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Judicial review of Job Creation Law: Implications to employment practices P1

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I. Introduction

Following a judicial review of Law No. 6 of 2023 on the Enactment of Government Regulation in lieu of Law No. 2 of 2022 on Job Creation (the "**Job Creation Law**"), the Constitutional Court of the Republic of Indonesia issued its ruling, Constitutional Court Decision No. 168/PUU-XXI/2023 (the "**Decision 168/2023**") on 31 October 2024. The decision addresses amendments to certain provisions of Law No. 13 of 2003 on Employment (the "**Employment Law**") as modified by the Job Creation Law.

The court partially granted a petition containing 69 points, submitted on 1 December 2023 by the Labour Party (*Partai Buruh*), the Federation of Indonesian Metal Workers Union (*Federasi Serikat Pekerja Metal Indonesia*), the Confederation of All Indonesian Workers' Union (*Konfederasi Serikat Pekerja Seluruh Indonesia*), the Indonesian Workers' Union Confederation (*Konfederasi Persatuan Buruh Indonesia*) and the Confederation of Indonesian Trade Unions (*Konfederasi Serikat Pekerja Indonesia*). Of these 69 points, 21 proposed amendments to the Employment Law were approved under Decision 168/2023.

Decision 168/2023 further mandates that legislators reformulate the Employment Law to incorporate the amendments introduced by both the Job Creation Law and Decision 168/2023. This reformulation must be completed within two years from the reading of Decision 168/2023. The decision aims to resolve existing regulatory complexities related to employment provisions introduced under the Job Creation Law. Moving forward, any future amendments related to employment provisions will be made exclusively to the Employment Law, rather than the Job Creation Law.

II. Key changes to the Employment Law

For employers and businesses, Decision 168/2023 introduces several changes that could directly impact existing employment practices. These changes cover various areas, including the employment of foreign employees, fixed-term employment agreements (*Perjanjian Kerja Waktu*

Tertentu or "**PKWT**") and outsourcing practices, employee rest period policy, long-term rest policy and employment termination procedure. Each of these areas requires careful consideration and potential adjustments to ensure compliance with the new provisions. Outlined below are the changes we consider crucial to employment practices.

1. Employment of foreign employees

Employment Law	Decision 168/2023
Article 42 (4)	
Foreign Employees can be hired in Indonesia only in Employment Relationships for specific positions and for a certain period, and they must possess competencies that align with the positions they will hold.	Foreign Employees can be hired in Indonesia only in Employment Relationships for specific positions and for a certain period, and they must possess competencies that align with the positions they will hold, ***with due regard to prioritising the employment of Indonesian workers***.

Decision 168/2023 underscores the importance of prioritising local employees for employment opportunities. The court emphasised that the use of foreign workers must be based on clear and measurable needs and should not negatively impact opportunities for local workers. Consequently, the court indicated that limitations on employing foreign workers must be regulated.

However, the decision lacks specific provisions detailing the extent to which the 'prioritisation' of local employees over foreign employees should be implemented, leaving room for interpretation. This amendment may not necessarily impose a restriction on fulfilling clear and measurable needs. **While this new provision may not directly affect current employment practices, any violation of this condition could serve as a basis for lawsuits alleging unlawful acts (*perbuatan melawan hukum*) by employees against non-compliant employers.**

2. PKWT

Employment Law	Decision 168/2023
Article 56 (3)	
The duration or completion of specific work as referred to in paragraph (2), is determined based on the Employment Agreement.	The duration or completion of specific work ***is set for a period not exceeding a maximum of five years, including any extensions***.

Prior to Decision 168/2023, the Employment Law (as modified by the Job Creation Law) did not specify a maximum duration for PKWT arrangements. This was later regulated to a maximum of five years, including any extensions, under Article 8 of Government Regulation No. 35 of 2021 on Fixed-Term Employment Agreements, Outsourcing, Work Periods, Rest Periods and Termination of Employment. **Decision 168/2023 upholds this provision, ensuring that the Government cannot introduce future changes to this provision without the approval of the House of Representatives.**

3. Outsourcing practices

Employment Law	Decision 168/2023
Article 64 (2)	
The Government determines certain aspects of work implementation as referred to in paragraph (1).	The ***Minister*** determines certain aspects of the work implementation as referred to in paragraph (1), ***in accordance with the types and fields of outsourced work agreed upon in the written outsourcing agreement***.

Decision 168/2023 designates the Minister of Manpower as the authority responsible for determining the fields of work eligible for outsourcing. The eligible types of outsourced work must align with the written outsourcing agreements between the outsourcing user company and the outsourcing provider company.

Prior to the enactment of the Job Creation Law, the Government had stipulated certain types of eligible outsourced work under Minister of Manpower and Transmigration Regulation No. 19 of 2012 on the Requirements for Outsourcing Part of the Work to Another Company. However, this regulation has since been revoked. **It remains to be seen whether the Minister of Manpower will adopt a similar approach in the future to formalise certain types of non-eligible outsourced work.**

4. Wage structure policy

Employment Law	Decision 168/2023
Article 88 (3) letter b	
The wage policy as referred to in paragraph (2) includes: b. Wage structure and scale […]	The wage policy as referred to in paragraph (2) includes: b. ***a proportional*** wage structure and scale […]
Article 92 (1)	
Employers are required to develop a wage structure and scale in the company, taking into account the company's capabilities and productivity.	Employers are required to develop a wage structure and scale in the company, taking into account the company's capabilities and productivity, ***as well as the employee's category, position, length of service, education and competence*.**

The requirement for a proportional wage structure and scale, as stipulated in Article 88(3)(b) of the Employment Law, was previously removed by the Job Creation Law but has now been reinstated by Decision 168/2023.

Furthermore, Decision 168/2023 amends Article 92(1) of the Employment Law, mandating that employers consider certain factors outlined in the article—such as employee category, position, length of service, education and competence—when formulating the wage structure and scale.

5. Wage stipulation under employment agreement

Employment Law	Decision 168/2023
Article 90A	
Wages above the minimum wage are based on an agreement between the Employer and the Employee/Labour at the company.	Wages above the minimum wage are based on an agreement between the Employer and the Employee/Labour ***or the Labour Union/Employee Union*** at the company.

By involving labour unions or employee unions in the wage determination process, Decision 168/2023 aims to ensure that workers have a stronger voice in negotiations. This change is likely to result in more balanced and equitable wage agreements. However, it may also lead to more complex and potentially prolonged negotiations of employee agreements. Unions typically advocate for higher wages and better working conditions for their members, which could affect the negotiation process.

6. Employee rest period policy

Employment Law	Decision 168/2023
Article 79 (2)	
The rest period as mentioned under paragraph (1) shall include: b. the weekly rest period is one day for six workdays in a week […]	The rest period as mentioned under paragraph (1) shall include: b. the weekly rest period is one day for six workdays in a week ***or two days for five workdays in a week*** […]

Previously, the Job Creation Law specifically defined the rest period only for employees working a six-day workweek, creating legal uncertainty for those with a five-day workweek. Meanwhile, Article 77(2)(b) of the Employment Law recognises the criteria for a five-day workweek for employees working eight hours a day. **The amendment by Decision 168/2023 establishes consistency and clarity regarding rest period terms for employees with a five-day workweek, ensuring that they are entitled to two days of rest.**

7. Long-term rest policy

Employment Law	Decision 168/2023
Article 79 (5)	
In addition to the rest and leave periods mentioned in paragraphs (1), (2) and (3), certain companies may provide long-term rest as regulated in the Employment Agreement, Company Regulations or Collective Employment Agreement.	In addition to the rest and leave periods mentioned in paragraphs (1), (2) and (3), certain companies ~~***may***~~ provide long-term rest as regulated in the Employment Agreement, Company Regulations or Collective Employment Agreement.

The provision for long-term rest, which was previously optional, is now mandatory for certain companies according to Decision 168/2023. However, the decision does not specify

which 'certain companies' are subject to this obligation. If the Government later establishes criteria for these 'certain companies,' those companies will be required to incorporate long-term rest provisions into their Employment Agreement, Company Regulations and/or Collective Employment Agreement.

8. Employment termination procedure

Employment Law	Decision 168/2023
Article 151 (4)	
In the event that the bipartite negotiation, as referred to in paragraph (3), does not result in a consensus, Termination of Employment shall proceed to the next stage in accordance with the Industrial Relations Dispute resolution mechanism.	In the event that the bipartite negotiation, as referred to in paragraph (3), does not result in a consensus, Termination of Employment ***may only be carried out after obtaining a ruling from the Industrial Relations Dispute resolution institution whose ruling has permanent legal force***.

According to Law No. 2 of 2004 on the Industrial Relation Dispute Settlement (as amended by Government Regulation in lieu of Law No. 1 of 2005) ("**Law 2/2004**"), the settlement procedures for an industrial relations dispute typically involve the following steps: (1) bipartite negotiation, (2) conciliation/arbitration or mediation, and (3) filing a lawsuit to the Industrial Relations Court if a settlement is not reached in the preceding steps. In bipartite negotiation, the disputing parties aim to reach a consensus through consultative meetings. If consensus is not achieved, the parties have the option to resolve the dispute through conciliation or mediation. Should the parties disagree with either process, the matter will proceed to mediation. If mediation is unsuccessful, the dispute is referred to and resolved by the Industrial Relations Court as the last resort.

Decision 168/2023 introduces significant changes to these procedures if the parties fail to reach an agreement in the bipartite negotiation. Upon failure at the bipartite negotiation stage, Decision 168/2023 requires disputing parties to obtain a ruling from the Industrial Relations Court with permanent legal force.

Decision 168/2023 stipulates that an agreement for termination of employment can only be enacted after obtaining a ruling from an industrial relations dispute resolution body, whose decision has become legally binding. For example, if an agreement for termination of employment is reached during mediation, the termination can only proceed after the settlement agreement is registered with the Industrial Relations Court and receives a formal ruling affirming the said settlement agreement.

Accordingly, when a company seeks to draft a settlement agreement related to the termination of employment following a bipartite meeting, it must consider the effective date of termination in light of the judicial process in which the agreement attains legally binding status. Consequently, both the company and the employee are obligated to fulfill their responsibilities throughout the dispute resolution process until the ruling is rendered.

III. Next steps

Decision 168/2023 introduces several changes that significantly impact multiple areas of employment practices in Indonesia. These changes enhance legal certainty for various compliance aspects and, notably, impose stricter procedures for employers regarding the termination of employment. For provisions that remain unclear, Decision 168/2023 may serve as a catalyst for legislators to enact future implementing regulations of the Employment Law, addressing any remaining ambiguities.

In light of these new provisions, it is advisable for companies to review and update their employment practices. This may include making necessary adjustments to internal policies and contractual documentation to ensure alignment with the Employment Law provisions as amended by Decision 168/2023.

This Legal Alert aims to provide an overview of Decision 168/2023. It may not cover all related aspects. Please feel free to contact us if you require more detailed advice or have specific questions.

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