



CLIENT ALERT

**Keberlakuan UU Cipta Kerja Pasca Putusan
Mahkamah Konstitusi: Bagaimana Dampaknya
Terhadap Perusahaan?**

***(Job Creation Law Enforceability in the Post
Constitutional Court Verdict: How Does It Impact
Corporation?)***

JAKARTA, 28 NOVEMBER 2021

INTEGRITY CLIENT ALERT

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(Job Creation Law Enforceability in the Post Constitutional Court Verdict: How Does It Impact Corporation?)

Oleh:

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Tareq Muhammad Aziz Elven, S.H.

Undang-Undang Nomor 11 Tahun 2020 tentang Cipta Kerja (“**UU Cipta Kerja**”) diputus inkonstitusional bersyarat (*conditionally unconstitutional*) oleh Mahkamah Konstitusi Republik Indonesia (“**MK**”) berdasarkan Putusan Nomor 91/PUU-XVIII/2020, tanggal 25 November 2021. Meskipun dinyatakan bertentangan dengan UUD 1945, MK menyatakan UU Cipta Kerja “masih tetap berlaku sampai dengan dilakukan perbaikan”. MK lalu memerintahkan Presiden dan DPR, serta DPD, untuk melakukan perbaikan paling lambat 2 (dua) tahun sejak putusan dibacakan. Meskipun masih berlaku, terdapat amar putusan lain yang memerintahkan penangguhan segala tindakan/kebijakan yang bersifat strategis dan berdampak luas, serta tidak dibenarkan pula menerbitkan peraturan pelaksana baru. Keberadaan amar yang cenderung saling bertolak belakang, satu sisi menyatakan masih berlaku tetapi sisi lain memerintahkan penangguhan pelaksanaan tersebut justru berpotensi menciptakan ketidakpastian hukum yang dapat mengganggu iklim bisnis dan berbagai aksi korporasi. Atas dasar itu, penting bagi **Indrayana Centre for Government, Constitution, and Society (INTEGRITY) Law Firm** memberikan *alert* atas dampak putusan MK tersebut.

SELURUH ATURAN UU CIPTA KERJA BERSIFAT STRATEGIS DAN BERDAMPAK LUAS

Melihat 2 (dua) amar keberlakuan UU Cipta Kerja yang berpotensi saling bertolak belakang, jika dibaca secara sistematis, maka pendapat yang menyatakan keberlakuan UU Cipta Kerja harus ditangguhkan, jauh lebih kuat. Meskipun MK menyatakan UU Cipta Kerja masih berlaku selama 2 (dua) tahun ke depan, namun tetap harus ditangguhkan untuk tindakan/kebijakan yang bersifat strategis dan berdampak luas. Pasalnya, setiap hal yang diatur dalam UU Cipta Kerja sejatinya memuat hal yang strategis, dan karenanya berdampak luas. Hal ini mengacu pada Pasal 4 UU Cipta Kerja itu sendiri yang mengatur:

PASAL 4 UU CIPTA KERJA:

Dalam rangka mencapai tujuan sebagaimana dimaksud dalam Pasal 3, ruang lingkup Undang-Undang ini mengatur kebijakan strategis Cipta Kerja yang meliputi:

- peningkatan ekosistem investasi dan kegiatan berusaha;
- ketenagakerjaan;
- kemudahan, perlindungan, serta pemberdayaan koperasi dan UMK-M;
- kemudahan berusaha;
- dukungan riset dan inovasi;
- pengadaan tanah;

- g. kawasan ekonomi;
- h. investasi Pemerintah Pusat dan percepatan proyek strategis nasional;
- i. pelaksanaan administrasi pemerintahan; dan pengenaan sanksi.

Mengingat UU Cipta Kerja adalah peraturan pada level undang-undang yang memiliki sifat mengikat secara umum, sudah tentu pengaruh yang dihasilkan berdampak luas. Dengan demikian, menggunakan logika pikir di atas, pasti akan muncul pemahaman bahwa seluruh keberlakuan UU Cipta Kerja harus ditangguhkan karena bersifat strategis dan berdampak luas.

Oleh karena itu, akan ada dorongan kuat bahwa semua pelaksanaan dan/atau kebijakan yang berdasarkan UU Cipta Kerja mesti ditangguhkan. Jika tetap dilaksanakan menjadi bertentangan dengan putusan MK, dan dapat dimaknai melawan hukum. Perlawanan hukum demikian dapat membawa akibat bahkan sanksi hukum baik di bidang perdata, pidana, ataupun administrasi. Padahal UU Cipta Kerja sudah mempunyai banyak peraturan pelaksanaan, yang tentu saja secara logika hukum harus ditangguhkan pula penerapannya, termasuk banyak hal yang berkaitan dengan ekonomi dan bisnis. Maka, putusan MK memang akan mempunyai dampak yang besar terhadap iklim usaha, terlebih putusan itu sendiri berpotensi menimbulkan berbagai interpretasi ketika dilaksanakan.

KEMBALINYA KEWENANGAN PTUN UNTUK MEMERIKSA PERMOHONAN FIKTIF POSITIF

Salah satu hal yang paling strategis dan berdampak luas adalah mengenai tersendatnya hak perusahaan dalam mengajukan permohonan mendapatkan keputusan, seperti perizinan, sertifikasi, sub perizinan, dan lain sebagainya. Pasal 175 angka 6 UU Cipta Kerja yang merubah Pasal 53 UU Administrasi Pemerintahan, mengarahkan upaya mendapatkan keputusan yang demi hukum dianggap dikabulkan, tidak lagi diajukan ke Pengadilan Tata Usaha Negara (“PTUN”), melainkan menunggu pengaturan lebih lanjut dalam Peraturan Presiden. Sementara, Perpres yang dimaksud tidak kunjung diterbitkan akibat terjadi “salah kutip” pasal. Dampaknya, hampir seluruh permohonan fiktif positif yang diajukan oleh perusahaan dan warga masyarakat lainnya akibat permohonan perizinannya tidak kunjung ditanggapi pejabat yang bersangkutan, tidak dapat diterima oleh PTUN (*niet onvankelijke verklaard*) dengan pertimbangan yang seragam, yakni PTUN kehilangan dasar hukum dalam mengadili pasca diterbitkannya UU Cipta Kerja.

Akibat hal ini, banyak perusahaan yang sedang dalam posisi menunggu untuk mengajukan langkah hukum ke PTUN atas pengabaian permohonan perizinan ke instansi tertentu. Kini, pasca dibacakannya Putusan Nomor 91/PUU-XVIII/2020, PTUN kembali memiliki dasar hukum untuk memeriksa, mengadili, dan memutus permohonan penerbitan keputusan (perizinan, sertifikasi, dll) yang demi hukum dianggap dikabulkan (fiktif positif). Oleh sebab itu, saat ini adalah waktu yang sangat tepat untuk mulai menempuh permohonan fiktif positif ke PTUN.

JUSTRU MENIMBULKAN KETIDAKPASTIAN

Putusan MK yang dimaksudkan untuk memberikan kepastian hukum, justru sejak selesai dibacakan menghadirkan pembelahan pandangan yang tajam tentang bagaimana keberlakuan dan pelaksanaan UU Cipta Kerja setelah putusan tersebut. Kita semua akan berhadapan dengan ketidakpastian. Karena itu pemerintah, DPR dan DPD harus segera mengambil langkah cepat untuk memberi landasan hukum bagi proses baku pembuatan UU Cipta Kerja dengan metode *omnibus law*,

yang menjadi dasar MK menyatakan pembuatan UU Cipta Kerja bertentangan bersyarat dengan konstitusi, dan diberi masa perbaikan selama 2 (dua) tahun.

Solusi atas ketidakpastian atas putusan MK adalah dengan mengubah Undang-Undang Pembentukan Peraturan Perundang-Undangan (UU 12 Tahun 2011 yang diubah dengan UU 15 Tahun 2019), dan memasukkan metode baku pembuatan *omnibus law*. Meskipun, pasti ada desakan kuat untuk tidak hanya memperbaiki proses legislasi, tetapi juga substansi UU Cipta Kerja itu sendiri. Tanpa ada kejelasan arah dan ketegasan sikap dari pembuat undang-undang, maka ruang publik akan disesaki dengan perdebatan tentang UU Cipta Kerja, terlebih perhelatan politik akbar pemilu kepala daerah, parlemen, dan presiden yang semakin dekat di tahun 2024.

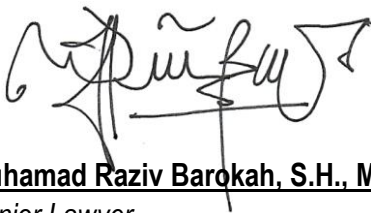
Demikian **INTEGRITY Client Alert** ini kami sampaikan, semoga bermanfaat.

Salam Integritas,
INTEGRITY Law Firm



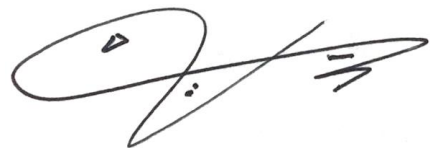
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6. Abdulatief Zainal, S.H.
7. Muhammad Rizki Ramadhan, S.H.
8. Musthakim Alghosyaly, S.H.
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TENTANG INTEGRITY



Indrayana Centre for Government, Constitution and Society (INTEGRITY) Law Firm diinisiasi oleh Denny Indrayana, Guru Besar Hukum Tata Negara, yang telah berpengalaman sebagai penasihat khusus Presiden Republik Indonesia untuk bidang Hukum, HAM dan Pemberantasan KKN (2008 – 2011); dan Wakil Menteri Hukum dan HAM (2011 – 2014). Sejak

2015, Denny Indrayana pernah menjadi Guru Besar Tamu (Visiting Professor) di Melbourne University Law School (2016 – 2019), sekolah hukum terbaik di Australia.

PRAKTIS AREA

Business Competition Disputes | Corporate Law | Investment Law | Capital Market Law | Business Licensing | Tax Law | Banking Law | Asset Recovery | Bankruptcy Law | Labour Law | Immigration Law | Land Disputes | Civil Law | Criminal Law | General Election Disputes | State Administrative Claims | Constitutional Law Disputes | Constitutional Review at the Constitutional Court | Judicial Review at the Supreme Court | Good Governance | Good Corporate Governance | Drafting of Public & Corporate Regulations | Natural Resources Disputes | Intellectual Property Rights | Environmental Law | Family Law

PROGRAM

Selain bergerak di bidang Litigasi, Konsultasi dan Riset, INTEGRITY juga mempunyai program-program rutin berupa:

1. **INTEGRITY Constitutional Advocacy** adalah litigasi yang diinisiasi oleh INTEGRITY terkait isu publik, termasuk pengujian peraturan perundangan di MK atau MA.
2. **INTEGRITY Constitutional Discussion** adalah diskusi rutin yang membahas isu-isu hukum aktual, dan mencari solusi.
3. **INTEGRITY Legal Training** adalah pendidikan dan pelatihan keahlian hukum praktis seperti *legal audit*, *legal writing*, *anti-corruption training*, *legal drafting*, dan pelatihan hukum lainnya.
4. **INTEGRITY Legal Update** adalah kajian tentang isu hukum aktual, baik dalam bentuk artikel singkat maupun bentuk lainnya.
5. **INTEGRITY Scholarship** adalah beasiswa tahunan yang diperebutkan melalui lomba karya tulis ilmiah yang finalisnya diundang untuk mempresentasikan dan memperdebatkan topiknya melawan finalis lainnya.

INTEGRITY CLIENT ALERT

Job Creation Law Enforceability in the Post Constitutional Court Verdict: How Does It Impact Corporation?

Adv. Prof Denny Indrayana, S.H., LL.M., Ph.D.

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On the 25th of November 2021, the Constitutional Court of Indonesia declared Law Number 11 of 2020 on Job Creation (broadly known as **Job Creation Law**) conditionally unconstitutional under verdict Number: 91/PUU-XVIII/2020, mentioned the Law is against the 1945 Constitution. The verdict does not necessarily annul the Job Creation Law, yet it is still applicable until amendments are made and ordered the President, the House (DPR), and the Senate (DPD) to amend the Law within a 2-year period. Albeit its applicability, there are other phrases written in the verdict which orders the Government to refrain from performing any acts or policies that are strategic and have broad impacts related to the Job Creation Law, together with halt the issuance of new implementing regulations. These likely contradictory orders, on the one hand, states that they are still applicable, but on the other hand, order the suspension of its implementation, bringing the situation to a potential legal uncertainty which may disrupt the business climate and various corporate actions. On that basis, **Indrayana Centre for Government, Constitution, and Society (INTEGRITY) Law Firm** provides this alert on such impact of Court's verdict.

ALL NORMS OF JOB CREATION LAW ARE STRATEGIC AND HAVE BROAD IMPACTS

Looking at the 2 (two) potentially contradicting phrases in the verdict on the implementation of the Job Creation Law, if systematically read, the opinion stating the Job Creation Law should be halted is more convincing. Despite the Court states that the Job Creation Law would still be in effect for the next 2 (two) years, strategic and broad-impact acts or policies still have to be halted. However, all norms in the Job Creation Law embodies strategic matters and therefore has a broad impact. This refers to Article 4 of the Job Creation Law which regulates:

Article 4 of the Job Creation Law:

*In order to achieve the objectives as referred to in Article 3, **the scope of this Law regulates strategic policies** of Job Creation which includes:*

- a. *investment ecosystem improvement and business activities;*
- b. *employment;*
- c. *facilitation, protection, and empowerment of cooperatives and SMEs;*
- d. *ease of doing business;*
- e. *research and innovation support;*
- f. *land acquisition;*
- g. *economic area;*
- h. *central government investment and national strategic projects acceleration;*
- i. *implementation of government administration;*
- j. *and imposition of sanctions.*

Given the circumstances the Job Creation Law is a regulation at the level of the statute that generally has a binding nature, there will be a strong urge to halt the full implementation of the acts or policies. If not, it will be contrary to the Court's verdict and, therefore, can be interpreted as being against the law. Such legal resistance may result in civil, criminal, or administrative sanctions. In fact, the Job Creation Law contains a slew of implementing regulations, all of which must logically be halted, including those pertaining to the economy and business. In consequence, the Court's verdict will undoubtedly have a significant impact on the business climate, putting its own verdict on the potential of vagueness in execution.

RETURN OF THE ADMINISTRATIVE COURT AUTHORITY TO TRY POSITIVE FICTIONAL PETITION

One of the most strategic and has a broad impact is the delay in the rights of corporations to petition for decisions, such as licensing, certification, sub-licensing, etc. Referring to Article 175 number 6 of the Job Creation Law which amends Article 53 of the Government Administration Law, directs attempts to obtain a decision which by law is considered granted, no longer petitioned to the Administrative Court and instead awaits further Presidential Regulation. However, due to "misquoting" articles, the Regulation in question has not been issued. Consequently, nearly all positive fictional petitions filed by corporations and other parties due to licensing applications have not been granted by the officials concerned, cannot be accepted by the Court (*niet onvankelijke verklaard*) with uniform considerations that the Court has no legal basis to try such petitions after the issuance of the Job Creation Law.

Under the circumstances, many corporations are in a waiting position to submit legal steps to the Court for the ignored licensing applications they have been submitting to the officials concerned. As of today, the Court wins back the authority to examine, try, and decide on petitions for the issuance of decision (be it permits, certifications, etc.) which by law are considered granted (positive fictional). Thus, this is the moment to file positive fictional petitions to the Court.

VAGUENESS OF THE VERDICT

The Constitutional Court's verdict, which was intended to provide legal certainty, has sparked debate on its enforceability in the post-hearing period. We are likely to face legal uncertainty, therefore, urging the Government, the DPR, and the DPD to take immediate action to provide a legal basis for the Job Creation Law through the omnibus law method, which is the basis for the Court ruling that it is conditionally against the 1945 Constitution, despite its given 2-year period of redrafting.

One solution to this legal uncertainty over the verdict is to amend Law Number 12 of 2011 as revised by Law Number 15 of 2019 on the Statutory Instruments and put the standard method of omnibus law drafting into the Law. Not to mention that there must be strong demand to alter not only amend the technical legal drafting, but also the norms of the Job Creation Law itself. Without clear guidance and firm

action of the lawmakers, the public arena will be flooded with unavoidable debates on the Job Creation Law, taking into account the upcoming local head, parliamentary, and presidential elections in 2024.

Thus, this INTEGRITY Client Alert is conveyed, we hope it will be useful.

Salam Integritas,
INTEGRITY Law Firm.



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ABOUT INTEGRITY



Indrayana Centre for Government, Constitution and Society (INTEGRITY) Law Firm was initiated by Denny Indrayana, a Professor of Constitutional Law, who has experience as a Special Staff for Law, Human Rights, and Anticorruption to the President of the Republic of Indonesia (2008 – 2011); and Deputy Minister of Law and Human Rights (2011 –

2014). Since 2015, Denny Indrayana has been a Visiting Professor at Melbourne University Law School (2016 – 2019), the best law school in Australia.

PRACTICE AREAS

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PROGRAMS

Apart from engaging in Litigation, Consulting, and Research, INTEGRITY has regular programs such as:

1. **INTEGRITY Constitutional Advocacy** is a litigation measure initiated by INTEGRITY related to public issues, including judicial reviews in the Constitutional Court or Supreme Court of the Republic of Indonesia.
2. **INTEGRITY Constitutional Discussion** is a regular discussion that addresses actual legal issues and seeks solutions.
3. **INTEGRITY Legal Training** is a legal education and training in practical legal skills such as legal auditing, legal writing, anticorruption workshop, legal drafting, and other legal training.
4. **INTEGRITY Legal Update** is a research of actual legal issues, both in the form of short articles and other forms.
5. **INTEGRITY Scholarship** is an annual scholarship that is contested through a scientific writing competition in which finalists are invited to present and debate their topic against other finalists.

INTEGRITY

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