

Job Creation Act

Legal Insight

Effectiveness of the Job Creation Act, Law No. 11 of 2020, and its implementing regulations after Decision of the Constitutional Court No. 91/PUU-XVIII/2020

On 25 November 2021, the Constitutional Court put an end to the lengthy debates and discussions regarding the validity and effectiveness of the Job Creation Act, Law No. 11 of 2020 (the “Job Creation Act”) by issuing Decision of the Constitutional Court No. 91/PUU-XVIII/2020 (“CC Decision 91/2020”), which adjudicated the petition for a material test submitted against the Job Creation Act and in which the Constitutional Court gave the following rulings, amongst others:

3rd Ruling of CC Decision 91/2020:

*“To declare that the process by which the Job Creation Act Law No. 11 of 2020 (Statute Book of the Republic of Indonesia 2020 No. 245, Supplement to the Statute Book No. 6573) was passed **was contrary to the 1945 Constitution of the Republic of Indonesia and it conditionally has no binding legal force without being interpreted if no correction is made within 2 (two) years as from when this decision is uttered;**”*

4th Ruling of CC Decision 91/2020:

*“To declare that the Job Creation Act Law No. 11 of 2020 (Statute Book of the Republic of Indonesia 2020 No. 245, Supplement to the Statute Book No. 6573) **shall still remain in effect until process by which it was passed has been corrected in accordance with the period specified in this decision;**”*

5th Ruling of CC Decision 91/2020

“To order the drafters of the statute to make the correction within 2 (two) years as from when this decision is uttered and if the correction is not made within that period, the Job Creation Act Law No. 11 of 2020 (Statute Book of the Republic of Indonesia 2020 No. 245, Supplement to the Statute Book No. 6573) shall become permanently unconstitutional;”

6th Ruling of CC Decision 91/2020:

*“To declare that if the drafters of the statute are unable to complete the correction of the Job Creation Act Law No. 11 of 2020 (Statute Book of the Republic of Indonesia 2020 No. 245, Supplement to the Statute Book No. 6573) within the period of 2 (two) years, **the statutes or the articles or material contents of the statutes which are repealed or amended by the Job Creation Act Law No. 11 of 2020 (Statute Book of the Republic of Indonesia 2020 No. 245, Supplement to the Statute Book No. 6573) shall be declared re-instated;**”*

7th Ruling of CC Decision 91/2020:

“To declare the suspension of all actions/policies which are strategic in nature and have a wide impact as well as to not uphold the issuance of new implementing regulations related to the Job Creation Act Law No. 11 of 2020 (Statute Book of the Republic of Indonesia 2020 No. 245, Supplement to the Statute Book No. 6573);”

Impact of CC Decision 91/2020 on the Job Creation Act

In the rulings of CC Decision 91/2020 quoted above, the Constitutional Court does indeed declare that the Job Creation Act is contrary to the 1945 Constitution and does not have any binding legal force. However, the Constitutional Court does say that the Job Creation Act's lack of binding force is conditional, i.e., the Job Creation Law Act does not have Creation Act's lack of binding force only if within the 2 years as from 25 November 2021, which was the date CC Decision 91/2020 was read out, there is no correction of the Job Creation Act. In other words, the Job Creation Act's lack of binding force is not yet effective.

The above decision means that the Job Creation Act is still in effect until the condition determined by the Constitutional Court, i.e., corrections in the process by which the Job Creation Act was passed within 2 years as from the date of CC Decision 91/2020, is fulfilled.

The obligation to make corrections as required by the Constitutional Court in CC Decision 91/2020 is based on the considerations and finding of the Constitutional Court that (1) the procedures for the process by which the Job Creation Act was passed did not meet the principles of clarity of purpose, clarity of formulation, and transparency, which provide space for the maximum participation of the public, and (2) the process by which the Job Creation Act was passed was not in line with the standards for the process by which legislative regulations are passed. If no corrections in the process by which the Job Creation Act was passed is made in accordance with the requirements specified, the 6th ruling of CC Decision 91/2020 specifies the legal effects consequent thereon in that the provisions of legislation the Job Creation Act amended or repealed will be reinstated or in other words the Job Creation Act will become ineffective.

It can be concluded from the above exposition that at present the Job Creation Act is still in effect and will only become ineffective if the process by which the Job Creation Act was passed is not corrected in the 2 years from November 2021.

Impact of CC Decision 91/2020 on the Job Creation Act's present implementing regulations

CC Decision 91/2020 does not have any ruling which determines the legal consequences or validity of the Job Creation Act's implementing regulations which were issued before CC Decision 91/2020. CC Decision 91/2020 only says in its 7th ruling “the suspension of all actions/policies which are strategic in nature and have a wide impact” and does not uphold the issuance of new implementing regulations in relation to the Job Creation Act. In other words, CC Decision 91/2020 suspends the issuance of any implementing regulations of the Job Creation Act after CC Decision 91/2020.

The lack of any ruling in CC Decision 91/2020 which mentions the status of the Job Creation Act's implementing regulations issued before CC Decision 91/2020 can be construed as meaning that CC Decision 91/2020 does not invalidate and does not declare ineffective any implementing regulations of the Job Creation Act issued before CC Decision 91/2020. This is in line with the limits to the authority of the Constitutional Court, which only has the authority to test Statutes against the 1945 Constitution and does not have the authority to apply material tests against implementing regulations derived from Statutes, which comes within the scope of the Supreme Court's authority.

Thus, it can be concluded that CC Decision 91/2020 does not invalidate or does not declare ineffective the Job Creation Act's implementing regulations which were issued before CC Decision 91/2020 and therefore these implementing regulations of the Job Creation Act remain in effect.

Public reaction to CC Decision 91/2020

The issuance of CC Decision 91/2020 has met with a variety of responses from the public. On the one hand, some experts in state administration law have said that CC Decision 91/2020 is ambiguous, seems to be inconsistent, and could give rise to disputes in its application. CC Decision 91/2020 is considered ambiguous and inconsistent because the Job Creation Act is declared to be contrary to the 1945 Constitution of the Republic of Indonesia and conditionally without any binding legal force, but CC Decision 91/2020 also says that the Job Creation Act remains in effect until corrections are made to it. CC Decision 91/2020 is also considered to have the potential to give rise to disputes at the level of its application because CC Decision 91/2020 declares the suspension of all actions/policies which are strategic in nature and have a wide impact even though the parameters of actions/policies which are strategic in nature and have a wide impact are not described any further in CC Decision 91/2020.

Another reaction from the public is an appreciation for the issuance of CC Decision 91/2020 because (1) CC Decision 91/2020 examines a material test of the Job Creation Act, which applied the omnibus technique, which is considered a new method of drafting legislative regulations in Indonesia, and (2) CC Decision 91/2020 is the first decision on a material test which examined and granted the formal aspects for the issuance of a statute.

Apart from the above reactions, another reaction appeared in community from business actors. According to various sources, the Indonesian Association of Entrepreneurs (Apindo), through its general chair, took the view that CC Decision 91/2020 would not have a major impact on legal certainty and the Indonesian business climate since CC Decision 91/2020 does not nullify the material contents of the Job Creation Act but rather concerns the formal aspects of the process by which the Job Creation Act's was passed.

The Government's Attitude to CC Decision 91/2020

Since the issuance of CC Decision 91/2020, President Joko Widodo and several Ministers have said that they respect CC Decision 91/2020 and they will correct the Job Creation Act immediately. This indicates that there will be legislative regulations appearing as further action to CC Decision 91/2020. According to various sources, the Government, through the Ministers, has stated that it will follow up on CC Decision 91/2020 by preparing statutory corrections in accordance with the direction of the Constitutional Court in CC Decision 91/2020.

Since the form of the Job Creation Act is a statute, the corrective remedies by the Government as a follow up to CC Decision 91/2020 may include (1) the compilation, discussion, and then the issuance of a new statute amending the Job Creation Act, to accommodate the notes of the Constitutional Court in CC Decision 91/2020, (2) the compilation, discussion and then the issuance of a new statute which amends the Passing of Legislative Regulations Act Law No. 12 of 2011 as last amended by Law No. 15 of 2019 concerning The Amendment of the Passing of Legislative Regulations Act Law No. 12 of 2011 (the "12/2011 Act") to accommodate the amendment of the relevant statutes through the Job Creation Act, or (3) the compilation, discussion, and then the issuance of a Government Regulation in Lieu of Law which accommodates the notes and findings of CC Decision 91/2020. These options for correction will of course need no short period of time and so it is certain that discussion of the formal aspects and material of the Job Creation Act will continue.

In CC Decision 91/2020, the Constitutional Court is aware of the size of the impact arising out of the Job Creation Act in the form of many existing and future strategic policies and implementing regulations. On the other hand, the Supreme Court does not minimize the non-compliance of the issuance of the Job Creation Act with the formal aspects of legislative regulations. Faced with these two aspects, the Constitutional Court ultimately took a middle path in the 7th ruling of CC Decision 91/2020 by declaring the suspension of all actions/policies which are strategic in nature and have a wide impact and not upholding the issuance of any new implementing regulations of the Job Creation Act.

Quite aside from whether or not the Constitutional Court has the authority to suspend the Government's strategic policies in relation to the Job Creation Act or to not uphold the issuance of any new implementing regulations of the Job Creation Act, the Government's statements through the President and Ministers declaring their respect for CC Decision 91/2020 indicate that Government's respect for and intention of implementing CC Decision 91/2020. In other words, it seems as if the Government is going to suspend all strategic policies and the issuance of implementing regulations in relation to the Job Creation Act.

Conclusions

Given the above exposition, several conclusions can be drawn from the issuance of CC Decision 91/2020 by the Constitutional Court, among others:

1. CC Decision 91/2020 does not immediately render the Job Creation Act ineffective. The Job Creation Act remains in effect after CC Decision 91/2020 so long as corrections are made within the 2 years from 25 November 2021;
2. CC Decision 91/2020 does not render the Job Creation Act's implementing regulations which have already been issued ineffective, or in other words, the Job Creation Act's existing implementing regulations remain in effect despite CC Decision 91/2020;
3. CC Decision 91/2020 only suspends the issuance of any implementing regulations of the Job Creation Act after the issuance of CC Decision 91/2020 (25 November 2021);

The Government will respect CC Decision 91/2020 and is committed to following up CC Decision 91/2020 by preparing corrective statutes in accordance with the directives of the Constitutional Court in CC Decision 91/2020. It is certain that there will be legislative regulatory instruments issued as further action to the Government's commitment.

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