

Key changes of Employment Law according to Constitutional Court's decision No. 168/PUU-XXI/2023

Background

The Constitutional Court of the Republic of Indonesia (*Mahkamah Konstitusi* – “**Court**”) through Decision No. 168/PUU-XXI/2023 (“**Decision No. 168/2023**”) has recently ruled that several provisions under the Employment Law¹ were unconstitutional against the 1945 Constitution of the Republic of Indonesia. As a result, the Court partially granted the petition, declaring 21 provisions under the Employment Law unconstitutional and requiring their amendments.

Summary

We set out below a summary of the key changes to the Employment Law (you may refer to the underlined provisions), as stipulated under Decision No. 168/2023. Please note that green highlights column are provision that may impact businesses in Indonesia:

Section	Article	Employment Law <u>prior</u> to the Decision No. 168/2023	Employment Law <u>after</u> the Decision No. 168/2023
Expatriate	Article 42 paragraph (1)	Any employer who employs expatriate must possess a plan to use expatriate that is authorised by the central government.	Any employer who employs expatriate must possess a plan to use expatriate that is authorised by the <u>Minister responsible in the field of employment, in casu Minister of Manpower</u> .
	Article 42 paragraph (4)	Expatriate may be employed in Indonesia only in an employment relationship for specific position and definite period of time and possess competence in accordance with the position that will be occupied.	Expatriate may be employed in Indonesia only in an employment relationship for specific position and definite period of time and possess competence in accordance with the position that will be occupied, <u>by considering the priority of using Indonesian worker</u> .
Fixed-term employee	Article 56 paragraph (3)	The period of time or completion of a specified work as referred to in paragraph (2) shall be determined based on an employment agreement.	The period of completion for a specified work <u>is made not to exceed at most 5 (five) years, including if there is any extension</u> .

¹ Law No. 13 of 2003 on Manpower as lastly amended by Law No. 6 of 2023 on the Determination of Government Regulation in-lieu of Law No. 2 of 2022 on Job Creation into Law (hereinafter the “**Employment Law**”).

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	Article 57 paragraph (1)	A fixed-term employment agreement is made in writing and must use Indonesia language and latin alphabets.	A fixed-term employment agreement <u>must be</u> made in writing and must use Indonesia language and latin alphabets.
Outsourcing worker	Article 64 paragraph (2)	The Government determines part of the work implementation as referred to in paragraph (1).	The <u>Minister</u> determines part of the work implementation referred to in paragraph (1) <u>in accordance with the type and the field of outsourcing work as agreed in the outsourcing agreement.</u>
Leave and holiday	Article 79 paragraph (2) letter b	1 (one) day weekly rest for 6 (six) work days in 1 (one) week.	1 (one) day weekly rest for 6 (six) work days in 1 (one) week <u>or 2 (two) days weekly rest for 5 (five) work days in 1 (one) week.</u>
	Article 79 paragraph (5)	In addition to the rest and leave periods as referred to in paragraph (1), paragraph (2), and paragraph (3), certain companies may provide long leave as stipulated in employment agreements, company regulations, or collective labor agreements.	In addition to the rest and leave periods as referred to in paragraph (1), paragraph (2), and paragraph (3), certain companies may provide long leave as stipulated in employment agreements, company regulations, or collective labor agreements.
Employee rights	Article 88 paragraph (1)	Every employee is entitled to a decent living for humanity.	Every employee is entitled to a decent living for humanity, <u>including income that meets a living standard which the amount of income or revenue of employee are from the results of their work therefore they will be able to meet the needs of themselves and their families reasonably, which includes food and drink, clothing, housing, education,</u>

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			<u>health, recreation, and old age security.</u>
Wages board	Article 88 paragraph (2)	The Central Government stipulates wage policy as one of the efforts to realise employee's right for a decent living for humanity.	The Central Government stipulates wage policy as one of the efforts to realise employee's right for a decent living for humanity <u>by involving regional wages board in which there are elements of local government in the formulation of wages policies which are used as material for the Central Government to establish wages policies.</u>
	Article 98 paragraph (1)	To provide advice and considerations to the Central Government or Regional Government in the formulation of wages policies and the development of the wages system, wages board is established.	To provide advice and considerations to the Central Government or Regional Government in the formulation of wages policies and the development of the wages system, <u>an actively participating</u> wages board is established.
Determination of wages	Article 88 paragraph (3) letter b	Structure and scale of wage.	<u>Proportional</u> structure and scale of wage.
	Article 88C	(1) The Governor shall determine minimum wage (2) The Governor may determine the regency/city minimum wage	The previous provisions remain prevail with the addition of <u>"including the Governor shall determine the sectoral minimum wage in the provincial area and may determine for the regency/city."</u>
	Article 88D paragraph (2)	The formula for minimum wage calculation as referred to in paragraph (1) considers economic growth variables, inflation, and certain index.	The formula for minimum wage calculation as referred to in paragraph (1) considers economic growth variables, inflation, and certain index.

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			<u>A certain index is a variable that represents the contribution of employees to the economic growth of the province or district / city by taking into account the interests of companies and employees as well as the principle of proportionality to meet the needs of a decent life (KHL) foremployees.</u>
	Article 88F	In certain circumstances, the Government may stipulate a different minimum wage calculation formula from what is referred to in Article 88D paragraph (2).	The phrase “in certain circumstances” <u>shall include, among others, natural or non-natural disasters, including extraordinary conditions of the global and/or national economy stipulated by the President in accordance with the provisions of laws and regulations.</u>
	Article 90A	Wage above the minimum wage are determined based on an agreement between employer and employee in acompany.	Wage above the minimum wage are determined based on an agreement between employer and employee <u>or labour union</u> in acompany
Scale of wage in company	Article 92 paragraph (1)	The Employer must formulate structure and scale of wage in the company by taking into account the company's ability and productivity.	The Employer must formulate structure and scale of wage in the company by taking into account the company's ability and productivity, <u>as well as class, position, period of service, education, and competence.</u>
Termination of employment	Article 151 paragraph (3)	In the event that an employee has been notified and refused his/hertermination of employment, the settlement of termination of employment shall be carried out through bipartite negotiations between	In the event that an employee has been notified and refused his/hertermination of employment, the settlement of termination of employment shall be carried out through bipartite negotiations <u>in a</u>

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		the employer and employee and/or labour union.	<u>deliberative manner to reach consensus</u> between the employer and employee and/or labour union.
	Article 151 Paragraph (4)	In the event that the bipartite negotiations as referred to in paragraph (3) did not reach into an agreement, the termination of employment shall be carried out through the next stage in accordance with the industrial relations dispute settlement mechanism.	In the event that the bipartite negotiations as referred to in paragraph (3) did not reach into an agreement, the termination of employment <u>can only be carried out after obtaining a stipulation from an industrial relations dispute settlement institution whose decision has permanent legal force.</u>
Severance pay and industrial dispute settlement	Article 156 paragraph (2)	Severance pay as referred to in paragraph (1) shall be given with the following provisions:	Severance pay as referred to in paragraph (1) shall be <u>at least</u> :
	Article 157A paragraph (3)	The implementation of the obligations as referred to in paragraph (1) shall be carried out until the completion of the industrial relations dispute settlement process according to its level.	The implementation of the obligations as referred to in paragraph (1) shall be carried out <u>until the completion of the process of industrial relations dispute settlement that have permanent legal force in accordance with the provisions in the Industrial Relations Dispute Settlement law.</u>
Other matter	Article 95 paragraph (3)	Other rights of employee as referred to in paragraph (1) shall be paid in priority over all creditors except creditors holding property security rights.	Other rights of employee as referred to in paragraph (1) shall be paid in priority over all creditors <u>including preferred creditors</u> except creditors holding property security rights.

Based on the above changes, the Court urged lawmakers to promptly draft a new employment law, separating or excluding the relevant provisions from the current Employment Law. This new

law aims to address, reorganize, and resolve disharmony and inconsistencies in employment legislation effectively.

Remarks

Decision No. 168/2023 has brought significant changes to the Indonesian Employment Law, particularly in areas such as wage determination and severance pay.

Previously, wages above minimum wage were primarily determined and agreed upon between employer and employee. However, the new ruling enabling employer to consult and agree on wage with labor unions. This change empowers labor unions and could potentially lead to a new dynamic in wage determination.

Further, the Court has clarified that employers can offer severance pay exceeding the statutory minimum. This provides employers with greater discretion to provide more generous severance package. Employers should carefully review the specific provisions amended by Decision No. 168/2023 and consult with legal experts to ensure compliance and mitigate potential risks.

For immediate guidance on adapting your employment policies, please contact us by email at info@tnklaw.id or phone at (021) - 2528636.

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