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Indonesian Constitutional Court Decision No. 168/PUU-XXI/2023
-Manpower Law partly Unconstitutional-

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1. Introduction

On October 31, 2024, The Constitutional Court ("Mahkamah Konstitusi" or "**MK**") issued a decision ("**MK Decision 168/2023**") finding several articles of Law No. 13 of 2003 on Manpower ("**Manpower Law**") unconstitutional.

MK Decision 168/2023 was issued in reply to a petition filed on December 1, 2023, by various labor federations requesting a judicial review of several articles in the Manpower Law. This petition focused on the articles amended by Law No. 6 of 2023 ("**Job Creation Law**"), claiming that some of those amendments violate workers' rights and are against the 1945 Constitution of Indonesia.

Here is the list of Manpower Law Articles that MK Decision 168/2023 found unconstitutional.

No.	Category	Article	Points
1	Foreign Workers (TKA)	42 (1)	Elimination of TKA Employment Permit & Clarification of the supervisory authority for the foreign worker employment plan (RPTKA)
2		42 (4)	Priority for Indonesian workers when hiring TKA (Article 42 (4))
3	Fixed Term Employment Agreement ("PKWT")	56 (3)	Employment Term for PKWT
4		57 (1)	Requirement for PKWT agreement in writing
5	Outsourcing	64 (2)	Scope of acceptable outsourcing work,
6	Working Hours and Rest	79 (2)	Weekly Rest
7		79 (5)	Long Leave
8	Wages	88(1), (2) and (3)	Right to live and Wages, and Central Government's obligation to stipulate Wage Policy and its Element
9		88C (2)	Minimum Wage (Provincial and Districts/Cities)
10		88D (2)	Minimum Wage Calculation (Certain Index)
11		88F (1)	Minimum Wage Calculation (Under certain circumstances)
12		90A	Minimum Wage Determination in the Company
13		92 (1)	Wage Structure and Scale in the Company

14		95 (3)	Wage when the Company goes Bankrupt
15		98	Wage Council
16	Termination of Employment ("PHK")	151 (3)	Bipartite Negotiations in a Dismissal Procedure
17		151 (4)	Industrial Relations Decision
18		157 (3)	Continuing Obligations
19		156 (2)	Severance Pay

This newsletter explains the key points of the above ruling.

2. Contents of MK Decision 168/2023

1) Foreign Workers ("TKA")

a. Elimination of TKA Employment Permit & Clarification of the supervisory authority for the foreign worker employment plan (RPTKA) (Article 42(1))

a) Issues

i. Background

Job Creation Law amended Article 42 (1) by deleting an obligation for employers to obtain written permission from the Minister.annd adding an obligation to have a plan for the use of Foreign Workers that has been ap-proved by the Central Government.

ii. Issues

Petitioners claimed that such amendment may weaken the supervision mechanism for foreign workers, thereby allowing many unskilled foreign workers to enter the Indonesian job market.

- Job Creation Laws amendment to Article 42 (1) :

Article No.	Old provision (before the amendment by the Job Creation Law)	Current provision
42 (1)	Every employer who employs foreign workers is under an obligation to obtain written permission from the Minister.	Every Employer who employs Foreign Workers is required to have a plan for the use of Foreign Workers that has been approved by the Central Government.

The Petitioners claim so, because of the change of requirement for employers who employ foreign workers; from the TKA Employment Permit ("IMTA") to mere Foreign Worker Utilization Plan ("**RPTKA**").

b) MK Decisions

Although the MK did not find the petitioners' argument itself problematic, it ruled that the current provision, which simply states that the central government is the organization that administers the RPTKA, is unconstitutional and that the Minister of Manpower should interpret this point differently:

Article No.	Current provision	The interpretation where the MK Decision 168/2023 is reflected
42 (1)	Every Employer who employs Foreign Workers is required to have a plan for the use of Foreign Workers that has been approved by the Central Government.	Every Employer who employs Foreign Workers is required to have a plan for the use of Foreign Workers that has been approved by the minister responsible for manpower, in this case, the minister of Manpower.

b. Prioritization of Indonesian Workers over TKA (Article 42 (4))

a) Issues

Petitioners claimed that Article 42 (4), which requires foreign workers to have the appropriate skills for a specific job type and for a specific period of time, has the potential to be used as a gateway for a massive entry of unskilled foreign workers (unskilled labor) into Indonesia.

b) MK Decisions

MK ruled that the Manpower Law is unconstitutional unless it is interpreted to include the following reference to the priority of using of Indonesian workers, as shown in the English translation below

Article No.	Current provision	The interpretation where the MK Decision 168/2023 is reflected
42 (4)	Foreign workers may be employed in Indonesia only in employment relationships for certain positions and for a certain period of time and must have the competencies appropriate to the position they will occupy.	Foreign Workers may be employed in Indonesia only in an Employment Relationship for a certain position and for a certain period of time and have competence according to the position to be occupied, taking into account the priority of using Indonesian workers.

MK Decision 168/2023 is in line with the Minister of Manpower Decree No. 349 of 2019 **("Kepmenaker 349/2019"),** which stipulates certain positions are still restricted for foreign workers, such as positions related to human resources.

2) Fixed Term Employment Agreement ("PKWT")

a. Employment Term for PKWT (Article 56 (3))

a) Issues

Under the Manpower Law before the Job Creation Law, the employment period for PKWTs was two years, with only one extension permitted, and the maximum extension period was one year (Article 59(4) of the Manpower Law before the Job Creation Law). This provision was deleted by the Job Creation Law, and the newly stipulated Article 56(4) does not contain any specific provisions regarding the employment period of PKWTs. The petitioners argued that the above-mentioned amendment by the Job Creation Law has resulted in legal uncertainty.

b) MK Decision

In response to the petitioners' arguments, the MK decided to extend the maximum period of the PKWT to five years, and decided to read the current provisions as follows.

Article No.	Current provision	The interpretation where the MK Decision 168/2023 is reflected
56 (3)	The time period or completion of a particular job, as referred to in paragraph (2), is determined (Note: this refers to PKWT) based on the Employment Agreement.	The time period for completion of a particular job is not made to exceed a maximum of five (5) years, including if there is an extension.

This decision aligns with Article 8 of Government Regulation No. 35 of 2021 ("GR 35/2021"), which is issued based on the Job Creation Law. Thus, MK Decision 168/2023 does not introduce new rules; however, it provides clarity.

b. Requirement for PKWT agreement in writing (Article 57 (1))

a) Issues

Petitioners claimed that the Job Creation Law deleted the provision of Article 57 (2), and such deletion put the workers in a legally unstable position.

Article 57
(1)A fixed-term employment agreement is made in writing and must use Indonesian language and Latin letters.
(2) A work agreement for a specified time, if not made in writing, is against what is prescribed under subsection (1) and shall be regarded as a work agreement for an unspecified time.

b) MK Decision

The MK stated that the purpose of Job Creation Law's deletion of Article 57, Paragraph 2 was to express that the absence of written employment contracts with PKWTs is contrary to the intent of the Labor Law and that the amendment clarifies that the employment of workers as PKWTs does not apply to work of a permanent nature. The MK then decided to replace the wording of Article 57(1) as follows, with the aim of providing clarity and legal certainty in the application of Article 57(1). MK then stated that non-written contracts with PKWT concluded after the above Job Creation Law's amendment shall be prepared in writing immediately, and those concluded before such amendment shall be interpreted that they are considered as PKWT under the law, and that this article is partially unconstitutional, but not unconstitutional as claimed by the petitioners.

Article No.	Current provision	The interpretation where the MK Decision 168/2023 is reflected
57 (1)	Fixed-term employment agreements are made in writing and must use Indonesian and Latin script.	A fixed-term employment agreement must be made in writing using Indonesian language and Latin.

The decision shifts the position of "must/harus," and by this shift, now it is clear that making the agreement in writing for PKWT is mandatory as well as that it shall be stipulated in the Indonesian language.

We should note that the employment agreement can be bilingual; however, Indonesian shall be the prevailing language, as Article 57(2) states below:

Article 57(2)
In the case of a fixed-term employment agreement being made in Indonesian and a foreign language, if there is a difference in interpretation between the two, the fixed-term employment agreement made in Indonesian shall apply.

Also, as mentioned above, it is necessary to note that the court has stated that, for PKWTs concluded before the amendment, if they are not in writing, they will be deemed to be a PKWTT, as per the laws and regulations at the time.

3) Outsourcing (Article 64 (2)) -Determining function and compliance with the outsourcing agreement-

a) Issues

Under the Manpower Law prior to the Job Creation Law, only five types of activities (cleaning, catering, security, auxiliary work in the mining and oil industries, and transportation) were permitted for the provision of workers, and the main work of each enterprise was excluded. The Job Creation Law deleted the above-mentioned terms "subcontract" and "provision of workers" and newly stipulated that "part of the work" could be outsourced to other companies and that the scope of work would be determined by government regulations. The petitioners argued that the above provisions were vague and legally unstable.

b) MK Decision

The MK ruled that the above provision was unclear as to what constituted "part of the business" The MK, considering the GR 35/2021's silence regarding the part of the performance of work that the company may assign with the Art. 64, which states that it is the government who decides

such, decided that the "Government" in paragraph (2) shall now be read as the "Minister of Manpower." Also, MK decided that the type and field of outsourcing work shall be agreed upon in the written outsourcing agreement.

Thus, the Article 64 (2) shall now be read as follows in comparison with the current provision:

Article No.	Current provision	The interpretation where the MK Decision 168/2023 is reflected
64	(1) A Company may assign part of the performance of work to another Company through an outsourcing agreement made in writing. (2) The Government shall determine part of the performance of work as referred to in paragraph (1).	(1) A Company may assign part of the performance of work to another Company through an outsourcing agreement made in writing. (2) The Minister determines part of the implementation of the work as referred to in paragraph (1) in accordance with the type and field of outsourcing work agreed in the written outsourcing agreement.

Now, it is now awaited for the Minister of Manpower to issue a guideline to clarify the area where outsourcing is allowed.

4) Working Hours and Rest

a. Weekly Rest (Article 79 (2))

a) Issues

Petitioners claim that Article 79 (2) b. of Manpower Law only provides a weekly rest for workers on a 6-day workweek and does not account for workers with a 5-day workweek who are entitled to 2 days of rest. MK decided that Article 79 (2) b. of Manpower Law shall be read as follows in comparison with the current provision:

b) MK Decision

Article No.	Current provision	The interpretation where the MK Decision 168/2023 is reflected
79 (2)	The rest period, as referred to in paragraph (1) letter a, must be given to Workers/Laborers at least include: a. rest between working hours, at least half an hour after working for 4 (four) hours continuously, and the rest time is not included in working hours; and b. weekly rest of 1 (one) day for 6 (six) working days in 1 (one) week.	The rest period, as referred to in paragraph (1) letter a, must be given to Workers/Laborers at least include: a. rest between working hours, at least half an hour after working for 4 (four) hours continuously, and the rest time is not included in working hours; and b. weekly rest of 1 (one) day for 6 (six) working days in 1 (one) week or 2 (two) days for 5 (five) working days in 1 week.

This decision reaffirms the provision of the GR 35/2021, which state also the weekly rest for workers with 5 days in a week.

b. Long Leave (Article 79 (5) of Manpower Law)

a) Issues

Petitioners claimed that the provision of long leave should be mandatory, and the wording of "can/dapat" in Article 79 (5) may be detrimental to employees because this doesn't mean that the employers must provide long leaves to their workers.

b) MK Decision

MK agrees and decides that the word "can/dapat" does not have any binding legal force, and the Manpower Law Article 79 (5) shall be read as below in comparison with the current provision:

Article No.	Current provision	The interpretation where the MK Decision 168/2023 is reflected
79 (5)	In addition to rest periods and leave as referred to in paragraph (1), paragraph (2), and paragraph (3), certain companies can provide long breaks as regulated in the Employment Agreement, Company Regulations, or Joint Work Agreement.	In addition to rest periods and leave as referred to in paragraph (1), paragraph (2), and paragraph (3), certain companies provide long breaks as regulated in the Employment Agreement, Company Regulations, or Joint Work Agreement.

Due to this decision, employers now must provide long breaks to their employees.

5) Wages

The MK168/2023 ruling also made decisions on several regulations related to wages, including the method for calculating the minimum wage. However, the impact of this is not clear at present, as it has not necessarily been reflected in the Minister of Manpower's regulations that came into force after the ruling.

6) Termination of Employment ("PHK")

MK Decision 168/2023 introduced several key changes regarding PHK to enhance the protection of workers' rights. These changes underscore the importance of prioritizing dialogue and adhering to legal procedures to ensure workers' rights are protected during the termination process.

a. Bipartite Negotiations

a) Issues

The provisions of Article 151, as amended by the Job Creation Law, state that if an employee does not agree to a layoff after being notified by the employer, the employee must go through either 1) consultation between the two parties (paragraph 3) or 2) resolution by the Labor Disputes Court (paragraph 4). The petitioners argued that the current provisions could potentially violate constitutional rights because they could create a situation where employers could arbitrarily implement temporary layoffs without going through a fair legal process.

b) MK Decision

The MK showed understanding of this argument and ruled that the dismissal was unconstitutional unless it was reinterpreted in the following amended form, which emphasizes that dismissal is a last resort.

Article No.	Current provision	The interpretation where the MK Decision 168/2023 is reflected
151 (3)	If the Worker/Laborer has been notified and refuses Termination of Employment, the settlement of Termination of Employment Relations must be carried out through bipartite negotiations between the Employer and the Worker and/or the Union.	If the Worker/Laborer has been notified and refuses Termination of Employment, the settlement of Termination of Employment Relations must be carried out through bipartite negotiations through deliberation to reach a consensus between Employers and Workers/Laborers and/or the Union.
151 (4)	In the event that the bipartite negotiations, as referred to in paragraph (3), do not result in an agreement, Termination of Employment is carried out through the next stage in accordance with the	In the event that bipartite negotiations, as referred to in paragraph (3), do not reach an agreement, Termination of Employment can only be carried out after obtaining a determination from an

	Industrial Relations Dispute Resolution mechanism.	industrial relations dispute resolution institution whose decision has permanent legal force.

c. Continuing Obligations

a) Issues

Article 157A (1), as amended by the Job Creation Law, states that employers and workers must continue to fulfill their obligations until the dispute between them regarding industrial disputes, including dismissals, is resolved, and Article 157A (3) states that these obligations are to be fulfilled "until the resolution of labor-management disputes at each stage is completed". In response, the petitioners argued that the provision "until the resolution of labor-related disputes at each stage is completed" was unclear as to how long the parties were obliged to fulfill their obligations.

b) MK Decision

The MK ruled that the current provision was unconstitutional unless it was reinterpreted in the following amended form, which emphasizes that dismissal is a last resort. As a result, the employer remains obligated to pay wages until a final decision is reached.

Article No.	Current provision	The interpretation where the MK Decision 168/2023 is reflected
157A	(1) During the resolution of Industrial Relations Disputes, Employers and Workers/Laborers must continue to carry out their obligations. (2) Employers may take action to suspend workers/laborers who are on leave. The process of Termination of Employment while still paying wages and other rights normally received by Workers/ Laborers. (3) Implementation of the obligations as referred to in paragraph (1) shall be carried out until the completion of the Industrial Relations Dispute resolution process according to its level.	(1) During the resolution of Industrial Relations Disputes, Employers and Workers/Laborers must continue to carry out their obligations. (2) Employers may take action to suspend workers/laborers who are on leave. the process of Termination of Employment while still paying wages and other rights normally received by Workers/ Laborers. (3) Implementation of the obligations as referred to in paragraph (1) shall be until the end of the industrial relations dispute resolution process, which has permanent legal force in accordance with the provisions of the PPHI Law".

d. Severance Pay

a) Issues

With regard to the method of calculation of the severance pay, the petitioners argued that Article 156(2), which states that "...it shall be provided in accordance with the following provisions," precludes the possibility of paying more than the prescribed amount.

b) MK Decision

MK decides that workers who are terminated must receive severance pay, at a minimum, as stipulated in Article 156 of Chapter IV of Job Creation Law. Now, Article 156 (2) shall be read as below in comparison with the current provision:

Article No.	Current provision	The interpretation where the MK Decision 168/2023 is reflected
156 (2)	Severance pay, as referred to in paragraph (1), is provided with the following provisions:	(2) Severance pay, as referred to in paragraph (1), is at least

3. Conclusion.

This MK Decision 168/2023 not only reaffirms and clarifies the provisions of the Manpower Law but also introduces adjustments aimed at establishing more employee protection. The updated regulations aim to foster a work environment that further prioritizes workers' rights and enhances the welfare of local employees.

Employers are now encouraged to assess their Employment Agreement or Company Regulation so that they align with the updated Manpower Law where the MK Decision 168/2023 is reflected and also to be cautious in carrying dismissal procedures.

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