

Title : Analysis of the Controversial Articles regarding Manpower under the Indonesian Job Creation Law

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Analysis of the Controversial Articles regarding Manpower under the Indonesian Job Creation Law

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Abstract:

In order to overcome the numerous and overlapping laws and regulations in Indonesia either at the same level of hierarchy or the regulations below, the Indonesian government attempts to apply the Omnibus Law method by establishing the Law No. 11 of 2020 concerning Job Creation which covers various regulations related to strategic Job Creation policies. However, the Law is considered as a controversy, specifically in the scope of manpower, which provides policies that would harm workers. This paper is written to assist public understanding by analyzing several Articles of the Law on such issue as well as to criticize and provide input to the government in making legislation with the aim of achieving the manifest function of law as an instrument of national development.

Keywords: Indonesia, Omnibus Law, Manpower, Job Creation.

INTRODUCTION

Fundamentally, laws and regulations are established to realize legal objectives, namely justice, certainty of law, and expediency among citizens. In practice, however, the disparity between *das sollen* and *das sein* keeps widening over time. Therefore, the Indonesian government attempted to solve this problem by using the Omnibus Law method as a measure to eliminate overlapping discrepancy of laws and establishing the Law No. 11 of 2020 concerning Job Creation. Through the Omnibus Law, the government wanted to simplify the regulatory constraints which are currently complicated and long.

Before discussing the Job Creation Law, we must understand what the Omnibus Law is first. The definition of Omnibus Law is started with the word ‘Omnibus’ which comes from Latin word and has a meaning of all. In Bryan A. Garner’s Black Law Dictionary Ninth Edition, it is stated that ‘Omnibus’ has a meaning that is related to or

dealt with numerous objects or items at once; including many things or having various purposes.¹ If it is endowed with a word “Law”, it can be defined as a law for all.²

For example, the United States had conducted and implemented Omnibus Law by enacting the Omnibus Trade and Competitiveness Act of 1988 (OCTA), which was drafted in order to improve the trade balance deficit of the United States at the time. It is composed of 10 Chapters, 44 Sections, and 10,013 Articles.³ This Act was established as the authority to negotiate reciprocal trade agreements (Uruguay Round) undertook extensive revisions of the Trade Act, aid adjustment, export incentive, harmonizing tariffs, international trade policies, agricultural trade and telecommunications, international technology trade, policies of competitiveness, foreign investments, the Act of Foreign Corruption Practices, government administration, patent policy, SEMATECH, and budget deficits.⁴

On November 2, 2020, President Jokowi signed the Law No. 11 of 2020 concerning Job Creator. By that, the Bill has come into force as a Law that is applicable after being announced by the Ministry of Law and Human Rights in the Republic of Indonesia State Gazette on the same day. The scope of this Law contains strategic Job Creation policies which includes improvement of the investment ecosystem and business activities; manpower; convenience, protection and empowerment of cooperatives and Micro, Small and Medium Enterprises; ease of conducting business; research and innovation support; land acquisition; economic area; Central Government investment and acceleration of national strategic projects; implementation of government administration; and the imposition of sanctions.⁵

Although the Law is established with the intention of addressing the problem of over-regulated and over-lapped such related issues, on the other hand, the Law requires the existence of a large number of derivative regulations so that it has the potential to produce hyper-regulated and much more complex regulations by delegating them either

¹ Agnes Fitriyantica, “Harmonisasi Peraturan Perundang-Undangan Indonesia melalui Konsep Omnibus Law”, *Jurnal Gema Keadilan*, Vol. 6, No. 3, November 2019, p. 302.

² Satjipto Rahardjo, *Hukum, Masyarakat dan Pembangunan*, (Bandung: Alumni, 1981), p. 29.

³ Agnes Fitriyantica, *Op.cit.*, p. 304.

⁴ *Loc.cit.*

⁵ Article 4, Law No. 11 of 2020 concerning Job Creation.

to Government Regulations or Presidential Decrees. This is one of the causes of the controversy over the Law that has continued even since it was still in the form of a Bill.

Many people from various circles are objecting to a huge number of the Articles in the Law, especially the Articles that are related to manpower. Workers have stiff objection, since in their perspective, the Law is a setback that is very detrimental to them. The large-scale demonstrations that was initiated by Labor Unions and supported by other elements on the society in rejecting the Law made the situation which was already tormented due to the Covid-19 Pandemic even more chaotic.⁶

Moreover, numerous academics and social activists have also criticized the Law, which they consider the process of manufacturing it less transparent. The discussion seemed to be rush so that it collided with and/or contradicted other Laws, even with the 1945 Constitution. The Law is also considered too much on delegating further regulation both to Government Regulations and to Presidential Decrees, which raises concerns for academics about the growing potential power of the President that will rule over democratic principles.⁷ In addition, many parties such as the Indonesian Trade Union Confederation (*Konfederasi Serikat Pekerja Indonesia*) have submitted a judicial review to the Constitutional Court citing several Articles that are detrimental to workers.

In this paper, the writer would discuss more about the controversial Articles under the Law No. 11 of 2020 concerning Job Creator on the issue of manpower which brings detrimental to workers. This paper uses a normative approach as its research method which the sources are obtained from literatures by looking for the information and studying research material from collecting secondary data sources such as legislation, books, journals, and internet. It emphasizes the analysis of the process of inference from descriptive data in the form of words compiled based on data that has been obtained by the writer.

ANALYSIS & DISCUSSION

⁶ Rafly Nurfaizy, Menilik Hubungan Pembentukan Hukum terhadap UU Cipta Kerja, Academia.edu, 2020, p. 12.

⁷ Loc.cit.

Under the Law No. 11 of 2020 concerning Job Creation, the manpower cluster can be found in Chapter IV which contains five Sections. The divisions are as follows.⁸

- Section 1: General Provisions
Containing the scope of the Chapter on manpower; there is one article, i.e. Article 80.
- Section 2: Manpower
Containing the amendments of the Law No. 13 of 2013 concerning Manpower, which includes one Article, namely Article 81 with 68 clauses in it.
- Section 3: Types of Social Security Programs
Containing the amendments of the Law No. 40 of 2004 concerning the Social Security System, contains Article 82 with two clauses including an additional clause regulating Job Loss Security.
- Section 4: Social Security Administering Bodies
Containing the amendments of the Law No. 24 of 2011 concerning the Social Security Administering Bodies, contains Article 83 with three clauses, one of which discusses the sources of Job Loss Security funding.
- Section 5: Protection of Indonesian Migrant Workers
Containing the amendments of the Law No. 18 of 2017 concerning Protection of Indonesian Migrant Workers which contains Article 84 with four clauses.

As the writer have mentioned previously, many people, especially workers, still express their strong rejection to the Law No. 11 of 2020 concerning Job Creation even though it has been enacted and came to force. It is due to many Articles under the Law that are detrimental to workers. The following analysis will address those Articles.

- The Provisions on Foreign Workers

⁸ Palupi Annisa Auliani, Naskah UU Cipta Kerja Klaster Ketenagakerjaan, <https://jeo.kompas.com/naskah-uu-cipta-kerja-klaster-ketenagakerjaan>, accessed on 19 November 2020.

The Job Creation Law amends and removes several regulations regarding foreign workers under the Manpower Law. First, in Art. 81 cl. 4 of the Job Creation Law, the government abolishes the provisions of Art. 42 para (1) of the Manpower Law, namely the obligation to write a written permit for entrepreneurs who wish to employ foreign workers. Instead, entrepreneurs are only required to have a plan to use foreign workers.

The government also expanded the exemption from the compulsory use of foreign workers through such clause. Prior, in Art. 42 para (3) of the Manpower Law, the obligation to have a permit to employ foreign workers did not apply to representatives of foreign countries who used foreign workers as diplomatic and consular employees. Then, the government lowered the exemption by amending Art. 42 para (3) of the Job Creation Law by adding an exception to the compulsory use of foreign workers into three parties, namely directors or commissioners with certain shareholdings or shareholders in accordance with statutory provisions; diplomatic and consular staff at representative offices of foreign countries; foreign workers required by employers in the type of production activities that have stopped due to emergencies, vocational, start-up companies, business visits, and research for specified period of time.

In addition, the government replaced Art. 42 para (6) of the Manpower Law which stated that foreign workers whose working period had expired and could not be extended could be replaced by other foreign workers. This regulation is replaced in the Job Creation Law which states that the provisions regarding certain positions and certain times are regulated by a Government Regulation.

Furthermore, Art. 43 of the Manpower Law contains the scope of the planned use for foreign workers, i.e. the reasons for the use of foreign workers, the position of foreign workers, the timeframe for using foreign workers, and the appointment of Indonesian citizens to assist foreign workers. Although the scope is quite detailed, Art. 81 cl. 5 of the Job Creation Law removes these provisions.

Art. 81 cl. 6 of the Job Creation Law removes the provisions in Art. 44 of the Manpower Law which states that the employer of foreign workers is obliged to comply with the provisions regarding the position and the applicable competency standards. Beside of that, the government has also narrowed the scope of positions

that are prohibited from being supported by foreign workers. Prior, it was regulated in Art. 46 of the Manpower Law which states that a foreign worker is prohibited from holding a position in charge of personnel and certain positions regulated by a ministerial decree. However, the government abolished such article through Art. 81 cl. 8 of the Job Creator Law.

- Provisions on Specified-Time Employment Agreement or Contract Workers

The Job Creation Law amends the provisions regarding Specified-Time Employment Agreements or contract workers in the Manpower Law. The prior provisions stipulated in Art. 59 para (4) of the Manpower Law stated that the Specified-Time Employment Agreement could only be held for a maximum of two years and could only be extended once for a maximum period of one year. However, in the Job Creation Law, this provision is removed and replaced with *further provisions regarding the type and nature or activity of work, the period of time, and the deadline for extension of the work agreement for a certain period of time are regulated in a Government Regulation*. This provision can cause the threat of contract workers having no clarity about obtaining their rights as permanent employees.

When referring to the Manpower Law, workers have clarity because when they have served a three-year contract period and are not appointed as permanent employees, the company cannot extend the non-permanent contract and must appoint the workers if their performance meets company expectations. However, this certainty has been revoked by the Job Creation Law and it may have the potential to grant power and discretion for employers to maintain the status of contract workers indefinitely.

- Provisions on Outsourcing

Under the Manpower Law, the use of outsourcing is limited and only for workers outside the main business. But Art. 81 cl. 18 and 19 of the Job Creation Law abolished Art. 64 and 65 which opens the possibility for outsourcing institutions to employ workers for a variety of jobs, including freelancers and full-time workers. It may cause the use of outsourced power increasingly free.

With the abolishment of the five types of work contained in Art. 66 which allows the use of outsourcing workers—i.e. cleaning service, catering, security,

driver, and supporting service for the oil and gas sector⁹—all types of work in the main business may use outsourcing workers. It may give the impression that the state legalized workers being traded by agents while internationally, outsourcing is known as modern slavery.

By using an outsourcing work system, workers no longer have clarity on wages, health insurance, pension security, and job security.¹⁰ Because in practice, outsourcing agencies often do not take responsibility for the future of their workers. It is due to the fact that the outsourcing agent only receives a success fee per head of the outsourced worker used by the user company.

- Provisions on Overtime Work and Rest Time

In Art. 78 para (b) of the Manpower Law, an employer may only employ workers with a maximum of three hours of overtime in one day and fourteen hours in one week. This provision is amended in Art. 81 cl. 22 of the Job Creation Law. It is stated that the overtime may be conducted for a maximum of four hours in a day and eighteen hours in a week.

Beside of that, Art. 81 cl. 23 of the Job Creation Law amended Art. 79 para (b) and removes para (d) of the Manpower Law. The right of workers to get two days off a week which was previously regulated in the Manpower Law was removed so that workers were only given one day of weekly rest for six working days in one week. The Job Creation Law also eliminates the obligation for companies to provide two-month long rest for workers who have worked for six consecutive years and apply every multiple of the work period of six years.

- Provisions on Wages

The Job Creation Law changes several provisions related to wages. Such provisions are regulated in Art. 81 cl. 24 and 25 of the Law which amends Art. 88 and abolishes Art. 89 of the Manpower Law. Based on Art. 88 para (3) of the Job Creation Law, such provisions that are eliminated, i.e. wages for exercising the right to rest from work, wages for severance pay, and wages for income tax calculation.

⁹ Ayomi Amindoni, UU Cipta Kerja: Kesalahan ‘fatal’ Pasal-Pasal Omnibus Law Akibat ‘Proses Legalisasi Ugal-ugalan’, Apakah UU Layak Dibatalkan?, <https://www.bbc.com/indonesia/indonesia-54768000>, accessed on 23 November 2020.

¹⁰ Loc.cit.

Subsequently, Art. 88 para (4) states that *further provisions regarding wage policies shall be regulated in a Government Regulation*.

In addition, the Job Creation Law adds 5 new articles, namely Art. 88A, 88B, 88C, 88D, and 88E. In Art. 88C para (1), it is stated that *the governor is obliged to determine the provincial minimum wage*. Afterward, para (2) states that *the governor may determine the district minimum wage with certain conditions*. The use of the phrase 'may' in determining such wage is deemed to be very detrimental to workers.¹¹ Because it gives the impression that the nature of such wage is not obligatory. In other words, the governor may not specify such wage. If so, the wages will be decreased. Therefore, it can be said that the enactment of the Job Creation Law may return to the low wage regime, which is very contradictory, especially since Indonesia has been independent for more than 75 years.¹²

- Provisions on Sanction for Paying Less Amount of Wages than the Stipulated Regulations

Art. 90 of the Manpower Law prohibited employers to paying wages lower than the minimum wage and if they are unable to pay, they may postpone them. Subsequently, Art. 91 stated that it is prohibited to give lower wages, or it is against the laws and regulations. If so, the agreement is null, and void and the employer is obliged to pay the workers' wages according to the prevailing laws and regulations. However, in Art. 81 cl. 27 and 29 of the Job Creation Law, the provisions of these two articles in the Manpower Law are completely abolished.

The existence of Art. 90 and 91 of the Manpower Law required the wages agreed by employers and workers must not be lower than the minimum wages in accordance with statutory regulations. If the agreed wage is lower than the minimum wage in statutory regulations, the employer is obliged to pay the workers according to the minimum wage standard in the statutory regulations. If it is violated, the employer will get sanction. With the removal of both Articles under the Job Creation Law, it is possible that it will lead to a lack of compliance by employers with the

¹¹ Luthfia Ayu Azanella, UU Cipta Kerja Resmi Berlaku, Ini Sejumlah Pasal yang Disorot Pekerja, <https://www.kompas.com/tren/read/2020/11/03/114850065/uu-cipta-kerja-resmi-berlaku-ini-sejumlah-pasal-yang-disoroti-pekerja?page=all>, accessed on 19 November 2020.

¹² Very, Resmi Berlaku, Buruh Minta UU No. 11 Tahun 2020 tentang Cipta Kerja Dibatalkan atau Dicabut, <https://indonews.id/artikel/313571/Resmi-Berlaku-Buruh-Minta-UU-No-11-Tahun-2020-tentang-Cipta-Kerja-Dibatalkan-atau-Dicabut/>, accessed on 20 November 2020.

minimum wage according to law. In other words, it is more likely that employers will pay workers lower wages and do nothing since there is no sanction that require them to do so.¹³

- Provisions on Severance Pay related to Layoff

Art. 156 para (2) of the Manpower Law states the phrase "at least" in the calculation of severance pay for layoffs. Meanwhile, in the Job Creation Law, such phrase is deleted. In addition, the provision in Art. 156 para (4) of the Manpower Law regarding housing replacement as well as medication and care stipulates that 15% of the severance pay and / or service pay for those who meet the requirements are abolished in the Job Creation Law.

- Provisions on Pension Security Sanction

In Art. 167 para (5) of the Manpower Law, if *an employer does not include workers who have experienced layoffs due to retirement age in the pension program, the employer is obliged to provide the workers with severance pay equal to 2 times the provisions of Art. 156 para (2), the reward for working period of one time the provisions of Art. 156 para (3) and compensation for rights according to the provisions of Art. 156 para (4).* However, the Job Creation Law abolishes this Article. Beside of that, the imposition of criminal sanctions—*imprisonment for a minimum of one year and a maximum of five years and / or a fine of at least IDR 100,000,000.00 and a maximum of IDR 500,000,000.00*—for companies that do not include workers in the pension security program previously stated in Art. 184 of the Manpower Law is also abolished.

- Provisions of the Right of Workers to Apply for Termination of Employment

Art. 169 para (1) of the Manpower Law states that workers can apply for dismissal to industrial relations dispute settlement agencies if the company, among other things, abuses or threatens them. Layoff application can also be made if the company does not pay wages on time for three consecutive months or more. These provisions are followed by para (2) which states that workers will receive severance pay twice, reward pay for one-time service, and compensation pay for rights as regulated in Art. 156. Nevertheless, Art. 169 para (3) states, if the company is not

¹³ Dipna Videlia Putsanra, Daftar Pasal UU Omnibus Law Cipta Kerja yang Dinilai Akan Merugikan Buruh/Pekerja, <https://tirto.id/daftar-pasal-uu-omnibus-law-cipta-kerja-yang-bisa-merugikan-buruh-f5Cb>, accessed on 20 November 2020.

proven to have committed an act as reported to an industrial relations dispute settlement agency, workers will not obtain those rights.

Art. 169 of the Manpower Law is entirely deleted in the Job Creation Law. The Law removes the rights of workers / laborers to apply for termination of employment if they feel disadvantaged by the company. This provision is regulated in Art. 81 cl. 58 of the Law.

CONCLUSION

Although the use of the Omnibus Law method has several advantages to rapidly harmonizing the applicable laws in Indonesia, this method creates complications due to the very broad substances. Under the Law No. 11 of 2020 concerning Job Creation, many provisions are refocused on the President or the Central Government, while the authority for regional autonomy is reduced. Though juridically, the existence of the Law is intended to overcome the overregulating and overlapping of laws and regulations; in fact, there are so many supplementary regulations that make it hyper-regulated and increase the complexity of the problem at the normative level. In addition, the new or amended provisions regarding Manpower are considered detrimental to workers.

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