

Employers Struggle Pending Relief from the Government

These past weeks have been hard on employers worldwide. The rapid spread of Covid-19 is forcing many companies to adjust their employment policies, from implementing a work from home policy, cutting out certain benefits, and to the most extreme, terminating non-essential employees.

While the Indonesian government has issued various regulations to combat the spread of Covid-19, including limiting any mass gathering in offices and religious centres, Indonesia is yet to follow other countries who have put in measures to help employers during this outbreak. To date, unlike the global increase in oil price in 2005, the government seems to continue adopting a 'business as usual' approach and many employment regulations remain the same, in that it continues to favour employees' interest.

Recently, the Ministry of Manpower issued Circular Letter No. M/3/HK.04/III/2020 on Labour Protection and Business Continuity in order to Prevent the Spread of COVID-19, which appears to reaffirm the government's approach. In this letter, an employer must obtain the employee's consent prior to reducing the employee's salary or restructuring the procedure to pay salary.

Sink or Swim

With the end of Covid-19 nowhere in sight, many businesses will start to struggle, and termination of employment may be the only option for these businesses to survive. In a country where unilateral termination is highly restricted, termination of employment was always an issue, even before the Covid-19 outbreak.

Many businesses have begun looking at, and even implementing alternative strategies, ranging from a consensual temporary reduction of salary, complete halt of overtime payment, restructuring of employment benefits, to non-renewal of fixed term employees. Other measures include:

1. **Termination due to redundancy**

The Labour Law (Law No. 13 of 2003) requires an employer to be partially or fully closed prior to terminating employees based on redundancy.

2. **Company is suffering loss**

Under the Labour Law, an employer can terminate an employee if it is suffering from financial loss. Here, the employer must show that it has suffered two years of consecutive losses. Upon termination, the employer must pay compensation to the employee amounting to 1x severance, 1x long service payment and 1x compensation of rights.

3. *Occurrence of a force majeure event*

Although the Labour Law sets force majeure as one of the grounds for termination of employment, it does not explicitly define a force majeure event. The closest link to a specific provision on force majeure can be found under the Indonesian Civil Code. However, the content of a force majeure event under the Labour Law is limited to a reduction of the termination package, instead of a full waiver of the obligation to pay severance payment. Here, employers can use the 1x formula (i.e. 1x severance, 1x long service and 1x compensation of rights) in compensating employees in the event of a force majeure.

Based on our review of several Supreme Court decisions, we have yet to find a specific decision that can aid in clarifying the types of condition that would be considered as sufficient grounds by the Labour Court or the Supreme Court to accept the existence of a force majeure event.

As such, if the employer is unable to satisfactorily prove to the court that they are indeed going through a force majeure event, they would only be able to initiate a termination of employment based on a force majeure event if they agree to pay the highest termination formula under the Labour Law (i.e. 2x severance payment, 1x long service payment and 1x compensation of rights payment).

4. *Mutual termination*

The last alternative is for the employer and employee to mutually terminate the employment relationship by executing a termination agreement. Generally, under a termination agreement, many employers agree to pay compensation based on the highest termination formula under the Labour Law. Often, the employer would also 'sweeten the deal' by agreeing to pay an ex-gratia payment to expedite the termination process.

Avoiding Termination Altogether

Prior to looking at the options of implementing a termination of employment, there are several known measures which were taken by companies in 1998, in the aftermath of the 1997 Asian financial crisis, and in 2005 during the increase of the global oil price. These measures include:

1. *Salary reduction for managerial employees*

There is not much court precedents for dispute arising out of salary reduction in times of global financial crisis or pandemics. However, it is clear that any reduction in salary would need the consent of employees. Noting that employees categorised as middle to top management would make up the bulk of the financial spending of employers, it comes to no surprise that there salary would be the first to be reduced by many employers.

2. Reduction or complete halt of overtime work

As Indonesia has one of the highest overtime pay rate in Southeast Asia, we have seen many employers have already taken this step.

3. Offering early retirement package

We have seen many employers persuading employees who may be entitled to an early retirement to consider and possibly take the early retirement package. This will allow the employers to reduce headcount safely.

4. Temporary leave

Based on our research, this has been the most favoured approach taken by many business thus far, this approach not only combats the spread of COVID – 19 but also significantly reduces employers' spending.

Depending on the industry, the temporary leave may range between 3-9 months and during this time, the salary is typically reduced between 20%-50%.

Conclusion

In some aspect, the government has begun taking stronger stance to stop the spread of the Covid-19 virus. In addition, several government authorities, such as OJK and KPPU (Indonesia's financial services authority and competition commission, respectively), have issued regulatory relief that relaxes their enforcement approach during this time.

Undoubtedly, the question now is 'when'. There is little doubt that the government will need to focus on employment matters soon and any steps that the government may take will need to be significant enough to ensure that both employers and employees' interests are adequately protected.

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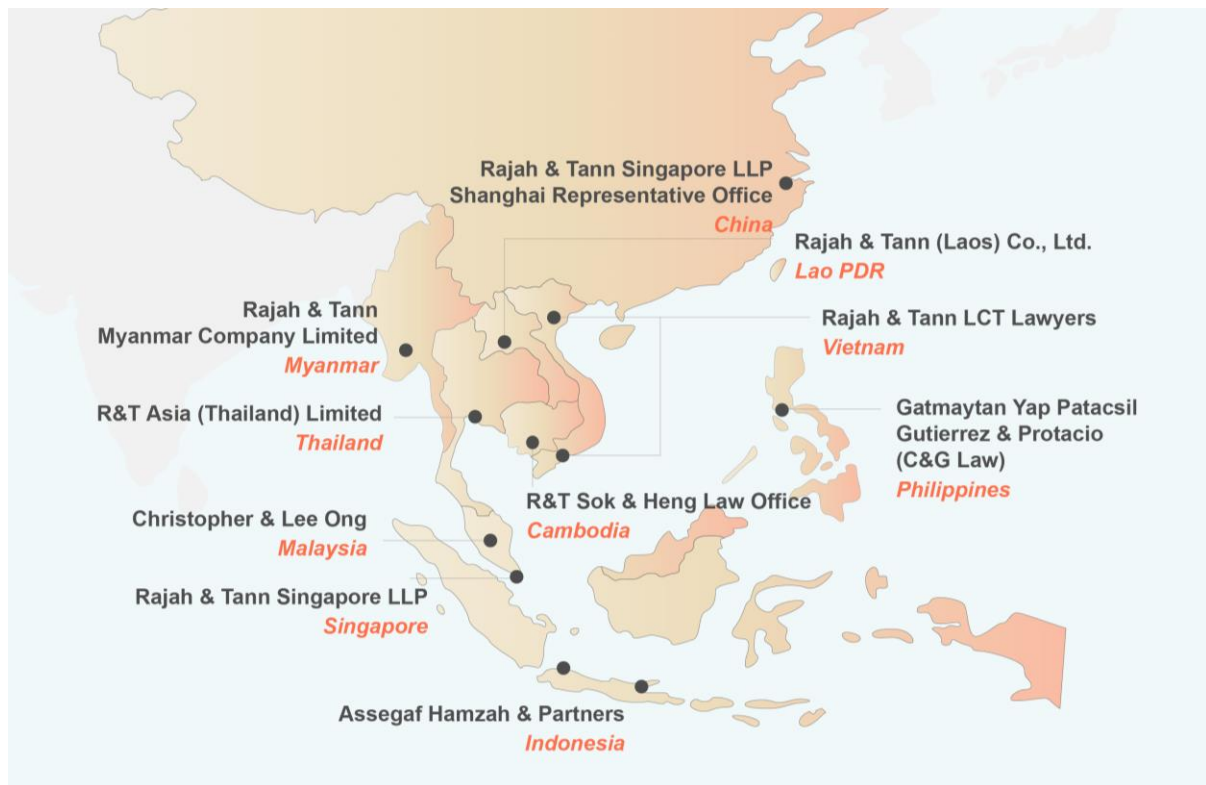
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