

# DYNAMEIS CLIENT INSIGHT

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## NEW FORMULA ON TERMINATION PAYMENT

One of the implementing regulation of Law No. 11 of 2020 on Job Creation (“Omnibus Law”) is Government Regulation No. 35 year 2021 on Definite Period Employment Agreements, Outsourcing, Working and Resting Hours and Termination of Employment (“Regulation 35”).

## NEW FORMULA ON TERMINATION PAYMENT UNDER THE NEW GOVERNMENT REGULATION NO. 35

In general, Regulation 35 maintains that the Termination Payment consist of Severance Pay, Long Service Pay and Compensation of Rights. However, the formula for Termination Payment under the new Regulation 35 is **less** than the previous formula as governed in Law No. 13 year 2003 (“Manpower Law of 2003”). This means that the payment received by employee for Termination Payment is lower than the previous regulation.

The main question is: does the new formula applied to current employment relationship? Does the current employee will receive lower payment when he/she is being terminated?

The simple answer to both questions is: No!

Reasoning for the answer is elaborated below.

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*“Does the new formula applicable toward  
current employment relationship?”*

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### 1. Non-Retroactivity

Non-Retroactivity is one of the main principle of Law. It means that a new Law / Regulation shall only be applicable subsequent to the Law’s / Regulation’s enactment. The Law/Regulation cannot be applied retroactively. With this principle, the new formula on Termination Payment based on Regulation 35 is **not applicable** to the employment relationship that already commenced;

### 2. Company Regulation ( *Peraturan Perusahaan* ) and Collective Labour Agreement ( *Perjanjian Kerja Bersama* ) is the main law in the employment relationship

The Company Regulation ( *Peraturan Perusahaan* ) and Collective Labour Agreement ( *Perjanjian Kerja Bersama* ) always states the

formula on how to calculate the Termination Payment. It is already agreed and legally accepted that the Company Regulation ( *Peraturan Perusahaan* ) and Collective Labour Agreement ( *Perjanjian Kerja Bersama* ) shall become the **applicable agreement/law/regulation in the relationship between the Employer and Employee**. Coupled with the Non-Retroactive principle, any termination payment under current Company Regulation ( *Peraturan Perusahaan* ) and Collective Labour Agreement ( *Perjanjian Kerja Bersama* ) **must be honoured and applied**. In other words, Company Regulation ( *Peraturan Perusahaan* ) and Collective Labour Agreement ( *Perjanjian Kerja Bersama* ) shall **prevail** over the Regulation 35. However when the Company Regulation ( *Peraturan Perusahaan* ) and Collective Labour Agreement ( *Perjanjian Kerja Bersama* ) expired after the enactment of Regulation 35, then Regulation 35 shall be applied towards the new Company Regulation ( *Peraturan Perusahaan* ) and Collective Labour Agreement ( *Perjanjian Kerja Bersama* ).

## **EFFECT TO THE COMPANY REGULATION ( *PERATURAN PERUSAHAAN* ) AND COLLECTIVE LABOUR AGREEMENT ( *PERJANJIAN KERJA BERSAMA* )**

### **Wordings on the Termination Payment Clause**

The wordings on termination payment clause in the Company Regulation ( *Peraturan Perusahaan* ) and Collective Labour Agreement ( *Perjanjian Kerja Bersama* ) usually states **two kinds of approaches**:

- a. First Approach: The clause use wordings that states **a detailed calculation on the formula for Termination Payment** which must be at least in accordance with and not less than the Manpower Law of 2003. If this approach is stated in the the Company Regulation ( *Peraturan Perusahaan* ) and Collective Labour Agreement ( *Perjanjian Kerja Bersama* ), then it is clear that the termination payment must be in accordance with the Company Regulation ( *Peraturan Perusahaan* ) and Collective Labour Agreement ( *Perjanjian Kerja Bersama* );
- b. Second Approach: The clause use wordings that states **that the Termination Payment must be in accordance with the applicable laws and regulations**. With this wording, some interpret that the Regulation 35 shall applied to the current Company Regulation ( *Peraturan Perusahaan* ) and Collective Labour Agreement ( *Perjanjian Kerja Bersama* ) that uses this approach.

However, **based on discussion with officials from Ministry of Manpower**, the government is under the view that in accordance with the principle of legal clarity and legal certainty, when the Company Regulation ( *Peraturan Perusahaan* ) and Collective Labour Agreement ( *Perjanjian Kerja Bersama* ) states that the Termination Payment must be in accordance with the applicable laws and regulations, then it will refer to the applicable laws and regulations **at the time** when the Company Regulation ( *Peraturan Perusahaan* ) and Collective Labour Agreement ( *Perjanjian Kerja Bersama* ) is **made or signed**. Therefore it means that the applicable termination payment formula for Company Regulation ( *Peraturan Perusahaan* ) and Collective Labour Agreement ( *Perjanjian Kerja Bersama* ) using this second approach is **still the formula under Manpower Law of 2003**

## How to Implement the new formula in Company Regulation ( *Peraturan Perusahaan* ) and Collective Labour Agreement ( *Perjanjian Kerja Bersama* )

One of the questions that is also often being raised is **how to implement this new formula** of termination payment in the Company Regulation ( *Peraturan Perusahaan* ) and Collective Labour Agreement ( *Perjanjian Kerja Bersama* ). To accommodate this new formula, **changes** in the Company Regulation ( *Peraturan Perusahaan* ) and Collective Labour Agreement ( *Perjanjian Kerja Bersama* ) must be made. However, the changes towards the Company Regulation ( *Peraturan Perusahaan* ) and Collective Labour Agreement ( *Perjanjian Kerja Bersama* ) that still ongoing / not expired **can only be performed if the Employee and Employer reach an agreement** to change the Company Regulation ( *Peraturan Perusahaan* ) and Collective Labour Agreement ( *Perjanjian Kerja Bersama* ).

A different case altogether is if the Company Regulation ( *Peraturan Perusahaan* ) and/or Collective Labour Agreement ( *Perjanjian Kerja Bersama* ) is already expired and needs to be renewed. A new Company Regulation ( *Peraturan Perusahaan* ) and Collective Labour Agreement ( *Perjanjian Kerja Bersama* ) shall be **made in accordance with the new and applicable laws and regulations**. Accordingly, **in the clause that govern Termination Payment, it must be in accordance with Regulation 35**.

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You should seek specific advice prior to take any actions including revision to your Company Regulation as well as Collective Labour Agreement. Should you have further questions with regard to matters as elaborated above or any other matters, please do not hesitate to contact your usual Dynameis' representative or you may contact our Albert Dustin at [albert@dynameisconsulting.com](mailto:albert@dynameisconsulting.com).