



## Retirement and Continuation of Employment Relations: Annotation of Supreme Court Circular Letter Number 5 of 2021

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**Abstract.** Retirement is a time when a worker stops working because he is old or has entered old age. At that time, laws and regulations stipulated that termination of employment could be carried out for the reason that workers were entering retirement age. However, sometimes it is common to find a company still employing retirees, whether they are employees who have retired but are still employed or have had their term of office extended, or who have retired and then been called back to work. For employees who have retired and are re-employed, the company can use a Specific Time Work Agreement (*Perjanjian Kerja Waktu Tertentu / PKWT*) by taking into account the time period and completion of work as stipulated in Article 4 paragraph (1) amended by Article 5 paragraphs (1) and (2) and amended by Article 6 of Government Regulation No. 35 of 2021. In line with the absence of laws and regulations prohibiting employers or companies from re-employing workers who have reached retirement age, the Supreme Court issued a Supreme Court Circular (*Surat Edaran Mahkamah Agung/SEMA*) Number 5 of 2021 concerning Enforcement of the Formulation of the Results of the 2021 Supreme Court Chamber Plenary Meeting as a Guideline for the Implementation of Duties for the Court in which it regulates the rights of workers who retire and then are reemployed.

**Keywords:** Retirement, Continuation of Employment Relations, Supreme Court Circular Letter, workers' rights, *PKWT*

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**Abstrak.** *Pensiun adalah saat dimana seorang pekerja berhenti bekerja karena usianya sudah lanjut atau sudah memasuki masa tua. Pada saat itu, aturan perundang-undangan mengatur dapat dilakukan Pemutusan Hubungan Kerja karena alasan pekerja memasuki usia pensiun. Akan tetapi, terkadang sering dijumpai di sebuah perusahaan masih memperkerjakan pensiunan, entah itu karyawan yang sudah pensiun tetapi masih dipekerjakan atau diperpanjang masa kerjanya, atau bisa sudah pensiun lalu dipanggil kerja kembali. Untuk karyawan yang sudah pensiun dan kembali dipekerjakan kembali, maka perusahaan bisa menggunakan Perjanjian kerja Waktu Tertentu atau PKWT dengan memperbatikan jangka waktu dan selesainya pekerjaan yang diatur dalam Pasal 4 ayat (1) jo Pasal 5 ayat (1) dan (2) jo Pasal 6 Peraturan Pemerintah Nomor 35 Tahun 2021. Seiring dengan tidak adanya peraturan perundang-undangan yang melarang pengusaha atau perusahaan untuk mempekerjakan kembali pekerja yang telah mencapai usia pension, maka Mahkamah Agung menerbitkan Surat Edaran Mahkamah Agung Nomor 5 Tahun 2021 tentang Pemberlakuan Rumusan Hasil Rapat Pleno Kamar Mahkamah Agung Tahun 2021 sebagai Pedoman Pelaksanaan Tugas bagi Pengadilan yang di dalamnya mengatur terkait hak-hak pekerja yang pensiun kemudian dipekerjakan kembali.*

**Kata kunci:** *Pensiun, Kelanjutan Hubungan Kerja, Surat Edaran Mahkamah Agung, hak-hak pekerja, PKWT*

## 1. Introduction

When entering retirement age, workers/employees are entitled to receive pension money from the place we work.<sup>1</sup> Termination of Employment is termination of Employment Relations due to a certain matter which results in the end of rights and obligations between Workers and Employers.<sup>2</sup> One of the things/certain reasons underlying the termination of the employment relationship is when the worker enters retirement age. Retirement is a time when a worker stops working because he is old or has entered old age. At that time, laws and regulations stipulated that termination of employment could be carried out for the reason that workers were entering retirement age.

Law Number 13 of 2003 concerning Manpower does not regulate when it is time to retire and what is the retirement age for private sector workers. Usually, the determination of the retirement age is regulated in work agreements, company regulations, or collective labor agreements in each company. However, Government Regulation Number 45 of 2015 concerning Implementation of the Pension Guarantee Program (Government Regulation No. 45/2015), which states the retirement age, can be used as a reference. According to Government Regulation No. 45/2015, the retirement age is 56 years old. The limit will be 57 years on January 1, 2019 and will continue to increase by 1 year every 3 years until it reaches the limit of 65 years (Article 15). This means that as of January 1, 2022 the retirement age according to Government Regulation No. 45/2015 is 58 years old.<sup>3</sup>

The laws and regulations governing layoffs due to retirement, namely Law Number 13 of 2003 concerning Manpower. Article 154 letter c confirms that an application for a layoff determination is not required in the event that the worker/laborer reaches retirement age in accordance with the provisions in the work agreement, company regulations, collective bargaining agreement, or statutory regulations (Marringan, 2015). Furthermore, article 167 paragraph (1)

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<sup>1</sup> Praktis, T. H. (2010). *Hak dan Kewajiban Karyawan*. PT Niaga Swadaya.

<sup>2</sup> Hidayani, S., & Munthe, R. (2018). Aspek Hukum Terhadap Pemutusan Hubungan Kerja yang Dilakukan oleh Pengusaha. *Jurnal Mercatoria*, 11(2), 127-140.

<sup>3</sup> Hernawan, A. (2016). Keberadaan uang pesangon dalam pemutusan hubungan kerja demi hukum di perusahaan yang sudah menyelenggarakan program jaminan pensiun. *Kertha Patrika: Jurnal Ilmiah Fakultas Hukum Universitas Udayana*, 38(1), 1.

states that employers can lay off workers/laborers because they are entering retirement age.<sup>4</sup>

Layoff compensation for retired workers is regulated in article 167 of Law 13/2003, namely, workers are entitled to 2 x provisions for severance pay, 1 x provision for gratuity pay, and compensation for rights. This provision is revoked by Law no. 11 of 2020 concerning Job Creation and its derivative regulations, namely Government Regulation No. 35 of 2021 concerning Work Agreements for Specific Periods, Outsourcing, Working Time and Rest Time, and Termination of Employment (Government Regulation No. 35/2021) which states that workers who are laid off for entering retirement age are entitled to 1.75 x severance pay provisions, 1 x provisions for long service pay, and compensation for rights. Article 167 of Law 13/2003 states that if an employer has included workers in a pension program, there are provisions for payment of layoff compensation. If the contribution/premium is paid in full by the employer, then the worker is not entitled to severance pay and long service pay as stated above, but is still entitled to compensation pay. However, if the amount of the guarantee or pension benefits received simultaneously in the pension program registered by the entrepreneur is less than the amount of the severance pay, long service pay, and replacement rights, then the difference is paid by the entrepreneur.<sup>5</sup>

However, if the contributions/premiums for the pension program are paid jointly by the employer and the employee, then the difference calculated by the amount of severance pay, gratuity pay, and compensation for rights is the premium/contribution paid by the employer only. Furthermore, contributions/premiums paid by workers are calculated into the total money received by workers. Finally, if the entrepreneur does not enroll the worker/laborer in the pension program, the entrepreneur is obliged to provide the worker/laborer with severance pay, gratuity pay, and compensation for these rights.

Pension funds that can be considered as compensation for layoffs are funds from the benefits of the pension program received all at once. Meanwhile, pension security benefits in the Pension Guarantee Program managed by BPJS

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<sup>4</sup> Indratno, R., Muchlis, M., & Fathullah, Z. (2019). Perbandingan Hukum Mengenai Batas Usia Pensiun Bagi Pekerja Di Sektor Swasta Dalam Sistem Hukum Ketenagakerjaan Di Indonesia Dan Malaysia. *Perspektif Hukum*, 19(1), 150-166.

<sup>5</sup> Uwiyo, A. (2003). Peranan Hukum Perburuhan Dalam Era Globalisasi. *Indonesian J. Int'l L.*, 1, 101; Soepomo, I. (2003). *Pengantar Hukum Perburuhan*. Jakarta: Djambatan

Employment are in the form of cash benefits received every month. Further information regarding BPJS Employment Pension Benefits.<sup>6</sup> Retired workers are also entitled to receive the benefits of the old age security program as stated in Article 167 paragraph (6) of Law 13/2003 confirming that the right to pension benefits that workers are entitled to receive does not eliminate the workers' rights to old age security which are mandatory in accordance with applicable laws and regulations.

However, sometimes it is common to find a company still employing retirees, whether they are employees who have retired but are still being employed or their term of service has been extended, or they may have retired and then been called back to work.<sup>7</sup> Basically, there are no laws and regulations that prohibit employers or companies from re-employing workers who have reached retirement age. As long as the worker concerned is still able to do the job competently. Employers can terminate employment for workers who have reached retirement age, followed by payment of workers' rights. So, the company could have rehired workers who have retired.

For employees who have retired and are re-employed, the company can use a Specific Time Work Agreement or *PKWT* by taking into account the time period and completion of work as stipulated in Article 4 paragraph (1) amended by Article 5 paragraphs (1) and (2) and amended by Article 6 of Government Regulation No. 35 of 2021. *PKWT* is a contract entered into between an employee and a company to establish a working relationship within a predetermined time. In the *PKWT*, there are still general provisions governing the working relationship between companies and employees such as the rights and obligations of each party, along with positions, wages, and other provisions.<sup>8</sup> However, what makes the difference is the time limit of the employment relationship because employees are not employed permanently but only for a certain period of time.

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<sup>6</sup> Muchlis, M. (2020). *Batas Usia Pensiun Bagi Pekerja Di Sektor Swasta Dalam Hukum Ketenagakerjaan di Indonesia* (Doctoral dissertation, Universitas Airlangga).

<sup>7</sup> Rachmawati, W. I. (2019). *Kebijakan Pemerintah Jepang Masa Shinzo Abe Dalam Merespon Permasalahan Penduduk yang Menua Melalui Peningkatan Batas Usia Pensiun dan Re-contract* (Doctoral dissertation, Universitas Gadjah Mada).

<sup>8</sup> Shalihah, F. (2016). Implementasi Perjanjian Kerja Waktu Tertentu (PKWT) Dalam Hubungan Kerja Di Indonesia. *Jurnal Selat*, 4(1), 70-100.

## 2. Discussion

On December 28, 2021, the Supreme Court issued Circular Letter (SEMA) Number 5 of 2021 concerning the Implementation of the Formulation of the Results of the 2021 Supreme Court Plenary Chamber Meeting as a Guideline for the Implementation of Duties for the Court. In point B of the Civil Chamber Legal Formulas, number 2 Special Civil Letter b Industrial Relations Disputes sub (1) is regulated that workers/laborers who resume working relations with employers at the same company after retirement and have obtained their pension rights, then in the event of termination of employment, the worker/laborer is only entitled to long service award money since being reemployed in accordance with statutory regulations.

It can be understood from the SEMA provisions that after retirement workers can be reemployed with the right to layoffs in the form of long service awards. It is interesting to carry out a legal review of Article 154 paragraph 1 letter n, Law No. 11 of 2020 concerning Job Creation (UU Cipta Kerja), which states that termination of employment occurs for the reason that the worker/labourer is entering retirement age. This provision replaces Article 167 of Law No. 13 of 2003 concerning Manpower (Labor Law).

In the implementing regulation Government Regulation No. 35 of 2021, Article 56 states that employers can layoffs because workers/laborers are entering retirement age with compensation in the form of severance pay according to Article 40 paragraph (2), long service pay according to Article 40 paragraph (3) and compensation for entitlements. in accordance with Article 40 paragraph (4), Government Regulation No. 35 of 2021. Based on these heteronomous rules, it can be understood that retirement is constructed as a reason for layoffs.<sup>9</sup> The retirement age is not regulated by the Labor Law, the Job Creation Law and Government Regulation No. 35/2021, therefore employers together with trade unions through an agreement can regulate the retirement age in their autonomous rules (Work Agreement, Company Regulations or Collective Labor Agreement).

In practice, the retirement age in a company can be regulated differently according to the job, duties, functions and positions. Retirement is withdrawal

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<sup>9</sup> Saefuloh, A. A., Alhusain, A. S., Silalahi, S. A. F., Surya, T. A., & Wirabrata, A. (2015). Kebijakan Pengelolaan Dana Pensiun Sektor Korporasi. *Jurnal Ekonomi & Kebijakan Publik*, 6(1), 77-96.

from one's position or job or from one's active work life.<sup>10</sup> Retirement is defined as not working anymore because his term of office has ended. With this understanding, retirement is constructed by heteronomous rules as a reason for layoffs.

Empirically it is often found that companies continue working relationships with workers who have entered retirement age, reasons for organizational needs and various other business considerations often come to the fore. The working relationship between companies and workers who continue their work relationship after retirement is in practice carried out on the basis of a specified time work agreement (*PKWT*).

When a company no longer extends the *PKWT*, there is the potential for disputes to arise because the company considers the workers to have violated Article 59 paragraph 2 of the Job Creation Law, which prohibits *PKWT* from being carried out for work that is permanent, continuous, not limited in time and is part of the company's production process. These disputes often end in workers' demands that *PKWT* violates the law so that by law it becomes Unspecified Time Work Agreement (*Perjanjian Kerja Waktu Tidak Tertentu /PKWTT*). As a result of this dispute, employers must pay layoff compensation like *PKWTT* workers. SEMA 5/2021, provides answers regarding the continuation of work relations after retirement at the same company and their rights when laid off. Author's side notes regarding SEMA 5/2021. SEMA 5/2021 must be implemented according to Company Agreement (*Peraturan Perusahaan/PP*) and Collective Labor Agreement (*Perjanjian Kerja Bersama/PKB*) or hereinafter called as *PKB/PP*. SEMA 5/2021 can be implemented by companies whose *PKB/PP* has regulated the duties, functions and positions of employees whose working relationship can be continued after retirement. For example, the *PKB/PP* regulates work relations after retirement for the managerial level.

Firstly, SEMA 5/2021 hints at *PKWTT*. Work relationships after retirement are generally carried out for jobs that are permanent, continuous, not limited in time and are part of the company's production process. This can be explained by looking at the years of service of retired workers, generally ranging from 20 to 32 years. By understanding the type and nature of the worker's work, a post-retirement employment relationship is only possible with an *PKWTT*. The practice that has

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<sup>10</sup> Boveda, I., & Metz, A. J. (2016). Predicting end-of-career transitions for baby boomers nearing retirement age. *The Career Development Quarterly*, 64(2), 153-168.

been carried out with *PKWT* should be reviewed again, considering that *PKWT* is only for work that is of a temporary type and nature.

Secondly, SEMA 5/2021 provides layoff rights in the form of long service award money. According to SEMA 5/2021, the right to lay off workers whose work relationship is continued after retirement is compensation money for a period of service commencing from the time the employment relationship is resumed. This means that workers who will get this right are those who are laid off in the third year or more, according to Article 40 paragraph (3) of Government Regulation No. 35/2021. The practice of working relations after retirement is currently carried out with *PKWT*, in such case the worker should still be entitled to *PKWT* compensation according to Article 15 of Government Regulation No. 35/2021 and long service pay according to SEMA No. 5/ 2021, if the workers have continued their work relationship after retirement for three years or more.

There is also SEMA 5/2021 Company dilemma that by "legalizing" work relations after retirement SEMA 5/2021 on the one hand provides an answer to the company's business needs, provides opportunities for workers to continue to contribute to the company and on the other hand has slowed down regeneration in the company.<sup>11</sup> The vacancy in company organizations which should be an opportunity for other workers will be delayed for some time because retired workers can still return to work in the same position, by continuing the employment relationship after retirement.

It is necessary to harmonize business needs and regulations in implementing the continuation of employment relations after retirement as regulated in SEMA 5/2021. Some things to pay attention to before implementing. The first is the arrangements in the Company Agreement (*Peraturan Perusahaan/PP*) and Collective Labor Agreement (*Perjanjian Kerja Bersama/PKB*). PKB/PP should become a legal umbrella for implementing the continuation of employment relations after retirement by taking over the understanding of SEMA 5/2021.<sup>12</sup> As for matters that need to be regulated in the PKB/PP, among others are to set the criteria for

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<sup>11</sup> Farianto, W., Samekto, F. A., & Uwiyono, A. (2018, July). The Informal Sector: Employment Dilemma and Solution. In *IOP Conference Series: Earth and Environmental Science* (Vol. 175, No. 1, p. 012132). IOP Publishing.

<sup>12</sup> Hidayani, S., & Nasution, A. H. (2019). *Tanggung Jawab Perusahaan dengan Pekerja dalam Perjanjian Kerja Bersama (Penelitian di PDAM Tirtanadi di Sumatera Utara)* (Doctoral dissertation, Universitas Medan Area).



jobs and employees who can continue their work relationship after retirement; (company needs, level, health, Key Performance Indicator, etc.), to regulate work agreements that form the basis of employment relations for workers whose employment relationship continues after retirement, namely *PKWTT*, to set the maximum time limit for an agreement for workers who continue their employment relationship after retirement, is 2 years (if the workers wish not to pay long service gratuities. However, if it is set for 3 years or more, the company is required to pay long service gratuities according to Article 40 paragraph (3), Government Regulation No. 35/2021), and to regulate the right to lay off employees who continue their working relationship after retirement in the form of gratuity money if they meet the terms of service for 3 years or more.

Regarding the mandate to pay pension rights before continuing the employment relationship, SEMA 5/2021 mandates workers who continue their working relationship after retirement to be paid their pension rights first. This implies that if the employment relationship is continued without paying pension rights in advance as a violation. There is legal reason that if the workers have not paid the pension rights, they will continue their employment relationship, while based on the Job Creation Law and Government Regulation No. 35/2021, retired workers are entitled to compensation in the form of severance pay, long service pay and compensation for rights.<sup>13</sup> The risk is that the working period after retirement is combined with the working period before retirement or it is reported to the labor inspectorate to the police.<sup>14</sup> By drawing up a Collective Agreement when the worker retires and register it with the Industrial Relations Court in accordance with the jurisdiction. The working relationship begins with an employment agreement and ends with a collective agreement. The deed of registration of the Collective Agreement issued by the Industrial Relations Court has executorial value so that it can be used to anticipate future disputes. By requiring proof of payment at the time of registration of the Collective Agreement at Industrial Relations Court, this proves that the agreement has been implemented so that it cannot be disputed anymore. Finally, it needs to be emphasized that the Constitutional Court's decision stated that the unilateral layoffs regulated by articles

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<sup>13</sup> Uwiyono, A., Suryandono, W., Hoesin, S. H., & Kiswandari, M. (2014). *Asas-asas hukum perburuhan*. Rajawali Pers.

<sup>14</sup> Uwiyono, A. (2003). Implikasi Hukum Pasar Bebas dalam Kerangka AFTA terhadap Hukum Ketenagakerjaan di Indonesia. *Jurnal Hukum Bisnis*, 22.

158 and 159 of the Manpower Law were unconstitutional. This means that unilateral layoffs cannot be implemented in Indonesia.

### **3. Conclusion**

In general, the results show that the agreement made between the pensioner and his employer determines the status of the person who returns to work after retirement, whether it is in the form of PKWT or PKWTT. This agreement further binds the form of the employment relationship of PKWT or PKWTT. This shows that the relationship between the pensioner and his employer is not definitely of the form of PKWT.

Thus, fulfilling the needs of company organizations due to retired workers apart from continuing the employment relationship after retirement, can also be done through a consulting/ advisory service agreement. With this agreement, retirees are given the role of non-employee consultants/advisors so that positions left by retirees can be filled by other workers, in other words regeneration takes place. The consultant/advisory service agreement that is drawn up may not fulfill all the elements of the work agreement, namely wages, orders and work. Treatment must also be distinguished from other workers. For example, regarding the working time of consultants/advisors, they are freed from working time, then fees as consultants/advisors are paid based on invoices for the work that has been done. Failure to fulfil the elements of the work agreement frees the consulting services agreement between the entrepreneur and the consultant/advisor from all obligations and rights regulated by the Labor Law and the Job Creation Law.

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