



BetterWork
Indonesia

Workers' Retrenchment Guidelines

A compilation of Q&A
when termination
is unavoidable



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Background

The COVID-19 pandemic has spread to more than 100 countries. This pandemic has not only affected people's health but also significantly impacted the economy of many countries and the world of employment. Many companies in Indonesia's garment sector have suffered heavy losses. Many workers were in furlough or experienced problems with seeing their rights and entitlements respected (e.g. annual festive bonus (THR) payment) and some were even laid-off (PHK).

This Guide has been developed by Better Work Indonesia, in consultation with the Ministry of Manpower of Indonesia, to support garment and footwear enterprises who are forced to engage in retrenchment processes.

As stipulated in the Manpower Act, Employment Termination (or PHK) is **the last choice**. Such tenant is even more relevant in the current pandemic situation. Before engaging in Employment Termination, companies and workers are recommended to go through the following steps to avoid mass Employment Termination:¹

- (1) Reducing the wage and facilities/allowances for high-ranked workers such as managers and directors;
- (2) Reducing shifts;
- (3) Limiting/abolishing overtime;
- (4) Reducing working hours;
- (5) Reducing working days;
- (6) Freeing or laying off workers/laborers in turns for a period of time;
- (7) Not extending contract for the workers whose contract period has expired;
- (8) Providing early retirement to those who have fulfilled the requirements.

Nevertheless, many questions have arisen pertaining to layoffs done to maintain business continuity during the pandemic. Therefore, Better Work Indonesia (BWI) has prepared a guideline, in the form of questions and answers, aimed at preventing, minimizing and managing lay-offs and company closure processes. This document², which is divided in four parts, is designed to assist companies and workers in facing economic challenges, specifically during the Covid-19 pandemic, while adhering to the applicable legal provisions.³

A. Business Continuity Plan

1. What do companies need to do to minimize the impact of COVID 19?⁴

Companies can prepare a Business Continuity Plan in dealing with COVID-19 to reduce the negative impacts that may arise.

Business Continuity Plans (BCP) can be plans and frameworks, designed by companies, to ensure that business processes can continue in an emergency or force majeure situation. The purpose of BCP is to keep the business operating despite disruptions and ensure that key information is recorded and available to appropriate personnel.⁵ Preparing a BCP will enable companies to find and reduce threats, respond to events when they occur, recover from the direct impact of an event and finally restore operations.



2. What are the steps/measures in preparing a business continuity plan?⁶

The Ministry of Manpower has provided guidelines to prepare a Business Continuity Plan to deal with the COVID-19 pandemic as follows:⁷

- STEP 1 Knowing the Business Priorities
- STEP 2 Identifying the Risks of COVID-19 Pandemic
- STEP 3 Planning the COVID-19 Pandemic Risk Mitigation
- STEP 4 Identifying the COVID-19 Pandemic Impact Responses
- STEP 5 Designing and Implementing a Business Continuity Plan
- STEP 6 Communicating the Business Continuity Plan
- STEP 7 Testing the Business Continuity Plan

B. Planning and Managing Retrenchment

1. What is Employment Termination (PHK)?

It is the termination of the work relation because of a certain condition or event that causes the end of the rights and obligations between workers/labourers and employers.⁸

2. Under which grounds is PHK not allowed?

Under Indonesian law, it is prohibited to terminate employees based on the following grounds:⁹

1. The worker is sick so that he/she cannot work, up to a maximum period of 12 months **consecutively**.
2. The worker is fulfilling the obligation to the country.
3. The worker is conducting religious worship.
4. The worker is absent from work because he or she is getting married.
5. The female worker is pregnant, giving birth, experiencing miscarriage, or breastfeeding.
6. The worker has family relations or marriage ties with another worker in the same company.
7. The worker forms a union, or becomes a member or official of a union, or carries out the activities of a Labour Union.
8. The worker reports the employer to the authorities for commission of a crime.
9. For reasons related to understanding/beliefs, religion, political orientation, ethnicity, skin colour, race, sex, physical condition, or marriage status.
10. The worker is in permanently disabled or ill due to work accident or occupational disease and the recovery period is unpredictable.



3. Is workers' retrenchment the most effective way to keep the business going?

Reducing the number of workers may seem to be the most obvious way to cut costs. However, retrenchment processes impose quite high costs as well. The costs for company's retrenchment/worker reduction can include:¹⁰

- Administrative and legal costs.
- Severance pay and compensations for PHK.
- Decreased morale and productivity among the remaining workers.
- Recruitment and employment costs for new workers.

Employers tend to believe in a number of myths about the benefits of reducing workers (downsizing): The following chart compares several myths with the facts of reducing workers.

MYTH	FACT
Worker reduction increases profit.	Profit does not always follow the reduction.
Worker reduction increases productivity.	Productivity results after the reduction become mixed or immeasurable.
Worker reduction/downsizing is the last choice.	Data indicates that reduction is the first choice taken by many companies.
Worker reduction/downsizing has no adverse effect on workload, morale, or commitment to the company.	In most situations, reduction/downsizing has adverse effects on worker's workload, morale, and commitment.
Those laid off do not suffer long-term income losses as a result of structural shift in the economy.	Downward mobility is the rule rather than the exception.

Employment security increases productivity. When workers are assured of continued employment, they will dedicate themselves to protecting the organization and its products. Employment security creates a bond between workers and employers, which ultimately contributes to the success of businesses.¹¹

Guaranteed employment continuity creates loyalty and confidence in management, which subsequently reduces resistance to technical changes, reduces labour turnover, and enhances cooperation and good relations at work.

Socially responsible restructuring ensures that employers facing serious business problems consider the business needs of the factory while also minimizing the negative impacts on workers and the community, through a process of dialogue.

Better Work strongly recommends that all employers carefully consider all other options and aspects before deciding to lay off employees. Employers should provide workers' representatives with relevant information on the challenges the factory is facing, and consult with them regarding possible solutions, as they may have constructive ideas as to how terminations can be avoided, minimized or more effectively managed.

4. Are there any example of procedures in workers' retrenchment?¹²

If workers reduction is unavoidable, the following best practices can be followed:

- Establish a Retrenchment Committee. The committee for a workforce reduction usually consists of: company owner, company manager, Finance Department, Production Department, Personnel and HR Department, and worker/union representatives (at least as many workers' representatives as employer representatives) e.g. existing LKSB or other functioning mechanisms for social dialogue.
- Develop a worker reduction (retrenchment) plan. Some important things in planning worker reduction programs are:
 - ~ Preparing initial information
 - ~ Analysing alternatives
 - ~ Explaining the retrenchment/worker reduction
 - ~ Planning for consultation with key stakeholders
 - ~ Determining the Selection Criteria for workers to be laid-off. Some of the frequently used criteria are: voluntary measures, early retirement, years of service, skills and qualifications.¹³
 - ~ Ensuring non-discriminatory measures (special attention needs to be paid to gender considerations, involvement/membership in union, race or skin colour, origin or ethnicity and citizenship, religion, disability, age).
- Planning the payment of compensation and severance pay for lay-offs. Severance pay is the main instrument to reduce the negative impact of worker reduction (retrenchment).
- Planning the activities to help the laid-off workers.
- Procedures and schedule for the implementation of worker reduction (retrenchment).

5. What kind of measures can companies and workers put in place if employment termination is unavoidable?¹⁴

- Employers **must negotiate and agree on the intention to carry out the employment termination with the trade union in which the workers are members, or if the workers are not union members, with the workers themselves.**
- Should the negotiations fail and no agreement is reached between workers' representatives/workers and an employer, employers can terminate the work relations with workers/labourers but only after obtaining stipulation of the industrial relations dispute settlement institution.

6. Is it possible for a company to implement PHK for reason of force majeure in a situation like the current COVID-19 pandemic?

The current pandemic has been designated as **national non-natural disaster**¹⁵ and yet this does not automatically or necessarily trigger a force majeure clause. The declaration of national disaster has a different scope and purpose and should be seen separately from what Indonesian Labour Law and Civil Law establish to be possible in the domain of the relationship between private parties. When planning to terminate employment contracts for reasons of force majeure, one should also refer to Article 61 point d of Law Number 13/2003 stating that Work agreement comes to an end if **certain conditions or events stated in the work agreement (PK), company regulations (PP), or collective work agreement (PKB) that can cause the end of work relations exist.**

As such, employers and workers must review the PK/PP/PKB in order to check if a force majeure clause has been included in the provisions that can be referred to as a legal basis for terminating the employment contract. The parties also will need to determine how the work agreement (PK)/company regulations (PP)/collective work agreement (PKB) define “force majeure”. If force majeure is defined to include “pandemic”, this should reduce the disagreements over whether Covid-19 is covered. On the other hand, if force majeure is defined broadly, such as “a situation beyond control of any of the parties,” the parties may be more likely to disagree. If this does not exist, employers must stand ready to build a case and argue that termination of employment contract is due to force majeure. This implies preparing a solid argumentation and evidence that shows the link between “the force majeure” (in this case the Covid-19 pandemic) and the plan to terminate employment contracts, along with evidence of implementation of other alternatives (other than termination of employment contract) as a proof of absence of ill-faith.¹⁶ After all processes are completed, each party can still challenge the decision for employment termination due to force majeure at the competent court. In such case, termination may only be carried out after a ruling by the Industrial Relations Court.

7. Is it possible for a company to implement PHK for reason of business loss in a situation like the current COVID-19 pandemic?

Article 164 point 1 of Law Number 13/2003 regulates that *employers can terminate the work relation with workers/labourers because of company closure due to continuous losses for 2 (two) consecutive years or force majeure.*

Therefore, if employers want to implement PHK for the reason of loss due to the pandemic Covid-19, it is necessary to observe the sub-clause:

1. The “company is closed” in Article 164 point 1 of Law No. 13/2003. Grammatically, this article can also be interpreted as a rule of “dismissal with the reason the company closed”.
2. There are sub-clause that stated demonstrate continuous losses for 2 (two) consecutive years. It means, in the context of current pandemic, employers must see whether the continuous losses for 2 (two) consecutive years are verified from the moment that the pandemic started impacting businesses in Indonesia in early 2020.

However, Indonesian courts have adopted several approaches in the handling of lay-off lawsuits for reasons of loss for 2 (two) consecutive years and have accepted lay-offs on the grounds of loss in respect of both companies still operating and already stop its operation.¹⁷



8. Is it possible to implement PHK for the reason of efficiency in a situation like the current COVID-19 pandemic?

PHK for the reason of efficiency is also regulated in Article 164 of Law No 13/2003, but it is necessary to know there is a judicial review on this article under the verdict of the Constitutional Court (MK) No.-019_PUU_IX-2011. Such court decision regulates that PHK for reason of efficiency can be implemented only if a company is permanently closed. However, the Supreme Court has granted several requests on employment termination for efficiency due to technology demand and reason in cases to avoid permanent closure. These verdicts have further contributed to the existing body of jurisprudence in handling employment termination cases.¹⁸

9. What happens after the bipartite negotiation reaches an agreement?

If companies and trade union(s)/workers agree on the employment termination, complete with the compensation, they must make a Joint Agreement, which is subsequently registered to the local Industrial Relations Court.¹⁹

The aim of the Joint Agreement registration is to guarantee the protection of any party in case the other party does not carry out the content of the Joint Agreement. If the Joint Agreement has been registered, the disadvantaged party can directly apply for the execution of the Joint Agreement.²⁰

10. What if the bipartite negotiations fail?

If companies and trade union(s)/workers are unable to agree on the employment termination, including the amount of compensation, one or both parties can register the dispute to the local Manpower Office by attaching evidence that settlement efforts through bipartite negotiations have been made. Both parties will get an offer from the local Manpower Office to resolve the dispute through conciliation. If the parties refuse to resolve the dispute through conciliation, the local Manpower Office will divert the dispute to the mediation process.²¹

- **Conciliation**

The parties must send a written application to the conciliator who has been approved from the list of conciliators issued by the local Manpower Office. The conciliation process must take place within 30 days after the receipt of application. If the dispute is settled by the parties through conciliation, they draw up a collective agreement, which is witnessed by the conciliator.

If the parties do not arrive at an agreement, the conciliator will then issue a recommendation to both parties to resolve the dispute. If both parties agree on the recommendation, within 3 (three) days, the conciliator must help the parties prepare a collective agreement, which must be registered to Industrial Relations Court (PHI). If one party does not accept the recommendation, a lawsuit can be submitted to the Industrial Relations Court (PHI).²²

- **Mediation**

Within 7 (seven) days after the request for mediation is received, the intermediary officer from the local Manpower Office must review the case and immediately start the mediation process which must be completed within 30 days. If the dispute is settled by the parties through mediation, they draw up a collective agreement, which is witnessed by the mediator.

If the parties do not arrive at an agreement, the mediator will issue a recommendation to both parties. If both parties agree, within 3 (three) days the mediator must help both parties prepare a collective agreement, which must be registered to the Industrial Relations Court (PHI). If one party does not accept the recommendation, a lawsuit can be submitted to the Industrial Relations Court (PHI).²³

11. What are the other legal remedies that can be taken if there is a dispute regarding employment termination?

The Industrial Relations Court has the duty and authority to examine and decide at the first level. If there is an objection from one party, legal remedies in the forms of cassation and judicial review can be submitted to the Supreme Court.

- **Industrial Relations Court**

The lawsuit is accompanied by a minute of the mediation or conciliation process. The verdict of Industrial Relations Court (PHI) is binding if there is no written appeal submitted by one of the parties within 14 days.²⁴

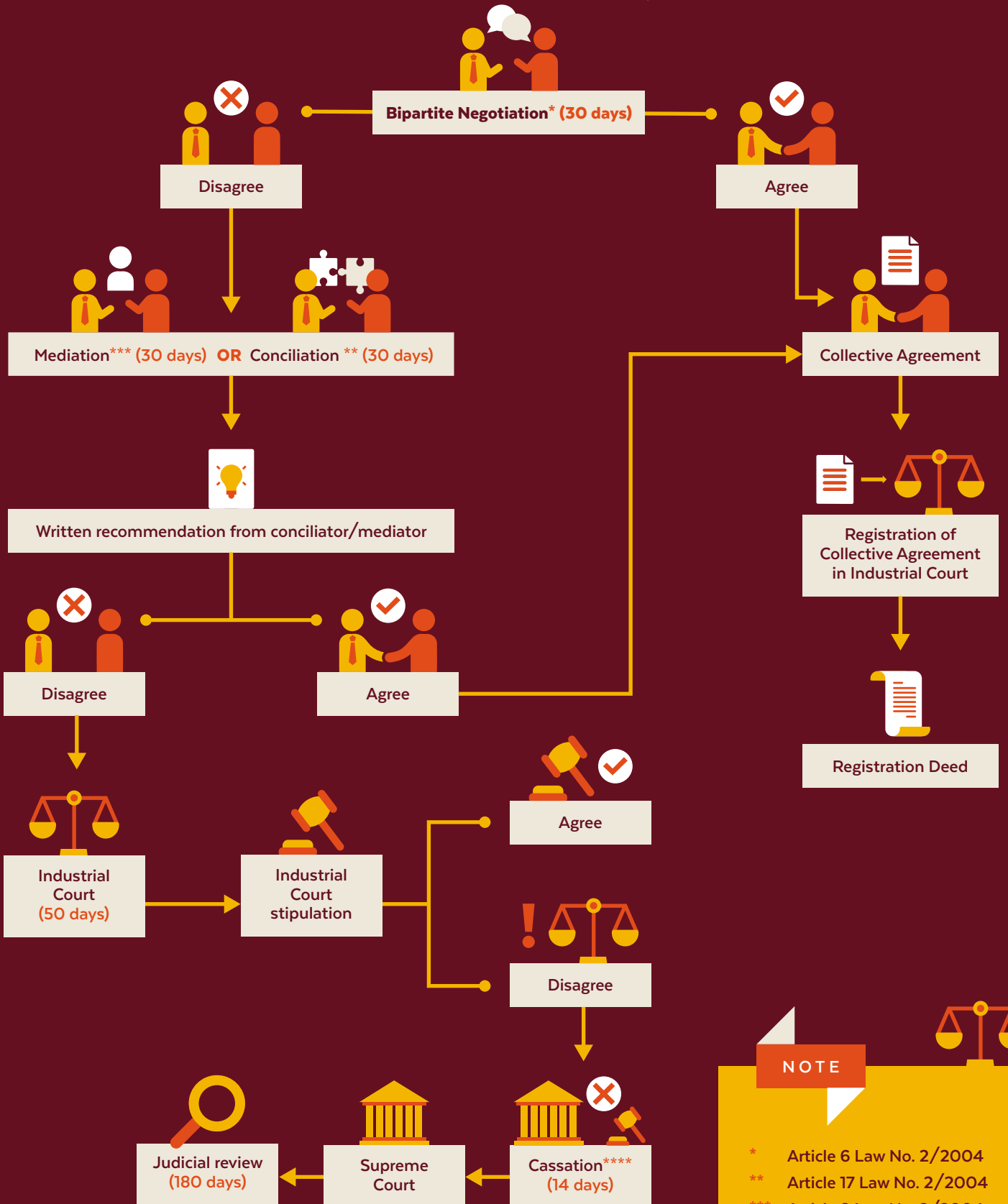
- **Cassation**

Against the verdict of Industrial Relations Court (PHI) an appeal can be submitted by either party to the Supreme Court no later than 14 working days after the court's verdict is notified to the concerned parties.²⁵

- **Judicial Review**

This is available only if there is new decisive evidence but which could not be found when the case was examined. The submission period is 180 days since the new evidence was found.²⁶

DIAGRAM OF EMPLOYMENT TERMINATION



NOTE

- * Article 6 Law No. 2/2004
- ** Article 17 Law No. 2/2004
- *** Article 8 Law No. 2/2004
- **** Article 114 Law No. 2/2004

C. Compensation of Termination

1. What are the components of wages used as the basis for calculating severance pay and tenure award?

The components of wages used as the basis for calculating severance pay, tenure award, and reimbursement of rights are:

- Basic salary
- All forms of fixed allowances



2. How to calculate severance pay and other compensation due to the terminated worker?

The provisions for calculating the value of severance pay, tenure award, reimbursement of rights or separation fee will vary depending on the reason of PHK, tenure and employment status as described in the following table.

Reason for termination	Severance pay ²⁷	Reward of Tenure ²⁸	Right reimbursement ²⁹	Detachment Money ³⁰	Law Number 13/2003
Closure due to loss or forceful circumstances or bankruptcy	1X tenure	1X tenure	Yes	No	Article 164 & 165
Closure for efficiency reason	2X tenure	2X tenure	Yes	No	Article 164 (3)
Consolidation, Merger, change of status and Employer is not willing to continue the work relations	2X tenure	1X tenure	Yes	No	Article 163 (2)
Consolidation, Merger, change of status and worker is not willing to continue the work relations	1X tenure	1X tenure	Yes	No	Article 163 (1)
Serious mistakes	No	No	Yes	Yes	Article 158 & Constitutional Court decision No. 012/PUU/2003
Criminal process	No	1X tenure	Yes	No	Article 160
Violation against work Agreement	1X tenure	1X tenure	Yes	No	Article 161
Absenteeism for 5 or more consecutive days	No	No	Yes	Yes	Article 168
Resignation in accordance with procedures	No	No	Yes	Yes	Article 162
Worker's request through Industrial Relations Court	2X tenure	1X tenure	Yes	No	Article 169
Sickness	2X tenure	2X tenure	Yes	No	Article 93 & 172
Retirement unless entitled to more under an employer-provided retirement benefit programme	2X tenure	1X tenure	Yes	No	Article 167
Death	2X tenure	1X tenure	Yes	No	Article 166
End of non-permanent workers' contract (PKWT) period	No	No	No	No	Article 61 & 154

Severance Pay	
Tenure (Years)	Severance Pay Calculation
< 1	1 month wage
1 - 2	2 months wage
2 - 3	3 months wage
3 - 4	4 months wage
4 - 5	5 months wage
5 - 6	6 months wage
6 - 7	7 months wage
7 - 8	8 months wage
> 8	9 months wage

Reward of Service	
Tenure (Years)	Calculation of Tenure Award
3 - 6	2 months wage
6 - 9	3 months wage
9 - 12	4 months wage
12 - 15	5 months wage
15 - 18	6 months wage
18 - 21	7 months wage
21 - 24	8 months wage
> 24	10 months wage

Please note that the entitlements are cumulatives



3. What is the compensation for non-permanent workers who were terminated before the end of the work agreement with specified period of time (PKWT)?

The party terminating the work relations is required to pay compensation to the other in the amount of the worker/laborer's remaining wages until the expiry of the work agreement.³¹ Thus, if a company wants to terminate work relations before the end of PKWT, the company must pay compensation equal to the remaining wages that should be paid until the end of the PKWT.

D. Company's Termination and Dismissal

1. What must the employer do if he/she wants to stop his/her business activities?

Employer or the company management must report in writing every time they establish, terminate, re-operate, move, or liquidate the company to the Minister of Manpower or appointed official (employment reporting). If a company has branch offices or stand-alone sections, this obligation also applies to each of the branch offices or stand-alone sections.³²

2. When and how to make the employment reporting?

Employers are required to report in writing to the Minister or appointed official no later than 30 (thirty) days before moving, stopping, or disincorporating the company.³³

3. What are the procedures for the employment reporting?

Employment reporting is done online through the official website of the Ministry of Manpower with the address <http://wajib.lapor.kemnaker.go.id>. Since 2019, Obligatory Employment Reporting (WLK) has been integrated into an online single submission system.³⁴

4. What are the sanctions if employers do not fulfill the reporting obligations?

Employers or company management that do not fulfill the obligations are threatened with a maximum sentence of three months and maximum fine of Rp 1 million. If the violation is repeated after the first verdict, then the violation is only imprisonment.

ENDNOTES

- 1 Minister of Manpower and Transmigration Circular Letter Number SE-907/ MEN/PHI-PPHI/X/2004 concerning the Prevention of Mass Employment Termination.
- 2 These Guidelines are intended for informational purposes only, and should not be construed as legal advice. In addressing labour-related issues, it may be necessary to consult an expert such as a labour inspector, a lawyer, or a representative of your employers' association or union federation. The ILO and IFC shall not be held liable for any damage incurred as a consequence of reliance on these guidelines.
- 3 Chapter XII Regarding Termination, Law Number 13/2003 and Industrial Relations Dispute Settlement, Act No. 2 of 2004
- 4 Business Continuity Plan to deal with Influenza Pandemic: Workbook. https://www.ilo.org/jakarta/whatwedo/publications/WCMS_120087/lang--en/index.htm
Manual: rencana keberlangsungan usaha
https://www.ilo.org/jakarta/whatwedo/publications/WCMS_151900/lang--en/index.htm
- 5 https://www.ilo.org/wcmsp5/groups/public/---ed_emp/documents/publication/wcms_115048.pdf
- 6 *ibid*
- 7 <https://k3corona.kemnaker.go.id/>
- 8 Article 1 paragraph 25, Law Number 13/2003
- 9 Article 153, Law Number 13/2003
- 10 A Handbook on Managing Transition, Better Work
- 11 W. Edwards Deming, the founder of total quality management principles
- 12 *ibid*
- 13 See Better Work Guidelines on Responsible Retrenchments (2020), at <https://betterwork.org/portfolio/managing-transitions-retrenchments/> for more detail on retrenchment criteria
- 14 Article 151, Law Number 13/2003
- 15 Presidential Decree Number 12/ 2020
- 16 See Article 1244 of Indonesia Civil Law on which it emphasizes the absence of ill-faith (or the existence of a good faith) to count out someone from his/her obligation. See also the verdict of Indonesia Supreme Court Number Reg. 24 K/Sip/1958, which emphasizes "no other legitimate alternatives for those who wants to be excepted from his/her obligation under force majeure clause."
- 17 Supreme Court Verdict Number 429 K/Pdt.Sus-PHI/2016
Supreme Court Verdict Number 1222 K/Pdt.Sus-PHI/2017
Industrial dispute court Medan Verdict Number : 269/Pdt.Sus-PHI/2018/PN Mdn,

ENDNOTES

- 18 Supreme Court verdict Number 58 K/Pdt.Sus/2013
Supreme Court verdict Number 828 K/Pdt.Sus/2011
- 19 Article 7 (3), Law Number 2/2004
- 20 Article 7 (5), Law Number 2/2004
- 21 Manpower Act No. 13 of 2003, Art. 136; Industrial Relations Dispute Settlement, Act No. 2 of 2004
- 22 Industrial Relations Dispute Settlement, Act No. 2 of 2004, Arts. 17-25.
- 23 Industrial Relations Dispute Settlement, Act No. 2 of 2004, Arts. 8-15.
- 24 Article 124, Law Number 2 / 2004
- 25 Article 110 of Law Number 2/2004
- 26 Article 67 (b) Law Number 14/1985 regarding Supreme Court , Law Number 5/2004 and Law Number 3/2009
- 27 Article 191, Law Number 13/2003 Ministry Of Manpower Decree No 150 Year 2000 Jo Article 1 Ministry Of Manpower Decree No 78 Year 2001
- 28 Article 191, Law Number 13/200, Ministry Of Manpower Decree No 150 Year 2000 Jo Article 1 Ministry Of Manpower Decree No 78 Year 2001
- 29 Article 164 (4), Law Number 13/2003. It covers:
- Annual leave that has not been taken and expired;
 - Return costs for the workers/labours and their families to the place where the workers/labours are accepted to work;
 - Reimbursement for the costs of housing as well as health care and treatment amounting 15% of the severance pay and/or tenure award for those who have fulfilled the requirements;
 - Other rights stipulated in the work agreement, company regulations or collective work agreement.
- 30 Article 158,162 & 168, Law Number 13/2003
- 31 Law Number 13/2003 Article 62
- 32 Law Number 7/1981 concerning Obligatory Employment Reporting in the Company
- 33 Law Number 7/1981 Article 8
- 34 Minister of Manpower Regulation Number 4 of 2019 concerning Amendments to the Regulation of the Minister of Manpower Number 18 of 2017 concerning Mandatory Procedures for Reporting Manpower in Network Companies