



PERLINDUNGAN HUKUM BAGI TENAGA KERJA LOKAL ATAS PENERBITAN RENCANA PENGGUNAAN TENAGA KERJA ASING

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ABSTRAK

Penggunaan Tenaga Kerja Asing di Indonesia diatur dalam PERPRES 20/2018 tentang Penggunaan Tenaga Kerja Asing (TKA). PERPRES 20/2018 mengatur bahwa pengusaha yang mempekerjakan TKA wajib memiliki izin tertulis dan Rencana Penggunaan Tenaga Kerja Asing (RPTKA). Kesulitan kerap muncul saat TKA datang, seperti aksi penolakan TKA di Kendari, Sulawesi Tenggara. Penolakan ini terjadi karena tidak adanya transparansi tentang RPTKA. Oleh karena itu, penulis akan menganalisis tentang perlindungan hukum yang dapat dilakukan terhadap penerbitan RPTKA tersebut. Dengan metode penelitian doktrinal, dapat disimpulkan bahwa tidak ada perlindungan hukum preventif terhadap penerbitan RPTKA. Sedangkan perlindungan hukum represif dapat diajukan kepada pemberi kerja atau pejabat yang mengeluarkan RPTKA. Adapun penyelesaian sengketa dibagi menjadi metode non litigasi dan litigasi.

Kata Kunci: Perlindungan Hukum; Rencana Penggunaan Tenaga Kerja Asing; Tenaga Kerja Asing; Tenaga Kerja Lokal.

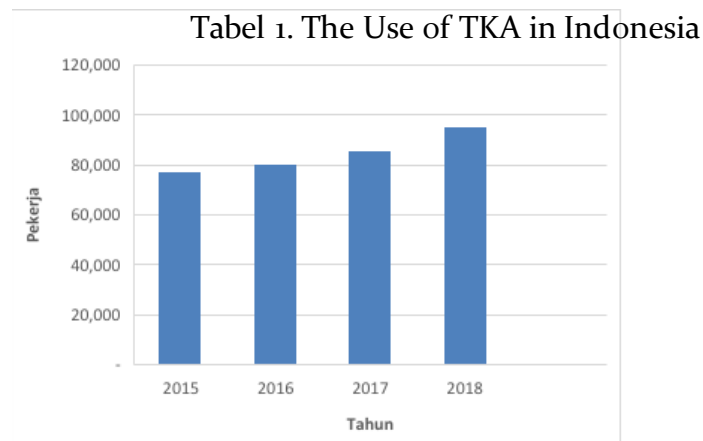
ABSTRACT

The use of foreign workers in Indonesia is regulated by PERPRES 20/2018 concerning the Use of Foreign Workers (TKA). PERPRES 20/2018 regulates that employers that employs TKA is obligated to have written permit and Plan for the Use of Foreign Workers (RPTKA). Trouble often stirs up when TKA arrives, such as the TKA rejection action in Kendari, Southeast Sulawesi. This rejection occurred because there was no transparency about the RPTKA. Therefore, the authors will analyze about legal protections that can be done for the issuance of said RPTKA. By using doctrinal research method, it can be concluded that there are no preventive legal protection toward the issuance of RPTKA. Meanwhile repressive legal protection can be submitted to employers or to the official who issued RPTKA. And the dispute resolution divided into non litigation and litigation method.

Keywords: *Legal Protection; Plan for the Use of Foreign Workers; Foreign Workers; Local Workers.*

INTRODUCTION

In carrying out their business activities, employers can employ foreign workers (TKA)(Nurhidayati, 2019) to meet the need for workers with expertise in certain fields that are not yet occupied by local workers.



From the tabel, it can be concluded that in 2015-2018, the number of foreign workers employed in Indonesia has always increased. The estimated number of use of foreign workers in 2019 has increased by 20%. The use of foreign workers in Indonesia in 2020 is estimated to reach 98,902 people from various countries (Ratih W, 2020). The number is smaller in 2020 due to the COVID-19 pandemic (Ratih W, 2020). So it can be concluded that foreign workers who master certain skills are increasingly needed.

The use of foreign workers is regulated in articles 42-49 of Law 13/2003 on Manpower as amended by Law 11/2020 concerning Job Creation. Some of the provisions for employing foreign workers are as follows:

- a. TKA only in a work relationship based on a certain position and time.¹
- b. TKA is only allowed for jobs with special skills.²
- c. Employers of TKA are obliged to appoint Indonesian workers to assist foreign workers with the aim of transferring technology.³

¹ Law Number 11 Year 2020 concerning Job Creation (The Republic of Indonesia State Gazette Year 2020 Number 245, Annotation 6573), Arc.81 number 4.

² Law Number 13 Year 2003 concerning Employment (The Republic of Indonesia State Gazette Year 2003 Number 39, Annotation 4279) as amended with Law Number 11 Year 2020 concerning Job Creation (The Republic of Indonesia State Gazette Year 2020 Number 245, Annotation 6573), Arc.1 number 2.

- d. Employers of TKA are required to pay compensation for each foreign worker they use.⁴

Based on article 81 point 4 of the Job Creation Law, employers who employ foreign workers are required to have a plan to employ foreign workers or RPTKA.⁵ Implementing regulations for the Manpower Law governing the use of foreign workers include PERPRES 20/2018 concerning the Use of Foreign Workers and PERMENAKER 10/2018 concerning Procedures for the Use of Foreign Workers. Meanwhile, although the Manpower Law has been amended by the Job Creation Law, the implementing regulations for the Job Creation Law have not yet been issued. Thus, based on Article 185 of the Job Creation Law, all implementing regulations of the amended law remain valid as long as they do not conflict. Thus, in discussing RPTKA, it still comes from PERPRES 20/2018 and PERMENAKER 10/2018.

RPTKA is a plan for the use of TKA in certain positions made by TKA employers for a certain period of time approved by the Minister in charge in the field of employment.⁶ Based on Article 9 of PRPRES 20/2018, RPTKA is also a permit to employ TKA (Adella V, 2019). Therefore, from the above description, between RPTKA and RPTKA confirmation are two different but inseparable documents.

RPTKA is a permit to employ TKA. Permission (*toestemming*) is a specific ability to do something that is forbidden (J.J.H. Bruggink, 2015). From this understanding it can be seen that the character of permission is affecting the rights of others (Nur A, 2017). If the use of TKA is not regulated, it will reduce the job opportunities owned by local workers. Therefore, as outlined in the previous paragraph, the government determines the criteria for the use of TKA in such a way as to protect local workers, and to ensure that employers do not do things that are prohibited (Adrian S, 2011).

In fact, chaos often happened when TKA arrives to the homeland. For example, the TKA rejection action that took place in Kendari, Southeast Sulawesi. This rejection occurred among them because there was no transparency about the RPTKA, so many assumed that the TKA submitted was not an expert TKA (Sitti H, 2020). In addition,

³ Law Number 11 Year 2020 concerning Job Creation (The Republic of Indonesia State Gazette Year 2020 Number 245, Annotation 6573), Arc.81 number 7.

⁴ *Ibid.*, Arc. 81 number 9.

⁵ *Ibid.*, Arc. 81 number 4.

⁶ Presidential Regulation Number 20 Year 2018 concerning Use of Foreign Workers (The Republic of Indonesia State Gazette Year 2018 Number 39), Arc.1 number 4.

local workers also doubt the transfer of technology by TKA employers (Chandra I, 2020). Therefore, the authors will analyze: 1) preventive legal protection and 2) repressive legal protection for local workers on the issuance of RPTKA.

METHOD

Both of the legal issues will be analyzed by using doctrinal research method. According to Terry Hutchinson, doctrinal research is: "... research which provides a systematic exposition of the rules governing a particular legal category, analyzes the relationship between rules, explains areas of difficulty and, perhaps, predicts future development." (Terry Hutchinson, 2015). Also this article is using statute approach and conceptual approach. Statute approach means that writers will analyze statutory provisions related to find the solutions of the legal issues. Meanwhile, conceptual approach will be used if there is absent of legal provisions and also used to complete the analysis with legal doctrines to provide a comprehensive answer.

RESULTS AND DISCUSSION

The Concept of Legal Protection

Licensing law recognizes the concept of legal protection (*rechtsbescherming*). This is a consequence of the character of the permit affecting the rights of others. Philip M. Hadjon defines legal protection as "the protection of the dignity and the dignity, as well as the recognition of the human rights of the subject of law under the general provisions of malpractice or as a set of rules or regulations that will protect something else." (C.S.T Kansil, 1989) From this definition, it can be concluded that legal protection is part of human rights. This is also emphasized by Article 28D (1) of the NRI Constitution 1945: "Everyone has the right to recognition, equity, protection and fairness of law and of equal treatment before the law."

Legal protection is divided into two, preventive and repressive (Philipus MH, 1987). Preventive protection (prevention) is done before the violation occurs, such as filing an objection or hearing an opinion before a decision is issued by a government official (Luthvi FN, 2016). The existence of preventive legal protection encourages decision makers to be careful in making decisions that are discriminatory.⁷ Meanwhile, repressive legal protection is done after a dispute, such as complaint

⁷ *Ibid.*

facilities, mediation, arbitration, lawsuits, etc. Repressive legal protection is done through non-litigation and litigation.⁸

The concept of legal protection is to protect society from the authority of the rulers. Therefore, the function of legal protection to the maximum is very much determined by the citizen's participation (May YB, 2016). In other words, the citizen's participation is a benchmark in assessing legal protection. The citizen's participation is a process that gives the citizens the opportunity to be involved or influence the decisions of the authorities (Hesty H, 2011). Wahyudi Kumorotomo writes that the citizen's participation is "The pattern of mass and individual action that shows the reciprocal relationship between the government and its citizens." (Wahyudi K, 1999) In licensing, the citizen's participation is very important remembering permits are instruments that will affect the rights of other citizens.

Preventive Legal Protection for Local Workers for the Issuance of RPTKA

The yardstick used to discuss preventive legal protection in the issuance of RPTKA is citizen's participation in the issuance of RPTKA. Citizen's participation is regulated in article 39 of Law 25/2009 on Public Services jo. Article 41 PP 96/2012 concerning Implementation of Law Number 25 Year 2009 concerning Public Services, in which citizen's participation in public services starts from the preparation of service standards to evaluation and awarding. So that in issuing RPTKA, the party authorized to issue permits is obliged to involve the citizens from the preparation of service standards, issuance of permits, to the implementation or use of permits.

Preventive legal protection is carried out before a violation or dispute occurs. Thus, preventive legal protection leads to citizens involvement in the issuance of permits. Involvement in the issuance of permits can take the form of objection efforts, hearings, etc. (Sulistiyani and Hardianto, 2019). Public participation in the issuance of permits is only possible if there is transparency and publication from the authorities.⁹ The purpose of public participation in the issuance of a permit is as a consideration for the licensor in deciding the issuance of a permit, considering that the decision is a decision based on free or discretionary authority (Adrian S, 2011). It should be noted that because a license is a discretionary decision, there is no obligation for the licensor

⁸ *Ibid.*, h.5.

⁹ Law Number 14 Year 2008 concerning Public Information Disclosure (The Republic of Indonesia State Gazette Year 2008 Number 61, Annotation 4846), general explanation.

to consider public opinion. In other words, whether public opinion is taken into account, the decision rests with the licensor.

In the framework of issuing RPTKA, there is no publication or facility for filing objections and / or hearings. In short, there is no citizen's participation in the issuance of RPTKA. Judging from the timeframe for obtaining RPTKA, in general, it only takes 2 (two) days from when the complete application is received to validate the RPTKA.¹⁰ Of course, in such a very short period of time, it would not be possible to publish, let alone attempt objections or hearings.

An example of citizen's participation in issuing permits is in the framework of issuing environmental permits. The minister, governors, regents/mayors are obliged to announce each application and decision for environmental permits.¹¹ Announcement of environmental permit applications and decisions allowing citizen's participation e.g. objections, hearings, etc. in the permit decision making process.¹² However, this regulation has been amended with the Job Creation Law where only the Decree of Environmental Feasibility is announced to the public via an electronic system or other means determined by the central government.¹³

From the above explanation, it can be concluded that preventive legal protection for local workers for the issuance of RPTKA is not available. The RPTKA issuance standard, which only takes 2 days, makes citizen's participation impossible. The government should open up opportunities for the citizens to participate in the issuance of RPTKA, considering that it is local workers who are most affected by the arrival of foreign workers.

Repressive Legal Protection for Local Workers for the Issuance of RPTKA

Repressive legal protection is carried out after a violation and/or dispute occurs. In other words, basically repressive legal protection is an effort to resolve disputes. KBBI defines a dispute as something that causes a difference of opinion or a fight. In the event that local workers are disadvantaged by the issuance of RPTKA, dispute resolution can be submitted against two parties; the employer as the maker of RPTKA;

¹⁰ Presidential Regulation Number 20 Year 2018 concerning Use of Foreign Workers (The Republic of Indonesia State Gazette Year 2018 Number 39), Arc.8.

¹¹ Law Number 11 Year 2020 concerning Job Creation (The Republic of Indonesia State Gazette Year 2020 Number 245, Annotation 6573), Arc.22 number 17.

¹² *Ibid.*, explanation of Arc.39.

¹³ Law Number 11 Year 2020 concerning Job Creation (The Republic of Indonesia State Gazette Year 2020 Number 245, Annotation 6573), Arc.39.

The Minister of Manpower or the official appointed as the party that issues the RPTKA ratification document.¹⁴ The official appointed to ratify the RPTKA are the Director General of Manpower Placement and Employment Opportunities (Binapenta & PKK) to employ 50 or more foreign workers, and the Director of Foreign Workers Control to employ less than 50 foreign workers.¹⁵ The settlement of disputes between local workers and employers is called industrial relations dispute settlement as regulated in Law Number 2 of 2004 concerning Industrial Relations Dispute Resolution (UU PHI).¹⁶ Repressive legal protection is further divided into repressive legal protection through non-litigation and litigation channels.

Repressive legal protection for non-litigation channels

a. Means of complaints

The public has the right to complain about the implementation of public services to the organizers, the Ombudsman, Provincial DPRD, and/or Regency/City DPRD.¹⁷ Complaints are filed by an aggrieved person against the organizers who do not carry out obligations/violate prohibitions, and/or provide services that do not comply with service standards.¹⁸ Thus the means of complaint is a repressive legal protection filed against the official who issued the RPTKA ratification document.

In the framework of implementing the RPTKA, the Ministry of Manpower of the Republic of Indonesia provides a Service for Complaint for Foreign Workers. So that people who are aware of illegal foreign workers, or are aware of violations in the use of foreign workers, for example, foreign workers filling personnel positions, the public can make a complaint to the Indonesian Ministry of Manpower through the number and email listed on the website (<https://tka-online.kemnaker.go.id/faq.asp>).

b. Bipartide Negotiations

Bipartite negotiations are negotiations between workers/laborers or trade/labor

¹⁴ Presidential Regulation Number 20 Year 2018 concerning Use of Foreign Workers (The Republic of Indonesia State Gazette Year 2018 Number 39), Arc.8.

¹⁵ Ministry of Employment Regulation Number 10 Year 2018 concerning Procedures for Using Foreign Workers (The Republic of Indonesia State Gazette Year 2018 Number 882), Arc.13.

¹⁶ Law Number 2 Year 2004 concerning Settlement of Industrial Relations Disputes (The Republic of Indonesia State Gazette Year 2004 Number 6, Annotation 4356) Arc. 1 number 1

¹⁷ Law Number 25 Year 2009 concerning Public Service (The Republic of Indonesia State Gazette Year 2009 Number 112, Annotation 5038), Arc. 40.

¹⁸ *Ibid.*, Arc.42.

unions and employers to settle industrial relations disputes.¹⁹ For example, if after the issuance of the RPTKA there is a dispute over rights because the foreign worker works as unskilled labor and the wages earned are higher than local workers with the same position, the local workforce can resolve the dispute by bipartite/negotiating first. If these efforts are successful, a Collective Agreement can be made.²⁰ If these efforts fail, then one or both parties will register the dispute with the local manpower agency by attaching evidence that efforts to resolve the bipartite have been carried out.²¹

c. Mediation

Mediation is the settlement of disputes over rights, disputes over interests, disputes over termination of employment, and disputes between trade unions in one company only through deliberation mediated by one or more neutral mediators.²² The mediator acts as a passive third party. The function of the mediator is as a connector between the disputing parties (Akbar P, 2013). The parties in the settlement through mediation are positioned as active participants in the decision-making process and participate directly in solving the problem by prioritizing their interests in the future (Mardalena H, 2016). For example, in the case of disputes over rights, a bipartite settlement has been carried out without success. The parties are given the freedom to resolve in other ways, namely through conciliation or through arbitration. However, if local workers and the employing company do not make their choice, the agency responsible for the manpower sector will delegate dispute resolution to the mediator. If the settlement through mediation does not reach an agreement, then one of the parties can file a lawsuit at the Industrial Relations Court.²³ If this effort is successful, a Collective Agreement will be made which will be registered at the Industrial Relations Court.

d. Conciliation

Conciliation is the settlement of disputes over interests, disputes over termination of employment, or disputes between trade unions/labor unions within one

¹⁹ Law Number 2 Year 2004 concerning Settlement of Industrial Relations Disputes (The Republic of Indonesia State Gazette Year 2004 Number 6, Annotation 4356) Arc. 1 number 10.

²⁰ *Ibid.*, Arc. 7.

²¹ *Ibid.*, Arc. 4.

²² *Ibid.*, Arc. 1 number 11.

²³ Law Number 2 Year 2004 concerning Settlement of Industrial Relations Disputes (The Republic of Indonesia State Gazette Year 2004 Number 6, Annotation 4356) Arc. 5.

company only through deliberation mediated by one or more neutral conciliators.²⁴ For example, if after the issuance of the RPTKA there is a conflict of interest between local workers and the company because the foreign workers who work at the company cannot communicate in Indonesian, then a settlement can be done by way of conciliation after the bipartite settlement does not reach an agreement. If the settlement through conciliation is successful, a Collective Agreement will be made which will be registered at the Industrial Relations Court. However, if the settlement through conciliation is not successful, then one of the parties can file a lawsuit at the Industrial Relations Court.

e. Arbitration

Arbitration is the settlement of disputes over interests and disputes between trade unions within one company, outside the Industrial Relations Court through a written agreement from the disputing parties to submit dispute resolution to the arbitrator whose decision is binding on the parties and is final.²⁵ The settlement of industrial relations disputes through an arbitrator is carried out on the basis of an agreement of the disputing parties.²⁶ For example, in the event of a dispute over interests as mentioned above, the local worker and the employing company must first resolve the dispute through a multi-concrete settlement. If the bipartite settlement is unsuccessful, and the parties have agreed to resolve the dispute of interest through arbitration, then the resulting decision on the dispute of interest is final and binding so that neither appeal nor cassation can be filed.

It should be noted that the settlement of industrial relations disputes is mandatory on a non-litigation basis. Only after efforts to resolve non-litigation disputes are unsuccessful, can one of the parties file a lawsuit at the Industrial Relations Court.²⁷

Repressive legal protection for litigation lines

Repressive legal protection through litigation is carried out through the courts, between local workers and employers or issuers of RPTKA ratification documents, according to the court's authority. The settlement of litigation disputes consists of:

²⁴ *Ibid.* Arc 1 number 13.

²⁵ *Ibid.*, Arc. 1 number 15.

²⁶ *Ibid.*, Arc. 32(1).

²⁷ *Ibid.*, Arc.5.

a. Lawsuit to PTUN

A lawsuit to the State Administrative Court (PTUN) can be filed if the dispute is a State Administration dispute. State Administrative Disputes are defined as disputes arising in the field of state administration between individuals or civil legal entities and state administrative bodies or officials, both at the central and regional levels, as a result of the issuance of state administrative decisions, including employment disputes based on the prevailing laws and regulations.²⁸ The object of PTUN is a state administrative decision (KTUN). State administrative decisions (KTUN) are a written stipulation issued by state administrative bodies or officials containing state administrative legal actions based on applicable laws and regulations, which are concrete, individual, and final in nature, which have legal consequences for a person or civil legal entity.²⁹

Employers who wish to employ foreign workers are required to have an RPTKA approved by the minister in charge of government affairs in the manpower sector or an appointed official (Emmy FT, 2019). Ratification of the Minister of Manpower or the appointed official who can be sued at the Administrative Court because the ratification fulfills the requirements of the State Administrative Court, namely concrete, individual and final. So that the parties in a lawsuit to the PTUN are local workers with officials who ratify the RPTKA document, with the object of the decision to ratify the RPTKA.

b. Industrial Relations Court

The Industrial Relations Court (PHI) is a special court established within the district court which has the authority to examine, hear and give decisions on industrial relations disputes.³⁰ So that in the case of RPTKA issuance, the parties to the PHI lawsuit are local workers with the employer.

Industrial relations disputes are filed at a district court whose jurisdiction covers the place of workers. In practice, the Industrial Relations Court is located in each provincial capital in each region, but there is not yet in every court as regulated in Article 81 of Law Number 2 of 2004 concerning the Settlement of Industrial Relations Disputes (UUPPHI) (Aam S, 2016). Industrial relations disputes consist of disputes

²⁸ Law Number 51 Year 2009 Concerning Second Amendment of Law Number 5 Year 1986 concerning State Administrative Court (The Republic of Indonesia State Gazette Year 2009 Number 160, Annotation 5079), Arc.1 number 10.

²⁹ *Ibid.*, Arc.1 number 9.

³⁰ Law Number 2 Year 2004 concerning Settlement of Industrial Relations Disputes (The Republic of Indonesia State Gazette Year 2004 Number 6, Annotation 4356) Arc. 1 number 17.

regarding rights, interests, termination of employment, and disputes between labor unions in one company.³¹ Decisions of the Industrial Relations Court regarding disputes over rights and disputes between labor unions are final and permanent in nature, while decisions of the Industrial Relations Court regarding disputes over interests and disputes over termination of employment can be appealed to the Supreme Court (Endang M, 2019).

c. Class Action

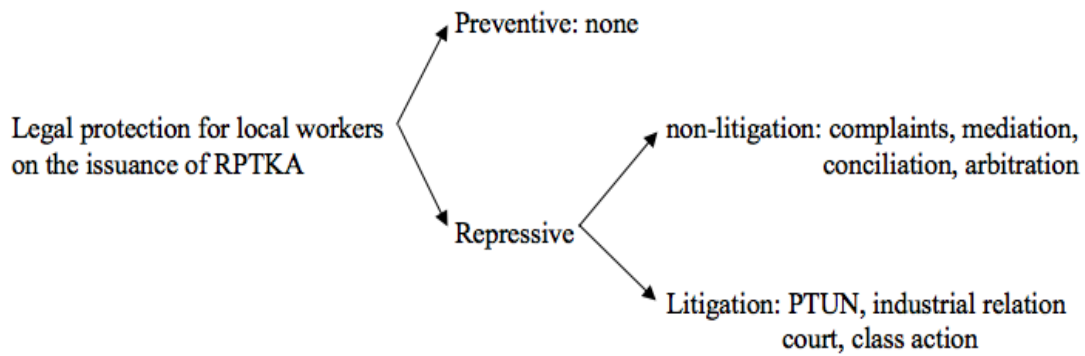
Local workers who feel aggrieved by the issuance of RPTKA, can file a class action lawsuit against the employer. Class Representative Action is a procedure for filing a lawsuit, in which one or more people representing the group file a lawsuit for themselves or for themselves and at the same time represent a large number of people, who have the same facts or legal basis between the group representatives and group members. The basic uses of class action include case efficiency, economical process of litigation, avoiding repeated decisions that may risk inconsistency decisions in the same case. A class action lawsuit can be filed if the formal and material requirements are in article 2 and article 3 PERMA 1/2002. These requirements include (Smart Legal Id, 2018):

- a. Representative action must be in the interest of many people, at least 10 people, for the lawsuit process to be effective.
- b. Representatives and represented class members must have the same legal basis (question of law) and substantial fact (question of fact)
- c. The plaintiff and class members represented must have the same type of claim.
- d. The party who will be the class representative must meet a number of requirements to determine his suitability in filing a lawsuit in court.
- e. The group representative must submit a class action letter in accordance with Article 3 PERMA 1/2002.

From the analysis of two legal issues above, the legal protection for Local Workers on the Issuance of the RPTKA can be described with the scheme below:

³¹ *Ibid.*, Arc.56.

Gambar 1. Legal protection for local workers on the issuance of RPTKA



CONCLUSION

RPTKA is a permit that must be owned by an employer to employ foreign workers. Given that a license has a character that affects the rights of others, the concept of legal protection in licensing is known. Legal protection aims to protect people from the arbitrariness of the authorities. The citizen's participation is a benchmark in analyzing legal protection.

Legal protection consists of preventive and repressive legal protection. Preventive legal protection is carried out before a violation or dispute occurs. In other words, preventive legal protection is the involvement of the citizens in issuing RPTKA. Repressive legal protection is carried out after a violation or dispute occurs. Thus, repressive legal protection is an effort to resolve disputes.

Preventive legal protection for local workers against the issuance of RPTKA is not available. Local workers are not involved at all in the issuance of the RPTKA. This is evidenced by the timeframe for RPTKA ratification which only takes 2 days from the time the application is received. In this period of time, publication and public participation would not be possible. Considering that local workers are most affected by the arrival of foreign workers, the government should provide a means of preventive legal protection because basically prevention is better than handling.

Repressive legal protection for local workers against the issuance of RPTKA is carried out through non-litigation and litigation channels. In addition, repressive legal protections can be filed against two parties, the employer and/or the official issuing the RPTKA ratification document. The means of non-litigation repressive legal protection consist of complaint facilities, as well as the settlement of industrial relations disputes through bipartide negotiaion, mediation, conciliation and arbitration. Repressive legal protection for the litigation line consists of a lawsuit

against the Administrative Court, a lawsuit against the PHI, and a class action lawsuit. The parties must first resolve the problem through non-litigation channels. If the non-litigation dispute resolution fails, only then can one of the parties resolve the dispute through litigation.

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