



Government Introduces New Rules on Expatriate Executives

The Manpower Ministry has issued Decree No. 40 of 2012 (the “Decree”), setting out a list of corporate offices/positions that are closed to expatriates (the full list in Bahasa Indonesia and the official ministry translation is given at the end of this Client Alert). The new rules have caused quite a lot of consternation and uncertainty in the business community given the lack of explanatory comment and clarity in the text of the Decree, which was issued on 29 February 2012 and entered into effect on the same date.

The Decree states that it is issued pursuant to Article 46(2) of the Manpower Law (No. 13 of 2003), which gives the Minister of Manpower authority to designate corporate offices/positions that are closed to expatriates. However, no reason is given as to why it has taken some nine years for such designations to be made.

Issue: President Director vs. CEO

The issue that is of paramount concern to many firms, and not just companies established under Indonesia’s foreign direct investment framework, is the fact that the office of CEO clearly appears on the list. This seems incongruous as all of the other positions (19 in total) are mid-level and relate to the human resources arena.

So, why is the office of CEO included? Following inquiries to officials at the Manpower Ministry in the immediate wake of the Decree’s issuance, AHP was informed that the list of positions/offices set out in the Decree is based on standard definitions employed by the International Labour Organization.

So far so good, but given that the office of CEO is not specifically recognized by Indonesian law, do the framers of the regulation intend the term “CEO” to signify “president director” (an office that is specifically recognized by Indonesian law)? According to our sources in the ministry, the answer to this is no. A CEO is appointed by the Board of Directors and is accountable to the board. Thus, the definition of CEO cannot be construed as also applying to the president director, who is automatically a member of the board. Furthermore, the view that president director does not equate to CEO is reinforced by Minister of Manpower Regulation No. PER. 02 / MEN / III / 2008, which specifically refers to the right of expatriates to serve as company directors and commissioners.

Damage Limitation

Faced with widespread criticism by both foreign-owned and local firms, the Manpower Ministry has posted an explanatory statement on its website. In the statement, Manpower Minister Muhaimin

Iskandar is quoted as saying that the Decree is only intended to apply to mid-level positions in the human resources field.

The issue is further elaborated on by Director General of Expatriate Manpower Placement Reyna Usman, who explains that the current confusion has arisen from the misinterpretation of the term CEO, which is in fact not known to Indonesian law. What is meant by “CEO” in the Decree, he continued, is the head of office administration or personnel, rather than the top officer of the company.

Prior to this, Minister Muhaimin had also been quoted by The Jakarta Globe English-language daily as saying that the Indonesian term kepala eksekutif kantor (executive head of office) had been incorrectly translated as “chief executive officer.”

Another senior ministry official, Titin Supenti, head of the expatriate manpower division, has stated that the Decree is not retroactive and that, as such, no existing appointments will be affected by it.

Sanctions

While the Manpower Law (which provides the basis for the issuance of the Decree) does not establish any criminal sanctions for a breach of Article 46(2), violations of the Decree will most assuredly attract administrative sanctions, including in the immigration field. In addition, any decisions taken by a company official who is illegally appointed to a prohibited office might be exposed to legal challenges

Conclusion

While at present senior ministry officials are insisting that the office of President Director is not covered by the Decree, it should be remembered that the Decree is a binding legal instrument and the views expressed by ministry officials are not fixed in stone and may change from time to time. Nevertheless, in the light of the discussion above, we believe that it is reasonably clear as things stand at the moment that a president directorship is not the equivalent of the office of CEO, and is therefore not covered by the Decree. However, given the current confusion in business and legal circles, the ministry would be well advised to issue an explanatory circular (surat ederan) so as to remove any lingering doubts.

List of positions closed to expatriates under Decree No. 40 of 2012

1. Personnel Director (Direktur Personalia), 2. Industrial Relations Manager (Manajer Hubungan Industrial), 3. Human Resources Manager (Manajer Personalia), 4. Personnel Development Supervisor (Supervisor Pengembangan Personalia), 5. Personnel Recruitment Supervisor (Supervisor Perekrutan Personalia), 6. Personnel Placement Supervisor (Supervisor Penempatan Personalia), 7. Employee Career Development Supervisor (Supervisor Pembinaan Karir Pegawai), 8. Human Resources Administrator (Penata Usaha Personalia), 9. Chief Executive Officer (Kepala Eksekutif Kantor), 10. Personnel and Career Specialist (Ahli Pengembangan Personalia dan Karir), 11. Personnel Specialist (Spesialis Personalia), 12. Career Advisor (Penasehat Karir), 13. Job Advisor (Penasehat Tenaga Kerja), 14. Job Advisor and Counseling (Pembimbing dan Konseling Jabatan), 15. Employee Mediator (Perantara Tenaga Kerja), 16. Job Training Administrator (Pengadmiistrasi Pelatihan Pegawai), 17. Job Interviewer (Pewawancara Pegawai), 18. Job Analyst (Analisis jabatan), 19. Occupational Safety Specialist (Penyelenggara Keselamatan).

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