

The Law on Job Creation

A New Dawn for Investment in Indonesia | 2020



Speed Read

The Law on Job Creation is an ambitious piece of legislation, amending or revoking 78 existing laws and introducing new provisions, with the aim of increasing investment and, by extension, generating jobs. It aims to resolve areas which have frequently caused problems for investors, including: (i) cumbersome licensing procedures; (ii) contradictory regulations and authorities; (iii) rigid labour legislation; and (iv) difficulty in procuring land. Additionally, the Law on Job Creation introduces a new sovereign wealth fund, aimed at driving more investments into Indonesia.

Background

On 2 November 2020, President Jokowi signed into law (as Law No. 11 of 2020) the Law on Job Creation (**Law on Job Creation** or this **Law**)¹. It is the most sweeping piece of legislation relating to investment in recent years, and, for the first time in Indonesia, a single piece of law amends or revokes a large number of existing laws (78 in total). While much of the controversy relates to the changes to the archaic manpower law, the Law on Job Creation's 'big bang' approach is a foundation that will set up an improved regulatory framework for investment in Indonesia.

This client alert will address some of the key provisions of the Law on Job Creation that may affect investors, namely: (i) the foreign investment regime; (ii) licensing; (iii) manpower; and (iv) land procurement.

Overview

The Law on Job Creation is a hefty 1,187-page piece of legislation that amends and revokes existing laws, as well as introducing new provisions, all with the stated aim of improving the investment climate and generating jobs. The key thematic changes under the Law on Job Creation include:

Ease of licensing and consolidation of the authority of the Central Government

Consolidation of foreign investment restriction

Framework on incentivizing investments

Revision on administrative sanctions

Manpower law amendments

Land and spatial planning amendments

¹ The People's Representative Council (*Dewan Perwakilan Rakyat*) passed the Law on Job Creation on 5 October 2020. Given the various versions of the bill circulating subsequently, we refrained from releasing this client alert earlier until the law had been enacted and we had seen the official text, to avoid any confusion for our clients.

There are also various industry-specific changes, with the below industries among others that are impacted by this Law.



Foreign Investment Restrictions and Incentives: A ‘Positive’ Step?

The full picture of the impact of the Law on Job Creation on investment will only be clear once the new Presidential Regulations implementing this Law are issued. However, the Law on Job Creation foreshadows simplification, the easing of investment restrictions and an expansion of investment incentives.

‘Open unless closed’ concept remains

Despite reports that the Law on Job Creation will adopt the concept of a ‘positive list’ (which implies that only businesses contained in a list will be open to investment), the concept of investment restrictions largely remains the same: i.e. all business activities are open for investment unless regulated otherwise.

The specific businesses that will remain with foreign ownership restrictions or fully closed are unclear at this stage; however, continuing the trend of previous Presidential Regulations on the Negative List, we would expect further relaxation of foreign investment restrictions.

Priority List

The elucidation to the Law on Job Creation gives a preview of the new Presidential Regulation implementing the investment section. While the current Presidential Regulation primarily contains restrictions and conditions to investment, the Law on Job Creation foreshadows that the Presidential Regulation will also contain a list of prioritized business fields that will be given: (i) fiscal incentives; and (ii) non-fiscal incentives².

Consolidation of investment restrictions

The provision in Article 2 of the Investment Law is now amended to affirm that the law is ‘the main reference’ for investments in all sectors in Indonesia. This revision is meant to consolidate the provisions on foreign investment restrictions.

Revisions to specific industry regulations such as the Postal Law and the Aviation Law, which remove express provisions regulating foreign ownership restrictions, indicate that the new Presidential Regulation will be the main reference on foreign investment restrictions.

Portfolio investment exclusion remains

Consistent with the existing investment law, the scope of the investment laws as amended by the Law on Job Creation do not apply to ‘portfolio’ investments. Although a few ministries may have a different view, generally this has been interpreted in practice to mean that publicly listed companies are not subject to foreign investment restrictions.

However, given the lack of the definition of ‘portfolio’ investment, there is some debate on whether majority ownership by a foreigner in a publicly listed company is subject to foreign investment restrictions. There was a precedent that gave rise to an interpretation that majority ownership in a publicly listed company is not a ‘portfolio’ investment. The Law on Job Creation remains silent on this, and this will be the subject of a continuing debate.

Wealth of the Nation: Indonesian Sovereign Wealth Fund

As part of the Law on Job Creation’s increased focus on attracting new investments into Indonesia, the Law on Job Creation sets out a specific chapter on government investments, which lays the groundwork for the investment activities of the Central Government, either through the Minister of Finance as the State Treasurer or a *sui generis* entity specially authorized to manage the Government’s investment activities.

This authorization to the *sui generis* entity also serves as the basis of the establishment of *Lembaga Pengelola Investasi* or the Indonesia Investment Authority under this Law.

² Such as ease of licensing, location, provision of infrastructure and energy and others

Licensing: Consolidation and Modernization



Licensing and its envisaged streamlining are one of the Law's key elements, and follows through on the recent attempts by the government to integrate and expand the use of technology in granting licenses through the Online Single Submission (OSS) system first introduced in 2018.

Risk-based approach

In addition to amending the licensing provisions of various sector-specific regulations, the Law also introduces a staggered licensing process via the risk-based licensing concept. Under the Law on Job Creation, a business' category will be evaluated based on certain criteria, which will determine the type of business documentation that will be applicable to the company.

An illustration of the risk-based licensing process is as follows:

	Low Risk	Medium Low Risk	Medium High Risk	High Risk
NIB ³	✓	✓	✓	✓
Standard certification statement (self)	✗	✓	✗	✗
Standard certification issuance (by regulator)	✗	✓	✓	✓ (Optional)
License	✗	✗	✗	✓

The risk category of the company will determine the type of business documentation/licenses that the company shall be subject to.

In addition to the above, the Law on Job Creation also updates the processes regarding zoning, environmental law compliance, and building certification, which will each be a precursory step (as applicable) for a business to obtain its general business license.

Environmental Licensing

Among the above, the most controversial point is the environmental law aspect, in which the Environmental License has now been removed from the environmental law compliance documentation. However, an Environmental Impact Analysis (AMDAL and UKL-UPL) still exists, now forms the "Environmental Approvals" (*Persetujuan Lingkungan*), and will still need to be prepared and obtained as a requirement to obtain the general business license.

Streamlining and Consolidation

Across the changes proposed by this Law, the message and key principle of the licensing process is clear, ie a streamlining of authorities between the Central and Regional Governments via the use of the Central Government's digital licensing platform.

The Law on Job Creation requires each head of Regional Government to utilize the integrated licensing system administered by the Central Government. Currently, we understand that to be the Online Single Submission (**OSS**) platform. To note, the Law on Job Creation still allows Regional Governments to develop their respective system to support the implementation of the integrated licensing system. This supporting system, however, must be in accordance with the standards stipulated by the Central Government.

³ Nomor Induk Berusaha or Business Identification Number

Manpower Law



The most controversial section of the Law on Job Creation is the manpower law section, which aims to amend the archaic manpower law which was last passed in 2003 and was perceived by many to be too employee friendly. We highlight below a few key provisions relevant to investment and M&A in Indonesia:

M&A and Termination Rights

A key concern in conducting mergers, acquisition, and consolidation (**M&A**) in Indonesia under the manpower law is that an M&A will trigger the right for the employees to unilaterally terminate their employments and collect severance⁴. This presents a risk to an acquirer that it would be obliged to pay a large severance payment upon an acquisition, and potentially disrupt the operation of the acquired company.

While there was hope that this issue would be addressed⁵, the Law on Job Creation only affirms the position that an M&A would trigger the right of the employee and the employer to elect to terminate the employment. The Law on Job Creation however changes a few things in relation to this right:

- (i) a 'change of status' (interpreted to include an IPO) no longer triggers this right to demand termination.
- (ii) the term 'change of ownership' is no longer used, which clarifies and affirms that change in minority shareholding does not trigger this right.
- (iii) a separation (*pemisahan*) which includes a spin-off now also triggers this right.
- (iv) for employer-initiated termination, the formula of severance pay is reduced. Where previously employees were entitled to 2x the severance component (*pesangon*) of the termination package, it is now only 1x.

Termination grounds

One major change in the grounds for termination is the ability to terminate employees based on 'efficiency' due to losses. Previously, termination on this ground would require closure of the company and after the company suffered losses for two years⁶. This addresses one of the key criticisms of the Manpower Law, and allows companies suffering losses to terminate its employees.

Severance Formula and Unemployment benefit

Another key change is that there is only one severance payment formula applicable to all grounds for termination. Previously certain grounds for termination would trigger 2x the severance component (*pesangon*).

There is also a reduction in the severance formula that must be paid. A terminated employee (depending on years of service) will be eligible for a maximum amount of 19 months' worth of pay (previously 32), which consists of: (i) 10 months' worth of severance pay; and (ii) 9 months' worth of long service pay, all provided by the employer. In addition, such employee will also be eligible for up to a maximum of 6 months' worth of pay, which will be paid through an Unemployment Benefit (*Jaminan Kehilangan Pekerjaan*) scheme from the Central Government.

⁴ However, the implementation of this is somewhat mixed, particularly in light of a Constitutional Court decision which seems to affirm that the right to terminate employment upon an M&A is with the employer.

⁵ A version of the draft Law on Job Creation previously circulated contained the removal of the employee's right to demand termination upon an M&A.

⁶ There is some ambiguity however as Article 154A(1)(b) grants employers the ability to terminate employees on the basis of 'efficiency' due to losses whether or not it leads to closure of the company. There is some contradiction however with Article 154A(1)(c) which allows termination due to closure caused by losses that continuously occur in two years. Given article 154A(1)(b), does not require the two years consecutive losses criteria, it would seem that the Article 154A(1)(c) is somewhat moot.

Fixed Term Employment

The provisions on fixed term employment has been one of the most contentious part of the manpower section of the Law on Job Creation. Previously, a fixed term employment was limited to a maximum timeframe⁷ – which has now been removed by the Law on Job Creation. While the timeframe is removed, the qualitative requirement that the nature of the work of a fixed term employee must be temporary in nature remains⁸. Further details on the type of work that can be classified as a fixed term employment will be regulated in a Government Regulation.

Another key change is that fixed term employees are entitled to a compensation amount at the end of their fixed term employments. The amount will be further regulated by a government regulation.

7 A three (3) year maximum period for fixed term employees, which was previously formulated as two (2) years plus a one (1) year extension, which can be renewed for another two (2) years.

8 A fixed term employee may only conduct the following works which, according to the type and nature or activity, such work will be completed within a certain time: (i) one-time or temporary work; (ii) work which is estimated to be completed in a short time; (iii) seasonal work; (iv) work related to new products, new activities, or additional products that are still in trial or investigation; or (v) work of which the type and nature or activity are not permanent.

Outsourcing

The Law on Job Creation also removes the previous provision that workers provided by an outsourcing company may only conduct auxiliary services. This could potentially increase outsourcing arrangements where outsourcing companies not only provide auxiliary services (eg cleaning or security services) but labour services related to main activities.



Land



Land procurement has often been cited as a key hurdle in realising public projects. Some of the amendments introduced by the Law on Job Creation aim to resolve this issue.

Land Procurement for Public Interest and Land Banks

The Law on Job Creation introduces a governmental institution called 'land bank body' that is responsible for guaranteeing the availability of land for, among others, public interests. The land bank body will manage land under the Right of Management (*Hak Pengelolaan* or **HPL**), which may serve as an underlying land title for, among others, the Right to Build (*Hak Guna Bangunan* or **HGB**). Parties that intend to obtain a HGB over the HPL land must enter into an agreement with the holder of the HPL right which, in this case, would be the land bank body.

For the purpose of supporting the investment, the Law on Job Creation authorizes the land bank body to carry out the land procurement. However, it remains to be seen how this authority will be implemented in practice.

The Law on Job Creation also adds a number of industries as potential beneficiaries of Law No. 2 of 2012 on Land Procurement for Development for Public Interest, ie. the development of oil and gas upstream and downstream industry, special economic area, industrial area, tourism area, food security area and technology development area, that is initiated and/or controlled by the Central Government, regional government, state-owned enterprise or regional government-owned enterprise.

Online Spatial Planning

The Law on Job Creation reiterates the mandate to integrate the online system of Detailed Spatial Planning (*Rencana Detail Tata Ruang* or RDTR)⁹ into the OSS system, in order to facilitate companies in reviewing/checking whether their businesses and/or activities are compliant with spatial planning.

To further facilitate land procurement for strategic projects, the Law on Job Creation affirms the ability of the Central Government to issue a 'recommendation of consistency of spatial utilisation activities' on the basis of a change in national strategic policy. Such a recommendation would allow areas that were originally not designated for certain activities under the existing spatial plans to be used to conduct such activities. This effectively allows a deviation from the existing spatial planning rules set by the regional government to facilitate a project.

Other key provisions

The Law on Job Creation also contains the following key provisions related to land:

- (i) Land or space above and/or below the land surface can be granted with *Hak Guna Bangunan*, *Hak Pakai* or *Hak Pengelolaan* right that can be held by a different land rights holder than the land rights holder of the land surface.
- (ii) Any land rights, permits, concessions on land plots and/or areas which are intentionally not cultivated or are abandoned for two years from the date that they were granted will be revoked and returned to the state. The Central Government can stipulate that such revoked land rights, permits and concessions on land plots and/or areas be included in the Land Bank.

⁹ The draft Law on Job Creation also expands the definition of RDTR under Law No. 24 of 2018 to include any zonation regulation of the regency/city that is attached to the regency/city spatial planning.

Commentary

The Law on Job Creation is touted to be a law that will drastically improve investment. However, in line with the nature of laws in Indonesia, the Law on Job Creation is only an initial foundation that will need to be built upon through the various implementing regulations and policies. To truly reach its potential, both the implementing regulations and the practices adopted by the Government need to align with the stated aims of this Law. The Government is in the process of finalising the various new Government Regulations and amendments to existing implementing regulations, each as mandated by the Law on Job Creation. We understand that, while the law itself provides a three-month period (as of 2 November 2020) for all of these to be completed, the President has verbally asked that his ministers do so within one month.

If you wish to explore the above further, please contact Ginting & Reksodiputro in association with Allen & Overy LLP.

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