



Constitutional Court Approves Outsourcing, But Imposes Tighter Rules on Use of Temporary Workers

The Directorate General of Industrial Relations and Manpower Social Security has issued Circular No. B.31/PHIJSK/I/2012, dated 20 January 2012 (“DG Circular”), in response to the decision handed down by the Constitutional Court on 17 January in Case Number 27/PUU-IX/2011 (the “Decision”). In the Decision, the court tightened up the rules governing outsourcing, but did not, as some sources have suggested, outlaw the practice entirely. The DG Circular essentially adopts the recommendations of the court as regards protecting the rights of workers of outsourcing providers. The Decision followed a challenge to the constitutionality of a number of provisions of the Labor Law (No. 13

of 2003) that permit temporary employment contracts and outsourcing.

The Decision

The court found that outsourced workers on temporary contracts are denied job security due to (a) the possibility of the contract between the user of outsourcing services and the outsourcing provider expiring or being terminated; and (b) frequent replacement or substitution of outsourcing providers resulting in employees of such outsourcing companies being denied their entitlements under the Labor Law. In consequence, the court held that, as things stand, workers are being deprived of their rights under articles 28D(2) and 27(2) of the Constitution.

However, the court specifically recognized that it is entirely reasonable for a company to outsource operations and services for purposes of business efficiency. Therefore, it concluded that the crux of the matter lies in the fact that articles 65 and 66 of the Labor Law permit outsourced workers to be employed on the basis of temporary contracts without sufficient protection for their rights should an outsourcing company’s contract with the user of the outsourcing services expire or be terminated, or should one outsourcing company be replaced by another.

Based on the above reasoning, the court ruled that the phrase “temporary contract,” as used in articles 65(7) and 66(2)(b) of the Labor Law, is unconstitutional unless the employment contract in question provides for the transfer (and continuity) of workers’ rights in a case where the work in question is still ongoing, even though the original outsourcing company has been replaced by another.

Recommendations:

To resolve the problem, the court recommended a twofold approach:

- 1) that outsourcing companies only enter into permanent contracts with their employees.

-
- 2) using nomenclature borrowed from British employment legislation, the court recommended that the principles of “transfer of undertaking – protection of employment” (TUPE) be extended to cover cases where one outsourcing company is replaced by another. The court describes TUPE as the transfer of an outsourcing company's employment obligations to a replacement outsourcing company. TUPE means that the replacement company must continue to employ workers from the original company if the outsourced work in question is still ongoing. In addition, the new outsourcing company cannot change the previous work contracts, except by mutual consent to the benefit of the outsourced workers. In other words, the new outsourcing company should “take over” the contracts of its predecessor’s employees, meaning that the employees’ would thereby keep their service and other entitlements.

Government Response

Recognizing the disquiet the Decision has caused among both providers and users of outsourcing services, the Ministry of Manpower responded with uncharacteristic speed by issuing the DG Circular referred to in the introductory paragraph of this Client Alert, which essentially provides that should an employee’s contract with an outsourcing company not incorporate a TUPE clause, then the employment relationship must be based on a permanent contract, while temporary contracts will continue to be lawful provided that they incorporate TUPE clauses.

Conclusion

Despite what some commentators have said, the court has expressly upheld the constitutionality of both temporary employment contracts and outsourcing arrangements. However, outsourcing companies now have to take into account the need to protect the continuity of employee rights by either offering permanent contracts to their workers or incorporating a TUPE clause in their temporary contracts.

***AHP Client Alert** is a publication of **Assegaf Hamzah & Partners**. It brings an overview of selected Indonesian laws and regulations to the attention of clients but is not intended to be viewed or relied upon as legal advice. Clients should seek advice of qualified Indonesian legal practitioners with respect to the precise effect of the laws and regulations referred to in **AHP Client Alert**. Whilst care has been taken in the preparation of **AHP Client Alert**, no warranty is given as to the accuracy of the information it contains and no liability is accepted for any statement, opinion, error or omission.*



Menara Rajawali 16th Floor
Jalan Mega Kuningan Lot #5.1
Kawasan Mega Kuningan
Jakarta 12950 – INDONESIA

Telephone : (62-21) 25557800
Fax : (62-21) 25557899
E-mail : info@ahp.co.id
Web Site : www.ahp.co.id