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The Social Impact of *Force Majeure* and The consequences of the Determination of the Covid 19 Disaster Status on the Manpower Law

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Abstract

This study aims to explore learning about the labor law regarding the *Force Majeure* event due to the determination of the 2019 Corona Virus Disease pandemic (Covid-19) National Disaster, which has implications for the termination of employment in Indonesia. This type of research is normative-empirical legal research. The non-Judi case study's approach is based on primary legal materials, social behavior guidelines, and relevant previous research. The study results reveal that the impact of social *force majeure* on Termination of Employment due to the determination of the Covid 19 disaster status imposed by the government has resulted in an increase in unemployment and increased economic difficulties for the community. The law of *force majeure* based on labor regulations and policies reveals that layoffs are carried out after going through the renegotiation process stage. Layoffs cannot just be carried out unilaterally by companies, especially on the Covid 19 outbreak. This is because there are independent auditing steps carried out by stakeholders before actually being declared to have experienced a force majeure condition and enforcing layoffs. In other words, layoffs can be done if both parties have negotiated and are looking to solve the company's financial problems. This research's main contribution is for stakeholders, especially work bound by the company's work contract. By increasing the legal literacy *force majeure*, the unemployment rate due to layoffs should be controlled. In this case, the government needs to review the Manpower Act regulation related to the *force majeure* criteria so that social justice can truly be realized for Indonesian workers..

Keywords: Social Impact, *Force Majeure*, Covid 19, Employment

Introduction

The determination of the status of a national disaster due to the spread of Covid 19 has a significant impact on workers and business activities in Indonesia (Siallagan, 2020). Domestic actors (workers who experience termination of employment) experience economic difficulties. Business actors have difficulty even being unable to fulfill their obligations, bound by labor contracts and business contracts.

Before the presence of Presidential Decree No.12 of 2020, business actors could use the spread of Covid 19 as an excuse for force majeure if they were unable to fulfill the contract agreement as long as the reasons are given for the failure of the agreement were not due to company negligence but due to something unpredictable and unavoidable (Berger & Behn, 2020). The Covid 19 pandemic has put strong enough pressure on what companies have never faced, and partnerships have even experienced the project's failure (Casady & Baxter, 2020).⁴ As a result, many companies have terminated their employment.

Article 164 paragraph 1 of Law Number 13 the Year 2003 concerning Manpower provides room for companies to lay off employees on the grounds of force majeure due to Covid 19. There is no explanation at all what is meant by compelling circumstances in the Manpower Law. Therefore, this coercive situation's interpretation largely depends on the judges at the Industrial Relations Court (PHI). Another problem that is no less important is the social impact of force majeure on layoffs. Layoff decisions due to force majeure have had a sizable social impact, especially unemployment.

The following are some of the companies that laid off due to corona, 1) Gojek Indonesia implemented a layoff policy for 430 employees; 2) Traveloka companies lay off 100 people or 10 percent of their total employees; 3) PT Shyang Yao Fang laid off 2,500 employees; and 4) PT Express Trasindo Utama Tbk (TAXI) laid off 81 employees and made a salary cut of 40 percent for the remaining 390 employees (Santia, 2020). These companies are proof that mass layoffs have actually caused a serious unemployment problem in Indonesia.

Based on data from the Central Statistics Agency (CSA) in the Indonesian labor sector, it was recorded that up to February 2020, the number of unemployed had increased by 60 thousand people. Meanwhile, the open unemployment rate, which is an indicator to measure the labor market that is not absorbed by the labor market, is 4.99 percent. This indicates that out of 100 people in the workforce, there are around 5 unemployed people with a higher male open unemployment rate than women (Badan Pusat Statistik, 2020a). Even though, in fact, the Covid 19 pandemic regulation cannot be the reason for companies to layoff. The high number of layoffs amid the Covid 19 situation is a strong reason for the importance of legal literacy in *force majeure* agreements related to the implications for layoffs. It is hoped that stakeholders understand that layoffs are the last step taken after going through the renegotiation process.

Force Majeure (French) or known as *vis major* (in Latin), is defined as superior strength, otherwise known as *cas fortuit* (French) or *casus fortuitas* (in Latin), bad events, or situations outside the plan that cannot avoid. *Force Majeure* is an excuse to be exempted from all obligations to pay compensation (Litvinoff, 1985). Several recent studies related to this research explain cases of *force majeure* determination and the implications of Covid 19. Research conducted by Casady & Baxter (2020) reviews several international policies using the Highway 104 Nova Scotia Twin Project as an illustrative force risk management case. *Majeure* at the time of the Covid 19 Pandemic. Furthermore, the issue of *force majeure* doctrine and difficulties in dealing with legal effects from unforeseen circumstances. This research discusses the causes of the Covid 19 pandemic, which involves the doctrine of *force majeure* and domestic partners. Research recommends the idea of the unexpected and the inevitable for determining the force majeure criteria (Berger & Behn, 2020).

Organizational resilience during the Covid 19 pandemic. The study states that the crisis that occurred due to the pandemic has worsened economic conditions. But *force majeure* cannot be said to be the reason that causes losses and is deemed to deviate from Article 164 paragraph 3 of Law Number 13 of 2003 concerning Manpower (Juaningsih, 2020). Another study conducted in the UK states that two things are considered about force majeure conditions, namely: the basic concept of clausal force majeure is to provide an alternative to the rigors of the frustration doctrine and in the case 'callosal force Majeure must be interpreted by considering every word words that precede or follow it and pay attention to the general terms of the contract' (Giaretta, 2020).

From various previous studies, most of them discussed important points that led to the doctrine of force advanced, legal effects, and contracts difficulties. Very few researchers have found previous research that discusses lessons learned from determining force majeure situations and the resulting social impacts. Based on the background of the problem, two questions cover the background to the problem that has been raised, namely:

1. Explain the study of the Force Majeure Agreement Law on Termination of Employment?
2. Explain the consequences of determining the Covid 19 Disaster Status on Employment?

Methods

This type of research is normative-empirical legal research. The research category used is a non-Judi case study, namely the legal case study approach, without conflict so that there is no interference with the court. The type of data used consists of secondary data that is public, namely the Central Bureau of Statistics, Data from the Ministry of Finance (Kemenkeu) of the Republic of Indonesia. Data collection techniques are carried out through a literature study found in legal materials. The primary legal material in research is in the form of government regulations issued related to the Covid 19 Pandemic, social welfare, and employment, namely: 1) Law No. 13 of 2003 concerning Manpower; 2) Presidential Decree (Keppres) Number 12 of 2020 concerning Determination of Non-Natural Disasters for the Spread of Covid 19; 3) Financial Services Authority Regulation Number 11 of 2020 concerning National Economic Stimulus. The data analysis method is descriptive which tends to be inductive which emphasizes the process that occurs as well as the background of the research problem.

Result and Discussion

Learning About the Law of Force Majeure Agreement on Termination of Employment

In essence, the Termination of Employment cannot be avoided by companies amid conditions of economic uncertainty. Moreover, facing the low purchasing power of the people as a consequence of the stipulation of Presidential Decree (Keppres) Number 12 of 2020 concerning the Determination of Non-Natural Disasters for the Spread of Covid 19, considering that,

"Non-natural disasters caused by the spread of Corona Virus Disease 2019 (Covid-19) have had an impact on increasing the number of victims and property losses, expanding the number of victims and property losses, expanding the coverage of areas affected by disasters and having implications for socio-economic aspects that are widely in Indonesia."

About company decision making, the Termination of Employment must pay attention to aspects as the objectives of the Manpower Law Number 13 of 2020 in article 4 letter a,

"Empowerment and workforce utilization is an integrated activity to provide the widest possible job opportunities for Indonesian workers. Through this empowerment and empowerment, it is hoped that Indonesian workers can participate optimally in National Development, but while still upholding their human values."

It is evident that the content in the explanation in article 4 prioritizes several aspects, namely: 1) empowering and optimally empowering human resources; 2) realizing equal employment opportunities and labor supply according to development needs; 3) protect workers; and 4) fair or non-discriminatory employment agreement provisions. This indicates that the Termination of Employment is the last step taken by the company. Given that companies must also comply with government regulations in supporting efforts to empower workplaces to achieve people's welfare. So, in this case, companies and workers should negotiate together in finding solutions to face the consequences of Presidential Decree (Keppres) Number 12 of 2020 concerning the Determination of Non-Natural Disasters for the Spread of Covid 19. Further information regarding the prohibition of discrimination is explained in articles 5 and 6, which reads,

“Every worker has the same opportunity without discrimination to get a job (Article 5). Every worker/ laborer has the right to receive equal treatment without discrimination from employers (Article 6).”

²
⁸As stipulated in article 1320 of the Civil Code, a valid agreement must fulfill five elements: a binding agreement, the ability to make an engagement, a certain subject matter, a cause that is not prohibited, and an employment relationship. Of course, it can be understood that negotiations are clearly highly recommended, given that a working relationship bounds the company and workers. Also, negotiation is a form of enforcing justice as a form of rejection of acts of discrimination. Termination of employment contracts unilaterally without clear reasons and the absence of independent auditing is clearly not justified because the action is contrary to the objectives of the Manpower Law.

Based on the Manpower Act Number 13 of 2020 concerning Manpower as contained in article 163,

“Employers can make a Termination of Employment for workers/laborers in the event of a change in status, merger, consolidation, or change in company ownership. Workers are not willing to continue their working relationship.”

From the explanation in Article 163, several reasons for the company to conduct a Termination of Employment can be seen. However, it is unfortunate that if the company took this step without independent auditing regarding the force majeure, it would not be by the Manpower Act's as explained earlier. Further, Article 156 regulates severance pay or service fees or forms of work service awards and compensation for rights that should be received and must be paid by companies.

Referring to article 164, paragraph 1 of Law No.13 of 2003 concerning Manpower, it states that employers can carry out Employment Termination for workers/laborers because they close due to force majeure.

Furthermore, Article 164 paragraph 3 adds that employers can also carry out a Termination of Employment of workers/laborers with the following provisions, namely:

“1) The provisions of Article 151 apply whereby when conducting a Termination of Employment, an intensive social dialogue must be carried out with a union of workers/ labor unions; 2) there must be evidence of loss for 2 consecutive years audited by an independent audit.”

It needs to be understood that there is an unclear definition of force majeure, which causes conditions of non-natural disasters and/or quarantine regulations to be used as reasons for layoffs. These findings corroborate the research presented by Casady & Baxter (2020) , which reveals the relationship between the Covid 19 pandemic and public-private partnerships (PPP) and force majeure. It was explained that this force majeure leads to a situation where contract execution is not possible and an effort to resolve problems arising from poor performance due to the suspension or termination of the first party. According to the study, the Covid 19 pandemic was a force majeure event, as long as it met the criteria of the 2017 World Bank Guidelines on Provisions for Public-Private Partnerships (PPP) Contracts,

“The Majeure Event Force in a PPP contract represents any event or combination of events that exceed reasonable control limits, is unexpected or cannot be prevented/cannot be prevented, and is not a direct result of any breach of the PPP contract by the private partner.”

Further in clause (1) is described,

“a) epidemics, diseases, epidemics and natural disasters, but not limited to hurricanes, cyclones, hurricanes, tornadoes, blizzards, earthquakes, volcanic activity, landslides, tsunamis, floods, lightning, and drought; b) fire, explosion, or nuclear, biological or chemical contamination (other than caused by the Private Partner, its contractor or any subcontractor, supplier or vendor); c) war (whether declared or not), armed conflict (including but not limited to hostile attacks, blockades, military embargoes), hostilities, invasions, acts of foreign enemies, acts of terrorism, sabotage or piracy [in any case occurring abroad]; d) civil wars, rebellions and revolutions, riots, military or power seizures, civil unrest or chaos, mass violence, acts of civil disobedience [in any case that occurs outside the State]; e) radioactive contamination or ionizing radiation [occurring outside the State]; or f) general labor disturbances such as boycotts, work strikes and lock-outs, sluggishness, occupation of factories and premises, do not belong to similar situations in PPP Projects and specific to private partners or their subcontractors [and occur outside the country] (The World Bank, 2017).”

Based on the criteria from the 2017 World Bank Guidelines regarding the Provisions for Public-Private Partnerships (PPP), it is clear that the criteria for enforcing *force majeure* against companies at the time of the Covid 19 incident are not much different from the provisions of the Manpower Law Number 13 of 2020. Both depend on conditions other laws such as the negotiation process, dispute resolution in court, limitation of responsibility in contract agreement's content, liquidated compensation, governing law, and the right to termination based on each government policy's decision. The government played an important role in the *force majeure* event. As stated by Smith (1936) explaining the *force majeure* doctrine and the impossibility of performance, in the case of *force majeure*, the central government and local government authorities' actions and regulations have been considered *force majeure*.

As in the statutory regulations, The Termination of Employment provision basically obliges employers or companies to provide severance pay to workers/laborers. However, this becomes a social problem when the unemployment rate due to the Termination of Employment in the midst of a national disaster has increased, and severance pay is no longer sufficient to meet daily needs. In this case, there should be renegotiation between worker² and the company as a form of the labor agreement. The *force majeure* alias overmatch is regulated in Article 1244 of the Civil Code, which explains,

“The debtor must be punished to compensate costs, losses, and interest if he cannot prove that the agreement was not carried out or that the agreement was not carried out on time due to unforeseen circumstances that could not be borne by though there was no bad intention to him.”

Unfortunately, in fact, some companies did not do it and dismissed unilaterally. Meanwhile, most lay workers do not understand the legal provisions regarding the terms of the Termination of Employment in a *force majeure* situation and accept it. Even though, as workers, especially those who are bound by a contract, they can file court demands related to their rights as workers who are bound by an agreement contract. Therefore, workers must understand that the *force majeure* that can result in the Termination of Employment must fulfill three elements, namely; Unforeseen situations, cannot be prevented by the party that must fulfill obligations, or carry out the agreement, beyond the fault of the party. These provisions have been explained in article 164 paragraph 1 of Law No.13 of 2003 concerning Manpower.

The problem is that the definition of *force majeure* is not regulated in detail in the Civil Code in Indonesia. Article 1245 of the Civil Code states,

“Costs, losses, and interests don't need to be compensated for an overmatch or an accidental situation. The debtor cannot provide or do something required or the same things that have committed an illegal act.”

Responding to the implementation of contract agreements for some people³ who have been laid off and experiencing economic difficulties, it has been regulated in the Financial Services Authority Regulation Number 11 of 2020 concerning National Economic Stimulus as a Countercyclical Policy on the Impact of the Spread of Corona Virus Disease 2019. Although the contents of the explanation in the regulation aim to encourage banking performance, about companies, this policy really helps ease the debt burden for companies constrained by loans or financing at the bank. Of course, by paying attention to the principles of prudence and monitoring mechanisms to prevent misuse in the application of regulations (*moral hazard*). As explained in the Regulation of the Financial Services Authority of the Republic of Indonesia Number 11/PJOK.03/2020 concerning National Economic Stimulus as a Countercyclical Policy the Impact of the Spread of Corona Virus Disease 2019 states,

“.....The countercyclical policy on the impact of the spread of coronavirus disease 2019 (Covid-19) is aimed at encouraging banking performance, especially the intermediation function, maintaining financial system stability, and supporting economic growth, namely by providing special treatment for bank credit or financing with a certain amount and restructured credit or financing to debtors affected by the spread of coronavirus disease 2019 (Covid-2019) include micro, small and medium business debtors....”

Based on the stipulation of Presidential Decree (Keppres) Number 12 of 2020 concerning the Determination of Non-Natural Disasters for the Spread of Covid-19¹ and the provisions of the Manpower Act Number 13 of 2020. It is understood that *force majeure* and difficulties provide legal tools to deal with long-term effects and the uncertainty of the Covid 19 situation, especially in long-term contracts. This finding is in line with research conducted by Berger & Behn (2020), which states that at the time of the Covid 19 situation, the doctrine of *force majeure* and difficulties acting as regular law was not an exception to recovery. This allows for risks stemming from an unprecedented crisis. Then distributed evenly among stakeholders. The same statement was made by Maskow (1992) regarding the difficulty and *force majeure* determination in the revolutionary events of the post-World War I inflation crisis period and the seventies oil crisis in Eastern Europe and parts of Eastern Germany. What is clearly stated is that the contract must define the rights and obligations of each party. One of the natural methods used is to maintain the contract stability and flexibility as the '*pacta servanda sunt*' law. It is further explained that the *force majeure* criteria must reflect the values of justice and the requirements to bind someone to the promise and protect the promised interests. Even in a situation where the first party cannot keep its promise, and both parties cannot reasonably expect a profit and without any compensation.

It should be understood that the *force majeure* principle is the main principle of most legal contracts and is recognized as a rule of international law (Ripert, 1949). In other words, in following up on *force majeure* learning and the issue of Termination of Employment, a sufficient understanding of the principles of *force majeure* itself is needed, especially understanding the criteria and standardization that have been determined by stakeholders, namely government regulations⁵ and international organizations such as the World Bank. Designing appropriate contracts to examine and carefully assess the criteria needed to claim *force majeure* as well as renegotiation, arbitration, and litigation and *force majeure* clauses

that clearly rearrange when damages can be claimed, but not after notification has been filed (Giaretta, 2020). Two aspects can be considered criteria for determining the force majeure under the Covid 19 situation, namely competent management to avoid reasonable doubt in determining force majeure and unpredictable and unpredictable situations (Ward, 2020).

If examined more deeply, good faith and moral strength as a standard in a labor contract's behavior as an agreement that binds the company and the workforce is needed. Therefore, a return to moral strength, human values, justice, and negotiation is carried out before deciding on employment termination. Moral strength is an integral part of preventing contract violations and at the drafting stage, predicting uncertain situations such as Covid 19. These findings are reinforced by previous research that recommends the rapid development of trust, pursuing project rescue agreements, embracing collaborative responsibility, being optimistic and innovative to create results that benefit both parties to the contract. And in the long term, it is hoped that the current situation requires a comprehensive revision of the force majeure provisions to prioritize mitigation measures more adequately (Casady & Baxter, 2020).

The Consequences of Determining Covid 19 Disaster Status on Employment

One of the development targets stated in the State Budget to improve people's welfare is to reduce unemployment, which is supported by quality economic growth and a successful social protection program. In the midst of a situation determining the Covid 19 disaster status, workers who were victims of the Termination of Employment were the biggest contributor to the unemployment rate. Not without reason, due to force majeure conditions, the company dismissed workers so that most of the workforce experienced economic difficulties. This is quite a social problem, given that the poverty rate in Indonesia due to Covid 19 is quite high. Until March 2020, there were 26.42 million people, with a percentage reaching 9.78 percent (Badan Pusat Statistik, 2020b).

Humanitarian disasters must be watched out for. Moreover, the Covid 19 pandemic situation is very vulnerable to a survival crisis. Even in India, a humanitarian disaster has occurred. About 99 percent of India's workforce is employed in sectors that are not well organized, losing their livelihoods for household needs, hunger, destitution, and abuse (Sengupta & Jha, 2020). Most of the workers have lost their jobs due to the Covid Pandemic 19. This has increased unemployment because most of the workforce depends on the economy on companies or business actors. Contract workers and self-employed workers also have to face the inequality of the government assistance program. A study revealed that there were four groups of workers who were socially affected during the Covid 19 crisis, namely 1) sick people who did work but did not get sick leave; 2) unemployed workers who wish to claim unemployment insurance but do not meet the requirements; 3) workers who are unemployed and receive insurance but have run out; and 4) workers are not covered by government programs (Wandner & O'Leary, 2020). Workers may not survive long unless they have a sufficient amount of savings (Martin, Markhvida, Hallegatte, & Walsh, 2020). They have to deal with decreasing income and use their savings until their savings are completely depleted. If this happens en masse, unemployment due to employment termination will lead to global poverty and famine.

To overcome unemployment, especially victims of the Termination of Employment affected by the determination of the Covid 19 disaster status, the government provided a Pre-Employment Card. This is part of a strategic step in the social protection program to encourage Indonesia's workforce expansion and quality. The Pre-Work Card is a card given by the government to job seekers or workers to obtain vocational training services (skilling and re-skilling) and/or job competency certification. The total budget for 2020 provided by

the government to implement this policy is IDR 10 trillion, with a target of 2 million participants (Direktorat Penyusunan Anggaran APBN, 2020). The following is the Pre-Work Card Implementation Scheme;

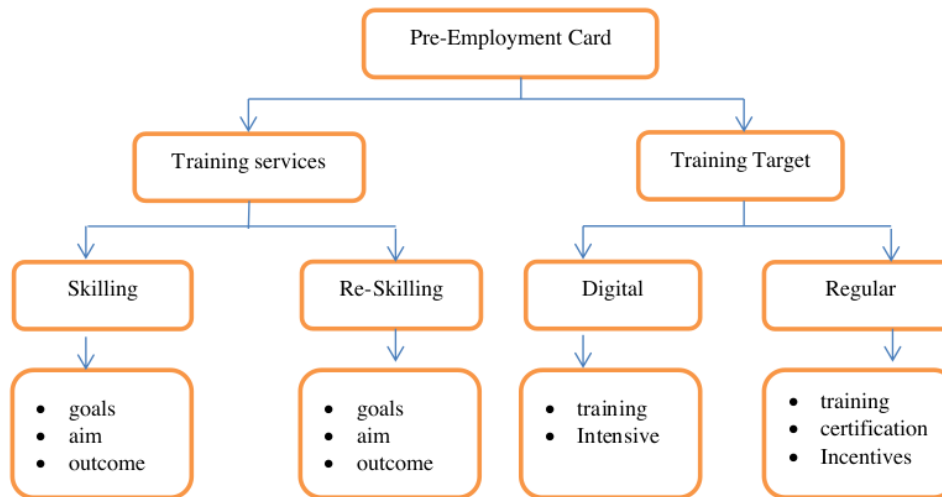


Figure 1. Pre-Employment Card Scheme
Source: (Direktorat Penyusunan Anggaran APBN, 2020)

Based on the design of the Pre-Work Card implementation, as in Figure 1, it can be seen that vocational training services consist of two categories, namely skilling and re.skilling. The difference lies in the goals, objectives, and outcomes the government wants to achieve- Skilling targets fresh graduate job seekers. The goal is to build adjustment skills and vocational skills for work. And the outcome to be achieved is to reduce unemployment. Meanwhile, Re-skilling has a target aimed at a change of profession, a terminated worker, or a potential Termination of Employment. The purpose of providing different or new vocational skills is for transferring professions and/or entrepreneurs. The outcome to be achieved is to prevent re-unemployment. It can be understood that the government is trying to overcome the social impact of determining the Covid 19 Disaster Status on employment or increasing unemployment by implementing the Re-Skilling Pre-Employment Card policy.

There are two kinds of implementation design used, namely digital implementation and regular implementation. The difference lies in the provision of certification for 0.5 million regular track participants, which is lower than the total digital implementation budget, reaching 1.5 million participants. In a digital implementation, participants are given training and incentives. The training is conducted online (e-learning) and offline (face-to-face) provided by the private sector. Whereas for the regular route, the next development stage, including training and certification, is carried out by Government Job Training Institutions (including Vocational Training Centers), Private LPKs, and Industrial TCs. Training and certification institutions are adjusted to the management of the executors.

In line with the findings, previous research revealed that programs that can be carried out to overcome social impacts as an effort to improve the economy at the time of Covid 19 are by providing income support programs, compensation (Woodbury, 2020), insurance benefits, and job subsidies (Ortiz, Salvo, & Astudillo, 2020). This is done in unique ways, namely in the form of a transfer of income paid within a certain period. To make this kind of program implemented quickly in emergencies like today. It was further explained that these programs need further protection to be right on target. Although in the implementation of the

possibility of failure, negative impacts and obstacles will definitely exist, over time with local businesses' support and the right government policies can ensure that the economy can run conducive.

Conclusion

The research results reveal that learning from force majeure during the Covid 19 pandemic encourages the importance of good faith and moral strength as a standard in labor contract behavior as an agreement that binds the company and the labor party. In this case, the criteria and principles of *force majeure* must also be considered. The second finding shows that the social impact of force majeure on employment is the occurrence of mass unemployment. To overcome these social impacts, the government implemented a pre-employment card program. However, it seems that the program has not been able to solve the current mass unemployment problem.

This research has quite broad implications. First, researchers highlight the importance of increasing legal literacy of force majeure agreements, especially in situations of economic uncertainty, as stated by Baker, Bloom, Davis, & Terry (2020) when discussing the results of their research, which states that half of the macroeconomic output contraction is estimated to hurt the uncertainty caused by Covid 19. Learning about *force majeure* is urgently needed for those who agree. Contract so that both parties can find a solution by the applicable legal provisions. If this is done, it is hoped that the company might avoid breaching contractual obligations. Second, this research's normative-empirical approach helps to build and explain legal provisions related to force majeure and its social impacts. Of course, it is hoped that this research can become a reference for the government to determine policy direction in dealing with unemployment problems. Future research should investigate the potential of the importance of learning force majeure law as a strategic step in determining the criteria and solutions faced by companies and workers in a situation of economic uncertainty.

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