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**INDONESIA'S OMNIBUS LAW ON JOB CREATION: REDUCING LABOUR  
PROTECTIONS IN A TIME OF COVID-19**

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The Labour, Equality and Human Rights (LEAH) Research Group is a research concentration within the Department of Business Law & Taxation, Monash Business School. It has been in operation since March 2008, having previously operated as Workplace and Corporate Law Research Group (WCLRG) and the Corporate Law and Accountability Research Group (CLARG) since November 2005.

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# INDONESIA'S OMNIBUS LAW ON JOB CREATION: REDUCING LABOUR PROTECTIONS IN A TIME OF COVID-19

Petra Mahy<sup>1</sup>

## 1. INTRODUCTION

On 5 October 2020, during the COVID-19 pandemic, the Indonesian National Legislature passed a very controversial 'Omnibus Law' on Job Creation. This legislation, with a massive 1187 pages, was then signed by President Joko Widodo and came into effect on 2 November 2020 and is now officially known as Law no. 11/2020 on Job Creation (*Undang-Undang no. 11/2020 tentang Cipta Kerja*). Representing the culmination of a signature policy of President Joko Widodo, this law is aimed at boosting foreign direct investment and economic growth by improving the ease of doing business. Indeed, climbing the World Bank's *Doing Business* ranking appears to be at least partly a driver behind this policy. This Law on Job Creation introduces a new framework for business licensing and then simultaneously amends 77 existing national laws covering a very wide sweep of issues including, but not limited to: environmental protection, spatial planning, special economic zones, small and medium enterprises, land rights, transport, energy, agriculture, fisheries and taxation.

Changes to the labour and social security laws are also a key aspect of this Law on Job Creation, and this Paper will focus on this cluster of labour-related amendments. The Law has introduced a range of changes to the existing Labour Law of 2003<sup>2</sup> on regulation of fixed-term contracts and outsourcing, wage determination, dismissals, severance pay, leave, working time, and use of foreign workers – the majority of which reduce existing worker protections. The Law also introduces unemployment insurance as an additional form of workers' social security scheme, and amends some aspects of the Overseas Migrant Worker Law of 2017.

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<sup>2</sup> *Undang-Undang no.13/2003 tentang Ketenagakerjaan* [Law no. 13/2003 on Labour (also commonly referred to in English as the Manpower Law or Manpower Act)]. For a review of the content of this 2003 Law, see Chris Manning and Kurnya Roesad (2007) 'The Manpower Law of 2003 and its Implementing Regulations: Genesis, Key Articles and Potential Impact', *Bulletin of Indonesian Economic Studies* 43(1): 59-86.

The Law on Job Creation has come into force, but is still in the form of umbrella legislation – as with the other issues covered by the Law, the cluster of labour law amendments still needs a number of implementing government regulations (*peraturan pemerintah*) to bring the changes fully into effect. These regulations are supposed to be all put in place within three months of the Law coming into force (by 2 February 2021) although it is unclear if this deadline will be met. The government regulations relating to the labour amendments are currently being drafted,<sup>3</sup> but at the time of writing in January 2021 none of the labour-related government regulations drafts have yet been made publicly available.<sup>4</sup> In the meantime, some confusion has ensued as to the state of the law while these regulations are being drafted,<sup>5</sup> although existing implementing regulations formally continue to be in effect if they do not contradict the new Law.<sup>6</sup> It is also expected that the Law on Job Creation will undergo a number of Constitutional Court challenges on both procedural law-making grounds in regards to the Law as a whole and on the constitutionality of specific provisions, including those relating to labour. These constitutional challenges have already begun to be filed and hearings have started.<sup>7</sup>

Unfortunately, Indonesia does not officially produce updated versions of amended legislation, and the law-user needs to piece together the jigsaw puzzle of original and amending legislation and their implementing regulations along with the impact of any relevant Constitutional Court cases. This is quite a complex task that has been made even more unwieldy than usual given the size and scope of the Omnibus Law. This no doubt impedes public access to legal knowledge, particularly in an area with such importance to a wide swathe of the population as labour regulation. This Paper undertakes this task of piecing together the labour cluster of

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<sup>3</sup> ‘Begini Kabar 4 Rancangan PP Ketenagakerjaan di UU Cipta Kerja’ [Here is the News about the Four Draft Government Regulations on Labour in the Law on Job Creation], (*Tempo.co*, 26 November 2020), <<https://bisnis.tempo.co/read/1409095/begini-kabar-4-rancangan-pp-ketenagakerjaan-di-uu-cipta-kerja>>; ‘Pemerintah Sedang Siapkan RPP tentang Pengupahan’ [The Government is Preparing Draft Government Regulations on Wages] (*Kontan.co.id*, 14 December 2020) <<https://nasional.kontan.co.id/news/pemerintah-sedang-siapkan-rpp-tentang-pengupahan>>.

<sup>4</sup> A dedicated website has been created to publish the drafts of these regulations and to make other announcements related to the Law on Job Creation, see: [uu-ciptakerja.go.id](http://uu-ciptakerja.go.id).

<sup>5</sup> E.g. for media coverage of confusion over the fate of sectoral wages while awaiting implementing regulations, see: ‘Dibenci Pengusaha & Disukai Buruh, Upah Sektoral 2021 Dihapus’ [Hated by Employers & Liked by Workers, Sectoral Wages for 2021 Abolished] (*CNBC Indonesia*, 30 November 2020) <<https://www.cnbcindonesia.com/news/20201130151943-4-205731/dibenci-pengusaha-disukai-buruh-upah-sektoral-2021-dihapus>>.

<sup>6</sup> *Undang-Undang no. 11/2020 tentang Cipta Kerja* [Law no. 11/2020 on Job Creation], art. 185.

<sup>7</sup> ‘Gekanas Tolak UU Cipta Kerja Ajukan Permohonan Uji Materi ke Mahkamah Konstitusi’ [National Prosperity Movement to Refuse the Law on Job Creation Submits Material Review to Constitutional Court], (*Kompas.com*, 18 December 2020), <<https://nasional.kompas.com/read/2020/12/18/14562811/gekanas-tolak-uu-cipta-kerja-ajukan-permohonan-uji-materi-ke-mahkamah>>.

amendments in the Omnibus Law on Job Creation and aims to explain and analyse these changes in the context of the previous law. This task has been undertaken without access to the minutes (*Risalah*) of the relevant legislative debates which do not appear to be available as yet.<sup>8</sup>

## 2. THE RAPID ENACTMENT OF THE OMNIBUS LAW ON JOB CREATION

This is not the first time that the Indonesian government has attempted to loosen the labour protections provided by the 2003 Labour Law. In late 2005 and early 2006, the government under then President Susilo Bambang Yudhoyono tried and failed to introduce flexibilising reforms to severance pay, fixed-term contracts, important holidays and to promote more opportunities for foreign workers. That attempt was stymied by mass worker demonstrations across major cities in Indonesia that reached a peak on May Day 2006 causing the government to backtrack on its plans.<sup>9</sup> Many of these same issues have arisen again in the Omnibus Law, but trade unions and their allies have not this time been successful in blocking amendments despite again hitting the streets in mass demonstrations both before and after the Law was passed.

The Omnibus Law was first proposed by President Joko Widodo in his second-term inauguration speech in October 2019.<sup>10</sup> The draft bill was then submitted to the National Legislature in February 2020, and it included amendments relating to foreign workers, wages, work hours, leave, outsourcing, redundancy and social security.<sup>11</sup> Many of these issues were also eventually included in the resulting Law, although some were later changed from their original form during legislative drafting processes. Due to the COVID-19 pandemic, deliberations in the National Legislature did not begin until April. Trade union demonstrations

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<sup>8</sup> Muhammad Yasin, '7 Catatan Legislasi yang Perlu Mendapat Perhatian' [7 Notes on Legislation that Need Attention] (*Hukumonline*, 20 January 2021) <<https://www.hukumonline.com/berita/baca/lt6007ae300f7aa/7-catatan-legislasi-yang-perlu-mendapat-perhatian>>.

<sup>9</sup> Indrasari Tjandraningsih and Hari Nugroho (2008) 'The Flexibility Regime and Organised Labour in Indonesia', *Labour and Management in Development* 9, p. 9; Benny Hari Juliawan (2010) 'Extracting Labor from its Owner: Private Employment Agencies and Labor Market Flexibility in Indonesia,' *Critical Asian Studies*, 42(1):25-52.

<sup>10</sup> 'Jejak Omnibus Law: Dari Pidato Pelantikan Jokowi Hingga Polemik RUU Cipta Kerja' [The Trail of the Omnibus Law: From Jokowi's Inauguration Speech to the Polemic of the Job Creation Draft Bill], (*Kompas.com*, 5 October 2020), <<https://www.kompas.com/tren/read/2020/10/05/090200165/jejak-omnibus-law-dari-pidato-pelantikan-jokowi-hingga-polemik-ruu-cipta?page=all>>.

<sup>11</sup> Esther Samboh, 'Key Points of Labor Reform in Omnibus Bill on Job Creation: What we Know so Far' (*Jakarta Post*, 13 February 2020) <<https://www.thejakartapost.com/news/2020/02/13/key-points-of-labor-reform-in-omnibus-bill-on-job-creation-what-we-know-so-far.html>>.

were organised in response to the draft,<sup>12</sup> and in response, on 24 April 2020, President Joko Widodo announced that the deliberations on the labour cluster would be postponed.<sup>13</sup> However, the labour cluster was suddenly returned to the draft law on 25 September 2020, and debate resumed.<sup>14</sup> As noted above, the full Law was passed just two weeks later in early October. This entire process was exceedingly quick in the Indonesian law-making context; according to the Minister for Labour Ida Fauziyah this was done to reduce the spread of COVID-19 among legislators.<sup>15</sup> Further demonstrations erupted across the country following the passing of the Law.<sup>16</sup>

Commentators have noted that President Joko Widodo's primary concern has been with building alliances with political and business elites which has led him, and the majority of political parties holding seats in the National Legislature, to ignore popular protests against this Law.<sup>17</sup> Overall, the Law on Job Creation has been widely criticised for having had no or limited public consultations as is formally required.<sup>18</sup> There have been numerous drafts circulating and

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<sup>12</sup> 'Workers Blast Lawmakers with Messages Opposing Omnibus Bill on Job Creation' (*Jakarta Post*, 9 April 2020)

<<https://www.thejakartapost.com/news/2020/04/09/workers-blast-lawmakers-with-messages-opposing-omnibus-bill-on-job-creation.html>>; 'Desperate Workers to Hold Mass Rallies Against Job Creation Bill Despite Pandemic' (*Jakarta Post*, 17 April 2020) <<https://www.thejakartapost.com/news/2020/04/17/desperate-workers-prepare-to-rally-nationwide.html>>.

<sup>13</sup> 'Indonesia Delays Deliberations Over Labor Issues in Omnibus Bill Amid Backlash' (*Jakarta Post*, 25 April 2020) <<https://www.thejakartapost.com/news/2020/04/24/govt-house-delay-deliberations-over-labor-issues-in-omnibus-bill-amid-backlash.html>>.

<sup>14</sup> Nabiyla Risfa Izzati, 'Logika Keliru Aturan Ketenagakerjaan UU Cipta Kerja' [Mistaken Logic in the Labour Regulations in the Law on Job Creation], (*The Conversation*, 5 November 2020)

<https://theconversation.com/logika-keliru-aturan-ketenagakerjaan-uu-cipta-kerja-148368>.

<sup>15</sup> 'Klarifikasi Menaker Soal Cuti Haid dan Melahirkan di UU Cipta Kerja' [Minister for Labour Clarifies Menstruation and Maternity Leave in the Law on Job Creation] (*Kompas.com*, 9 October 2020)

<<https://money.kompas.com/read/2020/10/09/080400726/klarifikasi-menaker-soal-cuti-haid-dan-melahirkan-di-uu-cipta-kerja?page=all>>.

<sup>16</sup> 'Indonesian Police Arrest Hundreds During Protests Against Labour Law' (*The Guardian*, 8 October 2020)

<<https://www.theguardian.com/world/2020/oct/07/indonesia-police-use-water-cannon-and-teargas-to-disperse-labour-law-protests>>; 'Indonesia Erupts in Protests for Third Day Over Controversial Labour Laws' (*ABC News*, 9 October 2020) <<https://www.abc.net.au/news/2020-10-09/indonesia-labour-law-protests-coronavirus-covid-19/12746812>>.

<sup>17</sup> See, e.g., Tim Lindsey and Ian Wilson, 'Ear to Asia Podcast: Episode 80: Why the Outrage Over Indonesia's New Job Creation Law' (19 November 2020) <<https://arts.unimelb.edu.au/asia-institute/ear-to-asia/episodes/episode-80>>; Arizka Warganegara and Paul Waley, 'Omnibus Bill Reveals Jokowi's Bedfellows', (*EastAsiaForum*, 28 October 2020) <<https://www.eastasiaforum.org/2020/10/28/omnibus-bill-reveals-jokowis-bedfellows/>>; Abdil Mughis Mudhoffir and Rafiqqa Qurrata A'yun, 'Omnibus Law Shows How Democratic Process has been Corrupted' (*Indonesia at Melbourne*, 12 October 2020)

<<https://indonesiaatmelbourne.unimelb.edu.au/omnibus-law-shows-how-democratic-process-has-been-corrupted/>>.

<sup>18</sup> See, e.g. Pusat Studi Hukum dan Kebijakan Indonesia [Centre for Indonesian Law and Policy Studies], 'Pengesahan UU Cipta Kerja: Legislasi Tanpa Ruang Demokrasi' [The Enactment of the Job Creation Law: Legislation without Democratic Space], press release, 6 October 2020,

<<https://www.pshk.or.id/publikasi/penge-sahan-uu-cipta-kerja-legislasi-tanpa-ruang-demokrasi/>>.

even once agreed to by the National Legislature for some time it was not clear exactly which draft had actually been enacted. The final Law also has a couple of errors with references to articles that do not exist,<sup>19</sup> and there has been much misinformation circulating about its content at least partly caused by all these drafts, rapid changes and errors.

### **3. DETAIL OF KEY LABOUR LAW CHANGES IN THE OMNIBUS LAW ON JOB CREATION**

The following sections will detail and analyse the main amendments in the labour cluster in the Omnibus Law on Job Creation in the context of the pre-existing laws and relevant Constitutional Court cases.

#### **3A. Fixed-term Contracts**

Indonesian labour law draws a distinction between fixed-term and permanent work contracts where, in addition to security of employment term, a key difference between the two types of contract relates to dismissal payments. In general, fixed-term workers have the right to compensation for lost wages if their contract is ended early by their employer, while permanent workers have rights to severance and reward payments. Since 1986, fixed-term work contracts have only been permitted in Indonesia for work that could be completed in a short period of time, or that was seasonal, non-routine or related to a new product.<sup>20</sup> The use of fixed-term contracts was restricted to three years duration (with an initial maximum two-year contract followed by a one-year extension).<sup>21</sup> The Labour Law of 2003, and its implementing regulations, provided that if work was still remaining to be done after three years, a fixed-term contract could be renewed provided that there was at least a 30-day hiatus in between the two

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<sup>19</sup> ‘UU Cipta Kerja: Kesalahan ‘fatal’ Pasal-pasal Omnibus Law Akibat Proses Legislasi ‘Ugal-ugalan’, Apakah UU Layak Dibatalkan?’ [The Law on Job Creation: ‘Fatal’ Mistakes in the Articles of the Omnibus Law Due to Reckless Legislative Processes, Should it be Cancelled?] (*BBC Indonesia*, 3 November 2020) <<https://www.bbc.com/indonesia/indonesia-54768000>>.

<sup>20</sup> Minister for Labour Decision Per-05/MEN/1986; Minister for Labour Regulation PER-02/MEN/1993; Law no. 13/2003 on Labour, art. 59.

<sup>21</sup> Law no. 13/2003 on Labour, art. 59(4).

contracts, and then it could only be renewed once for a maximum period of two years (i.e. a 2-1-2 pattern).<sup>22</sup>

Under the new Law on Job Creation, fixed-term contracts may still only be used for work that is seasonal or which can be completed within a certain time period, and contracts which do not meet these criteria will be deemed to be permanent.<sup>23</sup> However, the maximum length of fixed-term contracts has now been entirely removed, along with all restrictions on renewal. There is no doubt that this amendment is intended to increase employers' flexibility, particularly in labour intensive industries, as stated publicly by the Minister for Labour Ida Fauziyah.<sup>24</sup> Indeed, the original proposal in the first drafts of the Omnibus Law intended to remove all restrictions on fixed-term contracting regardless of the nature of the work,<sup>25</sup> but this was pared back sometime during the legislative drafting process. In addition, the requirement for fixed-term contracts to be in writing or else be deemed to be a permanent contract, has been removed.

While this removal of maximum time limits on fixed-term contracts is clearly intended to give employers more flexibility, it is difficult to gauge exactly what the real impact of this will be. This is because empirical evidence indicates that in practice employers have often flouted the law in any case. While no exhaustive survey exists, disparate studies indicate that employers across a range of sectors in Indonesia have commonly used fixed-term contracts to seek to avoid the greater entitlements that accrue to permanent workers. There are reports of sequences of fixed-term contracts with one month 'rest' in between being used, or rotating workers between branches within the same group of companies or to outsourcing companies.<sup>26</sup> There is also evidence of more blatant non-compliance with fixed-term contracts used continuously for the same work.<sup>27</sup> Cases of misuse of fixed-term contracts have often come before the

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<sup>22</sup> Law no. 13/2003 on Labour, art. 59(6); Minister for Labour Decision no. 100/2004 on Limited Time Employment Contracts, art. 3.

<sup>23</sup> Law no. 11/2020 on Job Creation, amending Law no. 13/2003 on Labour, art. 59. See also Constitutional Court Decision no. 7/PUU-XII/2014 on how a worker may request that their contract be deemed as permanent.

<sup>24</sup> 'Ini Skema "Karyawan Tetap" dan "Karyawan Kontrak" di UU Cipta Kerja' [This is the Scheme for Permanent and Contract Workers in the Law on Job Creation] (*Kompas*, 19 October 2020) <<https://money.kompas.com/read/2020/10/19/074613226/ini-skema-karyawan-tetap-dan-karyawan-kontrak-di-uu-cipta-kerja?page=all>>.

<sup>25</sup> Government of Indonesia, 'Naskah Akademis Undang-Undang Cipta Kerja' [Academic Discussion Paper for the Law on Job Creation], p. 1199 (pagination based on overall pages in document).

<sup>26</sup> Rina Herawati, Ratih Dewayanti, and Wulani Sriyuliani (2011) 'Penelitian Praktek Kerja Outsourcing Pada Sub-Sektor Perbankan: Studi Kasus Jakarta, Surabaya dan Medan' [Study of Outsourcing Work Practices in the Banking Sub-Sector: A Case Study in Jakarta, Surabaya and Medan]. AKATIGA – OPSI – FES, pp. 30-31.

<sup>27</sup> Indrasari Tjandraningsih, Rina Herawati and Suhadmadi (2010) 'Praktek Kerja Kontrak dan Outsourcing Buruh di Sektor Industri Metal di Indonesia' [The Practice of Work Contracts and Labour Outsourcing in the Metal Industry Sector in Indonesia]. AKATIGA–FSPMI–FE, p. 20, 32-33; Petra Mahy et al. (2017) *The Plural*

industrial relations courts particularly following dismissal.<sup>28</sup> Such misuse has also been the subject of major industrial disputes such as the Bank Danamon dispute in 2016 which included claims that 6970 bank tellers and accounts officers had been employed on illegal fixed-term contracts.<sup>29</sup>

The effect of this change will therefore primarily depend on how actively the requirement to only use fixed-term contracts for work that is of a temporary nature is enforced. Further, the 30-day hiatus between renewed fixed-term contracts has been removed from the main legislation, although it still remains to be seen whether it will reappear in the implementing regulations. It is clear from the empirical studies that this hiatus was never in workers' best interests given the tendency to stretch out fixed-term contracts as far as possible in practice and therefore often causing workers to miss one month of work.

The new Law has also added another way that a fixed-term contract can end, that is 'the completion of a certain task'.<sup>30</sup> In this event, compensation is to be paid to the worker,<sup>31</sup> perhaps in addition to the normal compensation for lost wages where an employer ends a fixed-term contract early, although this will probably need to be clarified in the implementing government regulation.<sup>32</sup> This new additional compensation is also due to be paid when a fixed-term contract comes to the end of its term – this seems to be one of the few amendments in workers' favour in the Law on Job Creation, although again the implementing government regulation will be required to formulate exactly what this means.<sup>33</sup>

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*Regulation of Work: A Pilot Study of Restaurant Workers in Yogyakarta Indonesia* (Centre for Employment and Labour Relations Law, University of Melbourne), pp. 30-31.

<sup>28</sup> Apri Amalia et al. (2017) 'Analisis Yuridis Perjanjian Kerja Waktu Tertentu Berdasarkan Undang-Undang Ketenagakerjaan dan Hukum Perjanjian' [Juridical Analysis of Fixed-Term Employment Contracts Based on the Labour Law and Contract Law], *USU Law Journal* 5(1): 66-76.

<sup>29</sup> Ela Lestari and Asri Wijayanti (2020) 'Shopping Forum as an Alternative of Settlement Disputes on Worker Status in PT Bank Danamon TBK', SSRN, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3665496](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3665496); 'Serikat Pekerja Bank Danamon Keluhkan PHK Sepihak Dari Perusahaan' [The Union at Bank Danamon Complains of Unilateral Dismissals by the Company] (*Kumparan*, 7 July 2017) <<https://kumparan.com/beritabojonegoro/serikat-pekerja-bank-danamon-keluhkan-phk-sepihak-dari-perusahaan/full>>; 'Curhat Karyawan Danamon, 10 Tahun Mengabdikan, Dipecat Lewat SMS' [Danamon Employees Confide: 10 Years of Service, Fired by SMS] (*Suara.com*, 28 October 2016) <<https://www.suara.com/news/2016/10/28/191500/curhat-karyawan-danamon-10-tahun-mengabdikan-dipecat-lewat-sms?page=all>>.

<sup>30</sup> Law no. 11/2020 on Job Creation, art 81(16), amending Law no. 13/2003 on Labour, art. 61.

<sup>31</sup> Law no. 11/2020 on Job Creation, art. 81(17), introducing Law no. 13/2003 on Labour, art. 61A.

<sup>32</sup> Law no. 13/2003 on Labour, art. 62.

<sup>33</sup> Law no. 11/2020 on Job Creation, art. 81(17), introducing UU no. 13/2003, art. 61A.



### 3B. Outsourcing

The second key area of labour law change in the new Law on Job Creation relates to outsourcing (i.e. use of subcontracted labour supplied by a third-party agency). These changes, too, are clearly intended to increase flexibility for employers and are explicitly based on the assumption that increasing outsourcing will necessarily increase job opportunities.<sup>34</sup> Since 2003, outsourcing has been specifically permitted under Indonesian labour law, but the previous law provided that outsourced workers could only be hired to carry out ‘non-core’ or support production activities.<sup>35</sup> From 2012, this non-core work was specified as cleaning services, catering for employees, security, support services in the mining and oil sectors and employee transportation services.<sup>36</sup> If outsourcing was used for core work, then the work was deemed to be ‘insourced’.<sup>37</sup> An intent to subcontract work had to be reported to the Ministry of Labour and could not begin until proof of registration was received from the Ministry.<sup>38</sup> The protection of workers and working conditions was the responsibility of the supplier firm and, somewhat ambiguously, had to be at least of the same standard as in the main firm *or* in accordance with legislative minimums.<sup>39</sup> Following a 2012 Constitutional Court decision,<sup>40</sup> the law also provided that the rights of outsourced workers on fixed-term contracts must be protected in the event that a labour supply service provider is changed.<sup>41</sup>

In the new Law, there is no longer any restriction on the type of work that can be outsourced, and the related provision deeming work to the ‘insourced’ has also been deleted. The previous ambiguity about working conditions has also been removed and outsourced workers’ conditions now need only match the general legal minimums and not the standards of the

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<sup>34</sup> Government of Indonesia, ‘Naskah Akademis Undang-Undang Cipta Kerja’ [Academic Discussion Paper for the Law on Job Creation, p. 1204 (pagination based on overall pages in document).

<sup>35</sup> Law no. 13/2003 on Labour, arts. 64-66.

<sup>36</sup> Minister for Labour Regulation No.19 of 2012, art. 17.

<sup>37</sup> Law no. 13/2003 on Labour, art. 65(8), art. 66; Constitutional Court Decision no. 7/PUU-XII/2014.

<sup>38</sup> Minister for Labour Regulation Kep 101/MEN/VI/2004; Minister for Labour Regulation No.19 of 2012, arts. 5-8; Minister for Labour Regulation no. 11/2019.

<sup>39</sup> Law no. 13/2003, art. 65 (4). Note, however, that mention of working conditions needing to be at least the same as in the main firm was absent from both Minister of Labour Regulation Kep 101/MEN/VI/2004 and Minister for Labour Regulation no. 19 of 2012, which only required that minimum legislative labour standards be met.

<sup>40</sup> Constitutional Court Decision No. 27/PUU-IX/2011.

<sup>41</sup> Minister for Labour Regulation no. 19 of 2012 on Conditions for Transferring Some Aspects of Work to Another Company; The Ministry of Labour and Transmigration Circular Letter SE.04/Men/VIII/2013 August 26, 2013; Minister for Labour Regulation no 11/2019 Amending Minister for Labour Regulation no. 19 of 2012 on Conditions for Transferring Some Aspects of Work to Another Company

company using the outsourced work.<sup>42</sup> The new Law does retain the Constitutional Court's requirement to transfer the protection for outsourced fixed-term contract workers in the event of a change in labour supply company.<sup>43</sup> Labour supply agencies will still require a permit from the Ministry.

Similar to the situation with fixed-term contracts, predicting the impact of these legal changes is difficult because of existing widespread non-compliance with labour regulations. It is certainly likely that the removal of restrictions on the types of work that can be outsourced will increase the proportion of outsourced work where businesses were previously restricted by the law. The empirical evidence in Indonesia shows that in general, enforcement of outsourced workers' rights has been very lax,<sup>44</sup> resulting in such workers tending to be paid considerably less than 'insourced' workers in contravention of the law.<sup>45</sup> This is likely to continue. Outsourcing companies have also tended to rotate workers on fixed-term contracts between companies in order to avoid them becoming permanent,<sup>46</sup> but with the time limits on fixed-term contracts having been removed (as discussed above), the need for this rotation practice will disappear.

### **3C. Wage Determination**

Minimum wage setting in Indonesia has undergone substantial political and regulatory changes in the past decades. Authority for minimum wage setting was devolved from the central government to the provincial-level governors in the year 2000, and from 2004 tripartite wage councils were formed as advisory bodies to the governors. The ability of trade unions to influence wage-setting through these wage councils was initially hampered by union

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<sup>42</sup> Law no. 11/2020 on Job Creation, art. 81(20), amending Law no. 13/2003 on Labour, art. 66(2).

<sup>43</sup> Law no. 11/2020 on Job Creation, art. 81(20), amending Law no. 13/2003 on Labour, art. 66(3).

<sup>44</sup> Indrasari Tjandraningsih and Hari Nugroho (2008) 'The Flexibility Regime and Organised Labour in Indonesia', *Labour and Management in Development* 9, p. 7; Benny Hari Juliawan (2010) 'Extracting Labor from its Owner: Private Employment Agencies and Labor Market Flexibility in Indonesia,' *Critical Asian Studies*, 42(1):25-52, p. 33.

<sup>45</sup> Indrasari Tjandraningsih et al. (2012) *Diskriminatif and Eksploitatif: Praktek Kerja Kontrak dan Outsourcing Buruh di Sektor Industri Metal di Indonesia [Discriminatory and Exploitative: The Practice of Using Contract Work and Outsource in the Metal Industry Sector in Indonesia]*, AKATIGA, Bandung.

<sup>46</sup> Nabiyla Rista Izzati (2017) 'Improving Outsourcing System in Indonesia: Fixing the Gap of Labour Regulation', *Mimbar Hukum* 29(3): 529-541.

fragmentation and difficulties in organising locally. By 2010, however, unions had gained strength and were quite successful in gaining more generous wage increases in the years 2010-2013. However, this then precipitated the central government moving to regain control of wage-setting by initially issuing non-binding instructions to the governors on how to calculate wages.<sup>47</sup> Then, in 2015, under President Joko Widodo, a central government regulation effectively recentralised wage setting by mandating the calculation for minimum wages as being the current year's minimum wage plus national inflation and GDP growth.<sup>48</sup> The central government has since issued further ad hoc advice, including a recent request to governors not to raise wages for 2021 due to the COVID-19 pandemic (a handful have ignored this).<sup>49</sup> Another key provision in the 2015 regulation was to restrict minimum wage entitlements to workers with less than one year service for their current employer, beyond which time wages were to be negotiated.<sup>50</sup>

Under the new Law on Job Creation, many of the changes to wage regulation have involved upgrading provisions in the 2015 implementing regulations to the status of Law. Each of the 34 provincial governors is still required to set provincial minimum wages.<sup>51</sup> The Law explicitly gives governors the choice of whether or not to additionally set regional, i.e. sub-provincial (*Kabupaten/Kota*), level minimum wages, which need to be higher than the provincial level. Previously, this option was contained lower down in the implementing regulations. All mention of setting *sectoral* regional minimum wages, which could be set at a higher level again, have also been removed from the new Law (although relatively rare, sectoral wages had been successfully negotiated in some industries<sup>52</sup>). The application of minimum wages only to workers with less than one year of service for their employer has also been upgraded to Law.<sup>53</sup> Confusingly, though, in the same article, employers are prohibited from paying below the minimum wage,<sup>54</sup> presumably in general which would seem to contradict the one-year

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<sup>47</sup> Teri Caraway and Michele Ford (2020) *Labor and Politics in Indonesia* pp. 59-69; Teri L. Caraway, Michele Ford and Oanh K. Nguyen (2019) 'Politicising the Minimum Wage: Wage Councils, Worker Mobilization and Local Elections in Indonesia', *Politics & Society* 47(2): 251-276.

<sup>48</sup> Government Regulation no. 78/2015 on Wages, art. 44; Peraturan Menteri Ketenagakerjaan no. 15/2018 ttg upah minimum art. 3.

<sup>49</sup> Surat Edaran Menteri of Labour no. M/11/HK.04/X/2020; Kompas.com, '5 Gubernur ini Tetap Naikkan UMP 2021, Siapa Saja?' 4 November 2020, <https://money.kompas.com/read/2020/11/04/103429726/5-gubernur-ini-tetap-naikkan-ump-2021-siapa-saja?page=all>.

<sup>50</sup> Government Regulation no. 78/2015 on Wages, art. 42.

<sup>51</sup> Law no. 11/2020 on Job Creation, art. 81(26), removing Law no. 13/2003 on Labour, art. 89.

<sup>52</sup> <https://www.aseanbriefing.com/news/the-minimum-wage-in-indonesia-increased-by-8-5-for-2020/>

<sup>53</sup> Law no. 11/2020 on Job Creation, art. 81(25), introducing Law no. 13/2003 on Labour, new art. 88E(1).

<sup>54</sup> Law no. 11/2020 on Job Creation, art. 81(25), introducing Law no. 13/2003 on Labour, new art. 88E(2).

stipulation, and criminal sanctions are attached to this.<sup>55</sup> Employers who pay wages late, either on purpose or negligently, will be now liable for fines at an amount yet to be determined through an implementing government regulation.<sup>56</sup>

Under the new Law, in setting minimum wages, provincial governors are to follow the central government's formula which is to take account of economic and labour market conditions including inflation. This is in line with the existing central government regulation of 2015, although it is possible that the implementing regulations may produce a new formula.<sup>57</sup> Wage councils will still exist, but the legislation is now reworded in such a way as to remove governors' specific duty to pay attention to the councils' recommendations.<sup>58</sup> Mention of the previous role of the district heads (*Bupati/Walikota*) in advising the governors has also disappeared.

Previously, if an employer could not afford to pay the minimum wage, then they could apply to the relevant Governor for up to one-year exemption.<sup>59</sup> However, under a Constitutional Court decision of 2015, the difference in wages still needed to be paid later and became a debt owed to the worker.<sup>60</sup> This one-year exemption has now been deleted under the Law on Job Creation.

Another important and entirely new change is an exemption from the requirement to pay minimum wages for small and micro enterprises.<sup>61</sup> Wages in these enterprises are instead to meet a certain percentage of average consumption with the exact calculation to be determined in the implementing regulations. No definition has yet been provided for these enterprises and an implementing government regulation is needed to define them (including for other parts of the Omnibus Law). The reason given for this change is to take account of the financial capacity of micro and small enterprises,<sup>62</sup> and according to Minister for Labour Ida Fauziyah, to protect

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<sup>55</sup> Law no. 11/2020 on Job Creation, art. 81(63), amending Law no. 13/2003 on Labour, art. 185.

<sup>56</sup> Law no. 11/2020 on Job Creation, art. 81(25), introducing Law no. 13/2003 on Labour, new art. 88A(6).

<sup>57</sup> Law no. 11/2020 on Job Creation, art. 81(25), introducing Law no. 13/2003 on Labour, new art. 88D.

<sup>58</sup> <sup>58</sup> Law no. 11/2020 on Job Creation, art. 81(36), amending Law no. 13/2003, art. 98, and removing art. 89.

<sup>59</sup> Law no. 13/2003, art. 90(2); Minister for Labour and Transmigration Regulation no. KEP-231/MEN/2003 Procedures for Suspension of Minimum Wage Implementation.

<sup>60</sup> Constitutional Court decision no. 72/PUU-XIII/2015; Agus Sahbani, 'Putusan MK ini Kabar Baik Bagi Pekerja' [This Constitutional Court Decision is Good News for Workers], (*Hukumonline*, 3 October 2016) <<https://www.hukumonline.com/berita/baca/lt57f231254dcfc/putusan-mk-ini-kabar-baik-buat-pekerja>>.

<sup>61</sup> Law no. 11/2020 on Job Creation, art. 81(28), introducing Law no. 13/2003 on Labour, new art. 90B.

<sup>62</sup> Government of Indonesia, 'Naskah Akademis Undang-Undang Cipta Kerja' [Academic Discussion Paper for the Law on Job Creation, p. 1223 (pagination based on overall pages in document)].

workers in these enterprises.<sup>63</sup> While it might be arguable that this change will merely replicate what happens in practice with minimum wages ignored in small enterprises, the minimum wage may have still had a shadow effect (e.g. as a general guide to calculating wages plus in kind benefits such as accommodation and food),<sup>64</sup> and formally removing it may end up reducing wages in the informal sector. On the other hand, removing minimum wages for small and micro enterprises may have some positive impact if employers become more willing to enrol workers in the workers' social security schemes without the fear of attracting attention for paying below the minimum.

### 3D. Working Time and Leave

Some de-regulatory changes have also been made to working time and leave. While the choice between using either a five or six-day working week remains (both with a total of 40 hours), it is now only compulsory to give workers one rest day per week.<sup>65</sup> Previously, using a five-day working week pattern required providing two rest days. The logic between these two amended sections is unclear, although it appears that the original proposal was to do away with the two working week patterns<sup>66</sup> – apparently this was reinserted during the drafting process creating this mismatch between articles.

The number of permitted hours of overtime has been increased from three to four hours per day and from 14 to 18 hours per week. Overtime work still formally requires worker agreement.<sup>67</sup> According to the Government's Discussion Paper, this change to overtime was 'needed to fulfil the needs of the business world in increasing production and accommodating dynamic work relations patterns'.<sup>68</sup>

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<sup>63</sup> 'UU Cipta Kerja Disebut Tidak Menghapus Upah Minimum' [The Law on Job Creation will not Remove the Minimum Wage] (Bisnis.com, 8 October 2020) <<https://ekonomi.bisnis.com/read/20201008/12/1303062/uu-cipta-kerja-disebut-tidak-menghapus-upah-minimum>>.

<sup>64</sup> Petra Mahy et al. (2017) *The Plural Regulation of Work: A Pilot Study of Restaurant Workers in Yogyakarta Indonesia* (Centre for Employment and Labour Relations Law, University of Melbourne), p. 37.

<sup>65</sup> Law no. 11/2020 on Job Creation, art. 81(23), amending Law no.13/2003 on Labour, art. 79.

<sup>66</sup> Government of Indonesia, 'Naskah Akademis Undang-Undang Cipta Kerja' [Academic Discussion Paper for the Law on Job Creation, p. 1210 (pagination based on overall pages in document)].

<sup>67</sup> Law no. 11/2020 on Job Creation, art. 81(22), amending Law no.13/2003 on Labour, art. 78.

<sup>68</sup> Government of Indonesia, 'Naskah Akademis Undang-Undang Cipta Kerja' [Academic Discussion Paper for the Law on Job Creation, p. 1212 (pagination based on overall pages in document)].

Long-service leave, which previously accrued after six-years of working for the same employer, has been made an optional entitlement to be negotiated in a collective bargaining agreement, company rules or individual contract. Given that collective bargaining agreements in Indonesia have tended to merely replicate the minimum legal standards,<sup>69</sup> this change probably represents a loss of entitlements for workers. Finally, despite indications in an earlier draft of the Omnibus Bill and in media coverage, the new Law has not changed existing rights to maternity leave or menstruation leave.<sup>70</sup>

### 3E. Dismissal Procedures and Dispute Resolution

In its Labour Law of 2003, Indonesia retained a procedural protection against dismissal from the earlier law of 1964.<sup>71</sup> This protection required employers to negotiate dismissal with the relevant worker and/or union, and if an agreement was not reached, to then make a request (*permohonan*) in writing to the relevant industrial dispute resolution body (i.e. the Court of Industrial Relations once it was established in 2006) for a ‘determination’ (*penetapan*) permitting them to fire a worker.<sup>72</sup> Obtaining a determination was not necessary if the worker was still in a trial period or the worker had voluntarily resigned or retired. Workers were to remain employed with their full entitlements until a legally binding decision was reached.<sup>73</sup> Without such a court determination, workers could bring an action to the Court to dispute any purported dismissal within one year.<sup>74</sup>

A procedural anomaly was created between this requirement to obtain a determination found in the Labour Law of 2003 and the Labour Dispute Resolution Law which was enacted the

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<sup>69</sup> Chris Manning (2010) ‘The Political Economy of Reform: Labour After Soeharto’ in *Suharto’s New Order and its Legacy: Essays in Honour of Harold Crouch*, edited by Edward Aspinall and Greg Fealy (ANU Epress), p. 163; Michele Ford and George Martin Sira (2019) ‘Workers’ Participation in Indonesia’ in *The Palgrave Handbook of Workers’ Participation at Plant Level*, edited by S. Berger et al. (New York: Palgrave MacMillan), p. 386.

<sup>70</sup> ‘Klarifikasi Menaker Soal Cuti Haid dan Melahirkan di UU Cipta Kerja’ [Clarification from the Minister for Labour on Menstruation and Maternity Leave in the Law on Job Creation] (*Kompas.com*, 9 October 2020) <<https://money.kompas.com/read/2020/10/09/080400726/klarifikasi-menaker-soal-cuti-haid-dan-melahirkan-di-uu-cipta-kerja?page=all>>.

<sup>71</sup> *Undang-Undang no.12/1964 tentang Pemutusan Hubungan Kerja di Perusahaan Swasta* [Law no.12/1964 on Private Sector Dismissals].

<sup>72</sup> Law no. 13/2003 on Labour, art. 151(3), art. 152.

<sup>73</sup> Law no. 13/2003 on Labour, art. 155(2) and Constitutional Court Decision no. 37/PUU-IX/2011.

<sup>74</sup> Law no. 13/2003 on Labour, art. 155.

following year in 2004.<sup>75</sup> Labour disputes are generally required to pass through bipartite negotiations between the employer and the worker/union. Then there is a choice between mediation or conciliation (or arbitration for interests and inter-union disputes) before, if still unresolved, the dispute may progress to the Court of Industrial Relations. The Labour Dispute Resolution Law of 2004 briefly acknowledged the requirement that employers seek a determination for dismissal,<sup>76</sup> but it did not resolve how this was supposed to interact with the general dispute resolution procedures.

In 2015, the Constitutional Court considered this inconsistency between the two laws.<sup>77</sup> Although the Constitutional Court dismissed the claim being made entirely (and indeed the legal arguments in the claim were rather poorly constructed), in its reasoning it stated that a case for dismissal could not be conducted as a request (*permohonan*) for a determination but that it must be a dispute (*sengketa/gugatan*) where the views of the opposing party (i.e. the worker) will be heard.<sup>78</sup> The Constitutional Court did not, however, go so far as to directly interpret the provisions in the Labour Law of 2003 requiring employers to obtain a determination, arguably leaving the law still unclear.

In the new Law on Job Creation, the procedural requirement for an employer to obtain a determination from the Court of Industrial Relations in order to legally dismiss a worker has now been entirely removed.<sup>79</sup> As has the associated right of workers to take a case to the Court if they were dismissed without their employer obtaining a determination.<sup>80</sup> Employers may therefore inform a worker of their intention to dismiss them (for various reasons, see discussion in Section 3F below), leaving that worker with the option of then pursuing the general labour dispute resolution procedures. Workers are still to be kept employed, or suspended with full pay, until the dismissal dispute resolution procedures have concluded.<sup>81</sup> In practice this could

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<sup>75</sup> Law no. 2/2004 on Labour Dispute Resolution.

<sup>76</sup> Law no. 2/2004 on Labour Dispute Resolution, arts. 82 & 96.

<sup>77</sup> Constitutional Court Decision no. 20/PUU-XIII/2015 (30 November 2015).

<sup>78</sup> Shietra & Partners (n.d.) 'Perusahaan Hanya Dapat Mengajukan Gugatan PHK Terhadap Buruh, Bukan Permohonan Penetapan ke PHI' [Companies may only Sue for Dismissal of Workers, not Apply for a Determination in the Court of Industrial Relations], <<https://www.hukum-hukum.com/2016/06/perusahaan-hanya-dapat-mengajukan.html#:~:text=PHK%20ke%20PHI-.Perusahaan%20hanya%20dapat%20Mengajukan%20Gugatan%20PHK%20terhadap%20Buruh.Permohonan%20Penetapan%20PHK%20ke%20PHI&text=%E2%80%9CGugatan%20perselisihan%20hubungan%20industri%20diajukan,tempat%20pekerja%2Fburuh%20bekerja.%E2%80%9D>>. [accessed 22 January 2021].

<sup>79</sup> Law no. 11/2020 on Job Creation, arts. 81(37), 83(39), 81(41), 81(43), amending Law no. 13/2003 on Labour art. 151 and removing arts. 152, 154 and 155.

<sup>80</sup> Law no. 11/2020 on Job Creation, art. 81(59), removing Law no. 13/2003 on Labour, art. 170.

<sup>81</sup> Law no. 11/2020 on Job Creation, arts. 81(37) and 81(43), amending Law no. 13/2003 art. 151 and adding art. 157A.

be for a considerable period of time particularly if the case is taken all the way through to the Supreme Court.

This change has certainly cleared up the previous uncertainty in relation to dismissal procedures. Although, note that the new Law on Job Creation has neglected to amend the two articles (82 and 96) in the Labour Dispute Resolution Law of 2004 that still mention the need for an employer to obtain a determination. The impact of these changes in practice may not be significant, as essentially it gives effect to the 2015 Constitutional Court decision. There is also some evidence that employers were previously ignoring the requirement to obtain a determination anyway, such as Industrial Relations Court data showing that workers had initiated dismissal dispute proceedings in the majority of cases.<sup>82</sup> Naybila Rizfa Izzati (2020) has argued, though, that this change in the law ignores imbalances of bargaining power and how workers often lack the ability to ‘refuse’ dismissal and then to pursue dispute resolution procedures.<sup>83</sup>

Note also that the new Law on Job Creation has removed the articles relating to a worker’s right to take a case directly to the Industrial Relations Court if they have been dismissed for serious (including criminal) misconduct.<sup>84</sup> These articles had already been declared null and void by the Constitutional Court in 2003 which held that dismissal for criminal conduct contravened the principle of being innocent until proven guilty, and further because the articles had required the Industrial Relations Court (a civil court) to consider criminal matters.<sup>85</sup> The Constitutional Court left the law rather uncertain in 2003, and these changes do appear to deal with that uncertainty.

One final issue on dismissal procedures to mention here is that in the amendment to art. 160 of the 2003 Labour Law, the right of a worker to bring a case of the Court of Industrial Relations if they are dismissed within six months of them being detained for a criminal trial but before a verdict is given, has also been removed.<sup>86</sup>

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<sup>82</sup> Suherman Toha (2010) *Laporan Akhir Penelitian Hukum tentang Penyelesaian Perselisihan Hubungan Industria [Final Legal Research Report on Industrial Relations Dispute Resolution]* (Badan Pembinaan Hukum Nasional), p. 96.

<sup>83</sup> Naybila Rizfa Izzati, ‘Logika Keliru Aturan Ketenagakerjaan UU Cipta Kerja’ [Mistaken Logic in the Labour Regulations in the Law on Job Creation], (*The Conversation*, 5 November 2020) <<https://theconversation.com/logika-keliru-aturan-ketenagakerjaan-uu-cipta-kerja-148368>>.

<sup>84</sup> Law no. 11/2020 on Job Creation, art. 81(48), removing Law no. 13/2003 on Labour, art. 159, and Law no. 11/2020 on Job Creation, art. 81(60), removing Law no. 13/2003 on Labour, art. 171.

<sup>85</sup> Constitutional Court Decision no. 12/PUU-I/2003.

<sup>86</sup> Law no. 11/2020 on Job Creation, art. 81(49), amending Law no. 13/2003 on Labour, art. 160.



### **3F. Permitted Reasons for Ending the Employment Relationship**

The new Law on Job Creation has amalgamated, and in the process also amended, a number of existing articles in the Labour Law of 2003 on ending the employment relationship into a new article 154A. This new article 154A is quite dense, now covering in just one article all possible ways that the employment relationship may end including redundancy, constructive dismissal, misconduct, resignation and retirement. It is specified that an implementing government regulation is needed to provide further details on this area, and indeed this is necessary.

To begin with, the changes have tried to deal with the long-standing confusion in the law regarding an employer's right to dismiss a worker for misconduct. This stems from the Constitutional Court case of 2003 mentioned in Section 3E above where provisions permitting dismissal for criminal aspects of worker misconduct were declared null and void. In the new Law, all mention of the ability of an employer to dismiss a worker for serious misconduct has now been removed. Instead, there is merely general permission to dismiss a worker for contravention of their individual contract, collective bargaining agreement and/or company rules and where the necessary warnings have first been issued.<sup>87</sup>

The acceptable reasons for redundancy have also been amended. Corporate mergers and a company experiencing continuous losses for two years remain as permitted reasons for redundancy. A new reason of a company postponing debt payments has also been added. Redundancy for 'efficiency' reasons has been clarified as being permitted where the company is not closing down permanently. This is clearly intended to override a Constitutional Court case of 2011 which held that the article on redundancy for efficiency reasons was constitutional provided that it was interpreted as only occurring in the context of permanent closure of the business.<sup>88</sup>

In relation to constructive dismissal, under the previous law a worker could apply to the Court of Industrial Relations if an employer had abused them, asked them to do something that contravened the law or their contract or was dangerous, or had not been paid for three or more

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<sup>87</sup> Law no. 11/2020 on Job Creation, art. 81(42), introducing Law no. 13/2003 on Labour, new art. 154A(1)(k).

<sup>88</sup> Constitutional Court Decision no.19/PUU-IX/2011.

months.<sup>89</sup> This provision has now been deleted and amalgamated with art. 154A. While this list of reasons for constructive dismissal remain almost the same,<sup>90</sup> the right to apply to the Court has been removed. Instead, the worker now needs to ask their employer to end their employment based on constructive dismissal.<sup>91</sup> The employment relationship may also end if there is a decision from the Court of Industrial Relations that the employer has not done any of those things but the employer may still decide to end the relationship on the request of the worker.<sup>92</sup> This seems to me to be quite confusing legislative drafting, and it certainly needs the implementing government regulation to clarify what is actually meant.

### 3G. The Calculation of Severance Pay

Severance pay rates have long been controversial in Indonesia, and there has been quite a bit of misinformation circulating in the media regarding the changes to severance calculations in the new Omnibus Law on Job Creation.<sup>93</sup> As noted above, severance payments only accrue to permanent workers and not to fixed-term contract holders, and are only paid when an employee is made redundant.

Under the new law, the basic calculations of severance payments (*uang pesangon*) and additional award money (*uang penghargaan*) remain the same as in the 2003 Labour Law. That is, there is a scale of severance payments determined based on term of service, starting with less than one year of service requiring a severance payment of one month's wages, and finally service of up to eight years or more attracting a payment equal to nine months of wages. The

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<sup>89</sup> Law no. 13/2003 on Labour, art. 169.

<sup>90</sup> A small addition has been made to the clause regarding a worker not having been paid for three or more months to say that this is still grounds for constructive dismissal even if the employer pays on time after that. This adopts the ruling in Constitutional Court Decision no. 58/PUU-IX/2011.

<sup>91</sup> Law no. 11/2020 on Job Creation, art. 81(42), introducing Law no.13/2003, new art. 154A(1)(g).

<sup>92</sup> Law no. 11/2020 on Job Creation, art. 81(42), introducing UU no.13/2003, new art. 154A(1)(h).

<sup>93</sup> One story circulating widely in the media is that the changes reduce the calculation from 32 months to 19 months severance pay (e.g. 'UU Cipta Kerja Ditetapkan Jokowi, Pesangon Pensiun 19 Kali Gaji Langsung Berlaku?' (*Bisnis.com* 6 November 2020) <[https://www.hukumonline.com/klinik/detail/ulasan/lt5fa242ac8f85c/benarkah-pesangon-dibayar-sebagian-oleh-pemerintah-menurut-uu-cipta-kerja-/->.](https://ekonomi.bisnis.com/read/20201106/12/1314367/uu-cipta-kerja-ditetapkan-jokowi-pesangon-pensiun-19-kali-gaji-langsung-berlaku#:~:text=%22%5BPesangon%20dalam%20UU%20Cipta%20Kerja,pekerjaan)%20sehingga%20menjadi%2025%20kali.&text=Masa%20kerja%201%20tahun%20atau,uang%20pesangon%202%20bulan%20upah>). For a correction of this misinformation, see: 'Benarkah Pesangon Dibayar Sebagian oleh Pemerintah Menurut UU Cipta Kerja?' [Is it True that Severance Will be Partly Paid by the Government under the Law on Job Creation?] (<i>Hukumonline</i> 4 November 2020) <<a href=)

additional award money is also calculated on a separate scale – starting at 3 to 6 years of service being rewarded with two months wages. There has been a small wording change in the new version, where the words ‘at least’ have been removed, presumably to remove any expectations that more than these severance and award payments will be paid to workers.

The key change in the Law on Job Creation, though, is that in deleting and amalgamating articles 161-169 of the 2003 Labour Law, the amendments have cut the previous link between the reason for redundancy and severance payment calculations. Previously, redundancy for the sake of ‘efficiency’ where the company had not experienced two years of losses, required twice the normal severance payment to be made.<sup>94</sup> Similarly, where the dismissal occurred due to merger or acquisition and the employer did not want to keep the worker in the new company, twice the normal severance payment was required.<sup>95</sup> Severance paid due to the death of a worker was also required to be twice the normal amount, as was retirement where the worker had not been enrolled in a pension scheme.<sup>96</sup> Now, the reason for redundancy does not matter and there is only one base set of calculations.

A final change in relation to severance pay and award money, is that criminal sanctions have been introduced for non-payment of these entitlements, with sanctions set between one to four years imprisonment and/or a fine of between IDR 100 million and 400 million (between US\$7,100 and \$28,500).<sup>97</sup>

### **3H. New Unemployment Insurance Scheme**

Indonesia’s social insurance schemes have generally not been well-equipped to manage the unemployment caused by the COVID-19 pandemic.<sup>98</sup> Until now, workers’ social insurance schemes have covered workplace accident insurance, workers’ death insurance, the old age

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<sup>94</sup> Law no. 13/2003 on Labour, art 164(3).

<sup>95</sup> Law no. 13/2003 on Labour, art. 163.

<sup>96</sup> Law no. 13/2003 on Labour, art 167(5).

<sup>97</sup> Law no. 11/2020 on Job Creation, amending Law no.13/2003 on Labour, art. 185. See also: ‘Akademisi: Aturan Pesangon dalam UU Cipta Kerja Untungkan Pekerja dan Pengusaha’ [Academic: The Regulation on Severance Pay in the Law on Job Creation Benefit Workers and Employers] (*Kontan.co.id*, 25 December 2020) <<https://nasional.kontan.co.id/news/akademisi-aturan-pesangon-dalam-uu-cipta-kerja-untungkan-pekerja-dan-pengusaha>>.

<sup>98</sup> Robert Sparrow, Teguh Dartanto and Renate Hartwig (2020) ‘Indonesia under the New Normal: Challenges and the Way Ahead’, *Bulletin of Indonesian Economic Studies* 56(3): 269-299, p. 289.

guarantee and, from 1 July 2015, pension insurance. Unemployment, however, has been mostly relegated to private resources and general poverty social nets. The exception to this is that the old age guarantee (*Jaminan Hari Tua*) component of the existing workers' social security schemes is an accumulation fund which can be accessed early and in full by members who have been formally dismissed from their jobs.<sup>99</sup> Government data and media reports suggest that applications to access the old age guarantee have increased sharply during the pandemic.<sup>100</sup>

The Law on Job Creation lays down the initial foundation for the development of a new unemployment insurance scheme. Like the other workers' social security schemes it will be administered by the *Badan Penyelenggara Jaminan Sosial (BPJS) Ketenagakerjaan* (Workers' Social Security Implementation Agency). The new Law provides only some basic information about the scheme. Members of the scheme will pay premiums, but the initial capital is to come from the central government. The benefits of the scheme will take the form of cash payments (maximum six months of wages), access to job market information and training.<sup>101</sup> All remaining details, perhaps including whether the old age guarantee will continue to be accessible early, are still to be determined in the implementing government regulation. The ILO has been providing technical support for the development of the scheme through its ILO/UNIQLLO project.<sup>102</sup>

It is certainly arguable that unemployment insurance may compensate for the lowering of severance payments by shifting the burden of unemployment from employers to the new social insurance scheme, but the evidence for this in practice will need to be explored in the future.

### **3I. Foreign Workers in Indonesia**

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<sup>99</sup> Government Regulation no. 46/2015 on Implementation of the Old Age Guarantee Program; Government Regulation no. 60/2015 on Amending Government Regulation no. 46/2015 on Implementation of the Old Age Guarantee Program.

<sup>100</sup> 'Ini Cara Mudah Cairkan JHT BPJS Ketenagakerjaan selama Covid-19' [This is the Easy Way to Access Old Age Guarantee Funds from the Workers' Social Security Scheme During Covid-19] (*Kontan.co.id*, 7 August 2020) <<https://keuangan.kontan.co.id/news/ini-cara-mudah-cairkan-jht-bpjs-ketenagakerjaan-selama-covid-19?page=all>>.

<sup>101</sup> Law no. 11/2020 on Job Creation, art. 82, amending Law no. 40/2004 on the National Social Security System.

<sup>102</sup> International Labour Organisation 'Unemployment Protection in Indonesia – Quality Assistance for Workers Affected By Labour Adjustments' <[https://www.ilo.org/jakarta/whatwedo/projects/WCMS\\_736748/lang-en/index.htm](https://www.ilo.org/jakarta/whatwedo/projects/WCMS_736748/lang-en/index.htm)> (accessed 22 January 2021); Ipppei Tsuruga and International Labour Organization (2020) *Exploring Policy Options for an Employment Insurance Scheme in Indonesia*, ILO.

The new Law on Job Creation introduces a few changes to facilitate the employment of foreign workers in Indonesia. These are ‘intended to promote investment growth and thereby increase job opportunities for Indonesians’.<sup>103</sup> Originally the only exception to the requirement to obtain a permit to employ foreign workers was for staff in diplomatic missions. Now exceptions have been introduced for: corporate directors or members of the board of commissioners or shareholders, workers in emergencies where production has stopped, ‘vocations’ (*vokasi*), technological start-ups, business visits and short-term research.<sup>104</sup> These areas all seem quite vaguely defined and will most likely require further clarification in the implementing regulations. Foreign workers are still prohibited from holding personnel management positions. Foreign workers also enjoy some tax exemptions provided for elsewhere in the Omnibus Law. The permits needed in order to employ foreign workers also appear to have been streamlined,<sup>105</sup> and the sanctions for non-compliance with permit requirements downgraded from criminal to administrative.<sup>106</sup> These changes have been made in the context of quite a lot of political controversy over foreign workers entering Indonesia, particularly from China. This has been particularly due to local community fears about loss of job opportunities to foreigners during the COVID-19 pandemic.<sup>107</sup>

### 3J. Indonesian Overseas Migrant Workers

The large-scale migration of Indonesians to work overseas has long been a politically fraught area of regulation. Competing interests play out between the state with its desire for economic development, various individual state agencies and their conflicting mandates, private recruitment and placement businesses and their pursuit of profits, and the rights and needs of

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<sup>103</sup> Government of Indonesia, ‘Naskah Akademis Undang-Undang Cipta Kerja’ [Academic Discussion Paper for the Law on Job Creation], p. 1192 (pagination based on overall pages in document).

<sup>104</sup> Law no. 11/2020 on Job Creation, art. 81(4), amending Law no.13/2003 on Labour, art. 42. Note that shareholders who were directors or commissioners in the employing company were already an exception under Presidential Regulation no. 20/2018 on foreign workers.

<sup>105</sup> Law no. 11/2020 on Job Creation, amendment to Law no. 13/2003, art. 43. This changes also probably displace Presidential Regulation no. 20/2018.

<sup>106</sup> Law no. 11/2020 on Job Creation, arts. 81(63) and 81(67), amending Law no. 13/2003 on Labour, arts. 185 and 190.

<sup>107</sup> See e.g. ‘Renewed Mistrust of Foreign Labor Tests Indonesia-China Relations’ (*Jakarta Post*, 23 April 2020) <<https://www.thejakartapost.com/news/2020/04/23/renewed-mistrust-of-foreign-labor-tests-indonesia-china-relations.html>>; ‘The Complicated Politics of Chinese Workers in Indonesia’ (*The Diplomat*, 26 June 2020) <<https://thediplomat.com/2020/06/the-complicated-politics-of-chinese-workers-in-indonesia/>>.

workers both in Indonesia prior to departure and in their country of work.<sup>108</sup> The current Overseas Migrant Worker Law of 2017<sup>109</sup> is generally considered to be more protective of workers than its predecessor law of 2004.<sup>110</sup>

One of the key aspects of the 2017 Overseas Migrant Worker Law are the requirements for licensing and regulation of private migrant labour placement companies (*Perusahaan Penempatan Pekerja Migran Indonesia*). The new Law on Job Creation has introduced some amendments to these articles regarding migrant labour placement companies.<sup>111</sup> There was no mention of these amendments in the official Academic Discussion paper so the exact reasoning behind these changes was not formally announced, but it can be surmised that they are driven by wanting consistency with the other business licensing changes in the Omnibus Law. Human rights and migrant labour rights groups have unanimously condemned the changes as reducing migrant worker protection.<sup>112</sup> Migrant Care, a leading NGO, has also filed for review of these amending provisions in the Constitutional Court.<sup>113</sup> Meanwhile the government has argued in reply that the changes do not in fact reduce worker protections.<sup>114</sup>

To detail the amendments, firstly, article 51 of the Overseas Migrant Worker Law 2017 now requires migrant labour placement companies to obtain a rather vaguely worded ‘Business Permit’ from the Central Government instead of the previous specific permit (SIP3MI) issued by the Minister. It is now not clear which government agency will do the issuing.<sup>115</sup> Secondly,

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<sup>108</sup> Wayne Palmer (2016) *Indonesia’s Overseas Migration Programme 1969-2010* (Leiden: Brill).

<sup>109</sup> Law no. 18/2017 on Protection of Indonesian Migrant Workers.

<sup>110</sup> Law no. 39/2004 on the Placement and Protection of Indonesian Workers Overseas.

<sup>111</sup> Law no. 11/2020 on Job Creation, art. 84.

<sup>112</sup> Alysa & Human Rights Working Group (n.d), ‘Polemik UU Cipta Kerja Terhadap Perlindungan Pekerja Migran Indonesia’ [The Polemic in the Law on Job Creation Towards Protection of Indonesian Migrant Workers], <<http://hrwg.org/wp-content/uploads/2020/10/Polemik-UU-Cipta-Kerja-dan-Perlindungan-PMI-final.pdf>>; ‘Migrant Care Menggugat UU Cipta Kerja ke MK’ [Migrant Care Challenges the Law on Job Creation in the Constitutional Court] (*Kontan.co.id*, 24 November 2020) <<https://nasional.kontan.co.id/news/migrant-care-menggugat-uu-cipta-kerja-ke-mk>>; ‘Hapus Syarat Perusahaan Penempatan, UU Cipta Kerja Dinilai Lemahkan Perlindungan Buruh Migran’ [Deleting Requirements for Placement Companies, the Law on Job Creation Weakens Migrant Worker Protection] (*Hukumonline*, 24 November 2020) <<https://www.hukumonline.com/berita/baca/lt5fbba48877c13/hapus-syarat-perusahaan-penempatan--uu-cipta-kerja-dinilai-lemahkan-perlindungan-buruh-migran/>>.

<sup>113</sup> ‘Migrant Care Menggugat UU Cipta Kerja ke MK’ [Migrant Care Challenges the Law on Job Creation in the Constitutional Court] (*Kontan.co.id*, 24 November 2020) <<https://nasional.kontan.co.id/news/migrant-care-menggugat-uu-cipta-kerja-ke-mk>>.

<sup>114</sup> ‘BP2MI Klaim UU Cipta Kerja Lindungi Pekerja Migran’ [The Indonesian Migrant Workers Protection Agency Claims that the Law on Job Creation Protects Migrant Workers] (*Detik*, 14 October 2020) <<https://news.detik.com/berita/d-5212638/bp2mi-klaim-uu-cipta-kerja-lindungi-pekerja-migran>>.

<sup>115</sup> Alysa & Human Rights Working Group (n.d), ‘Polemik UU Cipta Kerja Terhadap Perlindungan Pekerja Migran Indonesia’ [The Polemic in the Law on Job Creation Towards Protection of Indonesian Migrant Workers], <<http://hrwg.org/wp-content/uploads/2020/10/Polemik-UU-Cipta-Kerja-dan-Perlindungan-PMI-final.pdf>>;

article 53 has been amended to provide that branches of placement companies established in the regions will need to fulfil general business license requirements at the provincial level, where previously they merely needed to be registered. Thirdly, art. 57 has been partly deleted – taking out the prescription that migrant labour placement companies’ permits be for five years followed by renewal for a further five years along with various pre-conditions for renewal. The remaining parts of the article, as before, require that the companies provide updated data within 30 days and may be fined for not doing so. Finally, the new article 89A provides that all mention of the previous specific permits SIP3MI in the Law will be equated with the general ‘Business Permits’. This would seem to be rather vague legislative drafting that leaves much that is uncertain. Indeed, Migrant Care is challenging this particular article in the Constitutional Court.<sup>116</sup> The change that is most likely to have impacts on migrant worker protection is the removal of the criteria for license renewal in art. 57.

#### 4. CONCLUSION

This suite of changes to labour regulation in the Law on Job Creation are extensive, and in the interests of facilitating access to legal information, I would argue that it actually warranted a total reissue of the 2003 Labour Law. It has been very confusing indeed to try to piece together what has changed (and what has stayed the same). The political aims behind the Omnibus Law and the desire to sandwich the labour regulation changes in among all the other amendments probably explain this rather opaque outcome.

The changes do include a number of areas where worker protections have been reduced, particularly in relation to fixed-term contracts, outsourcing, severance pay calculations and application of minimum wages to small and micro enterprises. To the extent that these amendments are formally enforced, they are likely to have significant impacts on working conditions. However, there does not appear to be any actual empirical evidence base behind these changes to labour regulation to show that they will or will likely have positive impacts on job creation, at least none mentioned in the official Academic Discussion Paper or the

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<sup>116</sup> ‘Migrant Care Menggugat UU Cipta Kerja ke MK’ [Migrant Care Challenges the Law on Job Creation in the Constitutional Court] (*Kontan.co.id*, 24 November 2020) <<https://nasional.kontan.co.id/news/migrant-care-menggugat-uu-cipta-kerja-ke-mk>>.

media. Scepticism from commentators<sup>117</sup> about the economic impacts of these changes therefore appear to be warranted.

Not all of the changes reduce worker protections, and it is clear that a number of the amendments in the Law on Job Creation have responded to previous Constitutional Court decisions, either by incorporating its decisions in the new law or by expressly trying to overturn them. It seems likely that the Ministry of Labour had these technical amendments prepared and they were included in the Omnibus Law as the political opportunity arose. This is perhaps a sign of some maturity in Indonesia's legal system in terms of a dialectic developing between legislature and judiciary in the evolution of labour law. This dialectic is likely to continue as the Constitutional Court makes its way through the various challenges to the Law on Job Creation that have been recently filed.

As noted in the Introduction, at the time of writing in January 2021, the wait for implementing regulations and pending Constitutional Court reviews of the Law on Job Creation means that labour regulation in Indonesia is still in a state of uncertainty, and this Paper should be read with this mind.

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<sup>117</sup> See, e.g. Aulia Nastiti, 'Why Indonesia's Omnibus Bill Will Not Create Jobs and Only Strengthen the Oligarchy' (*The Conversation*, 20 October 2020) <<https://theconversation.com/why-indonesias-omnibus-bill-will-not-create-jobs-and-only-strengthen-the-oligarchy-147997>>.