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PELAKSANAAN PEMBELIAN KEMBALI SAHAM YANG DIKELUARKAN OLEH EMITEN ATAU PERUSAHAAN PUBLIK AKIBAT FLUKTUASI PASAR YANG SIGNIFIKAN

By **Nicky Lim S.H.**

Sejak awal tahun 2020 kondisi perdagangan saham di Bursa Efek Indonesia mengalami penurunan signifikan Indeks Harga Saham Gabungan (IHSG) telah mengalami penurunan sebesar 18,46%, hal ini terjadi seiring dengan pelambatan dan tekanan perekonomian baik global, regional, maupun nasional sebagai akibat dari wabah Corona Virus Disease (Covid-19).

Untuk memberikan stimulus perekonomian dan mengurangi dampak pasar yang berfluktuasi secara signifikan, pada tanggal 9 Maret 2020, Otoritas Jasa Keuangan (OJK) menerbitkan Surat Edaran Otoritas Jasa Keuangan Nomor 3/POJK.04/2020 tentang Pembelian Kembali Saham yang Dikeluarkan oleh Emiten atau Perusahaan Publik Dalam Kondisi Pasar yang Berfluktuasi Secara Signifikan (SEOJK 3/2020). Melalui SEOJK 3/2020, OJK memberikan kemudahan bagi emiten atau perusahaan public untuk melakukan Pembelian Kembali Saham (buyback) untuk mengurangi dampak fluktuasi pasar yang signifikan.

Penerbitan SEOJK 3/2020 merupakan suatu bentuk pelaksanaan yang dapat dikategorikan sebagai kondisi pasar yang berfluktuasi secara signifikan akibat kondisi lain sebagaimana dimaksud dalam Peraturan OJK No. 2/POJK.04/2013 tentang Pembelian Kembali Saham Yang Dikeluarkan Oleh Emiten Atau Perusahaan Publik Dalam Kondisi Pasar Yang Berfluktuasi Secara Signifikan (POJK 2/2013). Kondisi lain yang ditetapkan OJK dengan mempertimbangkan:

1. Kondisi perdagangan saham di Bursa Efek Indonesia sejak awal tahun 2020 sampai dengan ditetapkannya Surat Edaran Otoritas Jasa Keuangan ini mengalami tekanan yang signifikan yang diindikasikan dari penurunan IHSG sebesar 18,46%; dan

2. Kondisi perekonomian regional dan global yang mengalami tekanan dan pelambatan, antara lain disebabkan oleh wabah COVID-19.

Dengan mempertimbangkan hal-hal diatas, Berikut ini adalah ketentuan-ketentuan penting dalam SEOJK 3/2020 yang dikeluarkan OJK:

### **1. Pembelian Kembali Saham Tanpa Persetujuan RUPS**

Pembelian kembali dapat dilakukan tanpa terlebih dahulu memperoleh persetujuan Rapat Umum Pemegang Saham (RUPS).

### **2. Kuantitas Maksimal Pembelian Kembali saham**

Jumlah saham yang dapat dibeli kembali dapat lebih dari 10% dari modal disetor dan paling banyak 20% dari modal disetor, dengan ketentuan paling sedikit saham yang beredar 7,5% dari modal disetor.

### **3. Keterbukaan Informasi**

Sebelum melakukan Pembelian Kembali Saham, Emiten atau perusahaan public wajib menyampaikan keterbukaan informasi kepada OJK dan BEI Keterbukaan Informasi tersebut dilakukan paling lama 7 hari bursa setelah

## **TERMINATION OF EMPLOYMENT BASED ON MUTUAL CONSENT**

By **Ida Bagus Adhitya Pudja S.H., LL.M.**

Employment relationship is the relation between the employer and the employees where the employees perform certain task for and under the subordination of the employer, and they earn remuneration upon the completion of the tasks. Employees are the vulnerable party in this relationship because they work under subordination and the employer can give any instruction to them. Therefore, the existence of labour law is important balance the power dynamics and to specify the rights and obligation of each party. Labour law regulates the work relation from the hiring process to the phase of employment termination.

Termination of contract is the constitutional rights of the parties as the implementation of freedom of contract principle, so in substance, terminating the employment is not prohibited especially if it is by mutual consent/agreement. A mutual consent does not mean the parties are happy with the termination, but this execution merely serves as an official statement concerning the separation of the parties which is created in the form of settlement agreement or mutual termination agreement. This agreement normally contains the effective date of termination, compensation, remuneration,



terjadinya Kondisi Pasar yang Berfluktuasi Secara Signifikan yang ditetapkan oleh OJK melalui SEOJK 3/2020.

### **4. Jangka Waktu Pembelian Kembali Saham**

Emiten atau Perusahaan Publik dapat melakukan Pembelian Kembali Saham dalam jangka waktu paling lama 3 bulan setelah menyampaikan keterbukaan informasi.

Dengan berlakunya SEOJK 3/2020, maka sejak tanggal 9 Maret 2020 Emiten dapat melakukan Pembelian Kembali Saham (buyback) yang tercatat di BEI. Penerbitan SEOJK 3/2020 diharapkan dapat menjaga harga pasar dan mengurangi dampak pasar yang berfluktuasi. Emiten atau Perusahaan Publik yang sahamnya tercatat di Bursa Efek dapat melakukan pembelian kembali sahamnya berdasarkan mekanisme yang diatur dalam POJK 2/13.

non-competition clause, and handover of company property. Mutual termination agreement is also made to testify that the parties have completed each obligation, no outstanding obligation, and no further obligation after the execution. This arrangement is an effective tool to prevent potential dispute which usually arises in the area of notice period and ground of termination. Accordingly, we wish to elaborate the termination provision in Indonesia to see how far the Indonesian's law protects the worker's interest when termination takes place, especially in terminations based on mutual consent.

### **I. How is the termination provision in Indonesia?**

The employment legislation in Indonesia is regulated in Law number 13 of 2003 on Manpower ("Law 13/2003"). Termination of employment and resignation are common methods in Indonesia to end employment relationship, similar to the practice elsewhere. Nevertheless, the termination provision in Indonesia is considered gives stricter protection for worker and, because of this, employer should bear several compensation as stated in Law 13/2003. The methods of termination and the protection for workers will be described in details below.



## 1. Termination based on the initiative of employer

Serious misconduct by employee, breach of contract, and operational reason are the justified grounds for employers in Indonesia to terminate the employment. Nonetheless, there are various provisions in Indonesia which need to be underlined by the employer because they are prohibited to terminate the employment if:

- a. The worker is absent from work because of an illness, proven by a written medical statement, and the worker is not absent longer than twelve months consecutively;
- b. The worker is absent from work to fulfill their obligation to the state as regulated in special legislation;
- c. The worker is absent from work to practice what required in their religion;
- d. The worker is absent from work because they are getting married;
- e. The worker is absent from work because she is pregnant, giving a birth, having a miscarriage, or breast feeding her baby;
- f. The worker is related by blood (birth) and or through marriage with another worker;
- g. The worker establishes or join the trade union;
- h. The worker files a report to authorities because the employer commits a crime;
- i. The worker has different understanding with the employer about religion, belief, political orientation, race, sex, ethnic, color, physical condition, or marital status;
- j. The worker is permanently disabled because of working accident or occupational disease.

The termination by employer is only authorized after having obtained an approval from the labour authority, unless the worker is still in probation period, resign, reaching pension age, or deceased.

## 2. Termination based on the initiative of employee

Worker can submit their resignation without providing justifiable ground (on whatever basis). However, they should apply the following limitation:

- a. The resignation must be submitted at least 30 (thirty) days prior to the effective date of the last date of services;
- b. The worker is not currently being bound by a contract to work/serve the employer for a certain period of time in return for the training/education provided to him/her paid by the employer;
- c. The worker shall continue their obligation until the effective date of his/her resignation.

Under this scheme, a worker does not need an approval

from or to notify the labour authority prior and after their resignation.

However, a worker can submit the immediate resignation to the labour authority if the employers:

- a. Battered, rudely humiliated, or intimidated the worker;
- b. Persuade or order the worker to exercise an act against the law;
- c. Have not paid the wages as prescribed for three months consecutively or more;
- d. Fail to perform the obligation as committed to the workers;
- e. Instruct to do tasks outside the worker's job description as agreed in the employment contract;
- f. Instruct to perform a job which endangers worker's life, safety, and health.

## 3. Notification

Workers are the only group who is bound to the notification period in Indonesia. Employer must fulfill several compensation payment if they terminate the worker, but a notice period for employer does not exist.

## 4. Special protection for employee

The absence of employer notice period is one disadvantage for the worker in Indonesia. However, there are several protections for workers in the termination phase which include:

- a. Should the termination take place, the employer must pay several components to the dismissed worker: (i) severance pay ("Severance") and/or (ii) a sum of money as a reward ("Reward"), and (iii) compensation pay for rights which the dismissed worker has not utilized ("Compensation"). The total amount obtained by the employee must be the combination of the calculation of: the length of service and the reason of termination. The first two tables are designed to present the worker's entitlement based on their job tenure.

The calculation of Severance shall be as follow:

Entitlement	Worker's	length of service
1 month wages	< 1 year	
2 month wages	> 1 year	< 2 years
3 month wages	> 2 years	< 3 years
4 month wages	> 3 years	< 4 years
5 month wages	> 4 years	< 5 years
6 month wages	> 5 years	< 6 years
7 month wages	> 6 years	< 7 years
8 month wages	> 7 years	< 8 years
9 month wages	< 8 years	

The calculation of Reward shall be as follow:

<b>Entitlement</b>	<b>Worker's length of service</b>
2 month wages	> 3 years < 6 years
3 month wages	> 6 year < 9 years
4 month wages	> 9 years < 12 years
5 month wages	> 12 years < 15 years
6 month wages	> 15 years < 18 years
7 month wages	> 18 years < 21 years
8 month wages	> 21 years < 24 years
10 month wages	< 24 years

The element of Compensation consists of:

- 1) Entitlement to paid annual leaves that have not expired and the worker have not used;
- 2) Expenses for transporting the worker and his/her family back to the location where he/she was hired;
- 3) Compensation for housing allowance and medical allowance is determined at 15% of the severance pay and/or reward pay;
- 4) Other compensation set under work agreement, company regulation, and collective labour agreement.

Having ascertained the entitlement based on the length of services, each party should refer to the below table, which indicates the ground of termination and its calculation.

<b>Ground of termination</b>	<b>Severance</b>	<b>Reward</b>	<b>Compensation</b>
Resignation	Not mandatory	-	√
Immediate Resignation	2x	1x	√
Long term illness	2x	2x	√
Serious misconduct of employee	-	1x	√
Breach of contract of employee	1x	1x	√
<b>Operational reason:</b>			
Closure	1x	1x	√
Efficiency	2x	1x	√
Bankruptcy	1x	1x	√
Merger and etcetera	2x	1x	√
Death of employee	2x	1x	√

b. In the event that the worker is detained by the authorities because he/she is alleged to have committed a crime, and the report was filed not by the employer, the employer is not obliged to pay the wage, but instead to give financial assistant to the worker's family (dependents) based on the following provision:

- 1) For 1 dependent: 25% of the worker wage;
- 2) For 2 dependents: 35% of the worker wage;
- 3) For 3 dependents: 45% of the worker wage;
- 4) For 4 dependents or more: 50% of the worker wage.

This financial assistant must be paid within 6 (six) months since the first day of the workers detention. The inability of worker to work for 6 (six) months due to the litigation process can be used by the employer as a ground of termination, without compensation. Having passed the 6 (six) month period, if the court declares that the worker is not guilty, the employer must reemploy the worker into his position. If the court declares the worker was guilty, employee can terminate the worker without any kind of compensation.

c. The termination because of business needs (efficiency) must be proved by the employer through providing 2 (two) years financial statements which is audited by public accountant.

d. Death of employee terminates the employment and the employer must pay the compensation to the worker's next of kin.



## II. What kinds of terminations are covered by the concept of mutual consent?

Termination of employment and resignation can be designed in the form of termination contract where the parties agree to release their mutual obligations. Therefore, these arrangements could be classified as termination based on mutual consent

Mutual consent is deemed as the common practice or relational arrangement without obligation to consider: the justified ground of termination and notice period. Many parties articulate this arrangement as the pre-termination agreement, bilateral termination agreement or cancelation of contract.

## III. Under which condition is the mutual consent considered effective to end the employment?

1. In the situation when the termination of employment is based on justified ground, due to the request of worker or employer, where the initiative of the terminating party is approved by the dismissed party. This condition happens when either party has no choice but to terminate the employment, for instance because of illness or bankruptcy. Form of the mutual consent in this regards is the mutual/settlement agreement.

2. In the situation of internal dispute, where there is still an option for either party to continue or discontinue the employment, but one party decides to terminate the employment. For instance, the company issues the staff guide to prohibit the worker from wearing visible religion symbol to represent the company's secularity in the customer's perspective. This situation refers to the prohibition of wearing Islamic headscarf at workplace during office hours.

In this situation, the company offers two options: either workers must follow the staff guide or, alternatively, terminate the employment based on mutual consent. In this case, worker still has an option to continue the employment, but if she prefers to practice her religion, termination based on mutual consent will be the feasible solution for both parties.

3. Mutual consent is required when termination happens because of the expiration of fixed term contract and/or when the agreed job has been accomplished.

## IV. Are the interest of worker well protected under this scheme?

Interests of worker remain protected in the mutual consent arrangement, particularly if the end of employment falls under the form of resignation, dismissal, or termination, which have been agreed by the counterpart. Mutual termination agreement in this condition is merely a form of settlement to release the past, present, and future obligation of the parties to avoid the dispute.

A mutual consent arrangement still protects the worker's interest because the agreement are accompanied with some package or compensation offered by the employer for the worker to compensate the waiver of notice period or unjustified ground, and it normally sets above the minimum standard as stipulated by the regulations.

In Indonesia, this arrangement falls under the civil law on the basis of freedom of contract, therefore, the workers' protection (as a private person) falls under the Indonesian Civil Code (outside the competence of labour court), because the labour court is only authorized to examine the dispute: (i) on dismissal, (ii) on the implementation of employment contract, company regulation, and collective agreement (rights/interests), and (iii) between trade unions.

