
THE EMPLOYMENT LAW REVIEW

EIGHTH EDITION

EDITOR
ERIKA C COLLINS

LAW BUSINESS RESEARCH

THE EMPLOYMENT LAW REVIEW

The Employment Law Review
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Eighth Edition

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EDITOR'S PREFACE

Every winter we survey milestones and significant events in the international employment law space to update and publish *The Employment Law Review*. At that time, I read the Preface that I wrote for the first edition back in 2009. In that first edition, I noted that I believed that this type of book was long overdue because multinational corporations must understand and comply with the laws of the various jurisdictions in which they operate. This continues to hold true today, and this eighth edition of *The Employment Law Review* is proof of the continuously growing importance of international employment law. It has given me great pride and pleasure to see *The Employment Law Review* grow and develop over the past seven years to satisfy the initial purpose of this text: to serve as a tool to help legal practitioners and human resources professionals identify issues that present challenges to their clients and companies. As the various editions of this book have highlighted, changes to the laws of many jurisdictions over the past several years emphasise why we continue to consolidate and review this text to provide readers with an up-to-date reference guide.

Our first general interest chapter continues to track the variety of employment-related issues that arise during cross-border merger and acquisition transactions. After a brief decline following the global financial crisis, mergers and acquisitions remain active. This chapter, along with the relevant country-specific chapters, will aid practitioners and human resources professionals who conduct due diligence and provide other employment-related support in connection with cross-border corporate M&A deals.

Global diversity and inclusion initiatives remained a significant issue in 2016 in nations across the globe, and this is the topic of the second general interest chapter. In 2016, many countries in Asia and Europe, as well as North and South America, enhanced their employment laws to embrace a more inclusive vision of equality. These countries enacted anti-discrimination and anti-harassment legislation as well as gender quotas and pay equity regulation to ensure that all employees, regardless of sex, sexual orientation or gender identity, among other factors, are empowered and protected in the workplace. Unfortunately, there are still many countries where certain classes of individuals remain under-protected and under-represented in the workforce, and multinational companies still have many challenges with tracking and promoting their diversity and inclusion initiatives and training programmes.

The third general interest chapter focuses on another ever-increasing employment law trend in which companies revise, or consider revising, social media and mobile device management policies. Mobile devices and social media have a prominent role in and impact on both employee recruitment efforts and the interplay between an employer's interest in protecting its business and an employee's right to privacy. Because companies continue to implement 'bring your own device' programmes, this chapter emphasises the issues that multinational employers must contemplate prior to unveiling such a policy. 'Bring your own device' issues remain at the forefront of employment law as more and more jurisdictions pass, or consider passing, privacy legislation that places significant restrictions on the processing of employees' personal data. This chapter both addresses practice pointers that employers must bear in mind when monitoring employees' use of social media at work and provides advance planning processes to consider prior to making an employment decision based on information found on social media.

Last year we introduced the fourth and newest general interest chapter, which discusses the interplay between religion and employment law. In 2016, we saw several new, interesting and impactful cases that further illustrate the widespread and constantly changing global norms and values concerning religion in the workplace. Religion has a significant status in societies throughout the world, and this chapter not only underscores how the workplace is affected by religious beliefs but also examines how the legal environment has adapted to such beliefs. The chapter explores how several nations manage and integrate religion in the workplace, in particular by examining headscarf bans and religious discrimination.

In addition to these four general interest chapters, this eighth edition of *The Employment Law Review* includes 48 country-specific chapters that detail the legal environment and developments of certain international jurisdictions. This edition has once again been the product of excellent collaboration. I wish to thank our publisher, in particular Gideon Robertson and Iain Wilson, for their hard work and continued support. I also wish to thank all of our contributors and my associate, Ryan Hutzler, for his invaluable efforts to bring this edition to fruition.

Erika C Collins

Proskauer Rose LLP

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January 2017

Chapter 25

INDONESIA

*Nafis Adwani and Indra Setiawan*¹

I INTRODUCTION

The primary legislation governing employment relationships in Indonesia is Law No. 13 of 2003 concerning Manpower.² This Law stipulates the primary rules for establishing an employment relationship, employment terms and conditions and employment termination. Some time after its enactment, certain of its provisions were declared unconstitutional by the Indonesian Constitutional Court. Among the other laws that govern employment-related matters, the most important is Law No. 2 of 2004 regarding industrial relations dispute settlement.³

The above-mentioned laws are accompanied by implementing regulations in the form of, *inter alia*, government regulations and regulations of the Minister of Manpower.

To supervise the implementation of the employment laws, the regional offices of the Ministry of Manpower provide manpower-matters supervisors, whose task is to ensure compliance with the provisions.

Law No. 2/2004 regulates multi-stage industrial relations dispute settlements, and categorises industrial relation disputes into the following four groups:

- a* disputes of rights: a dispute that arises from the non-fulfilment of a right as a result of differences in the implementation or interpretation of the prevailing laws and regulations, employment agreements, company regulations or collective labour agreements;

1 Nafis Adwani and Indra Setiawan are partners at Ali Budiardjo, Nugroho, Reksodiputro.

2 Law No. 13/2003.

3 Law No. 2/2004.

- b* disputes of interest: a dispute that arises in an employment relationship as a result of disagreements with respect to the establishment of, or changes to, job requirements to be stipulated in an employment agreement, company regulations or a collective labour agreement;
- c* disputes on employment termination: a dispute that arises from a disagreement with respect to an employment termination that is initiated by one of the parties to the employment agreement; and
- d* disputes among labour unions: a dispute that arises between two labour unions within one company due to disagreements with respect to the membership, implementation of rights, and obligations of the union.

Under the prevailing labour laws, before an industrial relations dispute is brought to court, the parties to the dispute (the respective employer and the labour union) must first make an attempt to settle their dispute through bipartite negotiations. The dispute should be approached in the spirit of deliberation to reach a consensus.

If the negotiation is unsuccessful, either party, or both parties, may register the dispute with the regional manpower agency by submitting evidence of the negotiation. Following the registration of the dispute, parties who have failed to reach a consensus by negotiation have the choice of trying to reach a consensus by way of conciliation, arbitration or mediation. In practice, disputing parties generally opt for mediation under the guidance of mediators who are appointed by the Ministry of Manpower. Mediation is the preferred means for the settlement of employment disputes.

Upon the completion of the mediation process, the mediator will issue a recommendation. If the recommendation is not accepted by one or both of the parties, the dispute may be brought to the Industrial Relations Court (IRC), which has the authority to examine, try and render a decision on an industrial relations dispute. For disputes specifically concerning employment rights and termination of employments, the unsatisfied party may appeal against the decision of the IRC to the Supreme Court.

II YEAR IN REVIEW

On 23 October 2015, The Government of Indonesia issued Government Regulation Number 78 of 2015 concerning wages (Regulation 78 of 2015), and revoked the previous Government Regulation Number 8 of 1981 concerning protection of wages (GR 8/1981). As stated in the consideration section of Regulation 78 of 2015, this regulation is the implementation regulation referred to by Article 97 of Law Number 13 of 2013 concerning manpower (the Manpower Law).

The key stipulations of Regulation 78 of 2015 regard, among others, the formula of minimum wage, basic wage, fixed allowance, non-fixed allowance and payment of wages, which must be paid in Indonesian rupiah. Before this regulation was enacted, many companies paid the employee's wages in US dollars or other foreign currencies.

Regulation 78 of 2015 is now under heavy criticism from labour unions who oppose the new calculation formula of minimum wage. The minimum wage is now calculated based on inflation, GDP and basic cost of living. The basic cost of living is to be determined every five years. Previously, the basic cost of living was determined annually.

III SIGNIFICANT CASES

The Constitutional Court also reviewed Law No. 13/2003, upon which it issued several decisions to invalidate several provisions in Law No. 13/2003 concerning, *inter alia*, statutory time limitation for the submission of legal claims challenging termination, postponement of minimum wage payments. The reason for the invalidation is the Constitutional Court's view that the aforementioned provisions of Law No. 13/2003 are in violation of the Indonesian Constitution.

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Law No. 13/2003 stipulates that an employment relationship is a relationship between the employer and the employee, based on an employment agreement that sets forth the specifics of the job, wages and orders or instructions.

Employment agreements can be made in writing or verbally. If the agreement is made in writing, then it may be made for a definite (fixed-term) or indefinite period of time. A fixed-term employment agreement must be made in writing, and it must be written in Indonesian and in the Latin alphabet. If a work agreement is written in both Indonesian and a foreign language, in the event of differences in the interpretation it is the Indonesian version that will prevail.

A fixed-term employment agreement cannot be made for work that is permanent in nature. Violation of this requirement will cause the automatic conversion of employment relationship from a non-permanent (fixed term) one to a permanent (indefinite term) one.

An employment agreement that is made in writing must state at least the following:

- a* the name, address and line of business of the employer;
- b* the name, sex, age and address of the employee;
- c* the position of the employee or the type of work;
- d* the place where the work is to be carried out;
- e* the amount of wages and how the wages shall be paid;
- f* the terms and conditions of employment stating the rights and obligations of both the employer and the employee;
- g* the effective date of the employment agreement and the period of the employment agreement;
- h* the place and the date where the employment agreement is made; and
- i* the signatures of the parties to the employment agreement.

Amendment to the provisions of the employment agreement can be made at any time upon agreement of both parties.

ii Probationary period

A fixed-term employment agreement cannot provide for a probationary period. By contrast, an indefinite employment agreement may contain a probationary-period clause, but the probationary period may not be longer than three months. The employer and the employee may at any time terminate their employment relationship during the probationary period without the obligation to pay compensation to the other party, but the terminating party must

pay the other party the salary for the remaining employment period until the employment termination date. It is recommended that the notice of termination is made in writing and states the intended date of termination.

iii Establishing a presence

There is no law in Indonesia prohibiting a foreign company, with no legal presence in Indonesia, from employing local employees to work in Indonesia. However, in doing so that company faces the possibility of being deemed as having a permanent establishment (PE) in Indonesia, with the consequence that it must pay Indonesian taxes.

Likewise, a foreign company with no legal presence in Indonesia may hire an employee through an agency or another third party, and may engage an independent contractor. However, it again faces the possibility of being deemed as having a PE, in which case it will be under obligation to comply with all applicable Indonesian tax regulations, including a requirement to register with the relevant Indonesian tax office.

Permanent employees (employees who work under an employment agreement for an indefinite period) have, among others, the following statutory benefits:

- a* social security;
- b* leave entitlement;
- c* religious festivity allowance; and
- d* retirement allowance.

V RESTRICTIVE COVENANTS

The prevailing laws and regulations on employment contain no specific provisions on non-compete covenants and related agreements.

However, Article 1601(x) of the Indonesian Civil Code provides that an agreement that restricts the employee from performing certain work following his or her termination shall be valid only if such agreement is made in writing with the employee.

The judge may, based either on a claim of the employee or upon his or her defence in a dispute, nullify such an agreement either in its entirety or partially, on the grounds that, in comparison to the interest of the employer to be protected and that of the employee, the employee has been unfairly disadvantaged by such agreement.

With regard to such agreement, the employer cannot assume any rights if it has terminated the employment unlawfully, or if the employee terminated the employment due to a certain matter caused by the employer, whether intentionally or due to its fault, or if the judge, at the request or pursuant to a claim by the employee, has declared the termination of the agreement based on urgent reasons which were given to the employee due to the employer's intention or fault.

VI WAGES

i Working time

The maximum working time is 40 hours per week, with the following arrangements:

- a* seven hours a day for six working days a week; or
- b* eight hours a day for five working days a week.

It is prohibited to employ female employees under 18 years of age between the hours of 11pm and 7am. Employers are also prohibited from employing pregnant female employees who, according to a physician's statement, are at risk of damaging their health or compromising their own safety and the safety of their pregnancy if they work between 11pm and 7am. Female employees who work between 11pm and 7am must be provided with food and beverages as well as guarantees of personal safety and decency. The employer is also obliged to provide transport for female employees who work between 11pm and 5am.

ii Overtime

Employers who require an employee to work outside of the normal working hours must pay overtime wages to the employee except if the employee's position, function or job is that of a thinker, planner, implementer or controller whose working hours cannot be limited to normal working hours. Employees of this kind are not entitled to overtime wages, but they are entitled to a higher salary than the salary of ordinary employees.

Overtime can only be performed for the maximum of three hours per day and 14 hours per week. The overtime pay rate for one hour of overtime work is 0.58 per cent of monthly wage plus fixed allowances, if any.

If overtime is performed in working days, the calculation for the overtime wages shall be as follows:

- a* the first overtime hour shall be paid one-and-a-half times the overtime pay rate; and
- b* each consecutive overtime hour after this shall be paid twice the overtime pay rate.

If the overtime work is performed during public holidays and the employee works for five working days, the overtime wages shall be as follows:

- a* the first eight hours shall be paid at twice the overtime pay rate;
- b* the ninth hour shall be paid at three times the overtime pay rate; and
- c* the 10th and 11th hours shall be paid at four times the overtime pay rate.

iii New provision on payment of wages

The newly issued regulation on wages (Regulation 78 of 2015) shows the government's intention to promote transparency. For the first time, the regulation introduces a formula for the calculation of minimum wages. The regulation confirms that the minimum wage applies only to single (not married yet) employees with less than one year working experience. Therefore, applying minimum wage to married or experienced employees is not something that is expected by Regulation 78 of 2015.

Further, the formula for the calculation of a minimum wage is as follows:

$$UM_n = UM_t [UM_t \times (\text{Inflation}_t + \Delta PDB_t)]$$

UM _n	=	Minimum payment to be determined
UM _t	=	Current minimum payment
Inflation _t	=	Inflation calculated from September of the previous year until September of the current year
ΔPDB _t	=	Gross domestic product (GDP) development calculated from the development of the GDP, which consists of the third and fourth quarters of the previous year and the first and second quarters of the current year

The enforcement of this formula gives certainty to entrepreneurs as it enables entrepreneurs to forecast and calculate the minimum wage for the following year.

VII FOREIGN WORKERS

The general rule is that foreign workers are welcome to work in Indonesia, provided that the work to be performed cannot be performed by Indonesian nationals. This requirement is generally applied in a lenient fashion, subject to specific requirements in a number of industries.

The employment of expatriates for the performance of work in Indonesia falls under the category of employment for a fixed term. The reasoning behind this categorisation is that those expatriates will need to obtain a valid permit for working in Indonesia and that such work permit is only issued with a maximum validity of 12 months (even though it comes with a possibility of extension).

Foreign investment companies are allowed to employ expatriates, subject to the prevailing laws and regulations on recruitment of foreign workers. On the other hand, when conducting business in Indonesia, a trading representative office is required to have at least three Indonesian nationals who are simultaneously employed and trained for the purpose of transfer of the expatriates' technical know-how and management skills.

An employer must obtain an expatriate manpower utilisation plan as the master document to obtain the individual work permits for every expatriate employed by the employer.

Further, the expatriate worker shall also obtain a limited-stay visa and the limited-stay permit card for valid employment in Indonesia.

Expatriate workers are entitled to the same protections under the relevant Indonesian labour laws and regulations, as the Indonesian employees.

VIII GLOBAL POLICIES

Law No. 13/2003 requires employers having no fewer than 10 employees to establish a set of enterprise or company rules and regulations (company regulations).

Under Article 111 of Law No. 13/2003, company regulations must regulate at least the following matters:

- a* the rights and obligations of the employer and the employees;
- b* working conditions or requirements;
- c* employee discipline and code of conduct;
- d* the validity period of the company regulations; and
- e* the use of information and facilities provided by the employer.

The provisions of company regulations may not contravene the provisions of applicable laws and regulations.

The draft company regulations that have been agreed by the employer and the representative of employees (or the respective trade union in the company, if any) must be submitted to the relevant manpower agency for approval before they can be put into effect. The company regulations are valid for two years as of their approval date; upon expiration they can be renewed.

If a company has a labour union, the labour union may enter into a collective labour agreement (CLA) with the management of the company. The CLA is also valid for two years with the possibility of extension.

i Discrimination

Law No.13/2003 protects employees from discrimination at the work place. Article 5 of the Law provides as follows:

All persons that are qualified to perform a job have the same opportunity to get the job without discrimination. The interpretation of Article 5 provides that all persons who are qualified to perform a job have the same right and opportunity to find a decent job that is in line with interest and capability and to earn a decent living, and may not be discriminated on grounds of sex, ethnicity, race, religion or political orientation.

Article 6 Law No. 13/2003 provides as follows:

(1) All workers have the right to receive equal treatment without discrimination from their employer; and

(2) Employers are under the obligation to provide workers with equal rights and responsibilities with no discrimination based on sex, ethnicity, race, religion, skin colour, or political orientation.

Indonesia has also ratified, among others, the following ILO Conventions:

- a* No. 111 of 1958 on Discrimination in Employment and Occupation; and
- b* No. 80 of 1957 on Equal Remuneration for Male and Female Workers for Work of Equal Value.

ii Corruption

With regard to corruption, Indonesia has Law No. 31 of 1999 concerning Eradication of Criminal Acts of Corruption as amended by Law No. 20 of 2001 (the Anti-Corruption Law). In addition, there is Law No. 11 of 1980 concerning Criminal Acts of Bribery (the Bribery Law).

The Indonesian government has not issued laws or regulations pertaining to sexual harassment. To whatever extent possible, the global policies on discrimination, corruption and sexual harassment must be put in writing under the employment agreement, company regulation or CLA.

IX TRANSLATION

Employment agreements and documents must be made in Indonesian language. Article 31 Paragraph 1 of Law No. 24 of 2009 on the Flag, the Language, the National Emblem and the National Anthem provides that: 'The Indonesian language shall be used in memorandums of understanding or agreements involving state institutions, government institutions, private institutions or Indonesian citizens.' Paragraph 2 of Article 31 of the Law provides that: 'Memorandums of understanding or agreements referred to in Paragraph 1 which involve foreign parties shall also be written in the national language of those foreign parties and/or the English language.'

While Article 31 contains legal obligations, the Law does not provide for any sanctions against the contravention of these obligations. This fact has created serious legal ambiguity and raises the question as to whether a private contract, not written in the Indonesian language in violation of Article 31, will be deemed null and void by a presiding judge.

The Indonesian Supreme Court has affirmed the decision of the district court and high level court that invalidated a loan agreement that was signed following the enactment of the Law because the agreement was not made in Indonesian language. Further, under Article 40 of the Law, the use of the Indonesian language in memoranda of understanding and in agreements (including employment agreement) is to be further regulated by an implementing regulation, which is to be issued by the president (to be issued within two years after the enactment of the Law). In 2014, the government issued Government Regulation No. 57 of 2014 concerning the Improvement and Development of Indonesian Language and Literature.

X EMPLOYEE REPRESENTATION

The Manpower Law provides the following three forums in which employees may have representation:

- a* the bipartite forum, which consists of representatives of the employees and the employer, and which may be established if there are at least 50 employees;
- b* the tripartite forum, which consists of representatives of the labour union, the employer association and the regulator; and
- c* the labour union, the establishment of which is not mandatory. A group of at least 10 employees can establish a labour union.

The government's current involvement in the area of labour unions lies solely with the registration of unions. Despite the fact that the government does not intervene in the establishment of a labour union, a union must be democratic, independent, and responsible. Its membership may not be based on politics, religion, race or gender and must be in line with the principles of the Pancasila (the fundamental ideology of the Republic of Indonesia) and the 1945 Constitution.

Pursuant to Law No. 21 of 2000 regarding Labour Unions,⁴ every employee or labourer has the right to form or to become a member of a trade union. A trade union is formed by at least 10 employees or labourers.

A trade union must, upon its establishment, submit a written notification to the local government agency responsible for manpower affairs for the purpose of registration and record keeping.

A trade union or labour union that has been duly registered and possesses a registration number has the right to:

- a* negotiate a collective labour agreement with the employer;
- b* represent workers or labourers in industrial dispute settlements;
- c* represent workers or labourers in manpower institutions;
- d* establish an institution or carry out activities for the improvement of the workers or labourers' welfare; and

4 Law No. 21/2000.

- e* carry out other manpower or employment-related activities as long as the activities are not against the prevailing laws and regulations.

Matters regarding which officials or which members of the trade union will act as the union's representatives, as well as matters regarding the appointment of such representatives, are to be regulated in by laws or the articles of association of the respective trade union.

The following provisions of Law 21/2000 are intended to protect members of a trade union, federation or confederation of trade unions.

No persons (including employers) may either prevent or force the following: an employee or labourer forming or not forming a trade union; becoming or not becoming a union official; becoming or not becoming a union member; or carrying out or not carrying out trade union activities by means of the following:

- a* terminating his or her employment, temporarily suspending his or her employment, demoting him or her, or transferring him or her to another post, another division or another place in order to discourage or prevent him or her from carrying out union activities or make such activities virtually impossible;
- b* not paying, or reducing the amount of his or her wage;
- c* intimidating the employee or subjecting him or her to any other forms of intimidation; and
- d* campaigning against the establishment of the trade union.

An employer must allow the officials and members of a trade union to carry out union activities during working hours, as agreed upon by the trade union and the employer or as provided in the collective labour agreement.

Law 21/2000 is silent on the matter regarding frequency of meetings for the trade union members and/or officials, and the period of service of the trade union members. These matters are to be regulated in the by-laws or the articles of association of the trade union.

XI DATA PROTECTION

i Requirements for registration

While Indonesia has enacted various laws relating to data privacy in a number of specific areas (e.g., banking, tax), currently no specific and dedicated laws have been enacted regarding the protection of an employee's privacy before, during or after employment. The laws that may be applicable are Law No. 39 of 1999 concerning Human Rights (the Human Rights Law) and Law No. 11 of 2008 as amended by Law No. 19 of 2016 concerning Electronic Information and Transaction (the EIT Law).

The Human Rights Law stipulates that each individual has the right to his or her own privacy, and may not be subjected to an investigation without his or her agreement. Article 39 of the Human Rights Law provides that freedom and secrecy of communication by letter or any other electronic media may not be disturbed or interrupted except upon the instruction of a judge or other authority.

Article 26, paragraph 1 of the EIT Law stipulates that, unless provided otherwise by relevant laws and regulations, use of any information through electronic media that involves personal data of a person must be made with the consent of the person concerned. In line with the Elucidation to Article 26, paragraph 1 of the EIT Law, the protection of personal data is part of privacy rights that include the following definitions: (1) the right to enjoy a

personal life, free from any disturbance; (2) the right to communicate without conversations being spied on; and (3) the right of access to information to do with one's personal life or privacy. In relation to the above, Government Regulation No. 82 of 2012, as implementing regulation of the EIT Law, stipulates that an operator of an electronic system who manages the personal data in the electronic media, must maintain the confidentiality, integrity, authenticity, accessibility, availability and traceability of such electronic information or documents in accordance with laws and regulations.

Based on the foregoing, considering the broad interpretation of personal data, any data or electronic documents related to employees may be considered as personal data; thus, an employer may reserve the right to routinely review all employee emails sent using the employer's email system or documents managed, maintained and held by the employee, to the extent the consent of the employee has been granted to employer.

ii Cross-border data transfers

The prevailing labour law and regulations do not contain restricting provisions in relation to the dissemination or exportation of data to another company in jurisdictions beyond the borders of Indonesia. However, taking into account the provisions of the Human Rights Law and the EIT Law, such dissemination or exportation of employee data may be done with the employees' consent.

iii Sensitive data

The prevailing labour laws and regulations do not provide definitions of 'sensitive data', nor do they set forth restrictions on processing sensitive data.

An employer may perform a medical screening test as long as it is performed with the aim of obtaining information that is relevant to the position's function and duties. The employer may perform the test by itself or use the services of a third party.

Under the Minister of Labour and Transmigration Decision No. KEP.68/MEN/IV/2004 of 2004 regarding prevention and control of HIV/AIDS in the workplace, an employer is prohibited from conducting an HIV test on a worker at any phase of the employment (or before the employment) without the written consent of the worker, except in the event that the test is required for the purpose of the fulfilment of the employer's obligation to provide pre- and post-test counselling to the worker.

The results of an HIV test must be treated confidentially and be protected in the same manner as that of other medical information.

iv Background checks

The labour laws and their implementing regulations do not specifically regulate employee background checks, however, see generally subsections i–iii, *supra*. In practice, an employer or prospective employer cannot do credit checks or criminal checks on its prospective employee without the employee's consent. A potential employer may only request applicants or prospective employees to provide a statement declaring no criminal record or clearance from the relevant police office, or their bank statements.

XII DISCONTINUING EMPLOYMENT

i Dismissal

In general, individual employment terminations or dismissals are regulated under Law No. 13/2003, but the procedure for the termination of an employment relationship is regulated in the Industrial Relations Law.

Law No. 13/2003 provides for two kinds of employment termination:

- a termination without cause (where the employee is not at fault); and
- b termination with cause (where the employee is at fault).

Termination without cause

Termination without cause is employment termination that is triggered by the following circumstances:

- a the employer's change of ownership or change of status, or the employer's merger or consolidation;
- b the employer closing down due to continual loss, *force majeure* and efficiency;
- c bankruptcy;
- d the employee's resignation;
- e the employee's retirement; or
- f the employee's death.

Termination with cause

Termination with cause is employment termination that is triggered by the following circumstances:

- a termination resulting from the employee's violation of the employment contract or company regulation; or
- b termination resulting from the employee's gross wrongdoing or commitment of a major fault.

The Decision of the Constitutional Court of Indonesia in the Case No. 012/PUU-I/2003, dated 26 October 2004, declared the provision in relation to major fault as being in contravention of Article 27, Paragraph (1) of the 1945 Indonesian Constitution, with the result that they are not applicable to the employment termination of employee.

The subsequent decision of Manpower Minister No. 13 of 2005 provides that such termination can only be conducted if a final and binding verdict confirming the employee's wrongdoing has been obtained from a criminal court judge.

All employment termination plans (except where the termination is caused by the resignation of the employee) requires the IRC's approval, in the form of a decision or legalisation. In addition, the employer is obliged to give notification of the termination plan and discuss it with the respective trade union or employee (if the employee is not a member of a trade union, or if there is no trade union in the company). The employee can be rehired by the employer after the employment termination (normally if the termination is without fault).

The labour laws and regulations do not contain a notice period requirement for an employment termination. However, owing to the requirement for prior discussion between

parties, mentioned above, in practice one month's notice should be given. However, the employer may pay a certain sum of money in lieu of the notice, as long as it is agreed to by the employee concerned.

Under Law No. 13/2003, employees whose employment is terminated (except in the event the termination is caused by their resignation or commission of major faults) are eligible for severance pay from the employer. The formula for the severance amount is discussed below.

The often cumbersome and costly procedures for an employment termination have tended to make employers opt for an amicable settlement instead as this is often more advantageous to both the employer and the employee. A mutually agreed amicable employment termination settlement must be made in the form of a written agreement and the agreement must be registered with the IRC.

ii Redundancies

The labour regulations do not contain provisions on redundancies. As discussed above, in general an employer who wishes to terminate the employment of its employees must obtain the approval of the IRC. As such, an employer may terminate a worker by simply giving him or her notice, followed by the procedure for the termination of an employment relationship as regulated in the Industrial Relations Law.

Due to the absence of specific regulations on these matters, mass lay-offs or collective dismissals are governed under Articles 163, 164 and 165 of Law No. 13/2003 concerning employment termination due to the employer's merger or acquisition, closing down, downsizing or rationalisation or bankruptcy. For mass or individual employment terminations, a consultation or discussion with the employee or the trade union is required before the termination.

The termination pay, or severance package, is calculated on the basis of the worker's:

- a* monthly wages;
- b* period of service; and
- c* allowances and benefits such as leave, medical and housing entitlements.

Severance pay

The formula for severance pay is: one month's wages for each year of service with a maximum of nine months' wages. The following is the calculation table:

<i>Length of service</i>	<i>Severance pay</i>
Less than 1 year	1 month's wages
1 year or more but less than 2 years	2 months' wages
2 years or more but less than 3 years	3 months' wages
3 years or more but less than 4 years	4 months' wages
4 years or more but less than 5 years	5 months' wages
5 years or more but less than 6 years	6 months' wages
6 years or more but less than 7 years	7 months' wages
7 years or more but less than 8 years	8 months' wages
8 years or more	9 months' wages

Service appreciation pay (merit allowance)

Service appreciation pay is calculated starting with two months' wages for the first three years of service, followed by an additional one month's wages for every three years of service thereafter, up to a maximum of 10 months' wages for 24 years of service. The following is the calculation table for service appreciation pay:

<i>Length of service</i>	<i>Service appreciation pay</i>
3 years or more but less than 6 years	2 months' wages
6 years or more but less than 9 years	3 months' wages
9 years or more but less than 12 years	4 months' wages
12 years or more but less than 15 years	5 months' wages
15 years or more but less than 18 years	6 months' wages
18 years or more but less than 21 years	7 months' wages
21 years or more but less than 24 years	8 months' wages
24 years or more	10 months' wages

Compensation

Law No. 13/2003 defines compensation as cash compensation for the following benefits and allowances:

- a* annual leave (or long leave) that has not expired and has not been taken: a worker becomes entitled to annual leave after having worked for 12 consecutive months;
- b* relocation expenses: to return the worker and his or her family to the place from which the worker was recruited;
- c* medical and housing allowance: this is stipulated to be 15 per cent of the total severance pay and service appreciation pay, if any;
- d* compensation for other benefits: provided under the respective employment agreement, the company regulations or the collective labour agreement; and
- e* other compensation amounts as determined by the IRC: in general, based on the special arrangements between the employer and worker.

Calculation of severance allowance

For the calculation of severance pay, service appreciation pay and compensation, the monthly wage is defined as:

- a* the basic wage (gross salary);
- b* any kind of allowance granted to the worker and the worker's family periodically and regularly; and
- c* the cost price of rations supplied by the employer to the worker free of charge or, if supplied at a discount, the difference between the cost price and the price at discount.

Severance package

The amount and type of severance to be paid to the worker vary, depending upon the basis of the dismissal or termination.

If the dismissal is due to the worker's violation of the terms of the employment agreement, he or she is entitled to the standard severance pay, service appreciation pay and compensation.

If the dismissal is not because of the worker's fault but for other reasons, such as the worker's reaching the pension age (where the employer does not include the worker in

a pension programme), the worker's death or the employer's rationalisation or redundancy scheme, the worker is entitled to twice the amount of severance pay plus the standard service appreciation pay and compensation.

XIII TRANSFER OF BUSINESS

Under Article 61, Paragraph 3 of Law No. 13/ 2003, in the event of the sale of the business of the employer, all of the rights of the seller's workers become the responsibility of the purchaser, unless agreed otherwise in the respective sale and purchase agreement, without diminishing the rights of the workers concerned.

Article 163, Paragraph 1 of Law No. 13/2003, provides that the employer may terminate its employment relationship with a worker in the event of the employer's change in status, merger, consolidation or change in ownership.

i Permanent workers

In theory and in practice, a transfer of undertakings may give rise to the following three circumstances with respect to the permanent workers of the acquired, surviving, consolidated, divided or transferor company.

Where a worker concerned is not willing to continue his or her employment with the transferee company (new employer)

In this circumstance, the worker is entitled to the severance package amount stipulated by the Labour Law, which consists of the stipulated severance amount, the service appreciation amount and the compensation amount (in other words, the basic amounts of the severance package elements, without any multiplication of the amount). The IRC's approval is required for this.

Where the new employer is not willing to continue the employment of a worker

In this circumstance, the worker concerned is entitled to at least twice the stipulated severance amount, as well as the service appreciation amount, if any, and the compensation amount. The IRC's approval is required.

Where the new employer and the worker mutually agree to continue the employment

In this circumstance, the employment relationship is continued under the same terms and conditions, and the employee's seniority status is recognised by the new employer and retained. The employee is entitled to no severance package.

For the details of the severance pay calculation, see Section XII.ii, *supra*.

ii Non-permanent workers

Non-permanent workers are those workers who work on the basis of a contract for a specified period of time. A non-permanent worker whose employment is not continued by the new employer is entitled to receive payment of his or her wages for the remaining period of the contract, if the employment is ended before the expiry of the contract.

XIV OUTSOURCING

Regulation of the Ministry of Manpower and Transmigration No. 19 of 2012, dated 14 November 2012 regarding Conditions for the Assignment of Part of the Work Performance to Another Company, as amended by Regulation of the Ministry of Manpower and Transmigration No. 27 of 2014, dated 31 December 2014 (Outsourcing Regulation), restricts the activities of the company (the 'user' of the services) that may be assigned to only five activities. These five activities are supporting activities, or activities which are not the company's core business activities. They are: cleaning services, security guards, catering services, transportation services, and mining and oil service supporting activities. This means that activities other than the aforementioned activities may not be assigned to another company. This is where the Outsourcing Regulation differs from Law No. 13/2003. Law No. 13/2003 does not limit the supporting activities that may be assigned to only those five activity categories.

The above Outsourcing Regulation is clearly making an attempt to solve the outsourcing issues. *Inter alia*, it requires the insertion of the TUPE (transfer of undertakings (protection of employment)) clause, which requirement is not mentioned in Law No. 13/2003. The TUPE clause provides protection to employees in the event that the provider company is replaced with another provider company by the user. This clause protects the employees by ensuring that the length of their service and their salary are in line with their experience. The Outsourcing Regulation requires that the contract between the existing provider company and the employee concerned contains the TUPE clause. As long as it contains the TUPE clause or provision, an employment contract between a provider company and its employee may take the form of an employment contract for a fixed term.

The TUPE clause is stipulated in Article 19b (which requires its insertion in contracts of work agreement or labour supplier agreements between the provider company and the user company) and Articles 29(2)c and 29(3)f (which require its insertion in individual employment agreements between the employees and their provider companies) of the Outsourcing Regulation.

Article 30 of the Outsourcing Regulation stipulates the effects for non-compliance with the TUPE clause requirement for fixed-term employment contracts between provider companies and their employees, comprising:

- a* automatic change of the employment status from employment for a fixed term to employment for an unfixed or indefinite period as of the date the fixed-term employment contract is signed by the employer and the employee; and
- b* rejection by the Ministry of Manpower of the registration of the labour supplier agreement between the provider company and the user.

XV OUTLOOK

i Common contraventions of employment law

Employers in Indonesia often encounter problems that arise from obligations they are not aware of or that they neglect to fulfil, or from imposing prohibited employment rules, such as the following.

Inserting a probation clause in a fixed-term agreement

Employers often make the mistake of including a probation-period provision in their fixed-term employment agreements. Under the prevailing labour laws, a worker who is working under a fixed-term employment agreement may not be required to undergo a probation period. A probation clause in an employment agreement for a fixed term will be deemed null and void by operation of law.

Wrongfully entering into a fixed-term employment agreement

An employment agreement for a fixed term may only be entered into if the conditions for it are satisfied (see Section IV.i, *supra*). An employment agreement for a fixed term will automatically transform into an employment agreement for an unspecified period if the conditions for the former type of employment are not satisfied. This has the further consequence that, in the event of the termination of the employment, the employer is required to pay severance to the worker.

Terminating a worker for reason of his or her major fault or grave wrongdoing without a verdict of a criminal court judge

Many employers are unaware that the provision of Article 158 of Law No. 13/2003 regarding termination due to major fault was declared as no longer in effect by the Decision of the Constitutional Court of Indonesia, on the ground that it is in contravention of Article 27, Paragraph 1 of the 1945 Indonesian Constitution.

Under the Decision of the Manpower Minister No. 13 of 2005, which is still in effect, the termination of an employment agreement on the ground of the employee's grave wrongdoing or major fault can be carried out if a final and binding verdict to that effect has been obtained from a criminal court judge.

Contracting work to a third party without following the proper procedure

A company may contract out part of its non-core works to a third party via a labour supplier agreement or a contractor agreement. The Indonesian government regulates a strict procedure that must be complied with by the company before contracting the non-core works to the labour supplier company or contractor.

Some companies fail to observe the correct procedure, however, and contract out their core works to a third party, which is prohibited. This condition may ultimately create a loss to the company because Law No. 13/2003 would then oblige the company to employ the third party's employees as its employee.

ii Hot topics for 2017

The current hot topic in the field of labour law is the introduction of a formula for the calculation of a minimum wage, as mentioned in Section II, *supra*. The increase in Jakarta's local minimum wage for 2017 is around 9 per cent of that of 2016.

Appendix 1

ABOUT THE AUTHORS

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Mr Nafis Adwani joined ABNR in 1993 and has been a partner since 1 July 1998. He graduated from the faculty of law at the University of Indonesia in 1984, majoring in civil law. In 1997, he was seconded to an international law firm in Singapore and gained experience in working on international transactions. His major areas of specialisation are corporate, labour and agrarian laws. In labour matters he has assisted business corporations in major employment termination cases and many other employment matters, such as reviewing employment contracts, reviewing company regulations, providing employment advice, etc. He is licensed by the Capital Market Supervisory Board to provide legal opinions to companies offering securities in the Indonesian capital market. He is also a licensed advocate.

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Mr Indra Setiawan joined ABNR as an associate in July 2003 and was promoted to become a senior associate in 2008. He is a law graduate of the University of Indonesia. In ABNR, he specialises in Indonesian employment law and has an extensive knowledge in this area. He has advised multinational and local companies as well as international non-governmental organisations on various employment matters. He is a licensed advocate who is admitted by PERADI, the Indonesian Bar Association. He has represented clients in employment disputes at the Industrial Relations Courts. He attended a course on Singapore Employment Law in Singapore to better understand the need of Singapore-based clients. In 2013 Mr Setiawan was seconded to Kim & Chang, a top-tier law firm in South Korea, during which he gained significant knowledge of Korean culture and its employment regulatory regime. While seconded, he assisted Kim & Chang in advising various South Korean companies on Indonesian employment law matters. He also has a strong understanding of Indonesian corporate matters, which allows him to better understand the needs of corporate clients when dealing with employment matters.

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