

The facts about “gardening leave”

MKK Labor Team (research by Miranda Mamahit, S.H.)

Gardening (or garden) leave is an expression which denotes when an employee is asked to leave his place of employment but still remains on the payroll. The term is commonly applied in the banking and financial sector in the U.K., Australia and New Zealand. The employee in question would continue to receive normal pay during gardening leave and must respect confidentiality requirements. Another reason for an employee to go on gardening leave is in a case where an employee has been disciplined and is sent home pending termination.

This practice occurs for various reasons, but let us consider gardening leave in the event the employee is a foreigner on a one-year work contract and is terminated, transferred or needs to leave the company before the end of his IMTA (work permit). How will it play out according to the Indonesian labor law? The Labor Law (Law no. 13 of 2003) does not expressly make mention of gardening leave. However, there are provisions on suspension during the termination process. The Labor Law provides that an employer is allowed to suspend an employee who is in the process of termination until approval from the Industrial Relations Court is issued. During this suspension period, the employer is still obliged to pay his salary and other benefits as regularly received by the employee. In light of the above, a company may put an employee on a gardening leave, but it will still be obliged to continue paying the employee's salary and other benefits so that the termination process will not have any impact on his work permit and his family's residence permit.

According to the law, a foreign worker is classified as a definite period employee due to the fact that the working period should be based on the validity of the employee's work permit. Under the Labor Law, for definite period employment, any party that terminates a definite period employment agreement before its expiry is obligated to pay to the employee compensation in an amount equal to the employee's salary up until the time the definite period employment agreement expires.

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Legal News

Financial Services Authority issues banking reg on single presence policy

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Introduction

The Indonesian Financial Service Authority (“OJK”) enacted a new regulation on single presence policy for Indonesian banks through OJK Regulation No. 38/POJK.03/2017 on Single Presence Policy for Indonesian Banks (“**OJK Regulation 38/2017**”). This regulation became effective on July 12, 2017 and repeals and replaces the former regulation on the same subject, Bank Indonesia Regulation No. 14/24/PBI/2012 on Single Presence Policy for Indonesian Banks (“**BI Regulation 14/2012**”) in which bank supervision authority was still carried out by the Indonesian Central, Bank Indonesia. The *raison d'être* of the regulation lies in the transfer of functions, duties and authorities on the regulatory and supervision of the banking industry from Bank Indonesia to the OJK which in turn requires the single presence policy to be re-regulated.

In principle, most of the existing rules from BI Regulation No. 14/2012 remain unchanged. The concept of mergers, Bank Holding Companies (“**BHC**”), and Holding Function which was adopted in the previous regulation is retained in OJK Regulation 38/2017. Incentives for merging banks include new forms of incentives. Several added provisions are designed to provide more detailed requirements, for example, the necessary supporting documents to establish BHC.

Amendments concerning incentives for banks which undertake merger or consolidation

Mergers and consolidations are being prioritized in accordance with the enactment of OJK Regulation 38/2017. Both the previous and current regulation offer several incentives for banks that conduct mergers or consolidations, as stipulated in Article 4 (1), which includes: a) extension of any period to settle any overdue amount of its Maximum Credit Provision Limit (*Batas Maksimum Pemberian Kredit*); b) ease of establishment procedures of branch offices; c) temporary ease on corporate governance implementation; and/or d) any other incentives, pursuant to the laws and regulations applicable on incentives for banking consolidation.

By way of comparison, the new regulation removes the previously offered incentive in the form of an extension with regard to compliance with compulsory minimum-reserve levels (*Giro Wajib Minimum*).¹ It is unclear why OJK revised the previous incentive. Previously, according to Article 3 (b) and (c) of Bank Indonesia Circular Letter No. 9/20/DNP on Incentives with respect to Banking Consolidation, merging and consolidating banks are granted leniency in the form of 1 percent reduction of compulsory minimum-reserve levels after calculating third-party funds and the loan-to-deposit rate for a one year period after the effective date of Merger or Consolidation permit. Nonetheless, it is worth noting that the OJK Regulation 38/2017 also provides other forms of incentives within the limits permitted by the applicable laws and regulations.

Amendment concerning the transfer of authority from Bank Indonesia to OJK

An important point in regard to this new single-presence policy regulation is related to the transfer of authority from Bank Indonesia to the OJK. Following the establishment of OJK which also includes supervision of banking activities in Indonesia, Bank Indonesia transferred its authority in this matter to OJK. The new authorities are not simply transferred, but also altered and in some cases, expanded. For example, in Article 3(5) of OJK Regulation 39/2017, OJK may provide an extension for implementation of the Single-Presence Policy for complex issues.

In other instances, authority was simply transferred without dramatic changes. Under Article 7(1) of OJK Regulation 39/2017, to establish a BHC, the Controlling Shareholder must submit its implementation plan to OJK for the establishment of a BHC and for the transfer of shares from the Controlling Shareholder to the BHC. Previously, the submission was to be addressed to Bank Indonesia.²

Amendments concerning supporting documents for submission of implementation plan to establish a bank holding company

The new regulation also provides further requirements with regard to such implementation plan. Submission of the implementation plan shall now be accompanied by several supporting documents, namely: a) the minutes of a General Meeting of Shareholder of the respective Bank; b) the draft deed of establishment of the BHC; c) a draft of the Bank's share-transfer deed; and d) a list of candidates to fill in the board of directors' and/or commissioners' position at the BHC.

¹ Article 4 of BI Regulation 14/2012.

² Article 7 (1) of BI Regulation 14/2012.

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Sanctions

With regard to existing sanctions, OJK Regulation 39/2017 retains all of the existing sanctions, as stipulated by BI Regulation 14/2012. However, OJK added new administrative sanctions. The newly introduced sanctions range from written warnings to inclusion of the BOD and BOC members and/or executive officials on the list of names of those who failed the fit-and-proper test.

The above newly introduced sanctions apply, among others, to the following cases:

1. Failure to undertake a merger or consolidation or establishment of a BHC within a year of purchase of shares in another bank;
2. Failure to establish a holding function within six months of the purchase of shares in another bank;
3. Failure to submit an implementation plan for the establishment of BHC and transfer of shares from the controlling shareholder to the BHC;
4. Failures by Banks that establish a holding function in submitting information and supporting documents with regard to the holding function and their implementation plan to OJK; and
5. BHC and holding function failure to provide strategic directions and consolidate the financial statements of banks that are its subsidiary;

For further inquiries on this new regulation, please contact our Oka Anantajaya at oka.anantajaya@mkklaw.net

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