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Judicial Review on the Job Creation Law

Background

On November 25, 2021, the Constitutional Court of the Republic of Indonesia decided that the lawmaking procedures of Law Number 11 Year 2020 on Job Creation Law ("**Job Creation Law**") is conditionally unconstitutional in its decision number 91/PUU-XVIII/2020. This sets a new precedent, where the Constitutional Court has ruled on a formal judicial review petition.

This Court decision is in response to a petition on the formality review of the Job Creation Law submitted by six petitioners, consisting of three individual petitioners and three non-government organizations.

The petitioners basically argued that the lawmaking of the Job Creation Law was in contradiction with Articles 22A of the Constitution and Law 12 Year 2011 on Law Making Procedures ("**Law 12 Year 2011**"). The merits of the case in the petition focus on the unconstitutionality of the lawmaking procedures in accordance with Law 12 Year 2011. The formality procedures which were neglected are:

- (i) the adoption of Omnibus Law techniques failed to observe the drafting and structuring of law under attachments I and II, Law 12 Year 2011;
- (ii) the preparation of the Job Creation Law lacks the formality principles of lawmaking procedures, namely (1) clarity of purpose; (2) versatility and result; (3) clear formulation; and (4) transparency;
- (iii) there are substantial discrepancies in the Job Creation bill between the enacted version (by the President and House of Representatives) and its final version.

It is clear from the petition that the petitioners focused on the constitutional review of the formality of the Job Creation Law. The petition did not contain or place merits of the case on substantive or material reviews. It is important to keep this in mind to understand the Court decision, which is formal in nature.

The Court ruled the lawmaking procedures of the Job Creation Law to be conditionally unconstitutional

The Court ruled on the formality of the Job Creation Law by setting out the conditions of such unconstitutionality, and imposed obligatory revisions by the Government. The full script of the decision follows:

1. Declare the petition of Petitioner I and Petitioner II can not be accepted;
2. Grant in part the petition of Petitioner III, Petitioner IV, Petitioner V, and Petitioner VI;
3. Declare that the formation of the Job Creation Law is unconstitutional and shall not be legally in so far as not interpreted to mean “it is not revised in 2 years since this decision is pronounced”;
4. Declare the Job Creation Law remains in effect until the revisions are made within the deadline as specified in this decision;
5. Order the lawmakers to perform revision in the period of a maximum of 2 years after this decision is pronounced; if within the given period no revisions are performed, then the Job Creation Law shall be permanently unconstitutional;
6. Declare in the event the lawmakers are unable to complete the revision of the Job Creation Law within the period of 2 (two) years then any law or clauses or substances of the law that have been revoked or amended by Job Creation Law shall be reinstated to be valid;
7. Declare to suspend any strategic and great impact action/policy, and shall be restricted to issue new implementing regulations pertaining to the Job Creation Law;
8. Order this decision to be included in the State Gazette;
9. Reject any other and the remaining petition of the Petitioners.

Furthermore, we can read from the deliberation of the judges on ruling on the formality judicial review that the formation of the law is problematic, as follows:

1. The omnibus method was not recognized by the Indonesian legal system especially under the Law 12 Year 2011. It is unclear whether the Job Creation Law is considered a new law, an amendment to the existing law, or a revocation of the existing law. In addition, according to the Constitutional Court Judges, the making of the Job Creation Law is not in line with the procedures as regulated by the Law 12 Year 2011.
2. The Constitutional Court Judges find several inconsistencies between the enacted version and final version of the Job Creation Law draft. These inconsistencies are considered not to conform with the principle of clear formulation, as stipulated under the Law 12 Year 2011.
3. The formation of the Job Creation Law does not accommodate sufficient participation from the public. The court recognized that the Government organized hearings sessions with various community groups, but that such hearings did not focus on the academic script or amended provisions of the Job Creation Law.

From the decision and its deliberation, it is clear that the Court only ruled on formal judicial review: the ruling does not cover any argumentation on certain substance or articles of the law.

The Job Creation Law and its implementing regulations remain in effect

In point 4 of its ruling, the Court decisively confirmed that the Job Creation Law is still in effect for the latest 2 years, until revision of the law formation procedures are in place. Since the decision solely ruled on the formality of the law, then the effectiveness of the Job Creation Law also applied to its implementing regulations, including among others any provisions of ease of doing business, investment activities and risk-based approach licensing. The validity of the Job Creation Law was also confirmed by President Joko Widodo in his statement to the public on 29 November 2021. President Jokowi reaffirmed the commitment of

the government, and that legal certainty for ease of investment shall be continued and ensured under his presidency.

However, during the next 2 years, it should be noted that any unissued implementing regulations shall be suspended until revision to the Job Creation Law is made. This means that there could be regulatory gaps for certain matters which might require further implementing regulations as set out in the Job Creation Law. Such a regulatory gap may have an impact on certain business plans or activities, meaning that investors or business sectors will need to identify and assess any risks and find mitigation plans.

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