

Basic Principles of Indonesian Labour and Employment Law

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The following paper is intended to provide a basic overview of Indonesian labour and employment law.

Legislation and Agencies

1 What are the main statutes and regulations relating to employment?

The main statutes relating to employment in Indonesia are:

- Law No. 13 of 25 March 2003 on Manpower (the Manpower Law), as amended by Constitutional Court decision on case number 012/PUU-I/2003 of 28 October 2004;
- Law No. 2 of 14 January 2004 on Industrial Relations Dispute Settlement, as amended by Government Regulation in Lieu of Law No. 1 of 13 January 2005 on the Postponement of Law No. 2 of 2004 on Industrial Relations Dispute Settlement (collectively, Law No. 2); and
- Law No. 21 of 4 August 2000 on Labour Unions (Law No. 21).

2 Is there any legislation prohibiting discrimination or harassment in employment?

Yes, the Manpower Law provides that each employee shall be entitled to equal treatment from the employer without discrimination. Employers must grant employees' rights and obligations without discrimination by sex, ethnic group, race, religion, skin color or political orientation.

The Manpower Law also prohibits harassment and other misconduct by the employer. The employee can claim termination of the employment with enhanced separation benefits if the employer engages in the following actions:

- abuses, grossly insults or threatens the employee;
- incites or orders the employee to commit acts contrary to laws and regulations;
- does not pay the salary at the stipulated time for three or more consecutive months;
- fails to perform its obligations to the employee;
- orders the employee to perform work other than as agreed; or

- assigns work that endangers the life, safety, health or good morals of the employee where such work is not contained in the employment agreement.
- 3 Is there any legislation protecting employee privacy or personnel data? if so, what are an employer's obligations under the legislation?

There is no labour legislation in Indonesia protecting employee privacy or personnel data whether before, during or after employment, although Indonesia has enacted various laws relating to data privacy in a number of specific areas (eg, banking, tax). The Human Rights Law (Law No. 39 of 1999) which stipulates that each individual has the right to his own privacy, and may not be the subject of an investigation without his or her approval. Article 39 of the Human Rights Law provides that freedom and secrecy of communication by letter or any other electronic media may not be disturbed or interrupted except upon the instruction of a judge or other authority. However, employers routinely reserve the right to review all employee e-mails using the employer's computers and e-mail system.

- 4 What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The primary entities responsible for the enforcement of employment statutes are the Department of Manpower and Transmigration, the Industrial Relations Court (Labour Court), and the Manpower Service Offices of the regional governments.

Worker Representation

- 5 Is there any legislation mandating the establishment of a works council or workers' committee in the workplace?

Under the Manpower Law, there are three fora in which employees may have representation:

- the bipartite forum consisting of representatives of employees and the employer if there are at least 50 employees;
- the tripartite forum consisting of representatives of labour union, the employer association and the regulator; and
- the labour union. A labour union is not mandatory. Establishment of a labour union is regulated under Law No. 21. A group of at least 10 employees can establish a labour union.

The government's current involvement in this area lies solely with the registration of unions. Despite the fact that the government does not intervene in the establishment of labour unions, labour unions are required to be democratic, independent and responsible, and not to base membership on politics, religion, race and/or gender-based on Pancasila (basic fundamental law of the Republic of Indonesia) and the 1945 Constitution.

Law No. 21 imposes criminal sanctions on anyone, including the employer, who engages in certain anti-union activity, for example:

- preventing employees from forming a labour union, becoming a member of a labour union or conducting labour union activities;

- terminating an employee or reducing their salary for conducting labour union activities;
- conducting an anti-labour union campaign, and
- intimidation in any form.

Background Information on Applicants

- 6 Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

There are no restrictions or prohibitions against background checks on applicants. The employer may conduct its own checks or hire a third party. As a matter of best practice, a company may conduct background checks on potential employees if the information required is relevant to their duties and responsibilities at the company.

Specifically for director or commissioner positions, a company may ask applicants whether they have been convicted of a crime. Please note that under Law No. 40 of 2007 on Limited Liability Companies (the Company Law), persons appointed as members of the board of directors or commissioners shall be individuals who have not been punished for a criminal offence causing losses to the state during a period of five years prior to their nomination.

- 7 Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

There are no restrictions or prohibitions if an employer conducts medical examinations as a condition of employment. The employer may refuse to hire an applicant who does not submit to such medical examination.

- 8 Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

There are no restrictions or prohibitions if the employer conducts drug and alcohol testing as a condition of employment. Again, the employer may refuse to hire an applicant who does not submit to such testing.

Hiring of Employees

- 9 Are there any legal requirements to give preference in hiring to particular people or groups of people?

Article 5 of the Manpower Law states that each person shall have equal opportunity without discrimination to obtain work. Each employee has the same rights and opportunities to obtain a decent job and livelihood without discrimination by sex, ethnic group, race, religion or political orientation, in accordance with the interests and abilities of the employee, including equal treatment for the disabled.

There is a specific provision on disabled persons. Based on the elucidation of Law No. 4 of 1997 on Disabled Persons, an employer must employ one disabled person who fulfils the requirements and qualifications of the job concerned per every 100 employees.

10 Must there be a written employment contract? If so, what essential terms are required to be evidenced in writing?

Fixed-term employment agreements must be in writing and in the Indonesian language. If there is a written employment agreement, it must at least containing the following:

- name, address and type of business of the company;
- name, gender, age and address of the employee;
- position or type of work;
- place of work;
- amount of salary and method of payment;
- employment conditions containing employer and employee's rights and obligations;
- commencement date and term of effectiveness of employment agreement;
- place and date the employment agreement was made; and
- signatures of the parties to the employment agreement.

For permanent employment, the Manpower Law simply requires an employer to issue a letter of appointment as an employee (article 63 of the Manpower Law).

11 To what extent are fixed-term employment contracts permissible?

The period of a fixed-term employment contract may only be for up to two years, and may be extended one time for up to one year and renewed once for up to two years with a 30-day grace period (article 59(4) of the Manpower Law). Certain exceptions as to the maximum term of fixed term contracts apply depending on the nature of the work (eg, temporary projects, seasonal, or short term work related to new products or product trials, etc).

12 What is the maximum probationary period permitted by law?

The maximum probationary period is three months and cannot be extended. The probationary period is only permitted for permanent employees. Fixed-term employment agreements cannot provide for a probationary period.

13 To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

In theory, non-competition and non-solicitation (customers, employees or suppliers) agreements are enforceable in accordance with their terms. In practice, the enforcement of the agreement would likely depend upon the facts of the case (ie, scope and duration of restrictions) which should not interfere with a person's right of gainful employment under Indonesian law and should not interfere with the nation's development. There has been almost no jurisprudence on this point.

It is common in executive employment contracts to provide that employees are prohibited, directly or indirectly, from soliciting or diverting any customers, business employees, or suppliers of the employer with whom they became acquainted as a result of their employment for a period of up to one year.

- 14 What are the primary factors that distinguish an independent contractor from an employee?

The following table sets out the criteria distinguishing employees from independent contractors:

Employee	Independent Contractor
An employee of a company.	Not an employee of a company.
To be hired based on employment agreement.	To be retained based on independent contractor agreement.
The employer must enrol an employee in the mandatory manpower social security programme (Jaminan Sosial Tenaga Kerja or Jamsostek).	It is not necessary for the employer to enrol the independent contractor in Jamsostek.
The terminology of the payment is 'salary' or 'wages'. Payment of salary does not require an invoice.	The terminology of the payment is 'fee'. The independent contractor agreement will usually require a contractor to submit an invoice for payment of fees.
The employee must pay income tax by way of withholding at source on income from employment under article 21 of the Income Tax Law.	The independent contractor must pay income tax under article 23 of the Income Tax Law or other applicable tax regime depending on the nature of the services.
Employer and employee relationship is a relationship between superior and subordinate governed by labour laws.	A company and independent contractor relationship is a relationship between contracting parties governed by contract law and other applicable legislation.
If a dispute occurs, the parties will go to labour court with specific procedures under Law No. 2.	If a dispute is occurs, the parties will go to district court under the rules of civil procedure or arbitration.
If the employee is terminated, then she or he will be entitled to severance pay, service pay and/or other compensation, depending on the nature of the termination under the Manpower Law.	If the independent contractor is terminated then the provisions of the independent contractor agreement will prevail subject to other applicable laws.

Foreign Workers

15. Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

Business visitor visas are valid for up to 12 months.

Work permits and related visas are available for employees transferred to Indonesia but must be renewed annually. Further, the immigration and manpower authorities require that there be at least two or three Indonesian employees for each foreign worker.

16. Are spouses of authorised workers entitled to work?

Yes, provided that the spouse has the necessary visa and work permit.

17. What are the rules for employing foreign workers?

The Manpower Law states that each employer employing expatriate manpower must have a permit in writing from the minister of manpower and transmigration or appointed official.

The expatriate is also be subject to sanctions under Law No. 9 of 1992 on Immigration Affairs, including deportation if he or she works in Indonesia without a proper work permit.

18. Is a labour market test required as a precursor to a short or long-term visa?

In Indonesia, the immigration and manpower authorities will not grant a work permit to an expatriate if local employees can perform such job position. The authorities are quite flexible in the interpretation and enforcement of this rule in practice.

Terms of Employment

19. Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

In general, working hours may be either:

- seven hours a day and 40 hours a week for six working days per week; or
- eight hours a day and 40 hours a week for five working days per week.

Such schedule is the maximum working hours. However, employees may perform overtime work for a maximum of three hours per day and 14 hours per week.

Working hours for companies located in remote areas and companies whose business is exploration and production of natural resources may be longer and are regulated separately.

20. What categories of workers are entitled to overtime pay and how is it calculated?

Employees are entitled to overtime subject to the following. The Minister of Manpower and Transmigration Decree Kep-102/Men/VI/2004 On Overtime Work and Overtime Pay provides employees who 'bear the responsibility as thinkers, planners, executors, and controllers of the company's operation' whose working hours cannot be limited to the working hours stipulated by the company in accordance with prevailing laws and regulations are not eligible for overtime payment. This is generally interpreted in practice to mean employees who are managers and above.

The calculation of overtime pay is based on monthly wages. The monthly wage for calculating the overtime pay means as follows:

- if the wage consists of a basic wage and fixed allowance, the basis of calculation of overtime pay is 100 per cent of the wage, or
- if the wage consists of basic wage, fixed allowance and nonfixed allowance, and if the sum of basic wage plus fixed allowance is less than 75 per cent of total wage, the basis of calculation of overtime pay is 75 per cent of total wage.

The calculation of hourly wage is 1/173 times the monthly wage.

21. Is there any legislation establishing the right to annual vacation and holidays?

Yes, the Manpower Law regulates annual leave. The minimum annual leave is 12 workdays after the employee concerned has worked for 12 consecutive months.

In addition, the Manpower Law provides that employees are entitled to public holidays determined by the Government. An employee who works on a public holiday is entitled to overtime payment, unless he or she is not eligible for overtime (ie, managers and above).

22. Is there any legislation establishing the right to sick leave or sick pay?

The Manpower Law is silent regarding sick leave days granted to employees, except for the right of female employees to have sick leave during her menstruation period subject to a medical certificate.

However, the Manpower Law provides that an employee is entitled to receive salary during long-term sickness as follows (article 93(3) of the Manpower Law):

- for the first four months, 100 per cent of the salary;
- for the second four months, 75 per cent of the salary;
- for the third four months, 50 per cent of the salary; and
- for subsequent months thereafter, 25 per cent of the salary until the employer terminates the employment.

23. In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

An employee is entitled to paid time off depending on the circumstances as follows (article 93(4) of the Manpower Law):

- if an employee gets married, three days;
- if the employee's child gets married, two days;
- if the employee's child is circumcised, two days;
- if the employee's child is baptised, two days;
- if the employee's wife gives birth or miscarries, two days;
- if the employee's husband or wife, parent or parent-in-law, child, or daughter-in-law or son-in-law dies, two days; and
- if the employee's family member living in the same house dies, one day.

A female employee is entitled paid time off for one-and-a-half months before delivery and one-and-a-half months after the delivery. In a case of miscarriage, a female employee is entitled to one-and-a-half months paid time off after the miscarriage.

Employees are also entitled to leave of absence for duties required by the State as well as for religious purposes.

24. What employee benefits are prescribed by law?

The following are the mandatory employee benefits:

- salary: an employee is entitled to salary; the amount must be at least equal to the minimum wages stipulated by the competent authority based on location and industry;
- religious holiday allowance (tunjangan hari raya, THR): The THR payment is payable to employees who have worked for at least three consecutive months. The THR is paid pro rata if an employee has worked for three months but less than 12 months. If an employee has worked for 12 months, he or she will get the full THR payment in the amount of one month salary (basic salary plus fixed cash allowances); and
- Manpower Social Security Scheme (Jaminan Sosial Tenaga Kerja, or Jamsostek): Under Law No. 3 of 1992 on Jamsostek, all employers employing 10 or more employees, or having a payroll of at least 1 million Rupiah per month, must participate in the Jamsostek programme. Under this Law, those employers must cover their employees through the Jamsostek programme and make contributions to the programme for the benefit of the employees, for the following programmes: work or occupational accident security, death security, old age security, and healthcare security.

An employer who has implemented its own healthcare programme for workers with benefits better than the basic healthcare package under the Jamsostek programme is not obligated to participate in the healthcare security. The other three programmes are mandatory.

For termination benefits, see question 33.

25. Are there any special rules relating to part-time or fixed-term employees?

Benefits of part-time or fixed-term employees are the same as those of permanent employees. However, if a fixed-term employee is terminated without any cause, the relevant fixed term employee is entitled to payment of his or her salary up to the end of the term of the contract.

26. In which circumstances may an employer be held liable for the acts or conduct of its employees?

Article 1367 of the Indonesian Civil Code provides that generally an employer is responsible for its employees who are acting for the interests of the employer.

This liability in certain cases may not avoid any personal liability that an employee may face such as criminal liability or revocation of any licence or certification that the employee has.

Taxation of Employees

27. What employment-related taxes are prescribed by law?

Any and all income of an employee is subject to withholding income tax (known as Article 21 income tax) at the following rates:

- up to 50 million rupiahs, 5 per cent;
- over 50 million to 250 million rupiahs, 15 per cent;
- over 250 million to 500 million rupiahs, 25 per cent; and
- over 500 million, 30 per cent.

Employers are required to withhold the income tax and pay the withheld income tax to the State Treasury.

With respect to termination benefits, the applicable withholding income tax rates are as follows:

- up to 25 million is exempted;
- over 25 million to 50 million rupiah, 5 per cent;
- over 50 million to 100 million rupiah, 10 per cent;
- over 100 million to 200 million rupiah, 15 per cent; and
- over 200 million rupiah, 25 per cent.

Employee-Created IP

28. Is there any legislation addressing the parties' rights with respect to employee inventions?

Indonesian copyright law provides that an inventor owns the invention created during employment unless otherwise agreed by both parties (article 8 of Law No. 12 of 1997).

Business Transfers

29. Is there any legislation to protect employees in the event of a business transfer?

Acquisition of Shares

The Manpower Law provides that employees have a right to resign due to change of control (which in practice means a change of more than 50 percent of the shares in the employer) in a company and are entitled to enhanced resignation benefits. An employer has no right to terminate employees due to change of control.

Acquisition of Assets

The Manpower Law is silent on transfers of employees due to an acquisition of assets. It is necessary for all parties, including the employee, to agree that his or her employment will be transferred to the acquirer either as a successor employer or as fresh employment. In the latter case, the employees shall be paid their termination benefits (ie, enhanced termination benefits as described in question 33) and their employment period with the acquiring company starts anew.

Alternatively, the employees may agree to start employment with the acquiring company and their existing employment period with the transferring company will be transferred to the acquiring company. In this case, the employees should not receive the termination benefits.

Outsourcing

The Manpower Law expressly provides that outsourcing is permitted subject to compliance of certain requirements. Outsourcing is not permitted for core activities or activities directly relating to the production process of a company. Outsourcing is only permitted for supporting service activities or activities which are not directly related to the production process.

Termination of Employment

30. May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

Under the Manpower Law and other prevailing labour laws and regulations, termination at will is not recognised in Indonesia, and such termination must be 'with cause'. The termination of employment relationships must follow the procedures under the Manpower Law and Law No. 2.

Causes for termination include the following:

- 'ordinary' cause due to poor performance (ie, violation of the employment contract, company regulation or collective labour agreement) after three warning letters; and
- 'serious' cause including theft, providing false information harmful to the company, dangerous or immoral conduct, etc. We note that the 'serious' cause provision of the Manpower Law was revoked by a Constitutional Court decision in 2003. However, in 2005 the minister of manpower and transmigration issued Circular Letter No. SE.13/MEN/SJHK/I/2005, which mentions that a company may terminate an employment relationship for an 'emergency reason', subject to approval from the Labour Court. This is intended to reinstate termination for serious cause provided that the employer obtains Labour Court approval.