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Contents

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1. Terms of Employment

1.1 Status of Employee

The Indonesian Manpower Law does not recognise the differences between blue-collar and white-collar workers.

There is no other different status, except due to the term of employment, as explained further in **1.2 Contractual Relationship**, below.

1.2 Contractual Relationship

The Indonesian Manpower Law allows two categories of contracts: permanent (indefinite) and fixed-term (definite) employment contracts. The main difference is the types of work for which employees can be hired under fixed-term employment contracts (definite). Fixed-term employees can only be hired for the followings types of work: (i) work which is of a one-off (not continuing) or temporary nature; (ii) work estimated to be completed within three years; (iii) work which is seasonal in nature; or (iv) work which is related to a new product, activity, or ancillary product which is on trial.

The term of a fixed-term (definite) employment contract may be for up to two years, extendable once for one more year and/or renewable once for up to two years, with a 30-day break after the previous contract expires. The agreement must be registered with the local office of the Ministry of Manpower (MOM) within seven days of signing. If any of the above requirements is not met, it will automatically be deemed a permanent employment contract.

Contract Requirements

For permanent employees (indefinite), the employment contract can be entered into either in writing or orally. If oral, the employee must be given an appointment letter. Fixed-term contracts must be in writing, otherwise the employee automatically becomes – and has all the rights and entitlements of – a permanent employee.

All employment agreements (fixed-term or permanent) must contain at least:

- the company's name, business address and field;
- the name, gender, age and address of the employee;
- the class or title of the position;
- the work location(s);
- the salary and payment procedure;
- the terms and conditions – the employer's and employee's rights and obligation;
- the commencement date and effective term of the employment agreement;
- the place and date of signing; and
- the signatures of the parties.

1.3 Working Hours

Maximum Working Hours

The maximum working hours are: (i) seven hours per day (if working six days a week), or (ii) eight hours per day (if working five days a week). The Indonesian Manpower Law is silent on flexible working hour arrangements, but they are recognised in practice. In any case, the rules on working hours must be complied with, and if employees work beyond the maximum working hours then they are entitled to overtime pay.

Part-time Contracts

There are no specific working hours for a part-time contract (called 'daily workers' in the Indonesian Manpower Law), but the number of days a month they can work for is limited to 21. However, daily workers cannot be employed for 21 days for three months consecutively, otherwise they automatically become permanent employees.

Overtime Regulations

Overtime is specifically regulated under the Manpower Law and its implementing regulations. MOM Decree No KEP-102/MEN/6/2004 limits overtime work to three hours a day and 14 hours a week. A written order from the employer to the employee to work overtime is required. The employee's agreement to work overtime must be recorded in writing. The written order and written agreement can be in the form of a list of employees who are willing to work overtime, signed by the employees and the employer.

For working overtime, the employer must provide the employees: (i) extra pay, (ii) an adequate break, and (iii) food and drink containing at least 1,400 calories if the overtime work continues for three or more hours; this cannot be compensated for with money. Overtime pay is calculated as follows:

- for the first hour of overtime, the overtime pay is 1.5 times the hourly wage;
- for the succeeding hours of overtime, the rate per hour is twice the hourly wage;
- for working overtime on weekly rest days or on public holidays for a six-day or 40-hour work week, the rates are the following:
  - (a) for the first seven hours, the rate is twice the hourly wage; for the eighth hour, the rate is three times the hourly wage, and for the ninth and tenth hours, the rate is four times the hourly wage;
  - (b) if the public holiday falls on the shortest work day, for the first five hours, the rate is twice the hourly wage; for the sixth hour, the rate is three times the hourly wage, and for the seventh and eighth hours, the rate is four times the hourly wage;
- if the overtime work is performed on weekends and/or official holidays for a five-day and 40-hour work week, the overtime pay rate for the first eight hours is twice the hourly wage; for the ninth hour, the rate is three times the hourly wage, and for the tenth and eleventh hours, the rate is four times the hourly wage.

1.4 Compensation

Minimum Wage Requirements

The Indonesian Manpower Law requires employers to pay employees no less than the applicable minimum wage. The minimum wage only applies to employees who work for less than one year, which means that (i) newly hired employees must be paid at least the applicable minimum wage, and (ii) they will have their salaries adjusted to the new minimum wage if they work for less than a year. Several types of minimum wage apply: the provincial minimum wage (UMP) or the regency or municipal minimum wage (UMK) and the industry minimum wage for the relevant province (UMSP) or regency or municipality (UMSK). Whenever the UMP, UMK, UMSP, or UMSK differ, employees are entitled to be paid the highest minimum wage. The UMP/UMSK/UMSP/UMSK is different in every province, regency, and municipality in Indonesia and is amended once a year.

Thirteenth Month, Bonuses, etc

Employees who have worked for an employer for at least one year are entitled to a religious holiday allowance (*tunjangan hari raya*, THR) from the employer of one month's salary. If an employee has worked for less than one year, the THR is paid on a pro rata basis. THR is payable at the latest 14 days before the applicable religious holiday. The religious holiday applicable is that of the employees' religion. For example, if the employees are Muslim, they are paid the THR during the *Idul Fitri* holiday. However, the employer and employee can agree on certain religious holiday for the THR payment.

The salary used to calculate the THR is the employee's basic salary plus any fixed allowances. If a permanent employee is terminated 30 days or less before the religious holiday, the employee is entitled to his/her THR.

Under the implementing regulations of the Indonesian Manpower Law, a bonus can be provided to employees based on the employer's profit and employee's performance. The bonus scheme can be included in the employment agreement, Company Regulations, or Collective Labour Agreement.

Government Intervention

There is no government intervention except in terms of salary increases, as described above in Minimum Wage Requirements.

1.5 Other Terms of Employment

Vacation and Vacation Pay

Employers are required to allow their employees paid leave. All employees (including those under fixed-term employment contracts) are entitled to 12 working days annual leave

after working for 12 months consecutively with one employer. During their annual leave, all employees are entitled to their full salary. This must be stated in the employment contract, Company Regulations or the Collective Labour Agreement.

The number of public holidays celebrated in Indonesia varies from year-to-year; they are fixed under a government decree.

Paid Leave: Maternity, Child Care, Illness, etc
Employees can take leave of absence on full pay for the following occasions:

- their own wedding – three days;
- the baptism of their child – two days;
- the circumcision of their child – two days;
- the marriage of their child – two days;
- the death of their child or in-law – two days;
- the death of their husband, wife, parent, parent-in-law, child or daughter/son-in-law – two days;
- the death of another family member staying with the employee in one house – one day.

Pregnant employees are entitled to one-and-a-half months' maternity leave before giving birth and one-and-a-half months after giving birth, as estimated by a midwife or obstetrician. However, in practice, they can usually take three months' leave starting just before giving birth. Fathers are entitled to two days' paternity leave with full pay.

The law does not recognise sick leave and, therefore, limits the number of days of sick leave. Under Article 93 (3) of the Manpower Law, if an employee cannot perform his or her duties because of illness supported by evidence (a doctor's certificate), the employee is entitled to the following:

- 100% of his or her salary for the first four months of absence;
- 75% for the second four months of absence;
- 50% of for the third four months of absence; and
- 25% for all further months of absence until the employee is terminated.

If the illness continues after 12 months, the employee may be terminated with severance pay.

Limitations on Confidentiality, Non-disparagement Requirements
The Indonesian Manpower Law does not recognise confidentiality or non-disparagement requirements. They are usually agreed to by the employee and employer in writing. Nevertheless, the enforcement of these matter is challenging in Indonesia.

There are no clear provisions on employee liability. However, employees must comply with their employment contracts, the Company Regulations or Collective Labour Agreement.

2. Restrictive Covenants

2.1 Non-Competition Clauses
In practice, a non-competetition clause is generally recognised in Indonesia. However, the validity of the non-competition clause is arguable, even it is agreed to. If a civil lawsuit is brought to court over this matter, the validity of the non-competition clause may be challenged using the following arguments:

- under Article 31 of the Manpower Law, all workers must be given the same opportunities and have the right to choose, obtain or change employment and receive an appropriate income either at home or abroad;
- under Article 38 (2) of Law No 39 of 1999 on Human Rights, everyone is free to choose the work that they like and to fair requirements for employment.

Given the above explanation, non-compete clauses are difficult to enforce as they could potentially infringe on rights guaranteed under the Manpower Law and the Human Rights Law. We know of no court precedent for a non-compete clause. In practice, bringing a non-competition clause violation case to court is rare and therefore there is no legal precedent to help predict the outcome or how it will be handled. However, it is acceptable to maintain the non-competition clause.

2.2 Non-Solicitation Clauses - Enforceability/ Standards
The Indonesian Manpower Law is silent on non-solicitation clauses. In practice, in Indonesia, non-solicitation clauses and other restrictive covenants are usually included in the employment agreement between the employer and the employee. As long as a non-solicitation clause is included in the employment agreement, theoretically, the employee should comply with it and not try to solicit other employees.

As the Indonesian Manpower Law is silent on non-solicitation clauses, as long as a restriction is included in the employment agreement, the employee should comply with it and not solicit clients of the employer which the employee has worked with while employed. We have never heard of a lawsuit being filed for a breach of a non-solicitation clause or agreement. However, since Indonesian courts are not bound by precedent, the court will apply its own principles of justice and fairness to rule on such a suit.

3. Data Privacy Law

3.1 General Overview of Applicable Rules

According to Minister of Communication and Informatics Regulation No 20 of 2016 on Personal Data Protection in Electronic Systems (MOCI Regulation No 20/2016):

- personal data are certain individual data stored, maintained, and their veracity sustained in electronic systems, the confidentiality of which must be protected (Article 1 paragraph (1)); and
- certain individual data means accurate and concrete information which is directly or indirectly attached to and identified with an individual, the use of which must conform to the prevailing laws and regulations (Article 1 paragraph (2)).

Therefore, in principle, personal data must be protected since they are considered an aspect of privacy and so must be treated as confidential information. Further, Article 3 of MOCI Regulation No 20/2016 requires personal data to be protected through and during their receipt, collection, processing, analysis, storage, display, publication, transmission, dissemination and deletion. A written consent from the owner of the personal data should be sought if it will be collected, stored, processed, maintained, displayed, transmitted and deleted.

4. Foreign Workers

4.1 Limitations on the Use of Foreign Workers

The employment of foreign workers is subject to various restrictions, and in all cases requires approval from the MOM. Foreign nationals may, in general, only be employed to perform certain work for which suitable Indonesian nationals cannot be found, and only on a temporary basis.

Foreign nationals may not be employed in positions dealing with or related to personnel and HR matters. According to MOM Decree No 40 of 2012, foreigners cannot occupy the following positions:

- personnel director;
- industrial relations manager;
- human resources manager;
- personnel development supervisor;
- personnel recruitment supervisor;
- personnel placement supervisor;
- employee career development supervisor;
- personnel declare administrator;
- chief executive officer;
- personnel and career specialist;
- personnel specialist;
- career adviser;
- job adviser;
- job adviser and counsellor;
- employee mediator;
- job training administrator;
- job interviewer;
- job analyst;
- occupational safety specialist.

The MOM issues a list of the positions that foreign nationals may occupy, depending on the sector. However, if a restricted position must be filled by a foreign worker in the sector, the employer can apply for a recommendation from the relevant ministry.

4.2 Registration Requirements

An employer wishing to employ foreign nationals must draw up a Foreign Manpower Utilisation Plan (*Rencana Penggunaan Tenaga Kerja Asing*, RPTKA) including at least the following information:

- why the services of foreign nationals are required;
- the occupations and/or positions to be filled by the foreign nationals;
- the planned term of the foreign nationals' employment;
- the arrangement for appointing Indonesian employees as the 'associates' of the foreign employees; and
- any plans to recruit foreign nationals on a temporary/ad hoc basis (ie, for less than six months) in certain positions, such as auditing and production quality control.

The employer must submit its RPTKA to the MOM for its approval. The government institutions, international agencies and representatives of foreign countries are not required to obtain RPTKA. Upon approving the RPTKA, the MOM will issue a notification to the employer.

After obtaining approval for its RPTKA, the employer must apply for approval for its utilisation of foreign manpower (notification) to the Director General of the Development, Placement of Workers, and Expansion of Job Opportunities. The notification will be issued within two working days of receipt for the complete and correct application. Like the RPTKA approval, the notification will be valid for the term of the employment agreement of the foreign employee.

Once the approval for the RPTKA has been issued, the foreign national(s) can apply for a Limited Stay Visa (*Visa Tinggal Terbatas*, VITAS). A VITAS application can be submitted by either the foreign employee or his/her sponsor to the appointed Indonesian immigration official at the Indonesian embassy/consulate in the home country of the foreign employee. The appointed immigration official at the Indonesian embassy/consulate in the home country of the foreign employee(s) will issue a VITAS within two working days of its receipt of the passport(s) of the foreign employee(s). How long the foreign employee(s) can stay under the VITAS will depend on the notification, but not more than two years. A

VITAS can also be issued upon arrival and remain valid for up to 30 days.

On arrival in Indonesia, the foreign national must obtain a limited-stay permit (*Ijin Tinggal Terbatas*, ITAS) from the immigration authorities. The immigration officials at the airport, harbour, or other place of entry and exit to/from Indonesian territory will issue the ITAS by placing a sticker which will be stamped in the foreign employee's passport with his or her electronic ITAS and re-entry permit.

5. Collective Relations

5.1 Status of Unions

The labour unions are recognised in Indonesia under Articles 102-149 of the Manpower Law, Law No 21 of 2000 on Workers' Unions/Labour Unions, MOM Regulation No PER.32/MEN/ XII/2008 and MOM Regulation No PER.16/ MEN/XI/2011.

Employees may form and join labour unions. Labour unions must have Articles of Association and Rules of Conduct and their establishment must be registered with the local MOM office.

Labour unions aim to protect and defend the rights and interests and improve the proper welfare of their employee members and their families. In order to achieve this aim, labour unions must perform the following functions:

- be parties to Collective Labour Agreements and the settlement of industrial disputes;
- be representatives of the employees in co-operation with the local manpower institution, according to the union hierarchy;
- be a structure for creating industrial relations that are harmonious, dynamic, and upholding justice according to the prevailing laws;
- be a structure for channelling their members' aspirations in order to defend their rights and interests;
- be the planner and the party responsible for any strike;
- be the employee's representatives in striving for the ownership of shares in the company.

5.2 Employee Representative Bodies - Elected or Appointed

Under Article 106 (1) of the Manpower Law, companies which have 50 or more employees must form a Bipartite Cooperation Body (*Lembaga Kerja Sama Bipartit*, LKS), a communication and consultation forum in the company. The function of the LKS is to communicate with and consult the employees, including on the employer's policies and the employees' aspirations in order to prevent any industrial disputes. Under Manpower Regulation No PER. 32/MEN/ XII/2008, the LKS should be established through the procedure summarised below.

6.1 Remedies for the Patentee*Establishment*

The employer and the representative of the employees and/ or representatives of the labour union should first have an amicable discussion on the appointment of members of the LKS. The members of the LKS will then determine the composition of its management. The composition of the management of the LKS must be recorded in the minutes of meeting signed by the representatives of the employees and/or the labour union and the representative of the employer.

Registration

The local manpower office must be notified of the establishment of the LKS and it will be recorded within 14 working days of its establishment. The management of the LKS must submit the notification in writing accompanied by (i) the minutes of the meeting on the establishment of the LKS, (ii) the composition of its management, and (iii) the address of the company.

Management of the LKS

The management of the LKS must include representatives from the company (the employer), employees, and labour union with a ratio of 1:1, and number at least six people. The management of the LKS consists of (at least) a chairman, a vice-chairman, a secretary and member(s). The chairman can be from the representative of the company or the employees (in turns). The term of the management of the LKS is up to three years and it can be changed before the three years expire upon receipt of a suggestion from the side which the member represents (for example, the employer's side can only propose a change of its own representative, not the employees').

Management of the LKS' Reporting Line

The management of the LKS must report on its activities to the head of the company and the head of the company should submit a report every six months to the local MOM office. We believe that the head of the company should be the Board of Directors or its proxy.

Costs and Expenses

All costs and expenses incurred for the establishment or the activities of the LKS are borne by the employer.

In relation to the above, it should be noted that, in Indonesia – according to several MOM offices – not many companies have established an LKS.

5.3 Collective Bargaining Agreements

The employer and labour union(s) must enter into a Collective Labour Agreement (*Perjanjian Kerja Bersama*, PKB) following a request from the labour union(s) to negotiate the

terms of the PKB with the employer. The employer cannot refuse to negotiate the PKB. Below is the general procedure:

- One party (usually the labour union) submits a request to the other to commence discussions to enter into a PKB. A draft is submitted to the other party for discussion. The employer should entertain the request to discuss the PKB if the labour union is registered with the relevant office of the MOM according to the prevailing regulations.
- Both parties are expected to prepare for the negotiation and may each have prepared a draft PKB. Each negotiating team has a chairman and a spokesperson.
- Negotiations should commence within 30 days of receipt of the draft and the negotiators are chosen from the labour union's officers (or members of the union chosen by the officers) and the employer's management team.
- The negotiations should be finalised within the timeframe agreed to by the employer and the labour union. The negotiations are to be conducted in good faith and should be fair, sincere, frank and undertaken without compunction or harming the other party. If the agreed-to timeframe is not long enough, either party or both parties can schedule further negotiations or report the situation to the MOM and request settlement of their disagreement through arbitration, conciliation or mediation.
- The mediation, arbitration or conciliation must be completed within 30 working days.
- Negotiations are held either in the company's premises or in the offices of the labour union, unless agreed to otherwise. Expenses are paid by the employer.
- If agreement is reached, the PKB is signed by both parties in triplicate and forwarded to the MOM for registration.
- Unless agreed to otherwise, the PKB is effective on the date of its signing.
- The employer and labour union must advise the employees of the content of the PKB and any amendments and print out and distribute the PKB to all employees, at the employer's expense.

Having a PKB has the following advantages for the employer and employees:

- it creates security and certainty with respect to the rights and obligations of both parties;
- it creates a good, sociable atmosphere and work spirit which will foster confidence and reduce prejudices;
- it increases work productivity and reduces obstacles which may hinder growth;
- it ensures an atmosphere of consultation and deliberation between the employer and the employees.

6. Termination of Employment

6.1 Grounds for Termination

In Indonesia, any termination of employment must be with reason (valid and acceptable reason).

The procedure for termination is the same whatever the grounds for the termination.

The Indonesian Manpower Law does not recognise mass termination (ie, collective redundancies).

6.2 Notice Periods/Severance

Required Notice Periods

Under the Indonesian Manpower Law, termination by notice is not possible. In principle, the employer must first obtain approval from the Industrial Relations Court (IRC), or the Supreme Court if the IRC's ruling is appealed, and unilateral termination is not possible.

Severance Payment2.3 Courts with Jurisdiction

The payment of severance depends on the background to the termination. There is no relevancy regarding the payment of severance compared to the notification since Indonesia does not recognise the termination by notice or termination without notice.

Specific Procedures, External Advice/authorisation Required

In Indonesia, manpower disputes can be:

- over rights;
- over interests;
- over terminations of employment;
- amongst labour unions in one company.

The following is the procedure for terminating an employee under the Manpower Law.

Bipartite

Before terminating an employee, the first step is to hold bipartite negotiations between the employer and the labour union (or the employee if the employee is not a member of a labour union). The negotiations must be completed within 30 working days of their commencement. If one of the disputing parties refuses to negotiate or the negotiations fail to reach an agreement within the 30-day time limit, the bipartite meetings are deemed failed. If agreement is reached, a Mutual Termination Agreement (*Perjanjian Bersama*, MTA) is drawn up and signed.

Tripartite

The options for the tripartite stage are the following:

- mediation – for all manpower disputes;

- conciliation – over interests, terminations of employment, and labour union disputes; or
- arbitration – over interests and labour union disputes.

However, in practice, the disputing parties mostly prefer mediation.

Following the bipartite negotiations if no agreement is reached, either party can register the dispute with the local MOM office. Within seven working days of receipt of the documents, the mediator must hold a meeting with the two parties. If a settlement is reached, an MTA is drawn up and signed by the parties. Once signed, the MTA must be registered with the IRC. If no agreement can be reached, the mediator must issue a recommendation within ten working days of the first mediation meeting. The parties have ten working days to accept or reject the recommendation and if either party does not respond, it is understood to have rejected it. If one or both of the parties rejects the mediator's recommendation, one or both of the parties can submit the dispute to the relevant IRC.

The IRC has jurisdiction over disputes: (i) over rights in the first instance; (ii) over interests in the first and final instances; (iii) over terminations of employment in the first instance; and (iv) amongst labour unions in a company in the first and final instances.

A petition for the dispute to be tried is submitted to the IRC in the District Court in the domicile of the workplace of the employee. Within seven working days of receipt of the petition, the chairman of the IRC must select the judges, consisting of the head of the panel of judges and two ad hoc judges. Within seven working days of their selection, the judges must hold the first hearing. The court must issue its ruling within 50 working days of the first hearing.

The IRC's ruling on a dispute over interests or amongst labour unions in one company is final and binding. The IRC's ruling on a dispute over employee/employer rights or a termination of employment does not become final and binding if an appeal is filed in the Supreme Court (*kasasi*). The appeal must be filed within 14 working days of the ruling being read out to the parties or the date of receipt of the written notification of the IRC's ruling by the parties if they did not attend the hearing for handing down the IRC's ruling.

However, please note that during the above termination procedures, the employee is still entitled to be paid in full and must perform his or her duties until a final and binding court ruling declares the employment relationship between the employee and the employer terminated.

Circular Letter of Supreme Court No 3 of 2015 (SEMA No 3/2015) limits the employer's obligation to pay the employee's salary pending the termination process up to six months. However, SEMA No 3/2015 does not clearly state when the six months start – for example, whether it is calculated from the first bipartite meeting or the first tripartite meeting or the first hearing in the IRC. In practice, we believe that it should be calculated from the first bipartite meeting since the employer has initiated the termination of the employee.

Moreover, it is still not clear whether SEMA No 3/2015 is fully enforceable because some MOM officials and judges consider that the employer is required to pay the employee's salary until a final and binding court ruling is issued. If the employer tries applying SEMA No 3/2015 and ceases to pay the salary of its employee pending the termination process, the employer may be potentially reported to the relevant MOM office for violating the Manpower Law or to the police for an allegation of embezzlement.

6.3 Dismissal for (Serious) Cause (Summary Dismissal)

Definition

The Indonesian Manpower Law does not provide a specific definition of termination for serious misconduct (cause). However, according to Article 158 of the Manpower Law, approval to dismiss an employee will be granted to the employer for the following types of serious misconduct on the part of the employee:

- swindling, theft and embezzlement of goods/cash owned by the employer;
- providing fake or falsified information, which inflicts losses on the company;
- being drunk, drinking liquor, using or distributing narcotic, psychotropic and other addictive substances in the workplace;
- committing an indecent act or gambling in the work place;
- assaulting, intimidating, maltreating, or deceiving the employer or his fellow employees within the company;
- persuading the employer or fellow employees to engage in an activity which violates the prevailing laws;
- recklessly or deliberately damaging goods belonging to the employer, harming them or leaving them in danger and thereby causing the company to suffer a loss;
- recklessly or deliberately leaving the employer or fellow employees in danger in the work place;
- divulging company secrets, which should be kept confidential, except in the State's interest;
- committing other crimes in the company premises liable to a prison sentence of five years or more.

In order to terminate an employee for the above types of serious misconduct, the employee must be caught 'red-handed' or must sign a confession or there must exist other evidentiary reports supported by at least two eyewitnesses. Under Constitutional Court Ruling No 12/PUU-I/2003 dated 28 October 2004 (MK Ruling No 12), the court deemed certain

provisions of the Manpower Law relating to termination for serious misconduct unconstitutional, on the ground that the guilt or innocence of an employee should be decided by a court of law, not the employer.

However, after the Constitutional Court issued MK Ruling No 12, the MOM issued a Circular Letter No SE-13/MEN/SJ-HK/I/2005 in which MOM states that following the revocation of Article 158 of Manpower Law, the employer can still terminate its employees due to 'urgent reasons'. However, the employer can only terminate the employee on this basis if such urgent reasons are stated under the Employment Agreement, Company Regulations, or PKB. The termination due to urgent reasons can also refer to the provisions provided in Article 1603 paragraph (o) of the Indonesian Civil Code.

Furthermore, the Supreme Court issued SEMA No 3/2015 in which the Supreme Court declared that if an employee is terminated for serious misconduct under Article 158 of the Manpower Law (after the issuance of MK Ruling No 12 which has revoked Article 158 and the relevant articles of the Manpower Law as above), it does not need a final and binding criminal court ruling. The termination of an employee due to urgent reasons will follow the mandatory termination proceedings under Law No 2 of 2004 on The Settlement of Industrial Relations Disputes (Law No 2/2004). However, in practice, Indonesian judges still hold that the termination of an employee for serious misconduct under Article 158 of the Manpower Law requires a final and binding criminal court ruling convicting the employees of serious misconduct despite the existence of SEMA No 3/2015. In practice, the judges in Indonesia will examine a termination of employment on a case-by-case basis and, accordingly, can rule differently for similar cases. As such, it is possible that judges may rule that a termination of employment due to serious misconduct or urgent reasons should be carried out upon issuing a final and binding criminal court ruling. Please note that Indonesian judges are not bound by the precedents issued by the previous judges since Indonesian legal system is a civil law not a common law system.

Procedure and Formalities

The procedure for termination for serious misconduct is the same as for termination for any other reason – ie, through bipartite negotiations, mediation, the IRC, and possibly the Supreme Court, as explained above. However, please note that for serious misconduct, a final and binding criminal court guilty verdict is required. Nevertheless, for termination due to urgent reasons as explained above, the termination procedure will follow the mandatory procedures under Law No 2/2004 (ie, bipartite, tripartite, IRC and possibly the Supreme Court.)

Consequences

Since a final and binding criminal court guilty verdict is required to terminate an employee for serious misconduct, the termination process takes time and the employer must still pay the employee's salary and other usual benefits until the termination becomes final. However, an employee can be terminated without having to wait for a final and binding criminal court guilty verdict. The employer can terminate the employee for urgent reasons – but the type of misconduct which can lead to termination for urgent reasons must be covered by the Company Regulations or PKB (Collective Labour Agreement).

6.4 Termination Agreements

Termination agreements are mandatory if the parties agree to mutually terminate their employment relationship. MTA should be registered in the IRC. Otherwise, the procedure for a termination agreement must follow the standard procedure for termination (explained in **6.2 Notice Periods/Severance**, above). However, during the termination procedure, the parties can still try to mutually agree the termination.

Requirements for Enforceable Releases

We assume that an enforceable release is the release of the terminated employee's right to file a suit against the employer despite the termination procedure having been completed. To avoid being sued by the employee, the employer must register the MTA with the relevant IRC. It is also advisable that a release and discharge is covered in the MTA.

There is no limitation on the MTA as long as the content of it satisfies the requirements for the validity of an agreement under Article 1320 of the Indonesian Civil Code, which are the following:

- the consent of the parties;
- their capacity to enter into agreement;
- a specific object;
- an admissible/legal cause.

6.5 Protected Employees

Dismissal of an employee is prohibited if the reason for the dismissal relates to any of the following:

- the employee's activities in a labour union;
- the employee reporting any illegal activity of the employer to the authorities;
- the ideology, religion, race, gender, physical condition, marital status, etc, of the employee;
- the employee being ill continuously for less than one year as confirmed by a physician's certificate;
- the employee becoming disabled or sick for work-related reasons and how long he or she will need to heal is unpredictable;
- the employee being on state duty;

- the employee being required to perform religious duties approved by the authorities;
- marriage, pregnancy, birth or miscarriage for female workers;
- for female workers, breast-feeding their babies;
- an employee being related to another employee by blood or by marriage.

During the termination procedure, the employee can be represented by (i) the labour union, or (ii) another party entitled to represent the employee as his/her legal attorney under the prevailing regulations.

7. Employment Disputes

7.1 Wrongful Dismissal Claim

The Indonesian Manpower Law does not recognise termination by notice. To have legal effect, a termination should be mutually agreed as stated in an MTA or if the dispute goes to the IRC, the IRC's ruling should be issued and it is still possible to appeal the ruling to the Supreme Court until it is issued a final and binding ruling. There is no such thing in Indonesia as a wrongful dismissal claim, only a claim against the employer because the employee will not accept the termination proposal of the employer or the reason for his or her termination. During the termination case in the IRC, if the panel of judges considers that there is no ground for termination or the ground has not been proved, the IRC can ask the employer to continue to employ the employee.

Any termination must follow the procedure: bipartite negotiations, tripartite negotiations/mediation, the IRC and possible appeal to the Supreme Court; otherwise, the termination will be deemed not valid and the employer must continue to employ the employee (Article 170 of the Manpower Law).

7.2 Anti-Discrimination Issues

The Indonesian Manpower Law contains no specific clause on discrimination in employment. Article 5 of Manpower Law states that every employee has the same opportunity to get a job without any discrimination – which includes discrimination due to sex, ethnicity, race, religion and political affiliation. Article 6 of the Manpower Law further provides that every employee has the same opportunity to receive equal treatment from the employer without any discrimination. Article 102 paragraph (2) of the Manpower Law also obliges the employer and/or labour union and employees to maintain a conducive working environment. Discrimination can be categorised as a crime and will lead to the employee or employer being sanctioned under the Indonesian Criminal Code.

Indonesian Criminal Law adheres to the principle that the claiming party must prove his or her claim that the other party has committed a crime. Therefore, the reporting party must prove its claim.

The damages due to discrimination can only be sought by the aggrieved party by filing a civil lawsuit to the relevant district court. However, there is no clear regulation in Indonesia on what type of damages can be granted due to a discriminatory treatment.

8. Dispute Resolution

8.1 Judicial Procedures

As previously explained, the termination procedure under Indonesian Manpower Law is the following.

Bipartite: the aim of bipartite negotiations is for the employee and employer to reach a consensus and sign an MTA resolving their differences. The negotiations must be completed within 30 working days of their commencement. If one of the disputing parties refuses to negotiate or the negotiations fail to reach an agreement within the 30-day time limit, the bipartite meetings are deemed to have failed. If a consensus is reached, an MTA is drawn up and signed. If no consensus is reached, either party may register the dispute with the local MOM office for mediation.

Tripartite/mediation: within seven working days of receipt of the documents, the mediator must hold a meeting with the two parties. If a settlement is reached, an MTA is drawn up and signed by the parties. Once signed, the MTA must be registered with the Industrial Relations Court. If no settlement can be reached, the mediator must issue a recommendation within ten working days of the first mediation meeting. If one or both of the parties rejects the mediator's recommendation, one or both of the parties can submit the dispute to the relevant IRC.

IRC: a petition for the dispute to be tried is submitted to the IRC in the District Court in the domicile of the workplace of the employee. Within seven working days of receipt of the petition, the chairman of the IRC must select the judges, consisting of the head of the panel of judges and two ad hoc judges and within seven working days of their selection, the judges must hold the first hearing. The court must issue its ruling within 50 working days of the first hearing.

The IRC's ruling on a dispute over interests or amongst labour unions in one company is final and binding. The IRC's ruling on a dispute over employee/employer rights or a termination of employment does not become final and binding if an appeal is filed in the Supreme Court (*kasasi*). The appeal must be filed within 14 working days of the ruling being read out to the parties or the date of receipt of the written notification of the IRC's ruling by the parties if they did not attend the hearing for handing down the IRC's ruling.

Class Action Claims
Class action lawsuits are regulated under Supreme Court Regulation No 1 of 2002 on the Procedure for Class Action Lawsuits (PERMA No 1/2002). However, PERMA No 1/2002 does not specify which court (ie, the District Court, Administrative Court, or Industrial Relations Court) the class action lawsuit can be filed in. It is still debatable whether a class action lawsuit is possible for an employment dispute in the IRC. We have found a class action lawsuit over a civil dispute in a District Court and one over an administrative dispute in the State Administrative Court.

There was a Supreme Court ruling No 304 K/PDT.SUS/2012, dated 14 August 2012, dismissed the lawsuit and the appeal of the plaintiff. The Supreme Court's legal consideration was that the IRC does not recognise class action lawsuits. The court considered that under Article 87 of Law No 2/2004, employees can grant a power of attorney to their labour union to act as their representative. If the employees are not members of a labour union, they can grant a proxy to another person qualified to be a representative in the court under the prevailing regulations.

Representations in Court
During the IRC proceedings, the employer can be represented by one of its own officers or by a legal attorney according to the prevailing laws and regulations. Meanwhile, the employee can be represented by:

- him- or herself;
- a legal attorney or another person who qualified to be a representative in the court under the prevailing regulations;
- the labour union.

8.2 Alternative Dispute Resolution

The Manpower Law recognises arbitration as one method of settlement of employment disputes, but arbitration only applies for a dispute over interests or a dispute between labour unions within one company. Arbitration is outside the IRC; to go to arbitration, the disputing parties must sign an agreement to settle their dispute through arbitration and provide the following information:

- their names, and domiciles;
- a brief summary of the dispute;
- the agreed-to number of arbitrators, whether a single arbitrator or a panel of arbitrators;
- a statement from each disputing party that it will abide by and implement the arbitral award; and
- the date and location of the signing of the agreement along with the signatures of the disputing parties.

Arbitrations must be concluded within 30 business days of the signing of the agreement between the arbitrator(s) and the disputing parties. If requested by the disputing parties, the arbitration can be extended for another 14 business days. The arbitrator/arbitration panel must render its award within this time limit. An arbitrational award is final and legally binds the disputing parties. Once an arbitral award is rendered, it must be registered with the respective IRC. In practice, we have never come across arbitration being used as a method of settlement of employment disputes as above.

Enforceability of Pre-Dispute Arbitration Agreements
We assume this question is related to the arbitration clause of an employment agreement. Arbitration is only an option if the dispute is over interests or between labour unions within one company (please see **6.2 Notice Periods/Severance**, above).

If the employment agreement opts for arbitration for a dispute over interests, the parties should follow this option (pre-dispute agreement). Alternatively, if the parties wish to settle a dispute over interests, they can enter into an arbitration agreement (post-arbitration agreement). However, it is rare to see a clause on choosing arbitration for a dispute over interests in an employment agreement.

The other type of dispute which can be tried by arbitration is a dispute between labour unions. For a dispute between labour unions, the arbitration agreement can only be signed after the parties agree to take the dispute to arbitration (post-arbitration agreement).

8.3 Awarding Attorney's Fees

In principle, the parties in dispute are not require hiring attorneys. The court will most likely dismiss a petition to have the other party pay its attorney's fees. There is Supreme Court precedent for legal attorneys' fees not to be categorised as court costs and therefore they cannot be charged to the opposite party. In practice, we have never heard of any court decision granting legal attorneys' fees.

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