to prove that there has been a potential decrease in employer productivity or profit that will impact their operations. GR 35/2021 does not provide examples of documents or evidence that must be procured by the employer. This allows each employer to evaluate their circumstances and procure documents or evidence that are relevant to their business and operations, including documents showing an economic business rationale.

8. Is there a requirement or is it best practice to consult employees individually (whether or not the employer is also legally required to collectively consult employees)?

Although there is no obligation to consult with employees, employers usually prefer mutual termination since this option is deemed to be more practical, can be effective immediately, and carries a minimum risk of dispute. If there is a mutual termination, the employer must invite, consult and negotiate with the employee individually on the terms and conditions of termination.

9. Are there rules on the selection of individual employees for redundancy?

The prevailing law is silent on this matter; however, to justify a valid basis for termination, the employer can only terminate employees who are directly related to or affected by the basis for termination.

For example, if an employer plans to carry out mass termination due to the closure of a certain working division as a means of efficiency, the employer may not terminate employees of other divisions that are not directly related to or affected by the dissolved working division.

10. Are there any specific categories of employees who an employer is prohibited from making redundant?

Article 153 Law No. 13 of 2003 on Manpower, as amended by Law No. 6 of 2023 on Job Creation (the Manpower Law), states that employers are prohibited from terminating employees who:

- are absent from work due to illness proven by a doctor's certificate, for a period not exceeding 12 continuous months;
- are unable to perform their work due to a requirement to fulfil obligations to the state under the law and regulations;
- perform worship that is commanded by their religion;
- are getting married;
- are pregnant, giving birth, experiencing a miscarriage, or breastfeeding a baby;
- have blood or marital ties with other employees;
- establish, become a member, or undertake the management of a labour union, are conducting a labour union's activities outside of working hours or within working hours with the agreement of the employer, or based on provisions stipulated in the employment agreement, company regulation, or collective labour agreement;
- report the employer to the authorities for criminal offences committed by the employer;
- have a different ideology, religion, political view, ethnicity, colour, class, gender, physical condition, or marital status; and
- are in a state of permanent disability or illness due to a work accident, or illness due to an employment relationship, for which, as proven by a doctor's certificate, the recovery period has not been confirmed.

11. Are there categories of employees with enhanced protection (eg, union officials, employees on sick leave or maternity/parental leave, etc)?

There are no categories of employees who are entitled to enhanced protection. However, please refer to question 10.

12. What payments are employees entitled to when made redundant? Do these payments need to be made within a specified period? Are there any other requirements, such as giving contractual notice, payments into a central fund, etc.

In the event of termination, employers must pay a severance package, which consists of three components: severance pay, service appreciation pay, and compensation of entitlements. The severance package must be made by using the formulae stipulated under GR 35/2021 as a minimum. Employers may opt to use their own formula, provided that the formula is more beneficial to the employee. GR 35/2021 states different severance package formulae depending on the basis for termination and the employee's service period with the employer.

The Manpower Law and GR 35/2021 do not mention when the severance package must be paid. However, termination is considered effective once the severance package has been fully paid. Please also note that the employer's failure to pay a severance package would make the employer liable to criminal sanctions.

There are no other requirements regarding the payment of a severance package.

13. If employees are entitled to redundancy/severance payments, are there eligibility criteria and how is the payment calculated? If this is formula based, please set out the formula.

As explained in question 12, an employee's eligibility to receive a severance package as well as the severance package calculation formula will depend on the basis for termination and the employee's service period.

The following are stipulated under GR No. 35/2021:

Severance Pay

The amount of severance pay is one month's wages for each year of service, with a maximum cap of nine months' wages.

Service Appreciation Pay

The amount of service appreciation pay is dependent on the employee's length of service. It begins with two months' wages for three to six years' service and increases at a rate of one month's wages per three years's service up to a cap of 10 months' wages for 24 or more years of service

Compensation of Entitlements

Compensation of entitlements comprises:

- annual (or long) leave that has not been taken;
- relocation expenses (this is to cover the cost for employees and their family to return to where they were hired);
- other compensation as stipulated in the individual employment agreement, company regulation or collective labour agreement.

For the severance package calculation, the monthly wage is the aggregate of the:

- basic wage; and
- fixed allowances for employees and their family.

14. Do employers need to notify local/regional/national government and/or regulators before making redundancies? If so, by when and what information needs to be provided?

There is no obligation for employers to notify the authorities before terminating employees.

15. Is there any obligation on employers to consider alternatives to redundancy, including suitable alternative employment?

The prevailing law and regulations state that employers, employees, or labour unions should make every possible effort to avoid employment termination. Examples of this may be to seek suitable alternative employment, relocation, or transfer. If termination is inevitable despite all of these efforts, employers may carry out termination within the boundaries of the prevailing law.

16. Do employers need to notify local/regional/national government and/or regulators after making redundancies, eg, immigration department, labour department, pension authority, inland revenue, social security department? If so, by when and what information needs to be provided?

If the terminated employee does not object to termination within the specified time limit, the employer must report the termination to the relevant Manpower Office. For mutual termination, the parties must register the META with the relevant Industrial Relations Court.

In addition, following the termination, the employer may need to carry out certain administrative actions, which include terminating the Health and Manpower Social Security Programmes that the employee had previously been enrolled in or, for foreign employees, reporting the termination to the MoM and the Directorate General of Immigration.

17. If an employee is not satisfied with the decision to make them redundant, do they have any potential claims against the employer? If so, what are they and in what forum should they be brought, eg, tribunal, arbitration, court? Could a union or employee representative bring a claim on behalf of an employee/employees and if so, what claim/s and where should they be brought?

For an employee challenge and claim on the termination, including in what forum, should they be brought, see question 2.

For representation of labour unions, see question 4.

If employees reject termination, their claim may be: to be reinstated; or to get a higher severance package from the employer.

18. Is it common to use settlement agreements when making employees redundant?

Yes, it is common to use settlement agreements (META) in the termination of employees. Employers usually prefer mutual termination, as this option is deemed to be more practical, can be effective immediately, and carries minimal risk of dispute.

19. In your experience, how long does it normally take to complete an individual or collective redundancy process?

Every case of employee termination will have different timelines, depending on the circumstances. For a unilateral termination, the procedure from the issuance of a notice of termination until reporting to the relevant Manpower Office may take approximately one month. However, if the employee rejects termination, the industrial relations dispute settlement process may take more than a year.

Mutual termination can be effective immediately and its registration with the relevant Industrial Relations Court may take approximately one month.

20. Are there any limitations on operating a business for a period following a redundancy, like a prohibition on hiring or priority for re-hire being given to previous employees?

There are no limitations on operating a business for a certain period following termination.

Restructuring/Re-organisation of the business

21. Is employee consultation or consent required for major transactions (such as business transfer, mergers, acquisitions, disposals or joint ventures)?

Under the Manpower Law, employee consultation or consent is not explicitly required for major transactions.

However, Law No. 40 of 2007 on Limited Liability Companies, as amended by Law No. 6 of 2023 on Job Creation (Company Law) requires limited liability companies to notify employees in writing in the event of a merger, consolidation, acquisition, or spin-off, at least 30 days before the call for a general meeting of shareholders.

22. What are the remedies that are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

The Company Law is silent on the remedies that are available if an employer fails to comply with its obligation to notify its employees, as in question 21.

23. Is there any statutory protection of employees on a business transfer? Are employees automatically transferred with the business? Are employees protected against dismissal (before or after the transfer of employment)?

The prevailing laws and regulations do not stipulate specific provisions for the protection of employees on a business transfer. However, in essence, employees will not automatically be transferred with the business. The transfer of employment must be carried out with the consent of employees.

A business transfer is not listed as a valid basis for termination under GR 35/2021.

24. What is the procedure for a transfer of employment (upon a business transfer or within group companies)?

The prevailing law and regulations do not stipulate the procedure for a transfer of employment (whether upon a business transfer or within group companies). The transfer of employment must be based on an agreement between the transferring entity, the receiving entity, and the employee concerned.

25. Are there any statutory rules on harmonising the transferring employees' terms of employment with the existing employees' terms of employment?

There are no statutory rules on harmonising transferring employees' terms of employment with those of existing employees. The terms of employment will be based on an agreement between the transferring entity, the receiving entity, and the employee concerned.

Changing Terms and Conditions

26. Can an employer reduce the hours, pay and/or benefits of an employee?

In essence, changes to the terms and conditions of employment (including reduction of the hours, pay or benefits) must be based on an agreement between the employer and the employee, unless the changes are more beneficial to the employee.

If the employee agrees to a reduction in employee pay, it must not fall below the minimum wage stipulated by the regional government.

27. Can an employer rely on an express contractual provision to vary an employment term?

Employers may rely on an express contractual provision in the employment agreement to vary an employment term, provided that the new terms do not violate the prevailing law and regulations.

28. Can an employment term be varied by implied conduct?

No, an employment term cannot be varied by implied conduct. The employer and employee must expressly agree to vary the employment terms.

29. If agreement is required to vary an employment term, what are the company's options if employees refuse to agree to the proposed change?

The prevailing law and regulations do not provide alternative options for an employer if employees refuse to agree to the proposed change of an employment term.

30. What are the potential legal consequences if an employer varies an employment term unilaterally?

If an employer varies an employment term unilaterally, it may trigger the rights of the employee to request a termination of employment, as the employees may argue that they are required by the employer to work beyond what was initially agreed in the employment agreement (as stipulated in GR 35/2021). Consequently, the employer is required to pay a severance package to the employees.

Areas to Watch

Please provide an outline of any upcoming legislative developments or other issues of particular concern or importance that are not already covered in your answers to the questionnaire. Please limit responses to the jurisdictional level rather than descriptions of wider global trends. Please limit your response to around 200 words.

There are several proceedings ongoing in the Constitutional Court for the judicial review of the Manpower Law. The Court's decision on these cases will affect legislative developments in the labour sector.

Other than the above, it has been reported that the MoM will amend Government Regulation No. 36 of 2021 on Wages. The amendment will most likely affect the calculation formula for wages, as well as the minimum wage requirement. It will also include a provision that the central government has the authority to set the minimum wage for an area hit by a national or natural disaster.

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Indra Setiawan
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Indra Setiawan, a key figure in ABNR's labor and employment practice, is listed as a "Leading Individual" for Labour & Employment by The Legal 500 Asia Pacific (2023 ed), is ranked as a Band 2 lawyer for Labour & Employment by Chambers Asia Pacific (2023 ed), and was recently named one of Indonesia's top 100 lawyers by Vantage Asia/Asia Business Law Journal.

He has advised a long list of blue-chip domestic and multinational corporations, as well as Indonesian state-owned enterprises, across the entire spectrum of manpower law. He has in-depth knowledge and extensive experience in developing legal and communication strategies for individual and mass layoffs, and assisting clients in the execution of these. He advises clients on the employment aspects of corporate transactions; compliance issues, such as workplace fraud; employee transfers; and the complex rules governing expatriates and employee benefits.

In contentious manpower matters, he frequently represents employers during negotiations with employees and labour unions concerning industrial relations disputes and strikes. He acts for clients at bipartite meetings, in mediation, before the Industrial Relations Court, and on appeal in the Supreme Court.

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Ridzky Amin
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Ridzky, a partner of the firm, has been with ABNR since February 2008. He is recommended for Labour & Employment by The Legal 500 Asia Pacific (2023 ed).

Ridzky's main areas of practice encompass commercial litigation, arbitration and alternative dispute resolution, shipping and maritime, as well as employment matters. His experience in litigation spans a wide range of civil and commercial litigation and includes representation in legal matters as varied as shareholders and joint venture disputes, major construction, mining and plantation, oil and gas services, and entertainment. He has also acted in securities-related, banking and insurance claims, defamation and product liability cases. He occasionally represents clients in commercial-related criminal proceedings and investigations before the authorities, and is also experienced in representing clients in administrative disputes before the State Administrative Court, as well as in bankruptcy proceedings before the Commercial Court. His arbitration practice spans both domestic and international arbitration, and he has represented clients and been involved in arbitration proceedings under the auspices of BANI, SIAC and ICC.

Particularly in the field of shipping and maritime, Ridzky has been substantially involved in matters related to major collision, salvage, international sale of goods, charter party disputes, cargo claims, vessel repair and construction, sale and purchase of vessels, mortgage enforcement, insurance, carriage of goods and passengers, freight forwarding, and the arrest and detention of vessels.

His employment practice within ABNR includes the drafting and review of employment contracts, employee handbooks and manuals, collective labour agreements, as well as providing advice and assistance in employment termination and negotiations including complex employment matters arising from mergers, acquisitions, restructuring and reorganisation. He has also represented clients before the employment authorities and the Industrial Relations Court in employment disputes, including disputes regarding breach of employment agreements and wrongful dismissal.

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Tifanny Natalia
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Tifanny Natalia joined ABNR as an associate in October 2012. She graduated from the Faculty of Law, University of Indonesia, in 2011, majoring in Business Law.

At ABNR, she has assisted clients in major transactions relating to general corporate, investment, and labour matters and has gained extensive regulatory knowledge in these areas. She has also been part of ABNR teams of lawyers who are involved in legal due diligence for acquisition purposes.

Learn more

Marintan Panjaitan
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Marintan joined ABNR in 2012, and was promoted to associate in 2013 and senior associate in 2022. She focuses her practice on commercial litigation and arbitration, shipping and maritime, and employment matters.

As a litigator, her expertise extends across all aspects of dispute resolution from advising clients on how best to protect their interests before litigation to steering their cases through the judicial system. She has experience in a wide range of civil and commercial litigation, restructuring & insolvency, and antitrust/competition cases. She also represents clients in commercial-related criminal proceedings and investigations before the authorities. Together with other members of ABNR's commercial litigation team, she has an outstanding track record of wins at all levels of the judicial system.

In her shipping and maritime law practice, Marintan manages an extensive portfolio of high-end shipping work, where she has represented and assisted ship owners, operators and charterers, marine insurers and reinsurers (including P&I insurers and H&M underwriters), freight forwarders, and cargo interests. She assisted and advised clients on various legal issues related to carriage of goods by sea, cabotage, vessel registration and reflagging procedures, ship mortgages, salvage, wreck removal, sale and purchase of vessels, establishment of shipping companies, oil spills, liability for environmental damage, vessel arrests, submarine cable installation as well as public and private port infrastructure.

In contentious arenas, she has represented and defended her clients' interests in cases related to vessel collisions, cargo claims, charter-party disputes, and disputes arising from joint ventures for the establishment of shipping companies and shipbuilding contracts.

In employment, Marintan acts for clients in various industrial relations cases before the Industrial Relations Court, and regularly provides advice and assistance on manpower and immigration law, including advice on employment contracts, the complex rules governing the employment of expatriates in Indonesia; employment termination policies, strategies and their execution; employee transfer; employee benefits and entitlements; and regulatory and compliance issues.

She also regularly advises employers on the drafting and negotiation of company regulations and collective labour agreements, negotiations with employees and labour unions in connection with industrial relations disputes and strikes, and conducting fraud investigations on employees.

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