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Government Moves to Further Restrict Outsourcing

Against a backdrop of rising labor unrest, the Minister of Manpower and Transmigration ("MoMT") recently issued Regulation No. 19 of 2012 (the "Regulation"), promulgated on 19 November 2012, which tightens up the existing rules on the outsourcing of work functions and labor needs, and repeals the existing outsourcing regulations (MoMT Regulations 101/MEN/VI/2004 and 220/MEN/X/2004),

In addressing the outsourcing issue, the Regulation distinguishes between outsourcing of work functions and outsourcing of labor.

(a) Outsourcing of Work Functions

The Regulation provides that an enterprise may outsource part of its work functions to an outsourcing provider subject to fulfillment of the following conditions:

(i) the outsourced work is separate from the enterprise's core operations;
(ii) the outsourced work is performed based on direct or indirect instructions from the enterprise;
(iii) the outsourced work must be an ancillary operation that supports or expedites the core operations of the enterprise, as evidenced by a work-process flowchart produced by a trade association, established in accordance with law, that represents the sector in which the enterprise operates;
(iv) the outsourced work, if not performed, would not prevent the enterprise from effectively conducting its operations.

Trade associations are required to prepare work-process flowcharts for the purpose of facilitating the identification of whether work that is outsourced is ancillary work or part of core operations in the sector. However, no deadline is given for the preparation of such flowcharts.

Under Article 5, the enterprise is required to report work that is outsourced, and all subsequent changes in respect thereof, to the relevant regency/municipal agency responsible for manpower affairs, which must issue an acknowledgement of receipt of such report. Should no acknowledgement be issued, the enterprise is prohibited from outsourcing the work. If the enterprise nevertheless insists on outsourcing the work, the workers employed by the outsourcing provider shall be deemed to be employees of the enterprise by operation of law (Article 7(2)).

The Regulation provides that a work outsourcing arrangement must be enshrined in a written agreement, which shall contain, among other things, guarantees for the protection of labor rights in accordance with the provisions of the laws and regulations in effect. Such agreement must be registered by the outsourcing provider with the relevant regency/municipal manpower agency. Should all of the

requirements be satisfied, the manpower agency is required to issue an acknowledgement of registration within five days.

Article 13 provides that every employment contract related to a work outsourcing arrangement shall contain terms guaranteeing the fulfillment of the worker's rights as provided by law, while Article 14 stipulates that every such contract shall be in writing and clearly define the relationship between the outsourcing company and the employee.

Under Article 15, an employee of an outsourcing company may be employed on a permanent or temporary basis.

Article 29(2) provides that if the employment contract is temporary, then it must, at a minimum, contain guarantees of (a) security of employment, (b) the fulfillment of the worker's rights under the law and the agreement, and (c) the protection of the worker's service rights should a change in outsourcing provider take place. Rights under point (c) consist of the right to leave, occupational insurance, religious holiday bonus; one day off per week; redundancy compensation; service-related pay increments; and such other rights as may be accorded by law or the worker's employment contract. Should these requirements not be fulfilled, then the relationship of employment will, by operation of law, be deemed to be permanent counting from the date of signing of the employment agreement.

(b) Outsourcing of Labor

Article 17 of the Regulation allows an enterprise to outsource part of its labor supply needs, provided that the work to be performed is of an ancillary nature and is not directly related to the production process.

Unlike its predecessors, the Regulation (Article 17(3)) expressly spells out the types of services that come within the definition of "ancillary work" or "not directly related to the production process," namely:

(i) cleaning services;
(ii) catering services;
(iii) security services;
(iv) support services in the mining or oil and gas sectors; and
(v) staff transportation services.

Read literally, paragraph (d) above would appear to provide a blanket exemption from the Regulation for the oil and gas sector as no definition is given of "support services." Nor is any explanation given as to why this particular industry, albeit a crucial one, should be excluded.

Meanwhile Article 18 prohibits labor supply companies (LSC) from farming out part of their contracts to subcontractors.

Under Article 19, employment contracts between an LSC and its employees must state the type of work to be performed, and contain an express stipulation that in a situation where one LSC is to be replaced by another and where the work to be performed is the same, the agreement between the enterprise and

the new LSC must incorporate an acknowledgement by the new LSC that it will hire the workers employed on the same work by the previous LSC.

In addition, the contract must state whether the worker is employed on a permanent or temporary basis. Pursuant to Article 20, outsourcing agreements must be registered with the regency/municipal manpower agency within 30 days of their signing. Should all of the requirements of Articles 19 and 20 be fulfilled, then the manpower agency must issue a receipt within not more than 7 days. Should the requirements not be fulfilled, then the agency may refuse to register the agreement. In such circumstances, the LSC will be prohibited from supplying outsourced labor under its agreement with the counterpart enterprise. Should the LSC insist on doing so in the absence of registration, its operating license (see below) may be revoked.

Article 25 stipulates that an LSC requires an operating license from the provincial manpower agency (only valid within the province), while Article 26 provides that such license is valid for three years, extendable every three years subsequently.

The Regulation provides that a labor supply arrangement must be enshrined in a written agreement, which must contain, among other things, guarantees for the protection of labor rights in accordance with the provisions of the laws and regulations in effect. Such agreement must be registered by the LSC with the relevant regency/municipal manpower agency.

Under Article 29(2), if an LSC employs a worker on a temporary basis, then the employment contract must, at a minimum, contain guarantees concerning (a) security of employment, (b) the fulfillment of the worker's rights under the law and the agreement, and (c) the protection of the worker's service rights should a change in LSC take place. Rights under point (c) consist of the right to leave, occupational insurance, religious holiday bonus; one day off per week; redundancy compensation; service-related pay increments; and such other rights as may be accorded by law or the worker's employment contract. Should these requirements not be fulfilled, then the relationship of employment will, by operation of law, be deemed to be permanent counting from the date of signing of the employment agreement.

Employment contracts between an LSC and its workers must be registered with the regency/municipal manpower agency. If not registered, the operating license of the LSC may be revoked.

Under Article 32, should one LSC be succeeded by another, the new LSC is required to take over existing employment contracts subject to the same terms and conditions as subsisted between the former LSC and its employees. In such circumstances, the length of time worked by an employee with the former LSC shall be deemed to also apply in the case of the new provider.

Article 33 provides that the implementation of the Regulation shall be overseen by Manpower Supervisors, but gives no further information as to how this will work in practice.

Under the Regulation's transitory provisions, outsourcing providers and LSCs, and the enterprises that employ them, are required to bring themselves into line with the Regulation within not more than one year.

Previous Challenges to Outsourcing

There has been a long-running campaign on the part of labor unions to have outsourcing banned completely, including a challenge to the constitutionality of a number of provisions of the Manpower Act (No. 13 of 2003) that recognized temporary employment contracts and outsourcing (see AHP Client Alert, 6 March 2012 - Constitutional Court Approves Outsourcing, But Imposes Tighter Rules on Use of Temporary Workers).

In that case (No. 27/PUU-IX/2011), the Constitutional Court found for the applicants, ruling that outsourcing companies are prohibited from employing workers on the basis of temporary contracts, unless the contract in question provides for the transfer (and continuity) of the employee's rights in a case where the work is still ongoing and the original outsourcing company or LSC has been replaced by another. The government quickly responded by issuing Directorate General of Industrial Relations and Manpower Social Security Circular No. B.31/PHIJSK/I/2012, dated 20 January 2012, which essentially adopted the Court's ruling and recommendations.

Conclusion

As explained in the preceding paragraph, the rules on outsourcing had already been tightened up prior to the Regulation, but the difference now is that certain vague issues (such as the types of work that may be outsourced) have been clarified and more stringent requirements for obtaining operating licenses introduced.

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