

Labour & Employment

Contributing editors

Matthew Howse, Sabine Smith-Vidal, Walter Ahrens and Mark Zelek



2016

GETTING THE
DEAL THROUGH

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Labour & Employment 2016

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Matthew Howse, Sabine Smith-Vidal, Walter Ahrens and Mark Zelek
Morgan, Lewis & Bockius LLP

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Business development managers
Alan Lee
alan.lee@gettingthedealthrough.com

Adam Sargent
adam.sargent@gettingthedealthrough.com

Dan White
dan.white@gettingthedealthrough.com



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CONTENTS

Global overview	7	Germany	101
Mark E Zelek Morgan, Lewis & Bockius LLP		Walter Ahrens Morgan, Lewis & Bockius LLP	
Using non-competes and other restrictive covenants globally	9	India	109
Matthew Howse Morgan, Lewis & Bockius LLP		Rohit Kochhar Kochhar & Company	
Afghanistan	11	Indonesia	115
Ghazi Khan and Muhammad Ismail Legal Oracles		Johannes C Sahetapy-Engel and Anissa Paramita Arfidea Kadri Sahetapy-Engel Tisnadisastra (AKSET)	
Australia	16	Italy	120
Joydeep Hor and Therese MacDermott People + Culture Strategies		Valeria Morosini Toffoletto De Luca Tamajo e Soci - <i>member of Ius Laboris</i>	
Austria	22	Japan	128
Thomas Boller BLS Rechtsanwälte Boller Langhammer Schubert GmbH		Motoi Fujii and Tomoko Narita TMI Associates	
Belgium	29	Kazakhstan	138
Emmanuel Plasschaert, Evelien Jamaels and Alex Franchimont Crowell & Moring		Klara Nurgaziyeva and Marat Mukhamediyev Morgan, Lewis & Bockius LLP	
Brazil	34	Korea	144
Fabio Medeiros Machado Associados Advogados e Consultores		Sun Ha Kweon, Milosz Zurkowski and Sung Il Yoon Kim & Chang	
Bulgaria	41	Luxembourg	150
Maria Drenska and Maya Aleksandrova Pavlov and Partners Law Firm in cooperation with CMS Reich-Rohrwig Hainz Rechtsanwälte GmbH		Guy Castegnaro and Ariane Claverie Castegnaro - <i>member of Ius Laboris</i>	
Canada	47	Malaysia	160
Craig T Munroe, Roy L Heenan and Andrea L Zwack Gall Legge Grant & Munroe LLP		Selvamalar Alagaratnam Skrine	
Chile	56	Mexico	166
Jaime Salinas Toledo and María Francisca Montenegro Philippi, Prietocarrizosa & Uria		Humberto Padilla Gonzalez Morgan, Lewis & Bockius LLP	
China	63	Norway	171
Min Duan Morgan, Lewis & Bockius LLP		Tore Lerheim and Ole Kristian Olsby Hombler Olsby advokatfirma AS	
Cyprus	70	Peru	177
George Mountis and Yiannis Karamanolis Dr K Chrysostomides & Co LLC		Alberto Varillas and Sara Kalinicos García Sayán Abogados	
Denmark	76	Portugal	182
Morten Langer Norrbon Vinding		Ricardo Grilo Barrocas & Associados - Sociedade de Advogados, RL	
Ecuador	82	Puerto Rico	189
Patricia Ponce Bustamante & Bustamante Law Firm		Melissa C Rodriguez Morgan, Lewis & Bockius LLP	
Finland	87	Russia	196
Seppo Havia Dittmar & Indrenius		Bela Pelman and Dmitry Dmitriev Morgan, Lewis & Bockius LLP	
France	94	Singapore	203
Sabine Smith-Vidal and Charles Dauthier Morgan, Lewis & Bockius LLP		Ian Lim, Nicole Wee and Jamie Chin TSMP Law Corporation	

Slovakia	212	Turkey	244
Pavol Rak and Lucia Trnková Noerr s.r.o.		Nilgün Serdar Şimşek, Çağıl Şahin Sünbül and İpek Okucu GSG Attorneys at Law	
Slovenia	218	United Arab Emirates	251
Darja Miklavčič Odvetniki Šelih & partnerji, o.p., d.o.o.		Charles Laubach Afridi & Angell	
Spain	224	United Kingdom	257
Iñigo Sagardoy and Ricardo García Fernández Sagardoy Abogados - <i>member of Ius Laboris</i>		Matthew Howse, Lee Harding and Nicholas Hobson Morgan, Lewis & Bockius LLP	
Sweden	231	United States	264
Robert Stromberg and Jonas Lindskog Cederquist		David A McManus and Michelle Seldin Silverman Morgan, Lewis & Bockius LLP	
Switzerland	238	Venezuela	272
Roberta Papa and Thomas Pietruszak Blesi & Papa		John D Tucker, Pablo Benavente and María Elena Subero Hoet Peláez Castillo & Duque	

Indonesia

Johannes C Sahetapy-Engel and Anissa Paramita

Arfidea Kadri Sahetapy-Engel Tisnadisastra (AKSET)

Legislation and agencies

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

The main statutes relating to employment are Law No. 13 of 2003 on Manpower (the Manpower Law), Law No. 2 of 2004 on Industrial Relations Dispute Settlement (the Industrial Dispute Law) and Law No. 21 of 2000 on Labour Unions (the Union Law), Law No. 40 of 2004 on National Social Security System (the SJSN Law), Law No. 1 of 1970 on Work Safety and Health (the Work Safety Law) along with a well developed body of implementing regulations from the Minister of Manpower.

2 Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

The Manpower Law provides that every person has equal rights to obtain a job and receive equal treatment in the workplace without discrimination on the basis of sex, ethnicity, race, religion or political orientation, including equal treatment for disabled persons.

Indonesia has ratified the International Labour Organisation (ILO) Conventions regarding discrimination in employment, as follows: ILO Convention No. 111 concerning Discrimination in respect of Employment and Occupation and ILO Convention No. 100 concerning Equal Remuneration.

With regard to harassment, the Manpower Law does not explicitly stipulate protection from harassment in the employment relationship. However, a harassed employee may file a claim through criminal or civil law proceedings.

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

Enforcement is under the jurisdiction of the Ministry of Manpower, Industrial Relations Courts (Labour Courts) and regional Manpower Services Offices.

Worker representation

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

Yes. The Manpower Law acknowledges the right of workers to form a union in the workplace. Unions are further regulated under the Union Law.

A union may be established by any group of at least 10 employees. Following establishment, the union must register with the Manpower Services Office at the domicile of the union.

Under the Union Law, a union has the following functions: (i) to negotiate a collective labour agreement (CLA) and represent the union/employees in industrial relations disputes; (ii) to represent employees in any cooperation arrangement with the employer; (iii) to create harmonious, dynamic, and fair industrial relations in accordance with applicable laws; (iv) to be the channel for aspirations in connection with any struggle for the right and interest of the union; (v) to plan, organise and be responsible for any strikes in accordance with applicable laws and regulation; and (vi) to represent the employees in seeking share ownership in the company.

In addition, the Manpower Law provides that companies that employ at least 50 employees are required to establish a Bipartite Forum, consisting of employer and employee representatives, to serve as a communication and consultation forum regarding employment issues in the company.

Background information on applicants

5 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, whether conducted by an employer or by a third party.

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

Minister of Manpower Regulation No. PER 02/MEN/1980 on Medical Examination for Employees in the Implementation of Work Safety allows employers to request job applicants to undergo a medical examination. There is no restriction or prohibition against employers imposing a medical examination as a condition of hire.

Companies in fields mentioned in the Work Safety Law (including high-risk work, mining, agriculture, forestry, construction, transportation, shipping, diving, extreme conditions and others) must conduct medical examinations of candidates prior to hiring them.

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

Minister of Manpower Regulation No. PER.11/MEN/VI/2005 on Prevention and Anticipation of Misuse and Illegal Distribution of Narcotics, Psychotropics, and any Addictive Substance in Work Places provides that an employer may request employees to take a drug test. There are no restrictions or prohibitions against employers imposing a drug test as a condition of hire.

Hiring of employees

8 Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

Other than the basic protections against discrimination mentioned above, there is no 'affirmative action' in Indonesia. The only exception is for employers with more than 100 workers, who must make efforts to hire at least one disabled person per 100 employees, as stipulated under Law No. 4 of 1997 on Disabled Persons.

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

The Manpower Law recognises two types of employment: permanent and fixed-term. A contract for permanent employment may be made in writing or orally. If orally, a letter of appointment must be drafted to address the basic terms of the arrangement.

Fixed-term employment agreements must be prepared in writing, stating at least the following:

- name, address and business line of employer;
- name, gender, age and address of employee;
- position or type of work;

- place of work;
- wage and payment mechanism;
- terms and conditions of work;
- effective date and term of employment;
- place and date of execution; and
- signatures of employer and employee.

All written employment agreements must be executed in the Indonesian language.

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

Fixed-term employment contracts may be based on a certain time period (time based) or completion of a certain work (work based). The Manpower Law provides that work based fixed-term employment agreements may only be used for certain types of work, which, because of the type and nature of the work, will finish in a specified time, namely:

- work to be performed and completed at once or work that is temporary by nature;
- work whose completion is estimated not to take longer than three years;
- seasonal work; and
- work that is related to a product or activity that is new or in the trial phase.

Regardless of the nature of the work, foreign employees may only be employed on a fixed-term basis.

A time based fixed-term employment agreement can be executed for an initial period of up to two years. The agreement may be extended once for up to one year upon seven days' written notice to the employee. Subsequently, the agreement may be renewed once for up to two years, but there must be a 30-day interlude between expiration of the extension and commencement of the renewal period. If the procedures for extension or renewal are not observed, and the employee continues working past the expiration date, he or she will be deemed a permanent employee as of the date of the violation.

There is diversity of opinion as to whether this provision applies to foreigners, as, by law, they must not be considered permanent employees. Nevertheless, many foreign expatriates are employed in Indonesia on a long-term basis pursuant to a series of fixed-term agreements.

11 What is the maximum probationary period permitted by law?

The Manpower Law provides that a probationary period may be imposed for a maximum of three months and only in cases of permanent employment. The probationary period must be written in the work agreement or stated in a letter of appointment if the work agreement is made verbally. If the probationary period is not notified to the employee, or if the parties attempt to insert a probationary provision into a fixed-term contract, then probationary is deemed non-existent. Likewise, if an employee is not notified that he or she has failed probation prior to the end of the period, he or she becomes a permanent employee by operation of law.

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

Under the Manpower Law, an employment relationship requires three elements: work, instructions and wage. Although there is a large informal labour sector in Indonesia, meaning that many workers are de facto independent contractors, the laws define employment in the broadest sense in order to provide labour protections to the largest population possible.

An independent contractor is usually hired based on a service or consulting agreement, which does not meet the 'wage' element by virtue of the fact that the contractor receives payment for services or deliverables rendered based on an invoice (rather than an automatic wage payment). There are other factors that distinguish an independent contractor from an employee. Independent contractors are not bound by working hours, do not carry business cards bearing the employer's name and have certain deliverables to their employer. Those factors are not found in employees.

Service and consulting agreements are governed under the Indonesian Civil Code (ICC), which does not stipulate specific terms and conditions. Absent obligatory provisions, the general of freedom of contract principle in the ICC applies, such that all legally executed agreements bind the parties thereto. Nevertheless, employers should be cautious in using service agreements for work that inherently falls under the employment umbrella.

13 Is there any legislation governing temporary staffing through recruitment agencies?

The Manpower Law provides that an employer may recruit employees by itself or through a recruitment agency, whether it is for temporary or permanent employees. However, subcontracting and outsourcing are strictly regulated, and workers procured through a third-party contractor or labour supply agency must not be used to perform 'core' work of an employer. The definitions of 'core' work may vary in different sectors.

Foreign workers

14 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?

There is no general numerical limit on the number of foreign employee visas a company may sponsor, although limitations do apply in certain sectors, for example, law firms may hire a maximum of five foreign legal consultants.

All foreign employees must hold a valid work permit (IMTA), a limited stay visa (VITAS), and a temporary residency permit (KITAS). The VITAS and KITAS may be granted for periods of six months, one year and two years; however, they are generally issued in line with the duration of the IMTA (which is only valid for one year at a time, even if the employment contract is for two years). The same requirements apply to secondees and employees who are transferred from a foreign office, as they are being employed in Indonesia.

For work of limited duration, including film making or entertainment, conducting quality control, inspection of Indonesian branch offices of foreign companies, and work relating to machinery installation, after-sales service and market testing of new products, a temporary IMTA of up to six months may be obtained.

Foreigners who enter Indonesia for non-employment business purposes (eg, to attend meetings) may enter using a business visit visa, which is issued initially for 60 days, extendable in country for 30 additional days, and then convertible into a multiple entry business visa, which is valid for one year.

15 Are spouses of authorised workers entitled to work?

While spouses of authorised workers are eligible to reside in Indonesia based on a dependent KITAS (the duration of which is tied to the working spouse's KITAS), they are not permitted to work unless they obtain a work permit.

16 What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker that does not have a right to work in the jurisdiction?

Foreign workers may be employed in Indonesia as long as the employer has obtained an approved Foreign Manpower Utilization Plan and the IMTA along with necessary immigration documents. Foreign workers may only be employed for limited periods and in certain positions. Foreigners are specifically prohibited from occupying positions of authority in human resources.

Pursuant to the Manpower Law, employing a foreigner without an IMTA may subject an employer to sanctions of one to four years' imprisonment and criminal fine of 100-400 million rupiah.

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

There is no specific labour market test requirement, although the Manpower Law states that foreign workers will not be granted a work permit if local employees can perform the job. Nevertheless, an employer may hire foreign workers in order to facilitate the transfer of technology, skills and expertise to local employees, with the objective of increasing capacity to the point that the foreign employees can eventually be replaced by local employees.

Terms of employment

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

Under the Manpower Law a working week is 40 hours, with two possible arrangements: seven hours/day x six days per week and eight hours/day x five days per week.

An employer and an employee may agree to have longer working hours. Overtime is allowed up to three hours per day and 14 hours per week, subject to employee consent.

The Manpower Law prohibits employers from employing female workers aged less than 18 years, as well as pregnant employees who based on a physician's statement are at risk of damaging their health or safety, between 11pm and 7am.

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

All employees working outside normal working hours are entitled to overtime pay, as follows.

Overtime on working days:

- first hour: 1.5 x hourly wage (based on prorated monthly salary); and
- subsequent hours: 2 x hourly wage.

Overtime on weekends or national holidays:

- For a six-day work week:
 - first seven hours: 2 x hourly wage;
 - 8th hour: 3 x hourly wage; and
 - 9th and 10th hours: 4 x hourly wage.
- For a five-day work week:
 - first eight hours: 2 x hourly wage;
 - 9th hour: 3 x hourly wage; and
 - 10th and 11th hours: 4 x hourly wage.

Managerial or professional employees and workers in certain sectors (oil and gas production, mining, and fisheries) are exempted from overtime requirements due to the nature of their work schedules.

20 Can employees contractually waive the right to overtime pay?

Overtime pay is a statutory right, but it may be waived under the terms of the employment agreement or company regulation.

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

In addition to statutory public holidays (which are determined annually by the government), the Manpower Law provides for 12 working days of paid annual leave after an employee has worked for 12 consecutive months.

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

Employers must provide paid sick leave to workers based on a physician's statement, without limit as to the number of days per year. Employers are permitted to limit the number of sick days in employment agreements or company regulations or CLA. However, the Manpower Law provides for reduction of salary during long illnesses, as follows:

- first four months: 100 per cent salary;
- second four months: 75 per cent salary;
- third four months: 50 per cent salary; and
- subsequent months: 25 per cent 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?

Under the Manpower Law, employees are entitled to paid leave under the following circumstances:

- marriage of employee: three days;
- marriage of employee's child: two days;
- circumcision or baptism of employee's child: two days;
- live birth or miscarriage by employee's wife: two days;
- death of employee's spouse, parent or parent-in-law, child or child-in-law: two days;
- death of other family member living in employee's household: one day;
- miscarriage by female employee: one-and-a-half months; and
- maternity leave for female employee: one-and-a-half months before and one-and-a-half months after delivery.

24 What employee benefits are prescribed by law?

Wage

All employers must comply with the minimum wage applicable in their region and industry. In addition, many employees receive allowances for meals, transportation and/or housing. If the salary is composed of basic wage and fixed allowances, the amount of the basic wage must not be less than 75 per cent of the total amount of compensation.

In addition, employers must pay religious holiday allowance of one month's salary to employees who have worked for at least one month, pro rated for employees who have worked less than 12 months.

Social security

Every employee, including foreigners working in Indonesia for at least six months, must be enrolled in the national Social Security Program (BPJS), consisting of Manpower BPJS, and Health BPJS.

Contributions are as follows:

Type of coverage	Employer share	Employee share
Workplace accident	0.24-1.74% of salary (based on industry/risk factor)	-
Death	0.3%	-
Old age savings	3.7%	2%
Pension	2%	1%
Health/Medical	4% up to max. Rp320,000	0.5% up to max. Rp40,000

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

Part-time employees

The Manpower Law regime reflects the government's policy of formalising the labour sector by promoting full permanent employment for all citizens. The Manpower Law does not specifically regulate part-time employment (nor does it cover domestic employment).

Fixed-term employees

Requirements for fixed-term employment are discussed in the answers to questions 9-11. Generally, fixed-term employees are entitled to the same rights and benefits enjoyed by permanent employees, including all provisions on wages and benefits.

If one party to a fixed-term contract terminates the agreement prior to its natural expiration, the terminating party is liable to pay the non-terminating party the total of all wages owable under the remaining period of the contract.

Post-employment restrictive covenants

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

Non-competition and non-solicitation agreements are enforceable in accordance with the terms stipulated in the agreement, and there is no statutory maximum period, although standards of reasonableness should apply. However, a court may revoke a post-termination covenant at the request of an employee and if such covenant harms the employee.

27 Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Not unless specifically stated in an agreement between the parties.

Liability for acts of employees

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

An employer is liable for all acts of its employees conducted within agreed working hours, provided that the employee has performed his work in accordance with instructions or standard procedures stipulated by the employer.

Article 1367 of the Indonesian Civil Code provides respondeat superior liability, as long as the employee is acting for the interests of the employer.

Taxation of employees

29 What employment-related taxes are prescribed by law?

Employees are obligated to pay taxes on all salary and income earned in Indonesia (including bonuses and religious holiday pay). Employers are required to withhold the appropriate amount of income tax and convey it to the State Treasury.

Law No. 7 of 1983 on Income Tax (as amended) applies progressive tax rates on resident taxpayers (5 per cent–30 per cent, depending on income), with 20 per cent added to the income basis for taxpayers who do not possess a taxpayer identification number. Non-resident taxpayers are taxed at 20 per cent.

Employee-created IP

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

Law No. 28 of 2014 on Copyright provides that even if a work is made under an employment relationship or made based on an order from the employer, the employee who creates the work will be deemed the creator and copy-right holder, unless specified otherwise in the employment agreement.

31 Is there any legislation protecting trade secrets and other confidential business information?

Law No. 30 of 2000 on Trade Secrets requires employers to use all necessary efforts to keep the confidentiality of their trade secrets, including limitation of the people with access to such information and implementing internal regulations that hold workers responsible for the trade secrets.

Sanctions imposed on employees who violate confidentiality agreements depend on the terms of the agreements.

Data protection

32 Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

There is no specific regulation on employee privacy. At the time of writing, a Draft Bill on Protection of Private Personal Data had been circulating for some time, which if promulgated, would strengthen employees' rights to protection of 'sensitive information,' which is any information associated with religion, personal or political beliefs, physical or mental health, marital life, financial position or any other information that may cause an individual to suffer discrimination.

Business transfers

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

The Manpower Law provides separate rules depending on the nature of the business transfer event.

In case of merger or consolidation, employers are entitled to terminate redundant employees subject to mandatory severance payments.

In case of acquisition, the employer is not allowed to terminate employment, so it is common practice for acquiring parties to negotiate resignations (or to require the selling party to do so) prior to takeover. Employees of an acquired company have three options at their disposal:

- continue employment under the same terms;
- discontinue employment, in which case employees are entitled to enhanced severance pay, service pay, and compensation for accrued allowances; or
- constructive termination and rehiring, in which case employees receive standard severance and resume employment under new terms and conditions, forfeiting any tenure accrued to date.

The Manpower Law is silent on transfer of assets. Outsourcing is only permitted for stipulated 'non-core' functions (catering, security, transportation, etc) and would not be permitted grounds to terminate existing employees.

Termination of employment

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

In general, Indonesia does not recognise termination-at-will. Therefore, employers may not dismiss employees without cause. Termination of employment is subject to the approval of a Labour Court. Theoretically, fixed-term employees may be terminated without cause, provided the employer pays all wages remaining under the fixed-term agreement.

Other than for legitimate business necessity (permanent closure due to two years' consecutive losses, efficiency, merger, reorganisation or force majeure, change of status of the company (IPO or delisting), or bankruptcy) or prolonged illness lasting longer than one year (all of which requires a Labour Court's approval), employers may only terminate employment for specifically stipulated reasons:

- the employee violated the work agreement or company regulation;
- the employee conducted gross misconduct resulting in a final and binding verdict from the criminal court;
- the employee is unable to work after six months of criminal proceedings (not related to violations in the workplace) or the employee is convicted of a crime before the six-month period ends; or
- the employee is absent from work for five or more consecutive working days without notice, after the employer has sent two written warnings to the employee's house.

35 Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

As termination of employment requires approval from a Labour Court, neither notice of termination nor pay in lieu of notice is recognised under the Manpower Law.

36 In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

None, save as noted in the answer to question 34, termination of employment requires approval of a Labour Court.

37 Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

The Manpower Law stipulates elaborate provisions on severance (one to nine months' pay) and long-term service pay (two to 10 months' pay) based on length of employment, as well as compensation for accrued allowances and repatriation or return to the place of recruitment. Multipliers are imposed based on the reason for termination.

The concept of 'separation pay' is also mentioned, but not regulated in any detail, as it would be contractually determined.

38 Are there any procedural requirements for dismissing an employee?

All employment dismissals must be approved by a Labour Court, except:

- during the probationary period, if expressly stated in writing in advance;
- voluntary and unconditional resignation in writing;
- expiration of a fixed-term employment agreement;
- employee dies or reaches the retirement age stipulated in the employment agreement, company regulation, or CLA; or
- employee is unable to work for six months during a criminal proceeding, or is convicted of a crime before the six-month period ends.

If an employee violates the employment agreement, company regulation or CLA, the employer must first issue three consecutive warning letters (except for violations subject to 'first and final' notice). If the violation continues, the parties must attempt information resolution. If the parties fail to reach mutual agreement, a case can be filed with the Labour Court, which will prescribe a series of escalating proceedings (mediation, conciliation, trial) until a final resolution can be reached. The employer must continue to pay the employee's salary until a final and binding decree is issued by the highest court of appeal sought by the parties.

Because termination procedures are so onerous, employers often attempt to reach a 'negotiated resignation' rather than pursue official termination.

39 In what circumstances are employees protected from dismissal?

Under the Manpower Law, employees are protected from dismissal for the following reasons:

- long-term illness (validated by a physician) of less than 12 months;
- fulfilment of religious obligations or obligations to the state;
- marriage of employee or employee's child;
- pregnancy, delivery, miscarriage, or breastfeeding;
- relation by blood or marriage to another employee, unless specifically prohibited under the work agreement, company regulation or CLA;
- participation in labour union activities;
- reporting a crime committed by the employer;
- discrimination based on religion, political view, race, gender, physical condition or marital status; and
- permanent disability or illness owing to a work accident with undetermined period of recovery.

Dismissal owing to the above-mentioned circumstances is deemed null and void, and the employer is obligated to reinstate the employee with full back pay and benefits.

40 Are there special rules for mass terminations or collective dismissals?

Pursuant to Circular Letter No. SE-907/MEN/PHI-PPHI/X/2004 on Prevention of Mass Termination, before mass termination employers must first attempt the following:

- reduce the salary and work facilities (perks) of top-level employees;
- reduce shifts;
- limit or eliminate overtime;
- reduce working hours;
- reduce working days;
- suspend employees internally for limited periods;
- not extend or renew fixed-term employees; and
- offer pension to qualifying employees.

Employers must engage in discussion/negotiation with the employees or labour union prior to pursuing mass termination. If mass termination is inevitable, the employer must obtain a prior approval from the Labour Court.

41 Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Collective actions through a labour union are permitted in addition to asserting claims on an individual basis. Class action lawsuits are recognised in Indonesia, although they would be rare in the employment field.

Update and trends

Labour unions and employees continue demanding that the government ban outsourcing and fixed-term (or contract) employment in various industries. Also, we have seen more and more protests demanding an increase in minimum wages in various regions. All these will increase costs for employers in doing business in Indonesia.

42 Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

Government Regulation No. 45 of 2015 on Implementation of the Pension Security Program stipulates a retirement age of 56. An employer may impose a different retirement age under company regulation or CLA, but employees have the right to retire at age 56.

Dispute resolution**43 May the parties agree to private arbitration of employment disputes?**

The Industrial Dispute Law acknowledges arbitration as an alternative method of settlement only for union-employer disputes over interests or disputes between labour unions within a single company. By law, individual employment disputes are under the jurisdiction of the Labour Court; therefore, although employer and employee may agree to private arbitration, the right to resort to the Labour Court remains.

44 May an employee agree to waive statutory and contractual rights to potential employment claims?

There is no restriction for an employee to waive his or her contractual or statutory rights by executing a written agreement.

45 What are the limitation periods for bringing employment claims?

An employee whose employment is terminated due to voluntary resignation or due to a criminal proceeding may file a claim with the Labour Court within one year from the date of termination. The Manpower Law originally stipulated a two-year statute of limitations to bring claims for payments arising out of the employment relationship, but a 2013 Constitutional Court decision nullified the two-year limit.



Johannes C Sahetapy-Engel
Anissa Paramita

jsahetapyengel@aksetlaw.com;
aparamita@aksetlaw.com

The Plaza Office Tower, 29th Floor Unit A
Jl. MH Thamrin Kav.28-30
Jakarta
Indonesia

Tel: +62 21 2992 1515
Fax: +62 21 2992 1516
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