

Alarming Trend Regarding Employment of Expatriates in Indonesia

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Foreign investors and other employers in Indonesia need to take steps to anticipate and avoid the alarming trend for expatriates to claim the significant procedural rights and generous termination benefits under Indonesian law. In order to understand the significant financial implications of this developing practice, it is critical for employers to understand that termination-at-will is not recognized in Indonesia and that Indonesian statutory termination benefits far exceed the global standard.

The Risks: Under Indonesian law, all employee terminations are subject to the approval of a special Labour Court. The law contemplates a 140 day period which covers bipartite negotiations, mandatory non-binding mediation and Labour Court proceedings. In addition to the generous statutory minimum termination benefits, the employee is entitled to full salary throughout the process until the Labour Court approves the termination. The concept of providing a fixed number of months notice of termination or pay in lieu of notice simply does not work in Indonesia. In order to avoid the significant time and expense of conducting such formal termination process, and to end the employee's entitlement to continuing salary, the best HR practice is to negotiate a Mutual Termination Agreement with the employee which is not subject to Labour Court approval. The Court approval requirement obviously provides employees with enhanced bargaining power.

Indonesian law provides a clear statutory minimum entitlement for virtually every possible type of employment termination. Employers are able to calculate their employees' accruing termination benefits quite accurately on an actuarial basis and to make appropriate reserves. Employers are also able to take into account those statutory minimum entitlements when designing compensation packages for their local employees. Employers are therefore able to manage and offset the cost of such generous termination benefits which are essentially aimed at providing protections for the relatively low-paid Indonesian work force.

The problem is that multinationals are often not aware of the Court Approval requirement or the generous statutory termination benefits when they negotiate the compensation packages of expatriates being transferred to Indonesia or hired to work in Indonesia. Historically, expatriates normally accepted termination based on the notice provision of their employment contracts prepared by overseas counsel or HR managers without knowledge of the Indonesian system. It seemed to be well accepted that claiming the generous Indonesian rights and benefits would be unfair and unconscionable at their

salary level. Today, many expatriates will reject the agreed notice or pay in lieu of notice, and assert that they are entitled to all rights and benefits under Indonesian law. That assertion can be debated but consider the following scenario should Indonesian benefits apply: An expatriate with three years and one month service earning USD12,000/month is downsized. The employee would be entitled to 8 months “severance” pay, 2 months “service” pay and a “health and housing allowance” equal to 15% of the severance and service pay: US\$138,000.

The Solution: No multinational expects to pay the equivalent of 11.5 months severance pay for an expatriate with just over three years service. This scenario can be effectively avoided with an Employment Agreement in the home jurisdiction, a carefully prepared Secondment Agreement between the home jurisdiction employer, the local subsidiary in Indonesia and the employee, and a specially drafted Employment Agreement in Indonesia.