JURIDICAL REVIEW OF THE CLAUSE OF WITHHOLDING THE ORIGINAL DIPLOMA OF WORKERS BY THE COMPANY IN THE EMPLOYMENT AGREEMENT

Kadek Debi Triwangsa Mahardika[1*], Dewa Gede Pradnya Yustiawan[2]
[1,2] Faculty of Law, Universitas Udayana
E-mail: [1)] mahardiika16@gmail.com, [2)] pradnya_yustiawan@unud.ac.id

Abstract

The purpose of this research is to understand the aspects of legal certainty related to the Retention/Submission of Original Diplomas Clause in the employment contract applied by the Company and this research also aims to find out the legal protection efforts given to workers who agree to the retention of diploma clause in their employment contract, especially in the context where the Company is considered negligent in maintaining the original diploma belonging to its workers. The research method is normative legal research with an approach to legislation. The results of this study show that in the implementation of employment contracts that include diploma retention/submission clauses, there are no explicit statutory provisions that allow or prohibit the practice. However, regarding the legal requirements of agreements in employment contracts, this is regulated by the Civil Code. Therefore, the legal vacuum regarding whether or not the withholding of diplomas can cause this practice to occur as a result of customs in the world of work, and when related to RI Law No. 39 of 1999 concerning Human Rights is contrary to the principles of human rights because it hampers workers' rights to get better jobs and improve their quality of life. In addition, in the legal protection efforts for workers who agree to the clause of withholding/submission of diplomas in their employment contracts, there are preventive and responsive legal protections. This shows that there are measures to prevent and respond to potential violations of workers' rights in the context of such clauses.

Keywords: *Agreement, Withholding, Diploma, Legal Protection*

1. INTRODUCTION

With 260 million people living in this vast country, Indonesia is the fourth most populous country in the world, after the United States (328 million), China (1.42 billion) and India (1.37 billion). Currently, more than 68 percent of Indonesia's population is of productive age, which is the demographic bonus period that Indonesia is experiencing. The sizable proportion of individuals who are in the productive age also affects the need for survival, and one approach that can be taken to achieve a satisfying and high-quality standard of living is to have an established job. Education and employment are closely linked and for specialized and strategic positions in both the private and government sectors, the prerequisites for employment must be commensurate with academic qualifications. A competent education, reflected by an adequate grade point average, is a crucial aspect in detailing one's qualifications. This principle is not only an essential requirement, but also the main basis for prospective workers to apply in accordance with their respective expertise and discipline.

In today's modern world of work, most companies require applicants to attach the original diploma as the main requirement in the selection process. This is not just a formality, but a mechanism to ensure that applicants meet the qualification standards required by the company. However, an increasingly common phenomenon is that there are companies that have strict policies to keep the original certificates of the employees

they accept, citing the seriousness of the task and reflecting a high commitment to work. So here a work agreement is needed which aims to obtain legal certainty regarding what is promised, both parties must fulfill their respective rights and obligations. Employment agreements must not violate the law, the parties must agree and must not be forced. The contents of the employment agreement must also be clear, so that there is no misunderstanding in the future which results in default.

In the context of employment agreements, it is important to recognize that such agreements have a coercive characteristic, known as a "dwang contract". The concept of "freedom of contract" applied in the law of engagement cannot always be realized in employment agreements, given the different positions between the parties involved.

This condition results in the parties, especially employees, not being able to fully determine their wishes in the agreement. This situation tends to disadvantage employees, who are often in a weak position due to the need for work. In this dynamic, the employment agreement can be a more favorable instrument for the employer, given its more dominant position. Therefore, it is often found that there is a clause containing a guarantee on the original diploma of the employee, which is pledged to the employer. The guarantee requested by the employer aims to provide a sense of trust to the employer. With this, it is expected that workers will be more careful in carrying out their work, especially in positions where workers are entrusted with managing money, products, or equipment worth billions, and carrying the company's good name. For example, in the retail sector such as stores, outlets, or minimarkets, if workers commit fraud such as taking large amounts of goods or money, the diploma can be used as collateral. Therefore, while withholding a diploma may be considered a serious step in demonstrating an employee's commitment, it should not be the main aspect in assessing an employee's quality or commitment to their job. More importantly, the assessment of an employee's ability and dedication should be based on his or her performance and responsibilities, so as to create a trusting and productive work environment.

Law enforcement is very important to ensure the achievement of the benefits (efficiency) of these rules. Without strict law enforcement, these normative rules will not have significant meaning, especially in the field of labor. The Labor Law has provided a legal umbrella in Indonesia with the issuance of Law Number 13 of 2003 concerning Manpower. This Labor Law is presented to guarantee the basic rights of workers and ensure fair employment opportunities and treatment without discrimination based on anything. The main objective is to realize the welfare of workers and their families, while taking into account the development of the business world. However, it is important to emphasize that this law still has shortcomings related to the lack of clarity in allowing or prohibiting the use of diploma retention clauses in employment contracts between employees and employers. Therefore, law enforcement is crucial to ensure that the regulations are implemented and provide effective protection of workers' rights (Dini, 2019).

1.1. Problem Formulation

Based on the explanation above, the authors formulate 2 problem formulations from this journal, namely:

a. How is the retention of a worker's original diploma regulated by Indonesian law?
b. What is the legal protection for workers who agree to the clause of withholding certificates in their employment contracts?

1.2. Purpose of Writing

The purpose of writing this journal is:

a. Knowing the provisions of retaining the original certificate of workers based on the applicable laws in Indonesia.
b. Knowing the legal protection of workers who agree to the clause of withholding diplomas in their employment contracts.

2. RESEARCH METHODS

This research uses normative research methods. Normative legal research is a research process to examine and study the law as norms, rules, legal principles, legal principles, legal doctrines, legal theories and other literature to answer the legal problems under study. The type of approach used in this research is the Statute Approach This approach is used by examining all laws and regulations related to the legal issues being discussed (studied). Legal materials used in this research are primary legal materials, namely legal materials consisting of laws and regulations and secondary legal materials, legal materials consisting of law books, legal journals containing basic principles (legal principles). The legal material analysis technique used in this research is by performing description and argumentation techniques (Muhaimin, 2020).

3. RESULTS AND DISCUSSION

3.1. Provisions for Withholding Workers' Original Diplomas Under the Law

The clause of withholding/submission of workers' original certificates in employment agreements is a practice that is often carried out by companies as a condition of hiring their employees, this is often found in agreements (PKWT) for a certain period of time. This practice is carried out so that workers do not resign and/or get or look for other jobs during their contract period. However, legally If we look at the definition of work agreement as stipulated in Law Number 13 of 2003 concerning Manpower, Article 1 point 14 explains "Work agreement is an agreement between workers or laborers and employers or employers that contains working conditions, rights and obligations of the parties.

With the existence of a work agreement between employers and employees, a working relationship arises between the two parties so that the practice of withholding certificates must obtain approval from both parties, namely employees and companies. The company is obliged to make an employment agreement explaining that both parties agree to the conditions for withholding the certificate, along with the duration or period of withholding the certificate. In addition to the definition of employment agreement, there is also the definition of employment relationship, as stated in Article 1 number 15 of Law Number 13 Year 2003 "is the relationship between employers and workers / laborers based on employment agreements, which have elements of work, wages and orders." So, it can be concluded that the relationship between employers and workers has a close relationship and needs each other (Wibowo, 2020).

The legal requirements for an employment agreement as stated in Article 1320 of the Civil Code are: first, an agreement to bind themselves; second, the ability to make an agreement; third, the existence of a certain subject matter; and fourth, the existence of a cause that is not prohibited. As long as these conditions are met, the agreement is

considered valid and binding, including if it is agreed to retain the employee's diploma until the end of the contract (Vijayantera, 2017). According to Article 1338 of the Civil Code, agreements that are legally agreed upon by the parties shall apply as laws for those who make them, so that legally, the parties are obliged to comply with the contents of the agreed agreement, including the policy of withholding diplomas which becomes legally valid. In the Civil Code and Manpower Law Number 13 of 2003 and its implementing regulations, there are no provisions that explicitly regulate the withholding of original certificates.

Therefore, the legal vacuum related to whether or not to withhold certificates has resulted in this practice occurring based on custom in the world of work and the principle of freedom of contract. It should be understood that this freedom of contract does not mean freedom without any restrictions. Referring to the provisions of Article 1337 of the Civil Code which states that "a cause is prohibited, if it is prohibited by law, or if it is contrary to good morals or public order" and Article 1339 of the Civil Code which states that "an agreement is not only binding for things that are expressly stated". can be used as a limitation of freedom of contract is that the agreement must not conflict with law, decency, public order, propriety, and custom. Considering that the principle of freedom of contract was born from the realization of human rights, freedom of contract must also be limited by not being allowed to conflict with the human rights of one or the parties to the contract4in it, but also for everything that, according to the nature of the agreement, is required by propriety, custom or law".

The withholding of certificates by the company, when associated with Indonesian Law No. 39 of 1999 concerning Human Rights violates several articles, namely the first, Article 9 paragraph (1) "everyone has the right to live, maintain life and improve their standard of living" meaning that workers have the right to get a better job than before and get a bigger salary in improving their standard of living. workers lose their right to get the opportunity to work in other places that they consider better. Secondly, Article 12 states that "everyone has the right to protection for their personal development in order to obtain education, educate themselves, and improve their quality of life so that they become human beings of faith, devotion, responsibility, noble character, happiness and prosperity in accordance with human rights".

This causes certificate holders who want to continue their higher education to improve their quality of life to be hampered because their certificate is held by the company where they work. Finally, the third is contained in Article 38 paragraph (2) "everyone has the right to freely choose the job he likes and is also entitled to fair working conditions", with the withholding of certificates by companies resulting in workers being unable to use their certificates to get other jobs they want according to the talents they have. From the explanation of the articles above, it is clear that if a company withholds certificates, it means that it has violated the human rights of its workers but until now there is still no explicit rule that allows or prohibits the application of the condition of withholding/submission of certificates in employment contracts carried out by companies (Hidayah, 2018).

3.2. Legal Protection for Workers who Agree to the Clause of Withholding Diplomas in their Employment Contracts

The protection of labor is intended to guarantee the basic rights of workers/laborers and ensure equal opportunities and treatment without discrimination on any basis to

realize the welfare of workers/laborers and their families while taking into account the development of business progress. To protect workers/laborers from discrimination, a work agreement is needed, where the work agreement will regulate the rights and obligations of workers/laborers and employers. Legal protection itself is divided into two, namely, preventive and responsive legal protection:

Preventive legal protection is a protection provided by the government to prevent certain violations before they occur. This has the intention to provide a limitation when performing a certain obligation based on laws and regulations. Preventive legal protection provides legal subjects to file an objection or voice before a definitive decision, this aims to prevent future problems or disputes.

Preventive legal protection can be pursued by making employment agreements that are in accordance with the provisions of the legislation that clearly regulate what is agreed and do not violate what is agreed, including clauses regarding the return of diplomas to workers if both are no longer bound by the agreement. In labor law, preventive legal protection is based on the precepts of a just and civilized humanity alongside social justice for all Indonesian people. The purpose of this protection is expected to cover workers not only at the time of the employment relationship but also when the employment relationship ends. This is in accordance with the Pre-Contractual, Contractual, and Post-Contractual stages in which the employment agreement is balanced, in accordance with the legal requirements of the agreement, and also if a dispute occurs in industrial relations, it can be pursued by consensus based on the precepts of Pancasila (Salsabilah, 2021).

Repressive legal protection: protection that aims to resolve disputes (Ikhsani, 2020). After the existence of a work agreement, a work relationship occurs which can be referred to as a legal event so as to result in a work relationship there are legal consequences, namely rights and obligations for the parties, namely the company and workers, in the work agreement there is an agreement in the absence of coercion, error, fraud and there is also good faith which means that both parties agree to the existence of the work agreement. Work agreements between companies and workers related to the retention of diplomas often occur various kinds of problems, such as the loss of workers' certificates or damage to workers' certificates and also companies that do not want to return workers' certificates according to the work agreement (Agustin & Wahjoeono, 2023).

The loss of a worker's certificate has a big impact on the certificate owner because the certificate can only be issued once and cannot be reprinted. This is an anxiety for workers to submit certificates, and on the one hand prospective workers also want to work in the field of interest. If there is a loss of certificates committed by the company, it can be subject to Article 1365, Article 1366 and Article 1367 of the Civil Code because the company causes harm to other parties. Article 1365 "Every act that is unlawful and brings harm to another person, obliges the person who causes the loss through his fault to replace the loss", The provisions of this article can be used because the company is obliged to be responsible for losses caused by negligence or carelessness. Article 1366 of the Civil Code states that "every person is responsible not only for his actions but also for his negligence and lack of caution", From the provisions of the Article, it is clear that everyone must have the nature of prudence towards others, the company in this case that imposes the withholding of certificates in its work contract must take care of and safely store the certificates entrusted by its employees. Article 1367 paragraph 1 of the Civil Code "A person is not only responsible for losses caused by his own actions, but also for losses caused by the actions of those who are his dependents or by goods under his

supervision". This Civil Code argument can be used by workers to make a civil subpoena / lawsuit against the company, when workers are harmed by damage or loss of diplomas committed by the Company. In civil law there are two forms of compensation, namely material and immaterial compensation. In material form, it can be in the form of monetary compensation, and material responsibility in the form of compensation in the form of a certificate replacement letter.

In addition to what has been explained above, the return of certificates belonging to workers after the employment relationship ends is a very important thing, this is an obligation that must be carried out by employers who provide diploma requirements as a guarantee in employment relationships. If in the agreement letter to hand over the worker's certificate, whether it is an integral part of the employment agreement or made separately, it is stated that the work certificate will be returned after the employment relationship ends and in fact the employer does not fulfill its obligations, the worker as a party who is disadvantaged by the withholding of the certificate, can file legal remedies to regain their rights to ownership of the certificate based on a default lawsuit in the general court as Article 1243 of the Civil Code which reads that "Reimbursement of costs and interest for non-fulfillment of an obligation begins to be required, if the debtor, although it has been declared negligent, is still negligent to fulfill the obligation, or if something that must be given or done can only be given or done in a time that exceeds the specified time" (Anggraini, 2022).

Withholding employee certificates as a form of guarantee to the Company in the employment agreement can also fulfill the elements of the crime of embezzlement in office based on Article 374 of the Criminal Code, which reads: "For embezzlement committed by a person whose possession of property is due to an employment relationship or because of a profession or because he receives remuneration for it, shall be punished by a maximum imprisonment of five years." The perpetrator is aware of his actions that want to own property, either partially or fully, which is still part of or belongs to another person and the method of obtaining the property is carried out legally, not by theft but by embezzling. The perpetrator realizes that the property that he wants to own belongs to another person either partially or wholly, and that his actions will cause harm to that person. This Criminal Code argument can be used by workers to file criminal lawsuits against the company, when workers are harmed by damage or loss of certificates committed by the company (Gde Wiryawan, 2021)

4. CONCLUSION

The clause of withholding the diploma by the Company in the agreement often occurs in the agreement (PKWT) for a certain period of time work agreement, this is done so that the worker does not resign during the contract period, in the Civil Code and Manpower Law No. 13 of 2003 and its implementing regulations, there are no provisions that explicitly regulate the withholding of original certificates. Therefore, the legal vacuum related to whether or not it is permissible to withhold certificates has resulted in this practice occurring based on customs in the world of work and the principle of freedom of contract, however, when related to Indonesian Law No. 39 of 1999 concerning Human Rights, it violates several articles which cause this practice to hamper workers' rights to get better jobs and improve their quality of life so that the practice of withholding original certificates belonging to workers carried out by the company remains contrary to the principles of human rights. The form of legal protection for workers who have

implemented this agreement can be realized through preventive and repressive legal efforts. Preventive legal protection can be sought by making work agreements that are in accordance with the provisions of the legislation that clearly regulate what is agreed and do not violate what is agreed, including clauses regarding the return of diplomas to workers if both are no longer bound by the agreement. Repressive legal protection is sought by filing a lawsuit on the basis of default if the company does not return the worker's diploma in accordance with the employment agreement.

REFERENCES

Agustin, D., & Wahjoeono, D. (2023). Perlindungan Hukum Bagi Pekerja Atas Permintaan Ijazah Asli Oleh Perusahaan Sebagai Jaminan. *Bureaucracy Journal: Indonesia Journal of Law and Social-Political Governance*, *3*(1), 178–190.

Anggraini, S. D. (2022). Perlindungan Hukum Pekerja Atas Penahanan Ijazah Yang Dilakukan Pengusaha. *Jurnal Kajian Konstitusi*, *2*(1), 74–98.

Dini, N. R. (2019). *Analisis Yuridis Terhadap Penahanan Ijazah Pekerja Oleh Pengusaha Dalam Hubungan Kerja Dalam Perspektif Hak Asasi Manusia*. Universitas Islam Riau.

Gde Wiryawan, I. W. (2021). Aspek Pidana Dari Menahan Ijazah Pekerja Sebagai Jaminan Dalam Perjanjian Kerja. *Jurnal Magnum Opus*, *4*(2), 225–235.

Hidayah, A. (2018). Ketentuan Penahanan Ijazah Pekerja sebagai Syarat Tertentu dalam Perjanjian Kerja. *Jurnal Universitas Palembang*, *16*(2), 129–137.

Ikhsani, F. J. (2020). *Perlindungan Hukum bagi Pekerja atas Penahanan Ijazah Setelah Perjanjian Kerja Berakhir*. Fakultas Hukum.

Muhaimin. (2020). *Metode Penelitian Hukum. (Nusa Tenggara Barat, Mataram University Press, 2020)*.

Salsabilah, Y. R. (2021). *"Perlindungan Hukum Pekerja Terhadap Penahanan Ijazah Ditinjau Melalui Undang-Undang Nomor 13 Tahun 2003 Tentang Ketenagakerjaan". (skripsi, UIN Sunan Ampel Surabaya, 2021): 65-66.*

Vijayantera, I. W. A. (2017). Penahanan Ijazah Asli Pekerja dalam Hubungan Kerja sebagai Bagian Kebebasan Berkontrak. *Jurnal Komunikasi Hukum (JKH)*, *3*(2), 40–51.

Wibowo, D. (2020). *Penahanan Ijazah Pekerja Oleh Perusahaan Dalam Perjanjian Kerja Berdasarkan Undang-Undang Nomor 13 Tahun 2003 Tentang Ketenagakerjaan (Studi Putusan Nomor: 205/Pdt. G/2019/PN. SDA)*. Fakultas Syariah dan Hukum Universitas Islam Negeri Syarif Hidayatullah Jakarta.

Copyrights

Copyright for this article is retained by the author(s), with first publication rights granted to the journal.

This is an open-access article distributed under the terms and conditions of the Creative Commons Attribution license (http://creativecommons.org/licenses/by/4.0/).