THE EMPLOYMENT LAW REVIEW

Tenth Edition

Editor
Erika C Collins

THE LAWREVIEWS

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PREFACE

For the past nine years, we have surveyed milestones and significant events in the international employment law space to update and publish *The Employment Law Review*. In updating the book this year, I reread the Preface that I wrote for the first edition 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. I have been practising international employment law for more than 20 years, and I can say this holds especially true today, as the past 10 years have witnessed progressive shifts in the legal landscape in many jurisdictions. This tenth 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 this publication grow and develop to satisfy its initial purpose: 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.

This year, we proudly introduce our newest general interest chapter, which focuses on the global implications of the #MeToo movement. The movement took a strong hold in the United States at the end of 2017, as it sought to empower victims of sexual harassment and assault to share their stories on social media in order to bring awareness to the prevalence of this issue in the workplace. In this new chapter, we look at the movement's success in other countries and analyse how different cultures and legal landscapes impact the success of the movement (or lack thereof) in a particular jurisdiction. To that end, this chapter analyses the responses to and effects of the #MeToo movement in several nations and concludes with advice to multinational employers.

Our chapter on cross-border M&A continues to track the variety of employment-related issues that arise during these 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 2018 in nations across the globe, and this is one of our general interest chapters. In 2018, many countries in Asia and Europe, as well as 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 regulations to ensure that all employees, regardless of gender, 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.

We continue to include a chapter focused on 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.

Our final general interest chapter discusses the interplay between religion and employment law. 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 five general interest chapters, this edition of *The Employment Law Review* includes 45 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, and I wish to thank our publisher. I also wish to thank all our contributors and my associate, Vanessa P Avello, for her invaluable efforts to bring this tenth edition to fruition.

Erika C Collins
Proskauer Rose LLP
New York
February 2019

Chapter 22

INDONESIA

Nafis Adwani and Indra Setiawan[1]

I INTRODUCTION

The primary legislation governing employment relationships in Indonesia is Law No. 13 of 2003 on 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 on industrial relations dispute settlement.[3]

The above-mentioned laws are accompanied by implementing regulations in the form, *inter alia*, of 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 supervisors for matters related to manpower, whose task is to ensure compliance with the provisions.

Law No. 2/2004 regulates multi-stage industrial relations dispute settlements, and categorises industrial relations 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;

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 between labour unions: a dispute that arises between two labour unions within one company owing to disagreements with respect to the membership, implementation of rights and obligations of the union.

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

2 Law No. 13/2003.

3 Law No. 2/2004.

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, may register the dispute with the regional manpower agency by submitting evidence of the negotiation. Following registration of the dispute, parties that 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 before the Industrial Relations Court (IRC), which has the authority to examine, try and render a decision in 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

The relatively new Presidential Regulation No. 20 of 2018 (PR 20/2018) and Regulation of the Ministry of Manpower No. 10 of 2018 (MOM 10/2018) (the New Regulations), have respectively revoked Presidential Regulation No. 72 of 2014 (the Old Presidential Regulation) and Regulations of the Ministry of Manpower Nos. 16 and 35 of 2015 (the Old MOM Regulations), significantly streamlining the administration of expatriate employment.

The most important change brought about by the New Regulations is that a prospective employer will no longer be required to apply for a separate Expatriate Manpower Employment Licence (IMTA) from the Minister of Manpower in order to employ an expatriate. Instead, all the employer will need to do is submit an Expatriate Manpower Employment Plan (RPTKA) to the Minister for approval. Article 9 of the New Regulation expressly states that an approved RPTKA will simultaneously constitute the licence to employ the expatriate. Once the RPTKA is approved, the employer must take the following steps: (1) notify the Director General of Manpower Placement Development and Expansion of Job Opportunity (the Director General); and (2) pay the Director General a compensation fee of US$100 each month for each expatriate employed. Evidence of acceptance of the notification and compensation fee payment must then be submitted online to the Director General of Immigration as the basis for issuance of a limited-stay visa.

Further, under the Old Presidential Regulation, an IMTA could be issued with validity of up to one year, after which it could be renewed for a maximum of one year, except for a company director or commissioner, when it could be extended for a maximum of two years. In contrast, Article 11 of PR 20/2018, in conjunction with Article 9 of MOM 10/2018, provides that an approved RPTKA will remain valid for as long as the employer plans to employ the expatriate, or for the period of validity of the employment agreement or work agreement of the expatriate. This benefits employers because, previously, they would have been forced to renew or extend the RPTKA and (formerly) the IMTA even when the employment agreement or work agreement with the expatriate was still valid.

Further, Article 6 of PR 20/2018 allows expatriates in particular sectors to work concurrently for more than one employer. Previously, only a director or commissioner could serve with more than one company. This new provision seems to reflect a greater awareness of the need for flexibility in sectors suffering from shortages of skilled labour, in line with Article 2(2) of PR 20/2018.

III 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. A fixed-term employment agreement must be made in writing, and it must be written in Indonesian and in the Roman alphabet. If a work agreement is written in both Indonesian and a foreign language, in the event of differences in the interpretation, 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 an employment relationship from one that is non-permanent (fixed-term) to one that is permanent (indefinite term).

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

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

Amendments 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 be made in writing and state 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, the 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.

IV 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 it 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 the 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 the agreement. The employer cannot assume any rights if (1) it has terminated the employment unlawfully, (2) the employee terminated the employment because of a certain matter caused by the employer, regardless of whether it was intentional, or (3) the judge, at the request of or pursuant to a claim by the employee, has declared that the agreement should be terminated based on urgent reasons given by the employer.

V WAGES

i Working time

The maximum working time is 40 hours per week, with the following arrangements: seven hours a day for six working days a week; or 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 a 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 the 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 one-and-a-half times the overtime pay rate; and

b each consecutive overtime hour after this shall be 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 will be as follows:

a the first eight hours shall be twice the overtime pay rate;

b the ninth hour shall be three times the overtime pay rate; and

c the 10th and 11th hours shall be four times the overtime pay rate.

iii New provision on payment of wages

Government Regulation 78 of 2015 on Wages reveals 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 (unmarried) employees with less than one year's working experience. Therefore, applying the minimum wage to married or experienced employees is not something that is provided for in Regulation 78.

The formula for the calculation of the minimum wage is as follows:

$$UM_n = UM_t [UMt \times (Inflation_t + \Delta PDB_t)]$$

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 them to forecast and calculate the minimum wage for the following year.

VI FOREIGN WORKERS

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

The employment of expatriates for 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 this 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. However, when conducting business in Indonesia, a trading representative office is required to have at least three Indonesian nationals who are simultaneously employed and trained so that the expatriates' technical know-how and management skills may be transferred.

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. The expatriate worker must also obtain a limited-stay visa and 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 Indonesian employees.

VII 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 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 of the Law 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: No. 111 of 1958 on Discrimination in Employment and Occupation; and 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 government has not, to date, issued laws or regulations pertaining to sexual harassment. In practice, sexual harassment cases are adjudicated by using the provisions of Articles 289–296 of the Indonesian Criminal Code. 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.

VIII TRANSLATION

Employment agreements and documents must be made in the 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 memoranda of understanding or agreements involving state institutions, government institutions, private institutions or Indonesian citizens.' Article 31, Paragraph 2 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 of 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 a district court and High Court that invalidated a loan agreement that was signed following the enactment of the Law because the agreement was not made in the Indonesian language. Further, under Article 40 of the Law, the use of the Indonesian language in memoranda of understanding and in agreements (including employment agreements) 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.

IX 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 that 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 on 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

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 No. 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 an employee or labourer from:

a forming or not forming a trade union;

b becoming or not becoming a union official;

c becoming or not becoming a union member; or

4 Law No. 21/2000.

d carrying out or not carrying out trade union activities by means of the following:
- 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;
- not paying, or reducing the amount of his or her wage;
- intimidating the employee or subjecting him or her to any other forms of intimidation; and
- 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 No. 21/2000 is silent on the matter regarding frequency of meetings for trade union members and officials, and the period of service of the trade union members. These matters must be regulated in the by-laws or the articles of association of the trade union.

X 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 and 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 on Human Rights (the Human Rights Law) and Law No. 11 of 2008 as amended by Law No. 19 of 2016 on Electronic Information and Transactions (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(1) of the EIT Law stipulates that, unless provided otherwise by relevant laws and regulations, use of any information through electronic media that involves an individual's personal data must be made with the consent of the person concerned. In line with the Elucidation to Article 26(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 an individual'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, if the employee has been granted to the 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 outside 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 undergo a medical screening test as long as it is carried out with the aim of obtaining information that is relevant to the position's function and duties. The employer may undergo the test by themselves or use the services of a third party.

Under the Minister of Labour and Transmigration Decision No. KEP.68/MEN/IV/2004 of 2004 on prevention and control of HIV/AIDS in the workplace, an employer is prohibited from carrying out an HIV test on an employee at any phase of the employment (or before the employment) without the written consent of the employee, except if 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 subsections i and iii. 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.

XI 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 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 owing to continual loss, *force majeure* or 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 triggered by the following circumstances:

a the employee's violation of the employment contract or company regulation; or
b the employee's gross wrongdoing or commission of a major fault.

The decision of the Constitutional Court of Indonesia in Case No. 012/PUU-I/2003, dated 26 October 2004, declared the provision in relation to committing a major fault as being in contravention of Article 27(1) of the 1945 Indonesian Constitution, with the result that it is not applicable to an employee's termination.

The subsequent Circular Letter of Manpower Minister No. SE.13/MEN/SJ-HK/I/2005 provides that such termination can only be carried out 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) require the IRC's approval, in the form of a decision. 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 a major fault) 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 in subsection i, 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 an employee's contract 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.

Owing to the absence of specific regulations on these matters, mass lay-offs or collective dismissals are governed under Articles 163 to 165 of Law No. 13/2003 concerning employment termination owing 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 calculations are outlined in the table below.

Length of service	Severance pay
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 calculations are outlined in the table below.

Length of service	Service appreciation pay
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: an employee becomes entitled to annual leave after having worked for 12 consecutive months;

b relocation expenses: to return the employee and his or her family to the place from which the employee 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 employee.

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 employee and his or her family periodically and regularly; and

c the cost price of rations supplied by the employer to the employee 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 employee vary, depending upon the basis of the dismissal or termination.

If the dismissal is because of the employee'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 employee's fault but for other reasons, such as the employee reaching the pension age (where the employer does not include the employee in a pension programme), the employee's death or the employer's rationalisation or redundancy scheme, the employee is entitled to twice the amount of severance pay plus the standard service appreciation pay and compensation.

XII TRANSFER OF BUSINESS

Under Article 61(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 employees become the responsibility of the purchaser, unless agreed otherwise in the respective sale and purchase agreement, without diminishing the rights of the employees concerned.

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

i Permanent employees

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

Where an employee is not willing to continue his or her employment with the transferee company (new employer)

In this circumstance, the employee 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 (i.e., the basic amounts of the severance package elements, without any multiplication of the amount). IRC approval is required for this.

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

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

Where the new employer and the employee 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 not entitled to a severance package.

For details on the severance pay calculation, see Section XI.ii.

ii Non-permanent employees

Non-permanent employees are those employees who work on the basis of a contract for a specified period of time. A non-permanent employee 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.

XIII 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 (the 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 that are not the company's core business activities, and relate to the following services: cleaning; security; catering; transportation; and mining and oil. 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, which does not limit the supporting activities that may be assigned to only those five activity categories.

The Outsourcing Regulation clearly has the aim to solve outsourcing issues. Among other things, it requires the insertion of the transfer of undertakings (protection of employment) (TUPE) clause, the requirement of which 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 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.

XIV 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, an employee 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 III.i). 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 employee.

Terminating an employee's contract 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 on termination owing to a major fault was declared as no longer in effect by a decision of the Constitutional Court of Indonesia, on the ground that it is in contravention of Article 27(1) of the 1945 Indonesian Constitution.

Under Circular Letter of Manpower Minister No. SE.13/MEN/SJ-HK/I/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 work to a third party via a labour supplier agreement or a contractor agreement. The government regulates a strict procedure that must be complied with by the company before contracting the non-core work to the labour supplier company or contractor.

Some companies fail to observe the correct procedure, however, and contract out their core work 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 employees.

ii Hot topics

The hot topic in 2018 in the field of labour law was the elimination of the IMTA and the introduction of a process for notification to the Director General of Immigration, as mentioned in Section II. In 2018, Jakarta's minimum wage increased by 8.03 per cent compared with 2017.

iii National Legislation Programme 2015–2019

Currently, three employment-related bills have been prepared by the parliament. As recorded in the National Legislation Programme 2015–2019, there is the Bill on Manpower, the Bill on Supervision of Manpower and the Bill on Protection of Indonesian Workers Abroad. Among these, the Bill on Protection of Indonesian Workers Abroad was a priority of the 2017 National Legislation Programme.

Appendix 1

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