

LEGAL PROTECTION ON OUTSOURCING WORKERS AFTER THE IMPLEMENTATION OF LAW NUMBER 11 OF 2020 CONCERNING JOB CREATION

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ABSTRACT

This article aims to find out, First, regarding the employment relationship of the outsourcing system contained in the Job Creation Law as an Amendment to the Manpower Act; Second, efforts to protect workers in outsourcing arrangements to create a prosperous workforce. The method of this scientific research uses juridical-normative. The results of the research shown that: First, the change in outsourcing arrangements in The Job Creation Law abolishes articles 64-65 and revises article 66 of the Manpower Law No. 13 of 2003. The abolition of Articles 64 and 65 become odd because at some important points, outsourcing is not included in Article 66 of the Job Creation Law and Government Regulation No. 35 of 2021 on Non-permanent Contract, Outsourcing, Working Hours & Rest Hour and Termination, while the revision of article 66 of the Job Creation Law also does not insert the outsourcing requirements or the service provider. This potentially causes the outsourcing practices increasingly uncontrolled and wide spreading. Second, concrete steps are needed in enforcing the outsourcing employment relationship as an effort to protect workers. It is necessary to optimize the supervision of the outsourcing system that is oriented towards justice and human rights.

Keywords: Legal Protection, Outsourcing Workers, Labour Arrangement, and the Job Creation Law

INTRODUCTION

Protection for every worker is an obligation that must be fulfilled by the State. Legal protection for workers is the fulfillment of basic rights inherent and protected by the constitution as stated in Article 28D (2) of the 1945 Constitution in which everyone has the right to work and receive fair and proper compensation and treatment in an employment relationship. Furthermore, Indonesia is a constitutional state that is obliged to protect the dignity and worth of every human being and upholds human rights because considering that the socio-economic position of the workers is lower than the employers. Protection for every worker is covered and guaranteed by the State for the implementation of citizens' economic rights. The worker's right in labor relations is regulated in the Labour Law. However, there are some norms that distort the Human Rights in economy and have a significant impact on workers; one of them is the existence of outsourcing norms in Employment law in Indonesia.

Outsourcing as a part of employment is a very vital problem because it is directly related to the welfare of people's lives (Triyono, 2016:57) It is important to pay attention to the condition of workers in order to obtain legal protection. Legal protection for workers *outsourced* can be carried out by local governments by issuing policies that regulate legal protection for workers; so that the company will pay more attention to the welfare of workers. The system of *outsourcing* has placed the workforce in a privileged position. This because the working relationship that occurs in *outsourcing* is between workers and *vendors*; not between the workforce and the *principal* (Solechan, 2019: 337).

Indonesia's Labour Law was regulated in Law No. 13 of 2003 concerning Manpower. Outsourcing arrangements were explained in Article 64, 65 and 66. Article 64 clarified the outsourcing practice: the handing over part of work execution from one enterprise to another enterprise through a work contracting agreement and the provision of workers. Meanwhile, Article 65 and Article 66 contains the terms and conditions that must be applied by the enterprises in conducting a work contracting agreement and provision of workers.

Since its implementation in 2003, studies related to the implementation polemics of the Labour Law have been conducted by several parties, including the Five Universities Independent Study Team(2006), AKATIGA and FES (2010), and LIPI Labor Law Study Team (2010). The three studies generally highlight the substance weakness and the Labour Law implementation and analyze the implementation impacts of work contracting relationship and outsourcing on workers/labourers' welfare.

Until October 5th, 2020 in Plenary Session, the House of Representatives (DPR) and the Government agreed to legalize the Job Creation Law. Then it was signed by President Joko Widodo and promulgated on November 2nd, 2020 into Law No. 11 of 2020 concerning Job Creation. The Job Creation Law revises, replaces, or abolishes various regulations, one of them is related to the Major Labour Law and also revises requirements regarding the outsourcing practice. The problem is, the manpower aspect of the Job Creation Law has attracted more public attention than other aspects, even though they both cause problems. This caused by considering that content of the Job Creation Law has many relations and links with human rights.

Unlike the previous Labour Law, the outsourcing material in the Job Creation Law is only regulated in article 66. Article 66 of the previous Labour Law in detail explains the terms and conditions that must be implemented by enterprises in conducting agreements of labour provision. Unfortunately, a revision was made to abolish its conditions in the Labour Law. The Job Creation Law also abolishes the conditions of articles 64 and 65 concerning workers contracting agreements and the conditions of labour provisions. This means that there are no longer restrictions on work type and conditions that must be accomplished by the outsourced enterprises in outsourcing. In other words, the application of outsourcing can also be extended to the work type.

If it is juridically correct that the Job Creation Law abolishes restrictions on the work types outsourced, then it is worried that the enterprises will be arbitrarily carried out the work contracting agreement or provision of workers. Besides that, it can also bring more profits for the enterprises. But not for the workers, they are always haunted by an uncertainty in their employment status, whereas the workers need legal certainty about their work as a form of protection for themselves.

In Indonesia, outsourcing has become an unsolved problem for enterprises, especially for workers. In its development, there have been many criticisms of the outsourcing system so far, enterprises that apply the outsourcing system will cause the position and employment relationship between workers and employers become unbalanced. The application of the Outsourcing system must be noticed in the long term, start from career development, employees, efficiency of the labours, organization, profits and so on. For the enterprises, this system is assumed as a fee management, while the problems happened to workers such as uncertainty in employment status and the threat of Termination of Employment (PHK) for workers, discrimination in compensation and benefit between internal and outsourced employees, career paths in outsourcing are often less planned and directed, service user enterprises is very possible to break the relationship with the outsourcing provider until it causes unclear working status of the workers, indeed it brings out people or workers to exploitation.

Responding to the problem of the lack of welfare of outsourced workers, also the outsourcing business development which is becoming a trend, the researcher want to analyze how the new arrangements for outsourcing materials in the Job Creation Law, Does it provide welfare for outsourced workers and what are the efforts to protect workers in Outsourcing arrangements to create a prosperous workforce and legal certainty

RESEARCH METHODS

This research was normative legal research, therefore it required primary and secondary legal materials with the technique of collecting data from literature studies. The process was done by selecting legal materials and then classified them according to the legal materials classification, compiled the data from the research results and arranged them systematically and logically to provide an overview of the research results.

It used a conceptual and philosophical approach toward the legal materials, so it was expected that it can provide an analysis of outsourcing arrangements in the Job Creation Law because it had abolished several articles from the previous Labour Law.

RESEACRH RESULTS AND DISCUSSION

Arrangements for Outsourcing Employment Relations AfterThe Implementation Of Law Number 11 Of 2020 Concerning Job Creation

Outsourcing is a common practice in both national and international labour markets because this system provides benefits for all parties. On the one hand, the company can shift the workload to other workers without spending a lot of additional production costs. But on the other hand, outsourcing opens up great job opportunities for the unemployed to open a labor service provider enterprise that can be contracted or outsourced.

According to Greaver, outsourcing is an action of diverting or handing over internal activities repeatedly and the decision-making rights of an enterprise to *out side providers* service(Indrajit and Djokopranoto, 2003:3). As stated in the contract agreement, outsourcing arrangements are formulated in the Civil Code (KUHPperdata) Article 1601 (b) which formulates that:

"The contract workers means an agreement, which one party as the contractor that bind themselves to carry out a job for another party, while the contracting party accept the specified price."

Explicitly, in Law No. 13 of 2003 does not examine the outsourcing term, but in Articles 64, 65 and 66 contain the meaning of outsourcing basic practice itself. The Labor Law No. 13 of 2003 mentions that an enterprise may hand over a part of the work implementation to another enterprise through a job contracting agreement or a worker service provider which is made in written and has several jobs that can be handed over to other enterprises.

For work contracting agreements, the legal construction should involve a main contractor who sub-contracts a work to the sub-contractor. Sub-contractor have to do the work that is sub-contracted by the main contractor who needs workers (Uwiyono, 2011:392). That's where the sub-contractor recruits workers to do the work that is subbed by the main contractor. So that it creates a employment relationship between the sub-contractor and the workers. While the worker service provider agreement is also referred to as the assignor, project leader, aanbestededer, bouwheer, or principal or employer (Djumialdji and SH, 2019:20).

And for Article 65 and 66 of the Labour Law, it explains the terms and conditions for contracting work and service user agreements. Basically, the same, outsourcing enterprises in the form of job contracting enterprises or enterprises of worker/labor services provider may not be used to carry out the enterprise's main work. This requirement is an unsure essence in the outsourcing practices ban. However, for worker service provider enterprise, to determine what jobs can be hired/not related to the main business is different. This has been regulated in Article 66 of the Labour Law, which states that workers from worker service provider enterprise must not be utilized by employers to take main activities. Based on the explanation in Article 66, that the types of supporting work involve cleaning service business, catering, security, supporting service in mining and oil, and labor/worker transportation provider.

Other provisions also regulate those enterprises who carry out these two practices must be in the legal entity form and have permission from the responsible agency. The employment relationship between the outsourcing enterprises and the workers in carrying out works has regulated in a written work agreement and must base on the articles as referred to the Labour Law.

The employment relationship that occurs in the outsourcing agreement between the outsourced worker and the outsourcing enterprise (the job recipient) must follow the requirements as stated in Article 65 and 66. These requirements are cumulative requirements that have to fill as a whole by the employer (outsourcing enterprise), if a number of specified requirements in the Law are in completed, then for the sake of law of the employment relationship status between the worker and the service provider enterprise (outsourcing enterprise) turn into an employment relationship between the worker and the employer.

In its development, the implementation of outsourcing in the last few years after the issuance of the Manpower Law still has various weaknesses, especially this is due to the lack of regulations issued by the government as a form of anticipation of the injustice in the implementation of the working relationship between employers and workers (Sudiarawan, 2017: 838).

In the end, the government agreed to ratify Job Creation Law in 2020, the provisions related to outsourcing in the Labour Law were partially revised and abolished by Law No. 11 of 2020 concerning Job Creation. The Job Creation Law abolished articles 64-65 and revised article 66 of the Labour Law. Article 64 of the Labour Law is the basis for the outsourcing implementation in Indonesia and one of the characteristics of an outsourcing employment relationship is the delivery of work implementation to other enterprises through job contracting agreements or the provision of worker/labor services, however this has been abolished by the Job Creation Law.

The abolition of Articles 64 and 65 become odd because at an important point about outsourcing is not stated in Article 66 of the Job Creation Law or Government Regulation No. 35 of 2021 on Non-permanent Contract, Outsourcing, Working Hours & Rest Hour and Termination. It is further stated that Article 66 (1) of the Job Creation Law is amended to:

“(1) The employment relationship between the outsourcing enterprises and the workers/laborers it employs is based on a written work agreement, either a employment agreement for a certain time or a employment agreement for an indefinite time period.”

By abolishing Articles 64 and 65 but keeping Article 66 alive, this may cause legal uncertainty and confusion for employers and workers that will probably disrupt business and investment climate in Indonesia. Article 66 also does not include the terms and conditions of job service providers, as related to the restrictions on work types in Article 66 of the Labour Law which stated:

"Workers/Labours from worker/labour services provider enterprises must not be utilized by employers to take over main activities or activities that are directly related to the production process, except supporting service activities or activities of non-production process."

Thus, the terms and conditions of the contracting work agreements practice and service providers in articles 65 and 66 of this Labour Law are no longer included in the Job Creation Law revision. In fact, as mentioned above that the unsure essence in the outsourcing practices restrict both job contracting enterprises and workers/labor service providers that must not be utilized to perform the enterprise's main work. There are no restrictions on types of job are prohibited or carried out, the implication is that it will provide opportunities for outsourcing enterprise to employ workers in various works. This potentially cause the employ of outsourcing workers increasingly uncontrolled and wide spreading, whereas it has been proven that the form of triangular employment relationships (employment relationships involving third parties as intermediaries) such outsourcing tends to be unprofitable for workers. However, the Regulations derived from the Job Creation Law, is actually produced from Government Regulation No. 35 of 2021 on Non-permanent Contract, Outsourcing, Working Hours & Rest Hour and Termination and the unclear provisions of outsourcing practices. In this regard, Article 18 (4) of Regulation No. 35 of 2021 explains that the protection of Workers/Labourers, wages, welfare, working conditions, and disputes that arise are carried out in accordance with the provisions of laws and regulations and are regulated in Work Agreements, Company Regulations, or Collective Labor Agreements.

Based on the results of this research, by observing at the Labour Law revision to the Job Creation Law, it shows that the outsourcing arrangement run a setback. The provisions on the work type that become a requirement for outsourcing enterprises that have been regulated in such a way in the labour law are still consist of many violations there, then how about the Job Creation Law which abolishes this provision.

In line with the analysis of Dr. Aloysius Uwiyono who is a labor law expert at the University of Indonesia (UI) (Komisi Nasional Hak Asasi Manusia Republik Indonesia, 2021:34). The theory of government intervention within the framework of the formation of legislation (legislation) should be applied, as long as it concerned with the rights of workers/laborers for the sake of maximum standard mechanism. On the other hand, regarding the working relationship between workers and employers is applied for the minimum standard. However, this context, has degradation and a potential for the occurrence of *modern slavery*, especially by opening up all characteristics, types and positions of work, which are open to *outsourcing* so that they are not only seasonal, temporary, and supporting jobs. To avoid arbitrariness of employers, one of the things that needs to be regulated is how long the work contract is carried out and ensuring there is a severance pay as a *guarantee* for workers with permanent status and *outsourcing* (contracts).

After the enactment of the Job Creation Law, workers hope to get a life for their fortune, especially outsourced workers. The fact, workers did not get as what it expected, the substance of the outsourcing material contained in the Job Creation Act there has no a significant change for outsourced workers status.

The implementation of this conception indicated that the state is obliged to fulfill the rights of citizens, including economic rights. As in the aspect of the work right regarding the *Core Labor Standards (CLS)* according to Philips Alston that emphasizes the importance of a human rights perspective in regulation (Alston, 2004:457).

Protection of workers in outsourcing arrangements for a prosperous workforce

Basically outsourcing is a manifestation of flexible labor market concept that aims to expand job opportunities, but the outsourcing employment relationship system actually harms workers, and even has not shown the expanding job opportunity results. So, there still found a gap between market flexibility policies and its implementation. Dr. Aloysius Uwiyono, a labor law expert at the University of Indonesia (UI) assessed that there come a decline in efforts to protect the right to work and a decent wage, starting with imposing the enactment of labor (*outsourcing*) under the pretext of expanding job opportunities and accelerating national strategic projects (Komisi Nasional Hak Asasi Manusia Republik Indonesia, 2021:34).

The problem of company in implementing outsourcing relationship is determining the work types which work is supposed to be done and what activities not include to the main business, then other activities concerning beyond the work types of non-main business mentioned in article 66 on outsourcing practice. This causes the enterprise in question that which the work types is actually not become the main work, because they cannot easily decide the outsourcing practices and involve more people to do the same thing. On the one hand, the outsourcing practice in Indonesia has become widespread and has become a necessity that cannot be postponed by employers. In addition, the existence of regulations are not sufficient to regulate outsourcing, because outsourcing is still placed as labor policy domain in Indonesia that become part of labour market flexibility policy which is oriented to freedom recruitment and discharge workers according to business situation to avoid losses.

Besides, it is not only related to the *sustainability* and the certainty of the work right, but it also impacts other aspects, namely the potential for a decrease in the quality of the working relationship between employers and workers. Workers has a vulnerable position to company policies and it has no longer to be *equal*, where it no more find a harmonious working relationship.

Based on the conditions that the authors have described above, concrete steps are needed to overcome these problems. This is to ensure the basic rights of workers. This problem occurs because the optimal control has not been functioning. Due to lack of supervision when it experienced a wrong practice, the government do not take firm action. Ideally, a supervision in the outsourcing system is seen from whether or not the outsourcing provisions that have been contained in the positive law have been fulfilled. The main objective of any labor inspection is to ensure compliance with applicable laws. Means a set of national standards designed is to protect all workers and if it is possible, workers' families (ILO, 2015:16). The achievement of these supervisory objectives can be an indicator of the ideal supervision implementation.

In this analysis, the Job Creation Law does not answer the issue of outsourcing practice score requirements, both in form of better regulation and supervision and strict sanctions for violations of this outsourcing practice. Violations still occur because of the minimal number of supervisors. The option of recruiting independent supervisors from workers and employers should be pursued. Unfortunately, the Job Creation Law and Government Regulation No. 35 of 2021 does not add this point, instead it abolishes the essence of outsourcing practices, whereas in Government Regulation No. 35 of 2021 states that Workers' Protection, Wages, welfare, working conditions, and disputes that arise are carried out in accordance with the provisions of laws and it is contained in Work Agreements, Enterprise Regulations, or Collective Labor Agreements, but if there are no arrangements in form of supervision and sanctions against the practice, so it has no difference in it.

The government is actually trying to deny their responsibility by submitting the worker protection issues through an outsourcing work agreement mechanism. Even though the workers' position is lower than the employers, it is necessary for government intervention to provide legal protection, so that justice in employment can be achieved more quickly.

Theoretically, in Pancasila Industrial Labor relations, there is a legal principle which states that workers and employers have equal positions. However, in practice it often places unequal positions between workers and employers. The position of workers can essentially be viewed from two aspects, they are juridical and socio-economic aspect. From a socio-economic aspect, workers need legal protection from the state for the possibility of arbitrary actions from employers (Wijayanti, 2009:49). The protection form provided by the government to create regulations that bind workers and employers, provide guidance, and carry out industrial relations processes. Industrial relations is basically a process of fostering communication, consultation, deliberation and negotiation and it is supported by high ability and commitment from all elements within the enterprises (Sutedi, 2009:23). Unfortunately, the outsourcing policy stated in the Job Creation Law and Government Regulation No. 35 of 2021 has provided freedom for outsourcing practices, outsourcing practices which are the basis for outsourcing employment relationships in Indonesia are actually abolished.

CONCLUSIONS

Protection for every worker is covered and guaranteed by the State for the implementation of the citizens economic right. Prior to legalization of the Job Creation Law, Indonesia's Labour Law was regulated in Law No. 13 of 2003 concerning Manpower. Outsourcing arrangements were regulated in Article 64 related to work contracting agreements and the workers' provision and articles 65-66 related to the terms and conditions that must be applied by enterprises in conducting work contracting agreements and providing worker services. In 2020, the legalization of Law No. 11 of 2020 concerning Job Creation and Government Regulation No. 35 of 2021 on Non-permanent Contract, Outsourcing, Working Hours & Rest Hour and Termination, the Job Creation Law abolishes articles 64-65 and revises article 66 of the Labour Law. The abolition of Articles 64 and 65 is odd because at an important point, outsourcing is not stated in Article 66 of the Job Creation Law and Government Regulation No. 35 of 2021, while the revision of article 66 of the Job Creation Law also does not include the provisions of the work contracting agreement or service provider. This may cause the implementation of outsourcing increasingly uncontrolled and wide spreading.

The problem of outsourcing happened in Indonesia is about employment relationships, such as certainty of worker status, determining the type of work and protection of workers' rights that are not in accordance with the Manpower Law, it caused by the non-functioning of optimal supervision and sanctions. Coupled with the new regulation which actually eliminates the main principle of outsourcing, it shows that the Government is trying to release responsibility by handing over the issue of worker protection to the main company through an outsourcing work agreement mechanism.

In an effort to protect workers' rights, it requires legal rules that specifically regulate the outsourcing, because the Job Creation Law does not answer the problems that have occurred. It is very necessary to set strict sanctions for violations of the provisions of the outsourcing employment relationship and optimize the supervision of the outsourcing system if the implementation is not in accordance with the law. This is to support the protection of workers.

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