

## Dissecting the Amendment to the Omnibus Law: Which Sectors are Affected and How?



Last November, the Constitutional Court declared Law No. 11 of 2020 on Job Creation or commonly known as the Omnibus Law as “conditionally unconstitutional” and gave the government two years to rectify the Law. While the Law will remain valid during this period, no implementing regulations can be issued.

On 30 December 2022, the government took a step to amend the Omnibus Law by issuing Government Regulation in Lieu of Law No. 2 of 2022 on Job Creation (“**Government Regulation**”) to revise the Omnibus Law. In principle, the Government Regulation, which became effective immediately upon issuance, amended several laws that the Omnibus Law previously amended. However, after careful assessment, the changes under the Government Regulation are not too drastic, and the content of the Government Regulation is mainly similar to the Omnibus Law. In the Government Regulation, four sectors of the Omnibus Law were amended, namely: employment, tax, water resources, and halal products.

### What is Government Regulation in Lieu of Law?

Government regulation in lieu of law is governed under the Constitution and Law No. 12 of 2011 on Formation of Legislation as lastly amended by Law No. 13 of 2022. The President can enact a government regulation in lieu of law based on compelling urgency.

However, the law is silent as to what constitutes “compelling urgency” (it is somewhat further elaborated by a decision by the Constitutional Court in 2009). In that decision, the Constitutional Court stated that

whether a circumstance can be a compelling urgency will depend on the subjective perspective of the President. The elucidation of the Government Regulation stated that a compelling urgency exists if the government sees an urgent need to expedite and increase investment in the country, facilitate the ease of doing business for small, micro, and medium enterprises, strengthen research and innovation activities, and expand employment opportunities. In any event, what constitutes compelling urgency must also be approved by the People's Representative Council (*Dewan Perwakilan Rakyat* or "DPR"), after which the government regulation in lieu of law would become a law.

If, however, the DPR rejects the government regulation in lieu of law, such regulation will be revoked.

## Employment

In the employment sector, two major changes will give legal certainty and aid the government in achieving its goal of increasing the ease of doing business and investment activities in Indonesia. These changes pertain to outsourcing and the minimum wage formula.

### **Outsourcing**

Previously, the Omnibus Law had revoked the outsourcing provisions in Article 64 of Law No. 13 of 2003 on Labour, as amended by Law No. 11 of 2020 on Job Creation ("**Labour Law**") and Minister of Manpower Regulation No. 19 of 2012 on Requirements for Outsourcing Part of the Work to Another Company (and any latest amendment). As a result, there was no boundary between core and non-core business activities that could be outsourced to an outsourcing company. This created a free open market for outsourcing business arrangements and raised an interpretation that core business activities are all transferable to an outsourcing company.

However, the Government Regulation reinstated Article 64 with slightly revised wording. It stated that the government, as the regulator, will issue a new government regulation to determine which business activities can be outsourced. Besides giving legal certainty on transferable business activities, many hope this regulation will retain the flexibility for outsourcing arrangements while encouraging business players to protect outsourced employees.

We also expect this regulation to address the handling or resolution of existing outsourcing arrangements.

### **Minimum wage formula**

The Government Regulation added Article 88F to the Labour Law to allow the central government to determine the minimum wage formula in certain circumstances. However, the Government Regulation does not explain further the circumstances that will allow the central government to step in. We expect that there will be changes to Government Regulation No. 36 of 2021 on Wages.

It is worth noting that the central government's determination of the minimum wage formula is likely to be a tool to control the economic conditions within a region/province as determined by the regional government; however, we will have to wait and see how the regulator will tweak Government Regulation No. 36 of 2021 on Wages.

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## Tax

With respect to tax, Government Regulation does not create any new rules. Rather, it simply synchronises the content of the original Omnibus Law with the amendments to the tax laws that were issued before Government Regulation, i.e. those under Law No. 7 of 2021 on Harmonisation of Tax Regulations and Law No. 1 of 2022 on Financial Relations between Central and Regional Governments (“**Amendment to Tax Laws**”).

Several provisions on tax under the original Omnibus Law that have been amended or revoked by the Amendment to Tax Laws are no longer included in Government Regulation. Other than this, there is no other significant change made by Government Regulation to the original Omnibus Law.

## Water Resources

On water resources, the Government Regulation is unlikely to have material adverse effect on private entities in the water business sector as it does not amend Law No. 17 of 2019 on Water Resources (“**Water Resources Law**”), which continues to be the legal basis for water business in Indonesia. When the Water Resources Law was issued in 2019, many believed it as the government’s attempt to regain control over water resources from the private sector after the Constitutional Court dramatically revoked the 2004 law on water resources.

### ***Authority for diversion of river flow***

The Government Regulation offers a new tool for businesses that wish to participate in any relevant national strategic projects, such as dams, reservoirs, or even hydropower plants, under the article on diversion of river flow (*pengalihan alur sungai*), whereby any government institutions, state-owned enterprises (“**BUMN**”), regional government-owned enterprises (“**BUMD**”), village-owned enterprises, cooperatives, or private entities that wish to divert the direction of a river flow for a national strategic project must obtain approval from the central government or regional government, depending on the location of the river, i.e. for a river that flows across multiple provinces, approval must be obtained from the central government. In contrast, for a river that flows within the border of one province, approval must be obtained from the relevant regional government.

If a party intentionally or negligently diverts the flow of a river without prior approval from the central government or regional government, such party may be subject to imprisonment and monetary sanction.

The Government Regulation also states that the relevant norms, standards, procedures, and criteria for granting such approval for the diversion of a river flow by the central government or regional government will be further regulated in a separate government regulation.

### ***Licensing***

The Government Regulation also sets out that any party who carries out certain activities before the enactment of the Government Regulation without the relevant commercial licenses and/or approval may be subject to administrative sanctions. Such party will be ordered to obtain the relevant licence and/or

approval by 30 December 2025 (i.e. within three years from the date of enactment of the Government Regulation). These activities are:

1. the carrying out of any construction work of water facilities or non-construction work that affects water sources without any commercial licenses and/or approval;
2. the diversion of river flow without prior approval; and/or
3. the use of any water resources without commercial licenses and/or approval.

The procedure to apply for the licenses and/or approval as well as the applicable administrative sanction will be regulated further in a separate government regulation.

As a reminder, the most notable change for the water sector under the Omnibus Law was that it mandates the enactment of an ancillary government regulation to further regulate commercial licences (*perizinan berusaha*) for the utilisation of water resources. Both the Omnibus Law and the Government Regulation should be viewed as a good opportunity to voice concerns to the government to fill in the gap and clarify issues that often arise from the provisions of Government Regulation No. 122 of 2015 on Drinking Water Supply System, which is an ancillary regulation to the Water Resources Law.

### **Consolidation efforts**

The remaining amendments to the Water Resources Law as a result of the enactment of the Omnibus Law that remain intact (i.e., unchanged by the Government Regulation) are essentially consolidation and/or uniformisation efforts that the government wishes to implement, namely:

1. The requirement that regional government must observe and comply with the norms, standards, procedures, and criteria determined by the central government for the management of its region's water source;
2. the change of terms from permit (*izin*) to commercial licenses (*perizinan berusaha*) and approval (*persetujuan*) for commercial and non-commercial utilisation of water sources, respectively; and
3. the removal of the eligibility of a BUMN or BUMD to be delegated as a Manager of Water Resources (*Pengelola Sumber Daya Air*) either from the central government or the regional government, and instead mandates the enactment of government regulation(s) on this matter.

## Halal Products

One of the most notable amendments under the Government Regulation pertains to Law No. 33 of 2014 on Halal Product Assurance ("**Halal Products Law**").

### **Validity of halal certificate**

Initially, the Omnibus Law extended a halal certificate's validity from two years to four years. This extension benefits businesses as it reduces the burden of periodic renewal. The Government Regulation goes even further by eliminating the halal certificate's validity. Going forward, a halal certificate will be valid indefinitely and businesses must only renew their halal certificate if there is a change in:

1. the composition of the ingredients of the halal products; and/or

2. the halal product's process (*proses produk halal* or "PPH").

This move will significantly reduce the costs incurred by businesses in complying with the Halal Products Law. Moreover, the Government Regulation will likely reduce the government's budget allocation for subsidising the self-declaration method of halal certification for micro and small enterprises. It will also ease the government's burden in the halal certification monitoring process.

In line with the indefinite validity, the Government Regulation revokes the authority of the Halal Certification Body (*Badan Penyelenggara Jaminan Produk Halal* or "BPJPH") to supervise the halal certificate's validity.

Interestingly, the indefinite validity will apply automatically to halal certificates issued by BPJPH before the Government Regulation. However, the Government Regulation does not apply to any halal certificates issued by the Indonesian Ulama Council (*Majelis Ulama Indonesia* or "MUI"). Accordingly, businesses with a halal certificate issued by the MUI must convert their halal certificate to a halal certificate issued by the BPJPH before the MUI halal certificates expire.

#### **Establishment of Halal Fatwa Committee**

Before the BPJPH can issue a halal certificate, it must receive a determination or a written fatwa attesting to the product's halal status. Under the Omnibus Law, the institution authorised to issue a halal fatwa is the MUI, which includes the MUI at the national, provincial, or regional/city level or the Aceh Ulama Assembly Council (*Majelis Permusyawaratan Ulama Aceh* or "MPUA"). The MUI must issue the halal fatwa within three business days of receiving the halal audit report.

For this purpose, the Government Regulation establishes the Halal Fatwa Committee. Within one year of the enactment of the Government Regulation, the Minister of Religious Affairs must establish the Halal Fatwa Committee, which will consist of various *ulama* and academics. However, the Halal Fatwa Committee's scope of authority is limited in that it is authorised to issue a halal fatwa for a product if one of the following conditions is satisfied:

1. the MUI has not issued a halal fatwa within the statutory three business days after the MUI received the result of the examination of the product from the Halal Inspection Agency (*Lembaga Pemeriksa Halal* or "LPH"); or
2. the application for the halal certificate is made by a micro or small enterprise using the self-declaration method.

If none of the above conditions applies, then only the MUI or the MPUA can issue a halal fatwa.

#### **Electronic halal product assurance service**

Lastly, the Government Regulation mandates the establishment of an integrated electronic system for halal product assurance service within one year of the Government Regulation's enactment date. Upon establishment, this system will be managed by the BPJPH and link all halal certification procedures conducted by the BPJPH, the MUI, the LPH, and the PPH Assistant (*Pendamping PPH*).

The utilisation of an electronic system in the halal certification process has been introduced previously. Since 2021, the BPJPH has already begun using an electronic system for the halal certification process, which was created based on Government Regulation No. 39 of 2021 on the Halal Product Assurance

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Service (“GR 39/2021”). By mandating the government to establish a new integrated electronic system, we anticipate the halal certification process will be simpler, faster, and more efficient.

## Next Steps

Before the issuance of this Government Regulation, the government had already enacted Law No. 13 of 2022 on the Second Amendment to Law No. 12 of 2011 on the Formation of Laws and Regulations to accommodate the method of formatting laws under the omnibus method (i.e., the amendment of several laws under one umbrella law) in Indonesia.

Despite the issuance of the Government Regulation, the implementing regulations under the Omnibus Law will remain in force as long as they are in line with the Government Regulation.

This time, the government seems keen to avoid the uproar that came with the enactment of the Omnibus Law by forming a task force unit tasked to accelerate the socialisation of the Government Regulation. In our view, the task force’s formation seemed to be designed to accommodate the public’s concern about the lack of socialisation of the Omnibus Law. It is hoped that the unit will encourage meaningful participation of the public by increasing understanding and awareness of changes to the Omnibus Law.

In any event, the Government Regulation still has to be approved by the DPR to become law. However, by enacting the Government Regulation, the government has satisfied the Constitutional Court’s order to remedy the procedural flaws in the Omnibus Law. Moreover, the government has also corrected technical errors, e.g., typos and errors in numbering, found in the Omnibus Law.

For now, it is business as usual. If DPR approves the Government Regulation as a law, and based on the current composition of DPR, we believe that this is likely to be the case, major changes will be underway, the most vital being changes to the labour sector.

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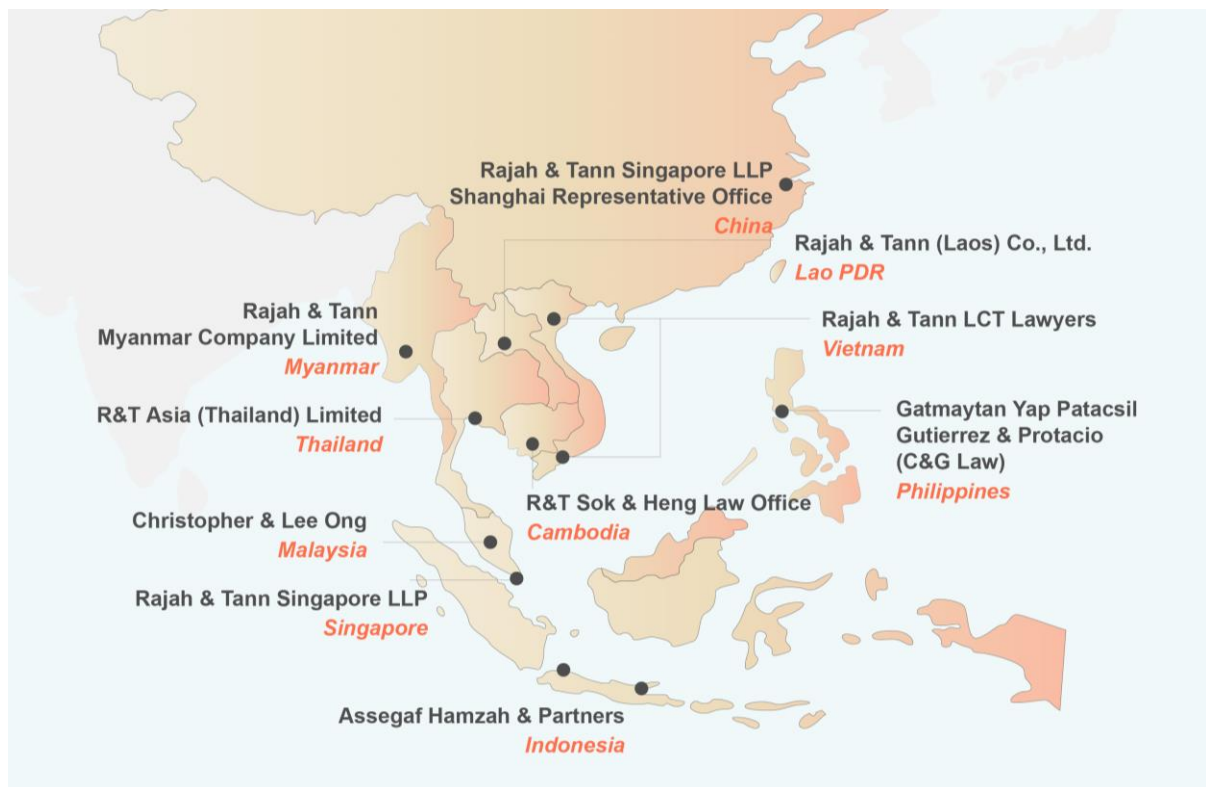
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