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## LEGAL PROTECTION OF OUTSOURCING WORKERS POST VALIDITY OF THE JOB CREATION LAW

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### **ABSTRACT**

*The government has legalized the Job Creation Law as an effort to improve the investment ecosystem and Indonesia's competitiveness, although there are many rejections, the government is optimistic that the provisions in the Law provide improvements in various sectors, including the Manpower sector. The purpose of this research is to understand the changes in the concept and requirements for the implementation of outsourcing after the enactment of the Job Creation Act. This research uses doctrinal legal or normative juridical methods which are carried out based on secondary data studies. In legal research, secondary data includes primary legal materials, secondary legal materials and tertiary legal materials. Research results show the Job Creation Law stipulates that the protection of workers/labor, wages and welfare, working conditions and disputes that arise are carried out at least in accordance with the provisions of the legislation and are the responsibility of the outsourcing company. several obstacles that may arise in the protection of outsourced workers after the enactment of the Job Creation Law, among others due to the absence of written agreement obligations in the outsourcing agreement between the employer and the outsourcing company, legal certainty over protection for workers because it can function as legal protection for parties in fulfilling their rights and obligations according to the agreement.*

**Keywords:** *outsourcing, Law of Job Creation, employee/labor, legal protection.*

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### **INTRODUCTION**

The government claimed that the attendance of job creation law as a protection for the outsourced workers. However, the workers have a different views regarding this matter due to the thought that this regulation presented the works may be done without any time limits and stipulated the types of works which is cannot able to guarantee the job security for the workers in Indonesia. The outsourcing system often gets rejection from the laborer or workers in Indonesia, but outsourcing is still maintained because it is one of the efficient strategies that supports the business world <sup>1</sup>. The term "outsourcing" emerged in the business world in the 1990s, outsourcing is one of the by-products of Business Process Reengineering. Business Process Reengineering is a fundamental change made by a company in its management process through a new approach to management that aims to improve performance. <sup>2</sup> The competitive environment requires companies to prioritize market demands that require speed and flexible

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<sup>1</sup> | Nyoman Putu Budiarta, "HUKUM OUTSOURCING: Konsep Alih Daya, Bentuk Perlindungan, Dan Kepastian Hukum" (2016).

<sup>2</sup> Ibid.

response to customer demands where these demands are often beyond the company's ability, so that outsourcing arises, in other words outsourcing as an alternative to doing the work yourself.<sup>3</sup>

The term outsourcing is not explicitly mentioned under the Law Number 13 of 2003 concerning Employment (Law No. 13 of 2003), but the definition of outsourcing mentioned in Article 64 of the law. In the provisions of Article 64 of Law no. 13 of 2003 regulates the handover of part of the execution of work from one company to another which carried out through a job charter agreement and worker service provider agreement, thus Law no. 13 of 2003 has provided justification for handing over part of the execution of work to other companies which then popularly called outsourcing.<sup>4</sup>

Since the enactment of Law no. 13 of 2003, the rejection of laborer/workers against the outsourcing system always echoes every Labor Day at May 1 celebration (Mayday) because outsourcing considered not to fulfill justice for workers. There are two levels of rejection by laborer/workers of outsourcing of workers, namely rejection on the regulation and rejection at the implementation level.<sup>5</sup> It is an irony that there are often demands from laborer/workers to eliminate outsourcing practices from employment in Indonesia, but from the entrepreneur's perspective, they still maintain outsourcing because it is considered to provide more value and efficiency for the company.<sup>6</sup>

Prior to the enactment of the Employment Act Law, in general, problems in the implementation of outsourcing were caused by two things, the first being a violation of the statutory provisions from the side of the employer company and the outsourcing company and the second was the lack of supervision by the government in the implementation of outsourcing.<sup>7</sup> Violations from the employer's side in the form of outsourcing are carried out in activities that are directly related to the main activities (core business) of the temporary company, in Law no. 13 of 2003 outsourcing is limited to non-core business activities of the company. From the side of the outsourcing company, problems often occur due to violations of the fulfillment of the rights of laborer or workers. Outsourcing has the potential to violate the human rights of outsourced workers through the "tender" or "sale and purchase" process of labor from the outsourcing company to the employer.<sup>8</sup>

At the end of 2020 the government validated the Law Number 11 of 2020 concerning Job Creation which expected to repair the investment ecosystem and competitiveness in Indonesia. Despite various rejections and formal and material trials at the Constitutional Court of Republic Indonesia, the Job Creation Law is still conditionally unconstitutional, that is

<sup>3</sup> Rohit Kumar Singh, Sachin Modgil, and Padmanav Acharya, "Assessment of Supply Chain Flexibility Using System Dynamics Modeling," *Global Journal of Flexible Systems Management* 2019 20:1 20, no. 1 (November 26, 2019): 39–63, accessed January 31, 2022, <https://link.springer.com/article/10.1007/s40171-019-00224-7>.

<sup>4</sup> YETNIWATI YETNIWATI, "PENGATURAN UPAH DI INDONESIA BERDASARKAN ATAS PRINSIP Keadilan, Kepastian Hukum, dan Kemanfaatan" (July 29, 2017). should be minimized through the wage legislation which is based on the principles of justice, legal certainty and utility. The objectives of this study are: 1. To understand and to analyze the development of wage legislation in the Indonesian national law; 2. To Analyze and criticize the wage legislation in the Indonesia positive law in terms of the principles of justice, legal certainty and utility; 3. To develop the theories and concepts of the future wage legislation (iusconstituendum

<sup>5</sup> Sharnaé E Little, "THE RELATIONSHIP OF CULTURAL ADJUSTMENT AND JOB SATISFACTION IN RIYADH, SAUDI ARABIA: A CORRELATIONAL STUDY" (2019).

<sup>6</sup> Luciano Fratocchi et al., "Motivations of Manufacturing Reshoring: An Interpretative Framework," *International Journal of Physical Distribution and Logistics Management* 46, no. 2 (March 7, 2016): 98–127.

<sup>7</sup> Dana Aditiasari, "Masalah Outsourcing Di RI Ruwet, Ini Sebabnya," *DetikFinance*, April 29, 2016, accessed January 31, 2022, <https://finance.detik.com/berita-ekonomi-bisnis/d-3199703/masalah-outsourcing-di-ri-ruwet-ini-sebabnya>.

<sup>8</sup> Rahmat Irwan Novrizal, Marzuki Marzuki, and Mirza Nasution, "PANCASILA SEBAGAI STAATSFUNDAMENTAL-NORM INDONESIA DALAM PEMBENTUKAN HUKUM NASIONAL (Perspektif Undang-Undang Cipta Kerja Nomor 11 Tahun 2020 Tentang Cipta Kerja) | Jurnal Ilmiah METADATA," *Jurnal Ilmiah METADATA*, last modified 2021, accessed January 31, 2022, <http://ejournal.steitholabulilmi.ac.id/index.php/metadata/article/view/76>.

still repairs made until an amendment is made for 2 years.<sup>9</sup> The Job Creation Law covers 31 (thirty one) ministries and related institutions, including 11 (eleven) clusters, one of which is the employment cluster. The Job Creation Law amends several articles in Law no. 13 of 2003, including Articles 64, 65, and 66 which regulate the implementation of outsourcing. After the enactment of the Job Creation Law, the government issued several government regulations as implementing regulations for the law, one of the implementing regulations issued was Government Regulation Number 35 of 2021 regarding Work Agreements for Certain Time, Outsourcing, Working Time and Rest Time, and Termination Employment Relations (PP No. 35 of 2021).

Law no. 13 of 2003 outsourcing can be carried out in 2 (two) ways, by contracting work agreements and providing worker services, but the implementation of outsourcing in the Job Creation Law only regulates the delivery of part of the work to other parties through job chartering agreements. Changes in the Job Creation Law also provide “expansion and legalization”, by removing restrictions on the fields of work that can use the outsourcing system, so that this system can be carried out freely in all existing fields of work.<sup>10</sup>

As a form of protection from the government in the Job Creation Law, it is regulated that the employment relationship, protection and welfare of workers are the responsibility of the outsourcing company. As a protection for work continuity or job security, it is regulated that in the case of a work agreement for a certain time there is a job transfer from an outsourcing company, the working period of the worker/laborer is still counted, and the transfer of protection of workers’ rights must be required in the work agreement.<sup>11</sup> In addition, it is also required regarding the obligation of the outsourcing company to take the form of a legal entity and must fulfill the business requirements issued by the central government.

The Job Creation Law is claimed by the government to bring strengthening of competitiveness and protection for workers in Indonesia.<sup>12</sup> Thus, changes in the concept and conditions of outsourcing after the enactment of the Job Creation Law are interesting to be studied further in this study so that it can be understood whether these changes actually bring about improvements in the implementation of outsourcing, especially for workers. With the fulfillment of protection for outsourced workers, the problem of refusal from workers will be resolved so as to create a harmonious industrial relations climate that supports the business world in Indonesia. The purpose of this research is to understand the changes in the concept and requirements for the implementation of outsourcing after the enactment of the Job Creation Act, to find out the protection of outsourced workers in the Job Creation Act, and to understand things that can become obstacles in the protection of outsourced workers after the enactment of the Copyright Law Work.

## RESEARCH METHOD

This research uses doctrinal legal or normative juridical methods which are carried out based on secondary data studies. In legal research, secondary data includes primary legal materials,

<sup>9</sup> 2021. Constitutional Court of the Republic of Indonesia, Decision Number 91/PUU-XVIII/2020 dated November 25, “Constitutional Court of the Republic of Indonesia, Decision Number 91/PUU-XVIII/2020 Dated November 25, 2021.” accessed January 31, 2022, [https://www.mkri.id/public/content/persidangan/putusan/putusan\\_mkri\\_8240\\_1637822490.pdf](https://www.mkri.id/public/content/persidangan/putusan/putusan_mkri_8240_1637822490.pdf).

<sup>10</sup> Suyoko Suyoko and Mohammad Ghufron AZ, “Tinjauan Yuridis Terhadap Sistem Alih Daya (Outsourcing) Pada Pekerjaan Di Indonesia,” *Jurnal Cakrawala Hukum* 12, no. 1 (2021): 99–109.

<sup>11</sup> CNN Indonesia, “Penjelasan Lengkap Kemenko Soal Buruh Outsourcing Hingga PKWT,” *Cnnindonesia.Com*, November 6, 2020, accessed January 31, 2022, <https://www.cnnindonesia.com/ekonomi/20201006172224-532-555088/penjelasan-lengkap-kemenko-soal-buruh-outsourcing-hingga-pkwt>.

<sup>12</sup> Coordinating Ministry for the Economy of Indonesia - Portal Resmi UU Cipta, “Coordinating Ministry for the Economy of Indonesia - Portal Resmi UU Cipta Kerja,” last modified November 2, 2020, accessed January 31, 2022, <https://uu-ciptakerja.go.id/uu-cipta-kerja-penguatan-daya-saing-dan-perlindungan-tenaga-kerja-2/>.

secondary legal materials and tertiary legal materials.<sup>13</sup> This type of research is descriptive in nature which aims to accurately describe a situation or symptom, or to determine whether there is a relationship between a symptom and other symptoms.<sup>14</sup>

## ANALYSIS AND DISCUSSION

“Outsourcing” or “Contracting Out” is the transfer of work or can also transfer the operation of a job from one company to another. Therefore, outsourcing can be said as the process of sub-contracting work from the main contractor to the sub-contractor, such as moving product design work, employee shuttle activities, providing lunch or manufacturing work. So the core understanding of outsourcing is the transfer of work or subcontracting the implementation of work to other companies in order to streamline the activities of the company as a whole.<sup>15</sup>

Eugene Garaventa and Thomas Tellefsen of the College of Staten Island, USA define *Outsourcing as the contracting out of function, tasks, or services by an organization for the purpose of reducing its process burden, acquiring a specialized technical expertise, or achieving expense reduction.*

Furthermore, Thomas L Wheelen and Favid Hunger, quoted by Amin Widjaja Tunggal, interpreted.<sup>16</sup> *Outsourcing is a process which resources are purchase from others through long term contracts instead of being made with the company (for example, Hewlett Packard buys its laser engines from canon for HP’s laser jet printer), to strategic alliances, in which partnerships.*

Meanwhile, according to Amin Widjaja Tunggal, outsourcing is the process of transferring work and services previously carried out within the company to third parties.<sup>17</sup> Then he added that outsourcing is an effort to get experts while reducing the burden and costs of the company as an effort to improve the company’s performance in order to face competition and global economic and technological developments.

In the field of employment, outsourcing is defined as the use of labor to produce or carry out a job by a company, through a labor provider/director.<sup>18</sup> This means that there are companies that specifically train/prepare, provide, employ workers for the benefit of other companies. This company has a direct working relationship with employees.<sup>19</sup>

From the definition of outsourcing as described above, it can be seen that there are two legal relationships in the outsourcing system, namely: the first is an agreement to hand over work or contract work from the employer to the outsourcing company (vendor), and the second is the relationship between the company of outsourcing providers and workers who carry out such chartering work based on an employment agreement. The outsourcing policy is one of the steps taken by the government in recruiting workers both in public and private sectors in Indonesia. This policy is one of the breakthrough that the government has given to various existing

<sup>13</sup> Soerjono Soekanto and Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*, Jakarta: PT RajaGrafindo Persada, 2003, accessed January 31, 2022, [https://scholar.google.com/scholar?hl=en&as\\_sdt=0%2C5&q=Soerjono+Soekanto+dan+Sri+Mamudji.+%282003%29.+Penelitian+Hukum+Normatif+Suatu+Tinjauan+Singkat.&btnG=](https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&q=Soerjono+Soekanto+dan+Sri+Mamudji.+%282003%29.+Penelitian+Hukum+Normatif+Suatu+Tinjauan+Singkat.&btnG=).

<sup>14</sup> Amiruddin dan H.Zainal Asikin, *Pengantar Metode Penelitian Hukum* (Jakarta.: PT Raja Grafindo Persada, 2012).

<sup>15</sup> Irawan Harimurti, “Jaminan Terhadap Pemenuhan Hak Tenaga Kerja Kaitannya Dengan Legalisasi Sistem Pekerja Kontrak Untuk Jangka Waktu Jangka Pendek (Outsourcing) (Analisis Yuridis Terhadap Undang-Undang Nomor 13 Tahun 2003 Tentang Ketenagakerjaan)” (2010), accessed January 31, 2022, <https://digilib.uns.ac.id/dokumen/13299/Jaminan-terhadap-pemenuhan-hak-tenaga-kerja-kaitannya-dengan-legalisasi-sistem-pekerja-kontrak-untuk-jangka-waktu-jangka-pendek-Outsourcing-analisis-yuridis-terhadap-Undang-Undang-Nomor-13-Tahun-2003-tentang-ketenagakerjaan>.

<sup>16</sup> Budiarta, “HUKUM OUTSOURCING: Konsep Alih Daya, Bentuk Perlindungan, Dan Kepastian Hukum.”

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

companies and offices that are under government authority. Therefore, with the existence of the outsourcing policy, workers in Indonesia has wider opportunity to find an appropriate job.

### **Outsourcing under the Job Creation Law**

The government formulated the vision of Indonesia Forward 2045 as a strategic step to make Indonesia one of the top five world economic powers by 2045. In order to implement this vision, the Government seeks to attract investment to accelerate the development process. The reason for the overlap and disharmony in laws and regulations which are the main obstacles to creating a friendly investment climate for investors, the government needs to carry out deregulation and bureaucratization by cutting, changing, and creating new norms that are not fills in the existing law. the previous law through one law at a time which was popularized as the Omnibus Law.<sup>20</sup> Based on this breakthrough, the Job Creation Law was born.

The Head of Sub-Directorate for Settlement of Industrial Relations Disputes at the Ministry of Manpower, Reytman Aruan, explained that the Job Creation Law regulates the rights and obligations of outsourcing companies and their workers. In essence, the outsourcing company is fully responsible for everything that arises as a result of the employment relationship. Protection of workers, wages, welfare, working conditions, and disputes that arise are carried out according to regulations and are the responsibility of the outsourcing company. Various things are regulated in work agreements, company regulations or collective labor agreements. In addition, the working relationship between the outsourcing company and the workers employed is based on a PKWT or an indefinite time work agreement (PKWTT).

#### **1. The Amends of The Regulation in Job Creation Law**

The Job Creation Law changes the outsourcing provisions by removing Article 64 and Article 65 and amending Article 66 of Law no. 13 of 2003. Amendments to Article 66 of Law no. 13 of 2003 introduced a new term in discussing the handover of part of the work to other companies, namely “Outsourcing”. After the enactment of the Job Creation Law, the government issued several government regulations, including Government Regulation Number 35 of 2021 concerning Work Agreements for Certain Time, Outsourcing, Working Time and Rest Time, and Termination of Employment as implementing regulations of the Job Creation Law.

The abolition of Article 64 of Law no. 13 of 2003 eliminates the provisions regarding the implementation of outsourcing which can be carried out in two ways, the chartering of work and the provision of worker services, as well as the conditions and protections in the implementation of outsourcing as regulated in Article 65 which is removed and then regulated in PP No. 35 of 2021.

Amendment to Article 66 of Law no. 13 of 2003 in the Job Creation Law stipulates the basic requirements for the implementation of outsourcing, there are:

- 1) The obligation to have a written agreement between the outsourcing company and the workers/laborers based on a certain time work agreement (PKWT) or an indefinite work agreement (PKWTT).
- 2) Provisions that the protection of workers/labor, wages and welfare, working conditions and disputes that arise are carried out at least in accordance with the provisions of the legislation and are the responsibility of the outsourcing company.

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<sup>20</sup> RPPK Karo and AF Yana - Warta Dharmawangsa, “Konsepsi Omnibus Law Terhadap Perlindungan Tenaga Kerja Wanita Di Indonesia,” *jurnal.dharmawangsa.ac.id* 14 (2020): 2716–3083, accessed January 31, 2022, <http://jurnal.dharmawangsa.ac.id/index.php/juwart/article/download/901/835>.

- 3) There is a requirement that in the case that the outsourcing company employs workers/laborers based on a work agreement for a certain time, the work agreement must require the transfer of protection of rights for the workers/laborers in the event of a change in the outsourcing company and as long as the object of the work remains there.
- 4) This requirement is in accordance with the Decision of the Constitutional Court of the Republic of Indonesia Number 27/PUU-IX/2011 dated January 17, 2012, which examines the material of Article 65 paragraph (7)<sup>21</sup> and Article 66 paragraph (2)<sup>22</sup> Law No. 13 Tahun 2003.
- 5) The outsourcing company must take the form of a legal entity and must fulfill the Business Licensing issued by the Central Government, the permit must meet the norms, standards, procedures, and criteria set by the Central Government.
- 6) Further provisions regarding the protection of outsourced workers/laborers are then regulated by PP No. 35 year 2021.

## 2. Concept Change of Outsourcing

PP No. 35 of 2021 provides a definition of the term outsourcing company, outsourcing company is a business entity in the form of a legal entity that meets the requirements to carry out certain jobs based on an agreement agreed with the company providing the work. From this definition there is a concept that is different from the previous provisions where previously outsourcing companies carried out outsourcing based on work implementation agreements or job chartering with companies providing jobs, so there is no longer a concept of outsourcing in the form of worker service providers as contained in Article 64 of Law no. 13 of 2003. Elimination of worker service providers from the outsourcing method is in accordance with the concept of outsourcing in general, which is the transfer of part of the work to other companies, thus it can only be done through a job charter agreement and cannot be done through a worker service provider agreement. workers because service companies that provide workers/labor can only place their workers, not hand over work.<sup>23</sup>

## 3. Elimination of Restrictions on *Non Core Bussiness*

In Article 65 of Law no. 13 of 2003 stipulates that the implementation of job transfer to other companies or outsourcing can only be carried out to non-core businesses or outside the main activities of the company, and in the event that these conditions are violated, there is a consequence that by law the status of the employment relationship between workers from the outsourcing company is switched. become a legal relationship between the worker and the employer. The shift in the employment relationship in this provision raises further questions because the work agreement is made by the worker and the company organizing the outsourcing, then on what basis is the shift in the working relationship because from the start there was never an agreement between the worker/worker and the contracting company.

In Law No. 13 of 2003 and its implementing regulations, in the Regulation of the Minister of Employment and Transmigration No. 19 of 2012 (Permenakertrans No. 19 of 2012) it is not explicitly regulated regarding the criteria for an activity to be said to be a core

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<sup>21</sup> UNDANG-UNDANG REPUBLIK INDONESIA NOMOR 13 TAHUN 2003, "UNDANG-UNDANG REPUBLIK INDONESIA NOMOR 13 TAHUN 2003".

<sup>22</sup> Ibid.

<sup>23</sup> Aloysius Uwiyono, "Indonesian Labor Law Reform since 1998," *Indonesian Journal of International Law* 5 (2007), accessed January 31, 2022, <https://heinonline.org/HOL/Page?handle=hein.journals/indjil5&id=646&div=&collection=>.

business or not which is the basis of a job submitted to outsourcing company. The freedom to determine the type of work by the employer as regulated in Permenakertrans No. 19 of 2012 often causes disputes due to differences in perceptions between trade unions and employers regarding what jobs are supporting and what jobs are primary. By removing Article 65 of Law no. 13 of 2003, the Job Creation Law seeks to eliminate polemics that occur as a result of restrictions on the main activities in the implementation of outsourcing, namely problems in determining the company's main activities as well as eliminating legal uncertainties that arise as a consequence of Law no. 13 of 2003, namely the transfer of the working relationship from the employee to the employer company in terms of the implementation of outsourcing is carried out in the main activity.

PP No. 35 of 2021 does not regulate restrictions on activities or types of work that can be outsourced as stipulated in Law no. 13 of 2003 and Permenakertrans No. 19 of 2012. Law no. 13 of 2003 explicitly states that work that can be transferred to another company is limited to work outside the main activity or not related to the production process, or for supporting activities. The absence of no setting limits on work that cannot be outsourced means that the implementation of outsourcing can be carried out for all fields within the company, including core business or main activities.

### **Protection of Workers in the Outsourcing Implementation of the Employment Creation Law**

The Republic of Indonesia is obliged to protect the entire Indonesian nation. This shows the role of the State in providing protection in general, including outsourced workers in this case. According to Satjipto Rahardjo, legal protection is an effort to protect a person's interests by allocating a Human Rights power to him to act in the context of his interests. A protection can be said to be legal protection if it contains the following elements: 1. There is protection from the government for its citizens; 2. Guarantee of legal certainty; 3. Regarding the rights of citizens; 4. There is a penalty for those who violate it.<sup>24</sup>

The ratification of the Job Creation Law, especially the employment cluster, aims to increase employment opportunities and protect workers. Specifically regarding outsourcing, changes to the terms and protection arrangements in the Job Creation Law and PP 35 of 2021 are expected to provide more protection for workers and fix problems that often arise in the implementation of previous arrangements. These changes directly or indirectly have an impact on the implementation of outsourcing and protection for labor/workers.

Protection for outsourced workers in the Job Creation Law is contained in the amendment to Article 66 of the Employment Law, where the forms of protection are as follows:

#### **1. Written Agreement Obligations**

The job creation law requires a written agreement between the outsourcing company and the workers/laborers based on a certain time work agreement or an indefinite work agreement.<sup>25</sup> This provision provides protection and certainty in the legal relationship between the outsourcing company and its employees. Further, Article 18 paragraph (2) of PP No. 35 of 2021 also stipulates that the working relationship between the outsourcing company and the

<sup>24</sup> Cicik Novita, "Apa Itu Perlindungan Hukum Dan Syarat Untuk Mendapatkannya," *Tirto.Id*, last modified February 24, 2021, accessed January 31, 2022, <https://tirto.id/apa-itu-perlindungan-hukum-dan-syarat-untuk-mendapatkannya-gawF>.

<sup>25</sup> Petra Mahy, "INDONESIA'S OMNIBUS LAW ON JOB CREATION: REDUCING LABOUR PROTECTIONS IN A TIME OF COVID-19," *DOI:10.13140/RG.2.2.25951.28329*, last modified 2021, accessed January 31, 2022, [https://www.researchgate.net/publication/348739615\\_INDONESIA'S\\_OMNIBUS\\_LAW\\_ON\\_JOB\\_CREATION\\_REDUCING\\_LABOUR\\_PROTECTIONS\\_IN\\_A\\_TIME\\_OF\\_COVID-19](https://www.researchgate.net/publication/348739615_INDONESIA'S_OMNIBUS_LAW_ON_JOB_CREATION_REDUCING_LABOUR_PROTECTIONS_IN_A_TIME_OF_COVID-19).

employed worker/labor is based on a work agreement for a certain time or a work agreement for an unspecified time which must be made in writing.<sup>26</sup> The concept of implementing a certain time work agreement and an indefinite work agreement on outsourcing refers to the concept of a certain time work agreement and an indefinite work agreement as regulated in Law no. 13 of 2003 which was amended in the Job Creation Law, namely Articles 56 to 60 and also further regulated in PP. 35 year 2021.

The outsourcing arrangement in the Job Creation Law focuses on the relationship between outsourcing companies and workers, as well as how to protect these workers. With the abolition of Article 64 of Law No. 13 of 2003 by the Job Creation Law, the government no longer stipulates that the implementation of outsourcing must go through a written job transfer agreement, this indicates that the government is no longer entering the civil area between the employer and the company.<sup>27</sup> The absence of an obligation to arrange for a job transfer or outsourcing agreement to be made in writing will also have the effect of reducing legal certainty and protection for contracting companies which indirectly also affects the legal certainty of the continuity of work for outsourced workers implementing the work.

## 2. Responsibilities of Outsourced Companies to Workers

The outsourcing company is required to be a business entity in the form of a legal entity that meets the requirements to carry out certain jobs based on the agreement agreed with the company providing the work. The terms and procedures for obtaining a business license must be carried out in accordance with the provisions of the legislation, namely Article 20 PP No. 35 of 2021 regarding norms, standards, procedures, and criteria for business licensing set by the Central Government.<sup>28</sup>

Requirements for companies accepting jobs to be legal entities with the background of thinking that outsourcing companies do not easily release their responsibilities to workers.<sup>29</sup> The obligation to fulfill the norms, standards, procedures, and criteria set by the Central Government is an effort by the government to provide protection for workers to ensure that outsourcing companies have qualifications that can fulfill normative protections for workers.

The Job Creation Law stipulates that the protection of workers/labor, wages and welfare, working conditions and disputes that arise are carried out at least in accordance with the provisions of the legislation and are the responsibility of the outsourcing company.<sup>30</sup> The outsourcing company is fully responsible for all matters arising from the employment relationship. Protection of workers, wages, welfare, working conditions, and disputes that arise are carried out in accordance with regulations and are the full responsibility of the outsourcing company as regulated in work agreements, company regulations or collective work agreements.

<sup>26</sup> Morales Sharoz Sundusing, "Government Regulation No. 35 of 2021. What's The Impact? - ADCO Law," <https://adcolaw.com/>, last modified September 12, 2021, accessed January 31, 2022, <https://adcolaw.com/blog/government-regulation-no-35-of-2021-whats-the-impact-2/>.

<sup>27</sup> Tri Jata Ayu Pramesti, "Perbedaan Pemborongan Pekerjaan Dengan Penyediaan Jasa Pekerja - Klinik Hukumonline," <https://www.hukumonline.com/>, last modified March 3, 2021, accessed January 31, 2022, <https://www.hukumonline.com/klinik/a/perbedaan-pemborongan-pekerjaan-dengan-penyediaan-jasa-pekerja-lt57749322e840f>.

<sup>28</sup> Egoitz Pomares, Alvaro Luna, and Alfonso Unceta, "Patterns of Workplace Innovation in the Basque Country: Challenges and Lessons from Gipuzkoa," *European Journal of Workplace Innovation* 2, no. 2 (October 30, 2016), accessed November 29, 2021, <https://journal.uia.no/index.php/EJWI/article/view/350>.

<sup>29</sup> Budiarta, "HUKUM OUTSOURCING: Konsep Alih Daya, Bentuk Perlindungan, Dan Kepastian Hukum."

<sup>30</sup> Petra Mahy, "INDONESIA'S OMNIBUS LAW ON JOB CREATION: REDUCING LABOUR PROTECTIONS IN A TIME OF COVID-19."

### 3. Protection of job security for outsourced workers

Amendment to Article 66 of Law no. 13 of 2003 and PP No. 35 of 2021 includes the principle of transferring the protection of rights for workers. In the event that the outsourcing company employs workers/laborers based on the certain time work agreement, the work agreement must require the transfer of protection of rights for the workers/laborers in the event of a change in the outsourcing company and as long as the object of the work remains there.<sup>31</sup> The new provisions are in accordance with the mandate of the Decision of the Constitutional Court of the Republic of Indonesia Number 27/PUU-IX/2011 dated January 17, 2012<sup>32</sup>, which examines the material of Article 65 paragraph (7)<sup>33</sup> and Article 66 paragraph (2)<sup>34</sup> UU no. 13 of 2003.

The transfer of protection of workers' rights in the practice of outsourcing is a long-standing principle in labor law, namely the Transfer of Undertaking Protection of Employment (TUPE). The transfer of protection of rights for workers means that the new outsourcing company provides protection of rights for workers/laborers at least the same as the rights granted by the previous outsourcing company.<sup>35</sup>

The requirements for transferring the protection of rights as mentioned above are a guarantee for the continuity of work for workers/laborers whose working relationship is based on a certain time work agreement with an outsourcing company.<sup>36</sup> When referring to the concept of outsourcing in PP No. 35 of 2021, then outsourcing is the implementation of work based on an agreement agreed between the company providing the job and the outsourcing company or contracting work agreement.<sup>37</sup> The concept of a worker service provider as regulated in Law no. 13 of 2003 is no longer recognized in the implementation of outsourcing.

The implementation of TUPE before the enactment of the Employment Creation Act refers to outsourcing in the scheme of companies providing worker services,<sup>38</sup> This requirement is not addressed to a job charter agreement. One of the differences between a job charter agreement and a worker service provider is the object of the agreement, in a job chartering agreement the object is a certain job, while the object for a worker service provider is human resources for a particular job. From this concept, the implementation of TUPE can only be carried out in an agreement that regulates the object of the agreement is the worker. Thus, there is a vagueness of norms contained in the TUPE arrangement in the implementing regulations of the Job Creation Law, how can the implementation of TUPE be applied to the implementation of contracting work whose object is a job, not human resources or workers from a job.

In the provisions, it is regulated that if after the completion of the contract period the chartering agreement and the worker do not get the transfer of rights and their working relationship with the new contracting company then it becomes the responsibility of the previous contracting company.<sup>39</sup> The responsibilities of the previous chartering company were limited as stipulated in the certain time work agreement in the applicable laws and regulations, including the provision of compensation money to workers in the event of the termination of the employment relationship with the certain time work agreement.

<sup>31</sup> Peraturan Pemerintah Republik Indonesia No. 35 Tahun 2021, "Article 19 Paragraph (1) PP No. 35 of 2021".

<sup>32</sup> PUTUSAN Nomor 27/PUU-IX/2011, "PUTUSAN Nomor 27/PUU-IX/2011".

<sup>33</sup> UNDANG-UNDANG REPUBLIK INDONESIA NOMOR 13 TAHUN 2003, "UNDANG-UNDANG REPUBLIK INDONESIA NOMOR 13 TAHUN 2003."

<sup>34</sup> Ibid.

<sup>35</sup> Ibid.

<sup>36</sup> Peraturan Pemerintah Republik Indonesia No. 35 Tahun 2021, "Article 19 Paragraph (1) PP No. 35 of 2021."

<sup>37</sup> Ibid.

<sup>38</sup> MENTERI TENAGA KERJA DAN TRANSMIGRASI REPUBLIK INDONESIA NO. 19 TAHUN 2012, "MENTERI TENAGA KERJA DAN TRANSMIGRASI REPUBLIK INDONESIA NO. 19 TAHUN 2012" (n.d.), accessed January 31, 2022, <http://aswinsh.wordpress.com/>.

<sup>39</sup> Ibid.

## Obstacles in the Protection of Outsourced Workers After the Enforcement of the Job Creation Law

The government has made efforts to make improvements in the protection of outsourced workers in Indonesia through changes in the Job Creation Law, however, will these changes then be able to fulfill full protection for workers.

To understand firsthand how outsourcing is carried out for workers, in this study interviews were conducted with 40 resource persons who are outsourcing workers in the Tanjung Priok Port area of Jakarta,<sup>40</sup> Almost all of these resource persons are workers who have a working relationship based on a Specific Time Work Agreement with an outsourcing company. From the results of the interview, the interviewees explained the following:

- (1) Almost all of the informants stated that welfare as outsourcing tends not to meet the needs of daily living standards, does not have a career path and uncertainty in job security;
- (2) The resource person understands that there are provisions for the transfer of rights and obligations to other outsourcing companies in the event of a transfer of outsourcing vendors, but this cannot be used as a certainty for work continuity or job security because in practice the transfer is not carried out immediately, and there are no sanctions imposed on outsourcing companies that do not do so. From the interviewees, there were workers who ended up losing their jobs due to the discontinuation of the employment relationship after switching jobs to the next outsourcing company.
- (3) There are outsourced workers who work concurrently with direct workers from the employer's company, where the direct workers have the same qualifications and type of work as the outsourced workers. However, in terms of facilities and welfare, there is an imbalance where outsourced workers get facilities and welfare under direct workers who have the same qualifications and types of work.

From the interview above, it was found that job security is a major concern for workers related to protection in the implementation of outsourcing in addition to welfare issues. From the analysis of changes to provisions in the Job Creation Law, this study finds several obstacles that may arise related to the protection of outsourced workers after the enactment of the Job Creation Law.

1. The absence of written agreement obligations in the outsourcing agreement between the employer and the outsourcing company

Although the Employment Creation Law stipulates that the protection of workers, wages, welfare, working conditions, and disputes that arise are carried out in accordance with the provisions of the legislation and are the responsibility of the outsourcing company, the role of chartering agreements can strengthen the position and legal certainty of protection for workers. Workers while avoiding potential disputes with workers that can affect the implementation of the work. A written agreement is a form of legal protection for the parties in fulfilling the rights and obligations according to the agreement.<sup>41</sup> For the employer company, this agreement can be a control over the implementation of the work chartering carried out, as well as to prevent potential deviations from what has been agreed in the agreement so that the implementation of job transfer can run well in accordance with the objectives expected by the employer company.

<sup>40</sup> Peraturan Pemerintah Republik Indonesia No. 35 Tahun 2021, "Article 19 Paragraph (1) PP No. 35 of 2021."

<sup>41</sup> Aan Handriani and Edy Mulyanto, "KEPASTIAN HUKUM TERKAIT PENTINGNYA MELAKUKAN PERJANJIAN TERTULIS DALAM BERTRANSAKSI," *Pamulang Law Review* 4, no. 1 (August 27, 2021): 1–10, accessed January 31, 2022, <http://openjournal.unpam.ac.id/index.php/palrev/article/view/12787>.

At least the agreement can regulate 3 (three) important points that can be stated in a written agreement and used as a protective measure for workers, namely that the outsourcing company guarantees the fulfillment of work protection, workers' rights, and working conditions for workers according to laws and regulations. as well as protection of work continuity for workers, namely acceptance of transfer of workers from previous vendors (TUPE).

In the Job Creation Law, the government chooses not to enter the civil area between the employer and the outsourcing company, so that all responsibility for protecting workers lies with the outsourcing company. This is very unfortunate considering that the push for worker protection can be legally bound between the employer and the outsourcing company.

## 2. There is no further regulation regarding the implementation of TUPE

TUPE is a guarantee of work continuity or job security for outsourced workers as regulated in PP No. 35 of 2021 as the implementing regulation of the Job Creation Law. The implementation of TUPE prior to the enactment of the Job Creation Law as regulated in Permenakertrans No. 19 of 2012 is intended for worker service providers whose object of agreement is a worker, while in the Job Creation Law it only recognizes job contracting where the object of the agreement is work. There is a vagueness of norms in the obligation to apply TUPE to job chartering considering that the object of the agreement is work, not labour.

Another problem in the implementation of TUPE is whether the outsourcing vendor who gets the next job contracting can be sure to accept the workers implementing the contracting from the previous outsourcing company to be rehired. PP No. 35 of 2021 only regulates the obligation to require the transfer of protection of rights for workers in the event of a change in the outsourcing company in the work agreement between the outsourcing company and its employees. Certainty in the implementation of the acceptance of workers from vendors previously has not been regulated in the provisions of laws and regulations, including sanctions in the event that this rule is not implemented by the outsourcing vendor company that receives the job transfer. Many outsourcing vendors do not want to accept workers from previous companies for various reasons, including the availability of workers at the company.<sup>42</sup> Even PP No 35 of 2021 stipulates that the fulfillment responsibility for workers who do not get a job transfer is with the previous vendor, this TUPE requirement cannot be used as a guarantee of protection for the continuity of work or job security of outsourced workers.

In addition, the fulfillment of TUPE implementation can be encouraged to be carried out in an outsourcing agreement if there is interference by the employer company. The employer may include the requirement to accept existing workers from the previous vendor in the contracting agreement with the new vendor company. The involvement of the employer company in ensuring the job security protection of outsourced workers is necessary to ensure the implementation of TUPE or the transfer of protection of rights for workers to ensure the continuity of the work of outsourced workers, but unfortunately the Job Creation Law releases provisions involving companies providing jobs by abolishing the terms of a written agreement on the grounds so as not to enter the civil area between the employer and the outsourcing company.

## 3. Elimination of non-core business requirements in the implementation of outsourcing

The abolition of the limitation on the business fields that can be outsourced in the Job Creation Law opens up opportunities for the implementation of outsourcing to be wide open for all types of work within a company, including the main activity, even for freelancers

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<sup>42</sup> Farida, *Hukum Kerja Outsourcing Di Indonesia*. .

or part-time workers. Workers/laborers consider that in the case that all types of work can be outsourced and moreover, a work agreement between a worker and a worker service provider company can be carried out with a work agreement for a certain time, it will have an impact on the exploitation of workers for the benefit of business, because it has separated the responsibilities of the company's employment relationship. employers with workers and this can obscure the aspects of guarantees and protection for outsourced workers.<sup>43</sup>

In the absence of activity restrictions in the outsourcing requirements, it is possible that one field of activity within the company can be carried out jointly, both by workers with a direct employment agreement from the company or by workers from the outsourcing company, the difference in treatment, rights and obligations to these workers has the potential to cause problems and disputes as well as industrial relations problems. Researchers from the Indonesian Institute of Sciences (LIPI) revealed that there is an imbalance in the salary received by outsourcing employees and direct contract employees with the company, outsourcing workers often get lower income than workers who have a direct working relationship with the company, there is a salary gap between permanent workers, non-permanent workers direct contracts and outsourced workers.<sup>44</sup> Based on a 2011 survey in Jakarta, Surabaya and Medan in the banking sector, the average base salary of outsourcing workers is 43.4% lower than direct contract workers and 75.4% lower than permanent workers. The average total salary of outsourced workers is 45.2% lower than direct contract workers and 74.6% lower than permanent workers.<sup>45</sup> Inequality of income in the same work role in the company shows a weaker position of outsourced workers and does not fulfill justice for these workers, as John Rawls' theory of justice that justice is fairness.<sup>46</sup>

On the other hand, from a business (economic) and legal perspective, it is impossible for all company activities to be handed over to other parties, if this is done the company will lose its identity and personal superiority. The company's focus or specialization on certain goods/services will make the company have an advantage that other companies cannot compete with.<sup>47</sup>

## CONCLUSION

Job Creation Law stipulates that the protection of workers/labor, wages and welfare, working conditions and disputes that arise are carried out at least in accordance with the provisions of the legislation and are the responsibility of the outsourcing company. several obstacles that may arise in the protection of outsourced workers after the enactment of the Job Creation Law, among others due to the absence of written agreement obligations in the outsourcing agreement between the employer and the outsourcing company, legal certainty over protection for workers because it can function as legal protection for parties in fulfilling their rights and obligations according to the agreement. In addition, the outsourcing policy is one of the steps taken by the government in recruiting workers in both the public and private sectors in Indonesia. This policy is one of the breakthroughs that the government has given to

<sup>43</sup> MAHKAMAH KONSTITUSI REPUBLIK INDONESIA, "FSP Singaperbangsa Perbaiki Permohonan UU Cipta Kerja | Mahkamah Konstitusi Republik Indonesia," <https://www.mkri.id/>, last modified November 19, 2020, accessed January 31, 2022, <https://www.mkri.id/index.php?page=web.Berita&id=16759&menu=2>.

<sup>44</sup> detikFinance, "Berapa Perbedaan Gaji Pekerja Outsourcing Dengan Karyawan Kontrak?," *DetikFinance*, last modified January 16, 2014, accessed January 31, 2022, <https://finance.detik.com/berita-ekonomi-bisnis/d-2468739/berapa-perbedaan-gaji-pekerja-outsourcing-dengan-karyawan-kontrak>.

<sup>45</sup> Studi Kasus Jakarta and Surabaya DAN MEDAN Laporan Rina Herawati Ratih Dewayanti Wulani Sriyuliani, "PENE-LITIAN PRAKTEK KERJA OUTSOURCING PADA SUB-SEKTOR PERBANKAN" (2011).

<sup>46</sup> John Rawls, "Justice as Fairness," *The Philosophical Review* 67, no. 2 (April 1958): 164. John Rawls. (1958). "Justice as Fairness" *The Philosophical Review*, 67(2): 164-194 <http://fs2.american.edu/dfagel/www/Philosophers/Rawls/JusticeAs-Fairness.pdf>.

<sup>47</sup> Budiarta, "HUKUM OUTSOURCING: Konsep Alih Daya, Bentuk Perlindungan, Dan Kepastian Hukum."

various existing companies and offices that are under government authority. Therefore, with the existence of the outsourcing policy, workers in Indonesia has wider opportunity to find an appropriate job.

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