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Overview of Constitutional Court's Interpretation on Labor Law Provisions under MK Decision No. 168/PUU-XXI/2023


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The Constitutional Court (Mahkamah Konstitusi - "**MK**") issued a groundbreaking decision under Decision No. 168/PUU-XXI/2023 ("**MK Decision**") dated 31 October 2024, in response to the petition filed on 1 December 2023 by the Labor Party (Partai Buruh), the Federation of Indonesian Metal Workers' Union (Federasi Serikat Pekerja Metal Indonesia), the Confederation of All Indonesian Workers' Unions (Konfederasi Serikat Pekerja Seluruh Indonesia), the Confederation of United Indonesian Workers (Konfederasi Persatuan Buruh Indonesia) and the Confederation of Indonesian Workers' Unions (Konfederasi Serikat Pekerja Indonesia). The petitioners sought a judicial review of the Job Creation Law,[1] specifically challenging the amendments made to Law No. 13 of 2003 on Labor (the "**Labor Law**").

[1]The Job Creation Law (Law No. 11 of 2020), which amended the Labor Law, was petitioned for constitutional review on 15 October 2020. MK then issued MK Decision No. 91/PUU-XVIII/2020 which was pronounced at MK's Plenary Session on 25 November 2021 which, among others, ordered for the Job Creation Law to be amended within 2 years since the issuance of such decision. In light of such order, Government Regulation in Lieu of Law No. 2 of 2022 was enacted on 30 December 2022 to amend the Job Creation Law and was adopted as a law based on Law No. 6 of 2023 dated 31 March 2023.

In summary, the provisions of the Labor Law that were petitioned for judicial review include those related to:

i. Foreign workers;

ii. Employment agreements;

iii. Outsourcing;

iv. Leave taking;

v. Wages;

vi. Termination of employment and industrial dispute resolution; and

vii. Grounds/events of termination.

MK has granted several petitions by construing the concerned provisions in light of MK's interpretation. Based on MK's interpretation the provisions at issue are deemed to contravene the Constitution of the Republic of Indonesia of 1945 and will lose their legally binding effect unless they are interpreted in accordance with MK's interpretation under the MK Decision.

It is important to note that not all of the provisions that have been petitioned were accepted by MK, e.g., the petition to broaden the scope of working positions/titles that may not be performed by foreign workers, the petition to define the scope of violations by employees that would give rise to the imposition of fines, and the petition to remove the exemption for foreign workers for being included in the foreign workers utilization plan.

In light of these developments, we have outlined the following key items in relation to the MK Decision, which are common areas of concern to relevant stakeholders.

1. Foreign Workers (Tenaga Kerja Asing – "TKA")

With regard to the utilization of TKA, the petitioners view that Article 42(4) of the Labor Law is open to interpretation, particularly due to the unclear scope of "certain position." This ambiguity does not necessarily guarantee that the utilization of Indonesian workers will be prioritized, potentially leading to the hiring of unskilled TKA over Indonesian workers.

MK has emphasized that Article 42(4) of the Labor Law shall be interpreted to mean that "TKA may be employed in Indonesia only in employment relationships for certain positions and periods, and they must have the competencies for the positions they will fill, taking into account prioritization of the use of Indonesian workers."

2. Period of fixed-term employment agreement (Perjanjian Kerja Waktu Tertentu – "PKWT")

Regarding the period of a PKWT, MK has emphasized that Article 56(3) of the Labor Law shall be interpreted to mean that "the term for the completion of a specific task [under a work-based PKWT] shall have a maximum term of 5 years, including extensions."

As a background, under the previous Labor Law regime, prior to the Job Creation Law, the period of a PKWT was stipulated to be 2 years, with the possibility of one extension for a period of 1 year and one renewal for a period of 2 years (i.e., a maximum period of 5 years, including extensions and renewals). After the Job Creation Law, the Labor Law does not contain the maximum period for a PKWT.

In light of the above, the petitioners have filed for a constitutional review of Article 56(3) of the Labor Law, for the reason that such Article lacks clear provisions regarding the terms for both period-based and work-based PKWTs. It only stipulates that the term or completion of a specific task (under a work-based PKWT) shall be determined based on an employment agreement. Furthermore, the petitioners contend that the duration of the PKWT is a substantial provision that should be determined at the law level, rather than being left to an implementing regulation.

In response to the above petition, although the term of a period-based PKWT has been regulated under Government Regulation No. 35 of 2021—which sets a maximum term of 5 years, including any extensions—and Article 57(4) of the Labor Law states that further provisions related to PKWTs should be stipulated under a government regulation, MK has emphasized that the term of a PKWT is a substantial provision that should be regulated under the Labor Law itself, to provide a legal basis for any implementing regulation, including for work-based PKWTs (without intending to review the legality of this government regulation, as it functions as an implementing regulation of the Labor Law).

Therefore, based on MK's emphasis, both work-based and period-based PKWTs shall now have a maximum term of 5 years, including extensions.

3. Employment relationship termination (Pemutusan Hubungan Kerja – "PHK") shall be based on a legally binding Industrial Relations Court decision

Regarding PHK, while the petitioners did not expressly challenge Article 151(3) of the Labor Law in their claim, MK has clarified that Article 151(3) of the Labor Law shall be

interpreted to mean that "the settlement of PHK shall be conducted through bipartite negotiations to achieve a consensus (musyawarah) between the Employer and Employee and/or Labor Union" in cases where an employee rejects the PHK after receiving a termination notice from the employer. This clarification is to affirm that PHK should be considered a last resort in resolving industrial relations disputes, particularly when an employee rejects the PHK.

Furthermore, during the settlement of an industrial relations dispute (in this case, PHK), Article 157A(1) of the Labor Law requires both the employer and employee to continue fulfilling their obligations. In relation to this, MK has emphasized that Article 157A(3) of the Labor Law shall be interpreted to mean that the performance of obligations must continue "until the end of the process of resolving employment/industrial relations disputes that have permanent legal force in accordance with the provisions in the Industrial Relations Dispute Settlement Law." In other words, this interpretation implies that in cases of a PHK dispute, the employer is obligated to continue paying the employee's salary, regardless of the employee's status (whether suspended or not), until a legally binding Industrial Relations Court decision has been issued.

As a background, the petitioners have petitioned for a constitutional review of Article 151(4) of the Labor Law due to its ambiguity. The provision only stipulates that if bipartite negotiations fail, a PHK shall be carried out through the industrial relations dispute settlement mechanisms, but it does not specify any consequences if employers carry out a PHK without undergoing such mechanisms. Furthermore, due to this lack of clarity and absence of specific consequences, the petitioners argue that the employers may arbitrarily carry out a PHK before obtaining a legally binding decision from the Industrial Relations Court. On a related note, under the previous Labor Law regime, prior to the Job Creation Law, the Labor Law stipulated that a PHK could only be carried out after obtaining a stipulation from the Industrial Relations Court.

In response to the above petition, MK has emphasized that bipartite negotiations shall be carried out to reach a consensus between the employer and employee. If such negotiations fail and no consensus is achieved, a PHK may only be carried out after obtaining a stipulation from an industrial relations dispute settlement institution, whose decision has permanent legal force (in other words, a legally binding Industrial Relations Court decision).

4. Conclusion

In addition to the interpretations provided by MK, MK views that the overlapping norms under the Labor Law and the Job Creation Law may cause further legal uncertainty, making it difficult for workers/employees to fully understand them. This is particularly worrisome because the Labor Law has been amended and subjected to constitutional review several times. To address this issue, MK is of the view that a new labor law should be enacted within the next two years to consolidate all previous norms and amendments. It is important to note that the foregoing is not part of the decision (Amar Putusan) in the MK Decision and should therefore be construed as an opinion from MK.

Accordingly, it will be important for stakeholders to continuously observe the developments in this area. If you have any questions in relation to the topic raised in this briefing, please contact the authors listed above.

[2]This would be different from the previous case where under MK Decision No. 91 PUU/XVIII/2020, MK explicitly ordered for the Job Creation Law to be amended within 2 years since the date of the decision and if not, it would be unconstitutional (hence, the Government Regulation in Lieu of Law No. 2 of 2022 was formulated and enacted). Therefore, this was an explicit order with an explicit consequence.