

THE URGENCY OF CHANGES TO GOVERNMENT REGULATION 35 OF 2021 REGARDING OUTFFERING

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Abstract

Outsourcing is considered an alternative way for companies that does not cause a lot of expenses for the company, but this is very detrimental for workers, especially in relation to the amount of wages they receive. In its implementation, quite a few companies violate workers' rights. The existence of Government Regulation Number 35 of 2021 is generally unprofitable for outsourced workers and even has the potential to lead to the practice of modern slavery. Modern slavery refers to the condition of a person being treated like a slave with limited freedom and rights in the context of labor exploitation. In the case of the use of outsourced labor, the Government Regulation provides significant leeway without clear restrictions which could exacerbate the risk of modern slavery practices occurring. Therefore, in order to provide real balance in a company, both between workers and company owners, it is appropriate for the Government to immediately make changes to the contents of Government Regulation Number 35 of 2021 concerning Outsourcing.

I. Introduction

The Indonesian state as a legal state is stated in Article 1 paragraph 3 of the 1945 Constitution of the Republic of Indonesia (UUD NRI). The 1945 Constitution also guarantees the rights of Indonesian citizens, including the right to work, a decent life, equal and fair treatment. in employment relations, legal protection and justice in social security. Indonesia is a country that is ranked 4th (fourth) as the country with the largest population after the United States (US). Apart from the large population, the size of the island which is not accompanied by an even distribution of population is also a factor in population problems in Indonesia. The imbalance between high population growth and unequal population distribution can influence employment problems in Indonesia.

The history of labor in Indonesia started from the time of slavery with the oppression of slaves by parties who had power, were socially and economically capable. The labor era was marked by the era of slavery. A person performs work under the leadership of another person as a laborer. Workers during the slavery era did not have any rights because their rights were determined by their masters, even their right to life. In contrast to modern times, labor or workers have an important role in the progress of companies and national development. Workers are the main actors in development goals because workers contribute to increasing productivity and welfare of companies and are able to compete in the era of globalization. Based on these conditions, the state should be able to be present to protect workers' rights and guarantees.

Every Indonesian citizen has the right to work and a decent living as stated in Article 27 paragraph 3 of the 1945 Constitution. Regulations related to employment in Indonesia are regulated in Law Number 13 of 2003 concerning Employment, Government Regulation Number 35 of 2021 concerning Employment Agreements Certain Times, Outsourcing, Working Time and Rest Time, and Termination of Employment Relations and are regulated in Law Number 6 of 2023 concerning the Determination of Government Regulations in Lieu of Law Number 2 of 2022 concerning Job Creation into Law. Some of these regulations are essentially a defense for workers in Indonesia. Labor regulations must be regulated in such a way as to guarantee and fulfill basic rights and protection for workers so as to create a conducive atmosphere in the world of work.¹

Companies or entrepreneurs bind their workers through work agreements. The employment agreement can be in writing or verbally². Labor protection, wages,

¹ Chairunnisa Ramadhani Putri Nursalim, Leli Joko Suryono. (2020). Perlindungan Hukum Tenaga Kerja Pada Perjanjian Kerja Outsourcing. *Media of Law and Sharia*. 2(1). hlm. 57.

² Indra Lover Reynaldo Manalu, Roida Nababan, Ojak Nainggolan. (2020). Tinjauan Hukum Terhadap Status Pekerja yang Belum Mengikat Kontrak Kerja Tapi Sudah Bekerja yang Ditinjau

welfare, working conditions and disputes that arise must be carried out in accordance with regulations and are the responsibility of the company and regulated in the work agreement, company regulations or collective work agreement. The work agreement system in Indonesia that is often used in the world of work is the Fixed Time Work Agreement which is abbreviated as PKWT or commonly called a contract agreement and the Indefinite Time Work Agreement which is abbreviated as PKWTT. In its implementation, quite a few companies have violated the implementation of PKWT and PKWTT. Permanent work is carried out using a contract or PKWT system so that this is detrimental to workers and only benefits the company. If you look at Article 4 and Article 5 of Government Regulation Number 35 of 2021, limits on the implementation of PKWT are regulated, but you still often find companies implementing work that should be carried out using the PKWTT system using a contract or PKWT system. This can happen because there are no strict sanctions regarding misuse of the work agreement system either in Law Number 13 of 2003, Government Regulation Number 35 of 2021 or Law Number 6 of 2023.

Apart from the problematic implementation of PKWTT into PKWT, the practice or application of outsourcing is also a controversial and problematic topic. In employment relations, outsourcing is the handing over of certain work by a company to a third party so that the worker's relationship is not with the employing company but with the labor supply company.³ The practice of outsourcing work often raises problems related to labor protection and company responsibility. Workers employed through this outsourcing system often face uncertainty and lack of clarity regarding the workers' employment rights, social security and legal protection. Moreover, if you look at Article 18 of Government Regulation Number 35 of 2021, it is stated that the employment relationship between outsourcing companies and the workers or laborers they employ is based on PKWT or PKWTT which is made in writing. This arrangement also does not provide legal certainty to workers, thereby providing opportunities for companies to carry out arbitrary actions against workers.

Apart from limited worker protection and the absence of legal certainty for workers, there are several outsourcing problems that must be studied and considered. One of them is abuse and exploitation of labor. There are no clear restrictions in Government Regulation Number 35 of 2021, outsourcing practices are used by companies to employ workers at low wages, there are no occupational safety and health standards or the freedom of workers' rights are limited. Of course, this not only harms workers personally or individually but also violates their rights as workers or laborers. Based on these problems, unequal

dari UU No. 3 Tahun 2003 Tentang Ketenagakerjaan. *PATIK: Jurnal Hukum*. 9(1). Hlm. 21.

³ Mus Muanam dan Ronald Saija. (2019). *Rekonstruksi Kontrak Kerja Outsourcing di Perusahaan*. Sleman: Deepublish, hlm. 2.

treatment of workers by companies arises. Outsourced workers should have the same rights as permanent workers such as equal wages, training and development opportunities. If the rights of outsourced workers are not fulfilled, it can create injustice for workers and exacerbate social inequality and economic inequality for workers.

Based on the background explanation, the formulation of the problem discussed in this scientific article is what is the urgency of changing Government Regulation 35 of 2021 regarding outsourcing?

2. Research Method

In obtaining the data and information required in this scientific article, this article uses a normative legal research approach. Normative legal research is a research method approach carried out using research from library materials or what is called secondary data. This research aims to examine the urgency of changing Government Regulation 35 of 2021 regarding outsourcing.

The data sources used are primary legal materials and secondary legal materials. The primary legal material in this article is Law Number 13 of 2003 concerning Employment, Government Regulation Number 35 of 2021 concerning Specific Time Work Agreements, Outsourcing, Working Time and Rest Time, and Termination of Employment Relations and regulated in Law Number 6 2023 concerning the Stipulation of Government Regulations in Lieu of Law Number 2 of 2022 concerning Job Creation into Law. The secondary legal material in this article is journals regarding employment, especially outsourcing

3. Results and Discussion

Urgency Of Changing Government Regulation 35 Of 2021 Regarding Outsourcing

Law in Indonesia has been influenced by developments over time and the interests of political elites, especially in relation to legal certainty. Everything actually leads to the principle of legal legality which states that the desired law is a clear and unequivocal law written in a statutory regulation. Clear and firm content of legal material can minimize legal violations on the grounds that there are no governing legal rules. Apart from all that, the modern legal system actually prioritizes formal procedures which tend to lack good substance so that they are prone to infiltration of the interests of certain parties and give rise to injustice.⁴

Legislation in the form of law can no longer be used as a guide in dealing with various

⁴ Yogi Prasetyo. (2023). Urgensi Pembentukan Peraturan Perundang-undangan yang Berkeadilan. *Jurnal Legislasi Indonesia*. 20(2). hlm. 30

legal issues that should be their responsibility. Dominant interests in increasingly advanced societies powerfully control the law. The formation of legislative regulations is even considered to be influenced by special interests related to political and power matters. If laws and regulations are made only for a specific purpose, it is certain that the results will not be able to provide justice to society. As a political product, legislation cannot avoid the influence of the interests of the political elite within it. This is a bad habit in the formation of laws and regulations in Indonesia. The question is whether law regulates politics or politics regulates law. The term as a rule of law in society is only a legal aspiration that is only realized on paper without real results in the field. In fact, universally good law is law that is based on the principles of justice.

One of the controversial laws and regulations in Indonesia is employment regulations. Prior to the promulgation of Government Regulation Number 35 of 2021, regulations regarding employment in Indonesia were regulated in Law Number 13 of 2003. The government then issued the Job Creation Law in 2020, but this law was rejected by various groups of society in Indonesia. The Job Creation Law is considered to benefit entrepreneurs or companies over workers. This law was also drafted and passed hastily by the government. Lawmakers should continue to prioritize the principles of forming legislative regulations as stated in Article 5 and Article 6 of Law Number 12 of 2011. That good legislative regulations include principles, one of which is the principle of openness. Consistent and consistent application of the principle of openness in the process of making legislative regulations will ensure the effective and efficient implementation of the resulting regulations. The principle of openness in the regulation-making process has a crucial role in producing responsive legal products.⁵

Constitutional Court (MK) Decision Number 91-PUU-XVIII-2020 states that the Job Creation Law is contrary to the Constitution and has no binding legal force as long as it is not revised within 2 (two) years of its promulgation. Based on this decision, legislators must improve the Job Creation Law within a period of 2 (two) years so that if improvements are not made, the Job Creation Law will become permanently unconstitutional and the articles or materials that have been changed or revoked. The Job Creation Law is declared to be valid again if it has not been repaired for 2 (two) years. With the Constitutional Court's decision, Government Regulation Number 35 of 2021 was issued to specifically regulate fixed-term work agreements, outsourcing, work time and rest time, and termination of employment relations. The Government Regulation regulates outsourcing specifically in Chapter III, namely Article 18, Article 19 and Article 20.

⁵ Arfiani, dkk. (2023). Urgensi Asas Keterbukaan dalam Pembentukan Peraturan Perundang-Undangan di Indonesia. *Pagaruyung Law Journal*. 6(2). Hlm. 218.

Companies or entrepreneurs definitely have the desire and drive to seek flexibility in managing their business. The outsourcing system is one option for entrepreneurs or companies as a form of flexibility. This is a form of globalization implication that has an impact on the employment sector. Regulation of a legal outsourcing system in Indonesia is a breakthrough that many companies are interested in. The government's perspective considers that the outsourcing system is a market need for an efficient workforce so that it has a great opportunity for equal opportunity for each individual because the outsourcing recruitment system tends to be easier compared to the recruitment system for workers using the PKWT or PKWTT system.⁶

In fact, in Article 18 paragraph 1 of Government Regulation Number 35 of 2021 it is stated that outsourcing workers with outsourcing companies is based on PKWT or PKWTT. This article certainly does not provide legal certainty for outsourced workers. This will also have an impact on the welfare of outsourced workers, both by regulating wages and the rights that outsourced workers should get. In Law Number 11 of 2020 in conjunction with Government Regulation Number 35 of 2021, outsourcing is no longer differentiated between job supply or labor supply. Outsourcing is no longer limited to supporting work (non-core business processes) so there are no longer any restrictions on the types of work that can be outsourced. The types of work that can be outsourced depend on the needs of the sector.

This means that this change provides more flexibility in the use of outsourcing so that companies can use outsourcing for various types of work, including core work (core business processes), according to the company's needs in certain sectors. With no restrictions on the type of work being outsourced, workers again face uncertainty regarding the status of the work they face. Workers will be more vulnerable to unexpected termination of employment or even changes to employment contracts that are unfavorable for outsourced workers. Work in an outsourcing agreement involves a relationship between the outsourced worker and the outsourcing company (which accepts the work). If the requirements specified in the law are not met, the employment relationship shifts to between the worker/laborer and the employing company. Outsourced work agreements generally use PKWT/contracts, making it easier for companies to lay off workers if they are no longer needed.⁷

⁶ Raja Tua Hamonangan, I Nyoman Bagiastra, (2022). Mengkaji Perlindungan Hukum Pekerja Alih Daya Pasca Berlakunya UU Cipta Kerja. *Jurnal Negara*. 10(4). Hlm. 340.

⁷ Jovita Do Rosario Amaral, (2021). Perlindungan Hukum Terhadap Pekerja Outsourcing atas Kesehatan dan Keselamatan Kerja (K3). *Jurnal Pendidikan Kewarganegaraan Undiksha*. 9(1). Hlm. 397.

From the point of view of the position of workers or laborers, it is certainly a dilemma. On the one hand, workers need work as agency workers to provide for their families. On the other hand, the wages and social security that workers receive from user companies are not comparable to those received by permanent workers or workers. Employer companies aim to achieve efficiency and reduce labor costs, so they tend to hand over some production work, including supporting work, to contracting companies or labor service providers through outsourcing practices. This process often involves an auction of outsourcing work, the company offering the lowest labor costs is deemed the winner with a written employment agreement. Even though the agreement is made in writing, it is possible that the material agreement between the employing company and the employing company may not provide adequate legal protection for workers.⁸

Most of the workers or laborers only have the status of contract workers or permanent workers from the company receiving the work or providing the worker services, and have no legal relationship with the company providing the work or using the work. This can result in injustice in the protection of workers' rights. The government considers that the existence of outsourced workers or laborers can contribute to reducing the unemployment rate, especially in the current difficult economic conditions. It should be noted that this can have a negative impact on workers' rights if it is not properly regulated through regulations that provide adequate protection for workers.

In Article 19 of Government Regulation Number 35 of 2021, PKWT must require the transfer of rights protection for workers/laborers if there is a change in outsourcing company and as long as the object of work remains. These requirements are a guarantee of continuity of work for Workers/Labourers. If the worker/laborer does not receive a guarantee of continued work, then the outsourcing company is responsible for fulfilling the worker/laborer's rights. Even though there are rights protection transfer requirements, the legal protection provided to outsourced workers may still be limited. Outsourced workers may not have the same protections as permanent workers in terms of wages, working hours, leave, benefits and other rights. Of course, this can create a power imbalance between workers and employers.

Based on this analysis, the stipulation of Government Regulation Number 35 of 2021 is generally not beneficial for outsourced workers and even has the potential to lead to the practice of modern slavery. Modern slavery is the term for modern slavery. Modern slavery refers to the condition of a person being treated like a slave with

⁸ Nuradi, (2019). Perlindungan Hukum Pekerja Alih Daya dalam Pelaksanaan Hubungan Industrial Guna Mendukung Terwujudnya Iklim Investasi yang Kondusif bagi Tercapainya Kesejahteraan Pekerja. *Pakuan Law Review*. 5(1). Hlm. 25.

limited freedom and rights in the context of labor exploitation. In the case of the use of outsourced labor, the Government Regulation provides significant leeway without clear restrictions which could exacerbate the risk of modern slavery practices occurring. Under these conditions, outsourcing companies can exploit the uncertainty and vulnerability of outsourced workers to maximize company profits by providing poor working conditions, inadequately low wages, or excessive workloads. Outsourced workers ultimately cannot leave the job because they are trapped in a cycle of poverty and dependence on work that does not provide workers with proper freedom and welfare. This violates human rights and creates detrimental social disparities.

Government Regulation Number 35 of 2021 must represent legislation as an instrument for protecting and upholding human rights for citizens, especially for outsourced workers. This is a consequence that the law as a legal policy must achieve the goals of the state and is an important instrument in the rule of law in government administration. Based on the current conditions in which outsourced workers are implemented, the government must immediately revise or amend Government Regulation Number 35 of 2021 to ensure adequate protection for outsourced workers and prevent the practice of modern slavery. These revisions need to strengthen the rules and restrictions that protect the rights of outsourced workers, as well as increase supervision over the practice of using outsourced labor. In this case, the government can work together with human rights organizations, trade unions and other stakeholders to overcome the risk of labor exploitation. If the government carries out appropriate revisions, the government can ensure better protection for outsourced workers, prevent exploitation that is detrimental to outsourced workers, and promote fair and humane use of labor.

Apart from the solution to revise Government Regulation Number 35 of 2021, especially the regulation regarding outsourcing, the government must also regulate and limit the criteria for work that can be outsourced. As in the Constitutional Court Decision Number 27 PUU-IX/2011 concerning the cancellation of Article 65 paragraph 7 and Article 66 paragraph 2 letter b regarding the main work being no longer permitted to be outsourced. Follow-up to this decision can be carried out through the DPR-RI, by proposing changes to laws or regulations relating to employment, especially Government Regulation Number 35 of 2021. This step can be part of the National Legislation Program (Prolegnas) that is being formulated by the DPR-RI. Through this process, permanent work can be declared not to be outsourced.⁹

⁹ Sukhebi, Atma Suganda, dan Ismail. (2020). Model Hubungan Alih Daya Dalam Hukum Ketenagakerjaan Indonesia Ditinjau dari Perspektif Keadilan. *Jurnal Nuansa Kenotariatan*. 6(1). hlm. 54

4. Conclusion

The urgency of changing Government Regulation Number 35 of 2021 regarding outsourcing is that if this change is not implemented it has the potential for significant negative impacts, especially for outsourcing workers. If this is not followed up, it will affect workers' welfare, employment uncertainty, reduction of rights and facilities, and the potential for increasing inequality among workers. The urgency of change must be to limit the type of work that can be outsourced, so that if it is not limited, it will provide flexibility to the company and be vulnerable to layoffs for outsourced workers. Even though Government Regulation Number 35 of 2021 requires the transfer of rights protection, the legal protection provided still allows for limitations that are feared to create an imbalance of power between workers and employers. Based on the analysis in this article, Government Regulation Number 35 of 2021 is generally unprofitable for outsourced workers and has the potential to create the practice of modern slavery, so revision is needed to ensure adequate protection, prevent exploitative practices, and promote fair use of labor.

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