

**JURIDICAL IMPLICATIONS OF BUSINESS LICENSING
REGULATIONS FOR OUTSOURCING COMPANIES POST
CONSTITUTIONAL COURT DECISION NUMBER 91/PUU-
XVIII/2020**

**IMPLIKASI YURIDIS PERATURAN PERIZINAN USAHA
TERHADAP PERUSAHAAN OUTSOURCING PASCA PUTUSAN
MAHKAMAH KONSTITUSI NOMOR 91/PUU-XVIII/2020**

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ABSTRACT

In 2020 the Supreme Court received a request for a judicial review of the formal review of Law Number 11 of 2020 concerning Job Creation. One of the main contents of the application is outsourcing. The Constitutional Court issued Decision Number 91/PUU-XVIII/2020, which stated that the Job Creation Law was Conditionally Unconstitutional. One of the essences of the Constitutional Court decision is to suspend all strategic policies with broad implications, and it is not justified to issue new implementing regulations related to the Job Creation Law. The method in this research is a normative legal research method. Normative legal research is legal research conducted by examining literature or secondary data. This study uses a statute approach. The statute approach is research that prioritizes legal materials in the form of laws and regulations as essential reference material in conducting research. The results of the study show that Constitutional Court Decision Number 91/PUU-XVIII/2020 suspends all actions/policies that are strategic and have broad implications. It is not justified to issue new implementing regulations related to the Omnibus Law on Job Creation so that the Government cannot issue new implementing regulations and the implementation of outsourcing still refers to the old provisions, namely the Regulation of the Minister of Manpower Number 19 of 2012 and its amendments.

Keywords: Outsourcing, Constitutional Court, Employment.

ABSTRAK

Pada tahun 2020 Mahkamah Agung menerima permohonan uji materiil atas uji formal Undang-Undang Nomor 11 Tahun 2020 tentang Cipta Kerja. Salah satu konten utama dari aplikasi ini adalah outsourcing. Mahkamah Konstitusi mengeluarkan Putusan Nomor 91/PUU-XVIII/2020 yang menyatakan UU Cipta Kerja Inkonstitusional Bersyarat. Salah satu esensi putusan MK adalah menanggukkan segala kebijakan strategis yang berimplikasi luas, dan tidak dibenarkan mengeluarkan peraturan pelaksanaan baru terkait UU Cipta Kerja. Metode dalam penelitian ini adalah metode penelitian hukum normatif. Penelitian hukum normatif adalah penelitian hukum yang dilakukan dengan meneliti kepustakaan atau data sekunder. Penelitian ini menggunakan pendekatan undang-undang. Pendekatan undang-undang adalah penelitian yang mengutamakan bahan hukum berupa peraturan perundang-undangan sebagai bahan acuan penting dalam melakukan penelitian. Hasil kajian menunjukkan bahwa Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020 menanggukkan segala tindakan/kebijakan yang bersifat strategis dan berimplikasi luas. Tidak dibenarkan mengeluarkan peraturan pelaksana baru terkait dengan Omnibus Law Cipta Kerja sehingga Pemerintah tidak dapat menerbitkan peraturan pelaksana baru dan pelaksanaan outsourcing tetap mengacu pada ketentuan lama yaitu Peraturan Menteri Tenaga Kerja Nomor 19 Tahun 2012 dan amandemennya.

Keywords: Outsourcing, Mahkamah Konstitusi, Ketenagakerjaan.

I. INTRODUCTION

Indonesia is a rule-of-law state, meaning that a country that stands above the law guarantees justice to its citizens. The rule of law means that no one is above the law, and the law reigns supreme. The administration of government power must be based on law, not the decree of the head of state. The state and other institutions in their actions must be based on the law and can be held accountable by law. The power to run the government is based on the rule of law and aims to maintain law and order.¹

Long before Indonesia's independence, the kingdoms in the Nusantara were familiar with the rule of law system. However, at that time, the concept of a rule of law state was based on customary law, namely state customary law, which was not written in a constitutional text. The administration of a legal state and the constitution cannot be separated because the constitution is the primary reference for living as a nation. The constitution was made to become a foundation for running the wheels of government. So, after declaring independence, the 1945 Constitution of the Republic of Indonesia was born.

The 1945 Constitution has undergone various changes since independence until now. After the amendment to the 1945 Constitution, the Indonesian state administration system recognized and gave birth to a judicial

¹ M. Tahir Azhary. (2003). Negara Hukum: Suatu Studi tentang Prinsip-Prinsipnya, Dilihat dari Segi Hukum Islam, Implementasinya pada Periode Negara Madinah dan Masa Kini. Jakarta : Prenada Media, 4.

institution, namely the Constitutional Court. Article 24, paragraph (2) of the 1945 Constitution has emphasized that the Supreme Court and the Constitutional Court carry out the exercise of judicial power. The presence of the Constitutional Court was due to demands for the concept of a democratic constitutional state.

The Constitutional Court as the executor of judicial power is essential because the Constitutional Court is the guardian of the constitution and an element of a democratic legal state. The Constitutional Court has direct contact with the constitution and is the center of state power, which aims to promote a check and balance mechanism. One of the powers of the Constitutional Court in carrying out its duties and functions is to conduct a judicial review of the 1945 Constitution.

On October 15, 2020, the Supreme Court received a request for a judicial review of the formal review of Law Number 11 of 2020 concerning Job Creation. One of the main contents of the application is outsourcing. Today's companies emphasize things that speed up processes for the sake of efficiency and effectiveness of the company. One way is to hand over part of the work to other parties through contracting services or labor providers, also known as outsourcing.

Legal protection for workers in work agreements with the outsourcing system has been regulated in articles 64 to 66 of Law Number 13 of 2003 concerning Manpower. Whereas in Law Number 11 of 2020 concerning Job Creation, there is an abolition of the provisions of Articles 64 and 65 of Law Number 13 of 2003 concerning Manpower and based on Article 81 number 20 of the Job Creation Law, which amends Article 66 paragraphs (4), (5), and (6) the Manpower Law stipulates that outsourcing companies must be in the form of legal entities and must fulfill business licenses from the central government.

Although further provisions regarding outsourcing company licenses based on derivatives of the Job Creation Law have not yet been issued, the previous regulation that applies is the Minister of Manpower Regulation Number 19 of 2012 and its amendments.

However, the Minister of Manpower Regulation Number 19 of 2012 and its amendments have been revoked and declared invalid by the Minister of Manpower Regulation Number 23 of 2021, which was effective on the date of promulgation, November 12, 2021, and retroactively since February 2, 2021.

However, later, the Constitutional Court issued decision Number 91/PUU-XVIII/2020, which stated that the Job Creation Law was Conditionally Unconstitutional. One of the essences of the Constitutional Court's decision is to suspend all strategic policies with broad implications, and it is not justified to issue new implementing regulations related to the Job Creation Law.

II. METHOD

The research method in this article is a normative legal research method. Normative legal research is legal research conducted by examining literature or secondary data.²

III. ANALYSIS AND DISCUSSION

a. Existence of Implementing Regulations for the Omnibus Law Regarding Outsourcing After the Constitutional Court Decision Number 91/PUU-XVIII/2020

With the ratification of the Omnibus Law, namely Law Number 11 of 2020 concerning Job Creation, on October 5, 2020, the Indonesian government introduced two main things related to the implementation of business activities, namely the positive list of investment and risk-based business licensing.

This risk-based business licensing regime is a new concept in implementing business activities to increase investment in Indonesia and simplify the flow of business licensing to make it more effective. This concept requires business actors to obtain permits for business activities based on the risks that may arise from these business activities.

Based on Government Regulation Number 5 of 2021, the risk level of business activities is divided into three classifications, which include:

- 1) Low-risk business activities;
- 2) Medium-risk business activities, which are divided into low, medium-risk business activities and medium-high-risk business activities; and
- 3) High-risk business activities.

The government has also determined risk level provisions, types of business licenses required, obligations and requirements that must be met, authority to issue licenses, and supervision of the business activity.

The Omnibus Law also impacts the implementation of business licenses in the outsourcing sector. According to Rajaguguk, outsourcing is a working relationship in which workers/laborers are employed in a company with a contract system, but the contract is not given by the employer company but by the company that sends the workers.³

Outsourcing arrangements are implicitly regulated in Law Number 3 of 2013 concerning Manpower, especially in articles 64 to 66. Outsourcing arrangements in Law Number 13 of 2013 cover the definition and procedure for obtaining the outsourcing permit.

The technical arrangements for implementing outsourcing are then regulated in Government Regulations and Ministry of Manpower Regulation Number 19 of 2012 concerning Conditions for Handing Over Part of the Implementation of Work to Other Companies where work relations with the outsourcing system can be carried out in two forms, namely a Specific Time Work Agreement (PKWT) and a Work Agreement Unspecified Time (PKWTT).

The requirements for worker service provider companies in the Minister of Manpower Regulation Number 19 of 2012 are regulated in Article 24, Article

² Soerjono Soekanto dan Sri Mamudji. (2001). *Penelitian Hukum Normatif Suatu Tinjauan Singkat*. Jakarta:Rajawali Pers.

³ Rajaguguk dalam Abdul Khakim. (2009). *Dasar-Dasar Hukum Ketenagakerjaan Indonesia*. PT. Citra Aditya Bakti. Bandung. 1(3), 74.

25, and Article 26. The provisions of Article 24 point "a" that worker/labor service provider companies must be in the form of Limited Liability Company legal entities (PT) established under the provisions of laws and regulations. Based on this provision, if the company providing workers/labor services is not a Limited Liability Company, then the employment relationship of outsourced workers based on Article 66 paragraph (3) and paragraph (4) of the Manpower Law shifts to the user company..

In addition, the requirement for an outsourcing company to run its business is that it must have an operational permit. The operational permit can be obtained by applying to the agency responsible for human resources affairs where the work is carried out or the Manpower Office in the local Regency/City. The operational permit is only valid for three years and can be extended simultaneously. Outsourcing companies must also make mandatory reports to the Ministry of Manpower.

After the Job Creation Law came into force, based on Article 81, number 18, and number 19, the provisions of articles 64 and 65 of Law Number 13 of 2003 were deleted. Article 66 paragraphs (4), (5), and (6) of Law Number 13 In 2003 it was amended by Article 81 point 20 of the Job Creation Law, making outsourcing companies must be in the form of a legal entity and must fulfill a business license from the central government, the entire provision reads:

- 1) As referred to in paragraph (1), the outsourcing company is a legal entity and is required to fulfill a Business Permit issued by the Central Government.
- 2) As referred to in paragraph (4), business licensing must comply with the norms, standards, procedures, and criteria stipulated by the Central Government.
- 3) Further provisions regarding worker protection, as referred to in paragraph (2), and Undertaking Licensing as referred to in paragraph (4), are regulated in a Government Regulation.

With the existence of this regulation, what was initially licensing regulations at the local Regency/City Government level was transferred to the Central Government. As a result of the promulgation of the Job Creation Law, the Minister of Manpower then issued a regulation in the form of Minister of Manpower Regulation Number 23 of 2021. At least 19 Minister of Manpower Regulations were revoked, including Minister of Manpower Regulation Number 19 of 2012 and its amendment rules.

However, the Constitutional Court then issued Decision Number 91/PUU-XVIII/2020 which in essence stated that:

- 1) The formation of the Job Creation Law is contrary to the 1945 Constitution and must be corrected within two years of the pronouncement of the decision.
- 2) The Job Creation Law is still in force until the formation is corrected according to the deadline.
- 3) Order the legislators to make improvements within a maximum period of 2 years after the decision is pronounced, and if no corrections are made, the Job Creation Law will become permanently unconstitutional.

- 4) If within two years, the legislator cannot complete the revision of the Job Creation Law, then the law or articles or content material of the law that has been revoked or amended by the Job Creation Law is declared to be valid again.
- 5) It is suspending all strategic policies that have broad implications and are not justified in issuing new implementing regulations related to the Job Creation Law.

The legal consequences of the Constitutional Court's decision began when it was pronounced. The applicability of a material norm, the content of paragraphs, articles, and parts of a law declared non-binding by the Constitutional Court may no longer be stretched forward. Thus, based on point number 5 in the above decision, the Government cannot issue new implementing regulations regarding outsourcing as regulated by the Minister of Manpower Number 19 of 2012, which was previously revoked by Regulation of the Minister of Manpower Number 23 of 2021. Therefore, in practice, all implementation outsourcing still refers to the old provisions.

b. The Impact of the Constitutional Court Decision Number 91/PUU-XVIII/2020 on the Implementation of Business Licensing for Outsourcing Companies

With the suspension of the Job Creation Law and its implementing regulations by the Constitutional Court Decision Number 91/PUU-XVIII/2020, the Minister of Manpower Regulation Number 23 of 2021, which previously revoked 19 Minister of Manpower Regulations was canceled and re-enforced these regulations.

Provisions for implementing outsourcing business licenses again refer to the Regulation of the Minister of Manpower Number 19 of 2012 and its amendments. Even though the Constitutional Court Decision Number 91/PUU-XVIII/2020 does not invalidate the articles or content material of the law, which has been revoked or amended by the Omnibus Law on Job Creation so that the Central Government still issues fulfillment of business permits.

Based on the author's observation, until now, there are no other regulations regarding the implementation of outsourcing business licensing. Therefore, licensing for outsourcing companies can refer to Article 24 paragraphs (1) and (2) of the Minister of Manpower Regulation Number 11 of 2019, namely as follows:

- 1) Every Labor Service Provider Company is required to have a business license to provide Labor Worker services.
- 2) To be able to have a business license, Employment Service Provider Companies apply to the OSS Institution and meet the following requirements:
 - a) a business entity in the form of a legal entity established by the provisions of laws and regulations and engaged in the business of providing labor services; and
 - b) have a Business Identification Number issued by the OSS Institution.

Thus, applications for business licenses for outsourcing companies or outsourcing companies are submitted to the OSS agency, not the Manpower Office.

IV. CONCLUSION

Based on the description and results of the research conducted, several conclusions can be drawn as follows:

- 1) Constitutional Court Decision Number 91/PUU-XVIII/2020 suspends all strategic policies with broad implications. It is not justified to issue new implementing regulations related to the Job Creation Law so that the Government cannot issue new implementing regulations. Outsourcing implementation still refers to the old provisions, namely Regulation of the Minister of Manpower Number 19 of 2012 and its amendments.
- 2) The implementation of licensing for outsourcing companies refers to Article 24, paragraphs (1) and (2) of the Minister of Manpower Regulation Number 11 of 2019 concerning the second amendment to the Minister of Manpower Regulation Number 19 of 2012 concerning the conditions for handing over part of the implementation of work to other companies, namely applications for business licenses outsourcing is submitted to the OSS agency, not to the Manpower Office.

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