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November 2020 | NEWSLETTER

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HOW OMNIBUS LAW SHAPES THE MANPOWER LAW: (Some) Things to Look Out for and Debatable Points

On 2 November 2020, the much talked about Omnibus Law was promulgated under Law No. 11 of 2020 on Job Creation. The Omnibus Law aims to boosts local economy by fostering a more friendly approach for micro, small, and medium enterprises in starting and doing their businesses. At the same time, it also attempts to refashion the investment regulatory framework in Indonesia to be more inviting for foreign investment, by (making the effort of) centralizing and simplifying licensing procedure in Indonesia. Whether it will get there, remains to be seen.

Given the ambitious aim Omnibus Law has, the Omnibus Law has amended various existing laws spanning from company law, manpower law, investment law, construction services law, taxation law, anti-monopoly and business competition law, and many others encompassing 1,187 pages. In this November 2020 newsletter, we will focus our discussion on the amended Manpower Law (Law No. 13 of 2003) under the Omnibus Law in 2 (two) sections, namely some of the things both employers and employees need to look out for, and some provisions that we believe may require further clarification in the implementing regulations, or in other words, debatable.

The points and discussions raised below are by no means exhaustive and are geared for informational purpose only while also adding our thoughts in the mix.

A. (Some) Things to Look Out for in the Amended Manpower Law under Omnibus Law

1. Flat Severance Package Structure

Before it was amended by the Omnibus Law, the severance package granted to terminated employee(s) may differ depending on the reason for the employment termination, for example, if the employment termination is due to change of status of the company (e.g. merger or acquisition of the company) or efficiency/redundancy/downsizing of the company, the employee(s) concerned is entitled to **two times** the severance package (so if an employee has worked for more than 8 (eight) years

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(which entitles him for 9 (nine) months salary for his severance package) and is terminated for one of this reasons, then the employee is entitled for 18 (eighteen) months' salary for the severance package) in addition to other compensation and long service pay (as applicable). In other words, the severance package structure is not flat and may be granted up to two times the package given under the (previous) Manpower Law.

Under the Omnibus Law, the amended Manpower Law, subject to any clarification that may be made in the implementing regulations, revised the severance package structure into a flat severance package structure meaning that regardless of the condition causing the employment termination, the employee(s) is entitled for one time (only) severance package, in addition to other compensation and long service pay (as applicable).

<u>II. Criminal Offense for Failure to Pay Severance Package, Long Service Pay, and Compensation</u>

In the amended Manpower Law, Article 185 is inserted a new provision where failure to comply with Article 156 (1) of the amended Manpower Law (which states that in the event of employment termination, the employer is required to pay severance package and/or long service pay and compensation that the employee is entitled for) is subject to imprisonment of at least 1 (one) year up to 4 (four) years and/or a fine of at least IDR 100 million up to IDR 400 million. In other words, it is now a criminal offense for employer(s) who fail to pay severance package, long service pay, and compensation for entitled employee(s).

<u>III. Minimum Wage Requirement Does Not Apply to Small and Micro Enterprises</u>

Article 90 B of the amended Manpower Law exempts the minimum wage requirement for small and micro enterprises, stating that the wage is subject to the agreement between the employee and the employer. However, the implementation of this provision is currently unclear for the following reasons:

a. There will be further implementing regulation on wage requirements specifically for small and micro enterprises as mentioned under Article 90 B paragraph (4) of the amended Manpower Law and so we need to wait until the issuance of this regulation; and

b. The criteria for Small and Micro Enterprises under Law No. 20 of 2008 is amended under the Omnibus Law and awaits further clarity under the implementing regulation, meaning that we would need to wait for the issuance of this implementing regulation to obtain clarity in determining whether a venture indeed falls under small or micro enterprise criteria (and is therefore subject to Article 90 B of the amended Manpower Law).

B. Debatable (Discussion) Points the Amended Manpower Law Raised

<u>I. Fixed Term Employment Agreement: extendable indefinitely?</u>

As the sub-heading suggests, this subject has been much talked about ever since the Omnibus Law bill came to public circulation. The discussion centers around the omission of Articles 59 paragraph (4)

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and (6) of the Manpower Law in the amended Manpower Law which, in summary, stipulated that a fixed term employment agreement may only be made for up to 5 (five) years (i.e. 2 (two) years initially – extendable once for 1 (one) year – and then renewable (after 30 (thirty) days rest period) only once for up to 2 (two) years).

With the omission of the above provisions in the amended Manpower Law, concerns are raised (primarily by the workers union) if this would give employers reasons/legal basis to only use fixed term system for all its employees and extendable only at the discretion of the employers (i.e. no more permanent employment system). This is because with fixed term employment, in the event of employment termination, employer is only required to compensate the employee if the termination is done before the end of the fixed term employment period (and the compensation (if paid) would only depend on the remaining period multiplied with the employee's monthly salary). Employer would not be required to pay severance package, long service pay, and/or compensation (as applicable) when they terminate a fixed term employment.

However, taking a more in-depth look of the amended Manpower Law, would this (indefinite extension of fixed term employment) be really the case and the intention of the law? It is true that Articles 59 paragraph (4) and (6) of the Manpower Law has been omitted in the amended Manpower Law, but in its place a new provision is inserted which states that further provisions on the type, period, and extension time limit of a fixed term employment agreement will be regulated in a government regulation (i.e. the implementing regulation). Therefore, it is safe to say that it is not the intention of the law to provide indefinite extension of fixed term employment agreement, but pending the issuance of the implementing regulation, it would be open for interpretation on the allowable period/extension/renewal of a fixed term employment agreement. According to the Omnibus Law, the implementing regulation of the Omnibus Law must be enacted within 3 (three) months as of the promulgation of the Omnibus Law (2 November 2020).

In addition, not all types of works may be designated for a fixed term employment because fixed term employment is specified for certain types of works which are temporary in nature such as seasonal works, project-based works, one-time assignment, etc. Therefore, it would not be legally compliant for employers to apply fixed term employment to all its employees.

II. Warning Letters to Employee: must it always be 3 (three) warning letters?

The discussion point in this subject revolves on the omission of elucidation of Article 161 paragraph (2) of the Manpower Law in the amended Manpower Law regarding warning letters. The substance of article 161 paragraph (2) itself is moved into Article 154 A paragraph (1) k. in the amended Manpower Law but the elucidation is nowhere to be found. Before, the elucidation provided flexibility that employer may issue warnings up to 3 (three) times (consecutively or not) to its employee upon violating the terms of his/her employment agreement, company regulation, or the collective labor agreement (CLA), **or** first and last warning for certain violations.

Without the elucidation, we have to rely on Article 154 A paragraph (1) k. which reads that employment termination may occur if the employee violates the terms of his/her employment agreement, company regulation, or the CLA and **has previously been served first, second, and**

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third warning consecutively, each having period of up to 6 (six) months unless stipulated otherwise in the employment agreement, company regulation, or the CLA. Whether the employment agreement, company regulation, or the CLA may stipulate the number of warning letters differently is now possibly open for interpretation.

III. Severance Package: applicable for resigning employees as well?

We do not believe this to be the case but the lack of clarity in the amended Manpower Law **may** suggest so. Here is the breakdown:

a. Manpower Law (both before and after amended by Omnibus Law) stipulates that:
   i. employer must pay severance package, long service pay, and/or compensation (as applicable) in the event of employment termination; and
   ii. voluntary resignation is one of the reasons for employment termination;

b. the legal basis for not paying severance package to resigning employee is Article 162 paragraph (1) of the Manpower Law which stipulates that resigning employee is entitled for compensation. Since compensation and severance package are distinctly differentiated in the Manpower Law, this article provides the basis for the exclusion of severance package mentioned in sub-section a.i. above from employment termination due to voluntary resignation; however

c. Article 162 is now omitted from the amended Manpower Law.

Of course, it is possible that the implementing regulations of the amended Manpower Law (which we still need to wait for) may provide clarity on this issue. However, in the absence of clear implementing regulations, the omission of Article 162 raises the question on the legal basis for not applying severance package to resigning employees (for reasons mentioned in sub-section a.i. and a.ii. above) and whether employees would have strong legal ground to enforce this lack of clarity, is open for interpretation.

The above is brief overview on some of the noteworthy points of the amended Manpower Law that any employer and employee need to keep in mind. It is also important to remember that some of the discussion points above require further clarity in the upcoming implementing regulations and therefore pending the clarity, it would be prudent to tread cautiously and conservatively in interpreting any gap therein.

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