



## LEGAL IMPLICATIONS OF AUTOMATICALLY ISSUED PERMITS IN A RISK-BASED BUSINESS LICENSING SYSTEM

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**Abstract.** This study aims to analyze and explain the risk-based business licensing process and the legal implications of licenses that are issued automatically in the risk-based business licensing system. This research used juridical-normative research methods with a statutory and conceptual approach. Based on the research results, the Job Creation Law divides business licensing based on the level of business risk and business scale. Business actors first register their business activities through O.S.S. to obtain the N.I.B. (Business Identification Number). The business licensing document for low-risk is the N.I.B., and for low to medium-risk, it is the N.I.B. and Standard Certificate, which are automatically issued after the business actor provides a self-declare. Business licensing documents with medium to high risk are the N.I.B. and Standard Certificate, while for high-risk are the N.I.B. and Permit. The Standard Certificate and Permit are issued after verification. The implications of the automatically issued N.I.B. and Standard Certificate as an Administrative Decision have eliminated the opportunity for government agencies or officials to make decisions and take actions in government administration. This results in confusion when determining the object of dispute against administrative lawsuits filed by the public whose interests are affected by the issuance of the N.I.B. and automatically issued Standard Certificates.

**Keywords:** Business licensing, standard certificate, administrative decision

### A. Introduction

Investment activities are the main pillars that can support economic development in Indonesia. Investment activities must be supported by providing certainty in all fields because they are related to the public interest, both directly and indirectly. Economic development through investment activities in a country can significantly impact job creation, leading to an increase in people's welfare. As a welfare state, one of the goals of establishing the Indonesian state is to create people's welfare. The nation's founders aspired to realize prosperity for all Indonesian people without exception. The Indonesian government has made various efforts to increase investment to build the economy and realize prosperity for its people.

On November 2, 2020, the Indonesian government enacted Law Number 11 2020 concerning Job Creation. This law introduces the omnibus law method of forming laws and regulations in Indonesia. Omnibus law is a method of creating laws that cover many aspects or correct various aspects previously regulated by several laws.(1) Through the Job Creation Law, 1,244 articles spread across 79 laws were revised. The Job Creation Law regulates strategic policies for job creation through improving the investment ecosystem and business activities; employment; convenience, protection, and empowerment of cooperatives and micro, small, and medium enterprises; ease of doing business; support for research and innovation; land acquisition; economic zones; Central Government investment and acceleration of national



strategic projects; implementation of government administration; and imposition of sanctions.(2) Although in its journey through the Constitutional Court Decision Number 91/PUU-XIX/2021, which was read on November 25, 2021,(3) the Job Creation Law was declared conditionally unconstitutional until the issuance of Perppu No. 2 of 2022 concerning Job Creation,(4) which was ratified into Law through Law No. 6 of 2023,(5) there were no significant changes to Law No. 11 of 2020, so the spirit is still the same. Therefore, what is meant by the Job Creation Law in this study is Law No. 6 of 2023.

Regarding ease of doing business, the Job Creation Law transforms the licensing process for business activity from permit-based to risk-based.

Risk-based business licensing is implemented based on determining the level of business risk and ranking the scale of business activities. The entire business licensing process is carried out online through the Online Single Submission (O.S.S.) information system provided by the Central Government. It is the only platform the Central Government and regional governments use to issue business licenses by the authority and norms, standards, and criteria set. Based on Article 7, paragraph (1) of the Job Creation Law, the risk rating of business activities is divided into low risk, medium risk, and high risk. The risk rating of business activities has consequences for granting business permits. In the Job Creation Law, business activities with a low-risk level only need to register to obtain a Business Identification Number (N.I.B.), issued automatically based on the business actor's independent statement on the business actor's O.S.S. account. In addition to the N.I.B., business activities with a medium risk level are required to state that they will meet and have been declared to meet business or product standards in carrying out their business activities to obtain a Standard Certificate. Medium risk is divided into medium-low risk and medium-high risk. For business activities with a medium low-risk level, the Standard Certificate is issued automatically based on the business actor's independent statement of ability to meet business or product standards.

Furthermore, for business activities with a medium to high-risk level, the Standard Certificate is issued by the Central Government or regional government authority after the business actor has fulfilled the requirements and has been declared to have met the business standards or product standards by the norms, standards, and criteria set. Meanwhile, business actors must meet specific requirements to obtain a permit for business activities at a high-risk level other than N.I.B. The Standard Certificate and Permit are issued by the Central Government or regional government by the division of authority regulated in Government Regulation 5 of 2021 concerning the Implementation of Risk-Based Business Licensing, which is the implementing regulation of the Job Creation Law.

The presence of N.I.B. as a sign of a list of low-risk business activities and a Standard Certificate issued based on a self-declaration by business actors to meet business standards or product standards for business activities with a medium to low-risk level is a new paradigm in State Administrative Law introduced by the Job Creation Law. The automatic issuance of business permits is intended to provide ease of doing business and stimulate public interest in business activities in Indonesia based on the ideals of the formation of the Job Creation Law.

State Administrative Law, as outlined in Law Number 30 of 2014 concerning Government Administration (UU AP), is one of the laws affected by the birth of the Job Creation Law. Business Licensing as a State administrative decision is bound by the norms, standards, procedures, and criteria stipulated in the A.P. Law. State Administrative Decisions are a form of action by state administrative bodies or officials in the field of public law. (6) The automatic issuance of N.I.B. and Standard Certificates for business activities with low and medium to low-risk levels gives the impression that the Job Creation Law denies the actions of state administrative officials/agencies in issuing business permits as a form of state administrative decision. Based on this background, it is interesting to analyze the risk-based business licensing



procedure and the legal implications for permits issued automatically in the risk-based business licensing system.

## **B. Methods**

The writing method used in this study is a normative legal or library research study. Namely, research uses literature, looking at problems based on literature and related laws and regulations,(7) and using a statute approach model and a conceptual approach.(8) This normative legal research uses primary legal materials in the form of laws and regulations, secondary legal materials in the form of literature related to administrative law and legislation (*gesetzgebungswissenschaft*), and the Academic Manuscript of the Job Creation Law, prepared by the President's Expert Team as of February 2020.

## **C. Results And Discussion**

### **1. Risk-Based Business Licensing Procedure**

According to N.M. Spelt and J.B.J.M. Ten Berge, in a broad sense, Licensing is an approval from the authorities based on the law to deviate from the prohibition provisions of statutory regulations in certain circumstances (9). A permit is permission to own, use, or do something in exceptional circumstances. It is given so that permitted actions can be carried out in a certain way, and various requirements are included in the relevant provisions (10). Based on this, licensing can be interpreted as granting, not prohibiting, approval, or allowing something to be done (9).

The purpose of licensing can be seen from two sides, namely, the government and the community. On the government side, the purpose of licensing is one of the control instruments to ensure that the provisions contained in the regulations are in accordance with the reality in practice and regulate order. In addition, licensing is a source of income for the State/region. Through the provision of licensing services, the government collects a state income that is not a tax or levy. The income obtained through licensing services can then be used to finance development. On the community side, the purpose of licensing includes obtaining legal certainty and rights, as well as facilities from the state after the permit is obtained, both in the form of fiscal and non-fiscal facilities (11).

Currently, the regulations governing licensing are in the Job Creation Law. This law introduces a new method of forming legislative regulations, namely omnibus law, a law that covers various aspects or corrects many aspects regulated by various previous laws. (1) In the context of licensing discussions, the Job Creation Law changes the paradigm for implementing business licensing in Indonesia with the Trust but Verify principle, namely by simplifying the process of issuing business permits but strengthening supervision of the implementation of business activities (12). Business licensing is carried out using a risk-based approach.

Quoted by Merissa Bhernaded Lie, the risk-based business licensing approach is a response to the "Regulatory State" that developed in the 1980s. A regulatory state is a concept where the state predominantly makes, monitors, and enforces rules through state bureaucratic organs. The idea of a regulatory state indirectly gives the broadest authority to the state to carry out monopolies and legally use violence to implement the regulations it makes. The risk-based approach exists as a way to deal with issues of inflexibility of legalism and over-regulation, which generally affect the administrative costs of the regulation itself. A risk-based approach is used as a strategy to analyze institutional risk, which will assess whether bureaucrats have carried out their functions appropriately or not. A risk-based approach can generally be interpreted as an instrument used to identify specific risks from an activity and make activities with the highest risk a priority (13).

Based on the Job Creation Law, risk-based business licensing is granted based on the level of business risk and the scale of business activities. In the General Explanation of Government



Regulation Number 5 of 2021 concerning the Implementation of Risk-Based Business Licensing, it is stated that the implementation of a risk-based approach requires a change in mindset (change management) and adjustments to the work procedures for administering Business Licensing services (business process re-engineering) and requires regulation (redesign) the Business Licensing business process in the electronic Business Licensing system. Through the application of this concept, the implementation of the issuance of business licensing can be more effective and straightforward because not all business activities require a permit. In addition, through the application of this concept, supervision activities become more structured in terms of the period and substance that must be carried out (14).

In the risk-based business licensing system, business risks are divided into low risk, medium risk, and high risk. Medium risk is divided into two parts: low and medium risk. Meanwhile, the business scale is divided into micro, small, medium, and extensive scales. The business scale is divided based on the amount of capital the business actor has to carry out business activities outside of land and buildings (14). Business actors who wish to carry out business activities must first register through an integrated information system that applies nationally in Indonesia's territory, called Online Single Submission (O.S.S.). Business actors who have registered their business will be given a Business Identification Number (N.I.B.), which is a proof of registration/enrollment document for business actors to carry out business activities and as an identity for business actors who are carrying out their business activities. For business activities with a low level of risk, the N.I.B. applies as legality for business actors in carrying out preparations, operations, and commercial activities for their business. Meanwhile, business actors who carry out business activities at a medium to low-risk level are given an N.I.B. and a Standard Certificate based on the Business Actor's statement to meet business standards in order to carry out business activities.<sup>1</sup> Standard Certificates for business activities with a medium to low level of risk are issued automatically after the business actor declares that he will fulfill the business standards in order to carry out business activities by ticking the self-declaration format provided by the O.S.S. System when processing his business permit. Meanwhile, business actors who carry out business activities with a medium to high level of risk are given N.I.B. and Standard Certificates issued by the Central Government or Regional Government according to their authority based on the results of verification of compliance with business activity implementation standards by Business Actors.<sup>2</sup> Business actors who carry out business activities with a high level of risk other than N.I.B. are required to fulfill specific requirements to obtain a permit. The granting of licenses by the Central Government or Regional Government is carried out based on the results of verification by ministries/institutions or technical services. The proposed requirements are declared to have been verified or in accordance with business standards and product standards. Standard Certificates and Permits are issued by the Central Government or regional governments in accordance with the division of authority regulated in Government Regulation Number 5 of 2021 concerning the Implementation of Risk-Based Business Licensing, which is an implementing regulation of the Job Creation Law.

## 2. Legal Implications of Automatic Issuance of Risk-Based Business Licensing

Through risk-based business licensing, the Job Creation Law introduces government action (*bestuurhandelingen*), providing N.I.B. and Standard Certificates as legalities for business actors in conducting and running their businesses and activities. The term "standard" was previously not known or has never been known in state administrative law in Indonesia. The more common or popular term is actually "registration" rather than "standard." However, in the

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<sup>1</sup> Pasal 9 ayat (4) UU Cipta Kerja

<sup>2</sup> Pasal 9 ayat (5) UU Cipta Kerja



Government Administration Law, before the Job Creation Law was amended, registration was not regulated. Based on the Academic Text of the Job Creation Law, risk-based business licensing is an instrument for controlling business activities. In the Academic Text of the Job Creation Law, it is explained that the qualifications/types of business licensing products include:

- a. Permit, intended for business activities that have a high impact;
- b. Standard, intended for business activities that have a high and medium impact; and
- c. Registration is intended for business activities that have a low impact (15).

Even though the term Registration appears in the Academic Text of the Job Creation Law, in fact, the amendments to the Government Administration Law in the Job Creation Law only add Standards without including them. According to footnote number 87 in the Academic Paper, the Job Creation Law explains (15):

"Standards are guidelines/standard provisions for the implementation of business activities that are carried out without being preceded by an evaluation process (standard) or that are carried out before an evaluation process (certificate/license)."

The standard definition in the Academic Paper is not clear because there is terminology in the terminology (Standard in "Standard"). Hence, the definition given is ambiguous and violates the rules for establishing definitions. The term registration actually appears in the initial substance of the Job Creation Law, specifically in Article 8 paragraph (2), which states that the Business Identification Number is proof of registration/enrollment of Business Actors to carry out business activities and as an identity for Business Actors in carrying out their business activities. However, there is no definition of registration in the Job Creation Law as a whole.

N.I.B. for business activities with a low level of risk and Standards for business activities with a medium-low level of risk are issued automatically by the O.S.S. System as if eliminating government action (*bestuurhandelingen*) in the issuance of a state administrative decision. The absence of government action (*bestuurhandelingen*) in the form of providing N.I.B. and Standards has been discussed by the Regional Autonomy Implementation Monitoring Committee (K.P.P.O.D.) in Government Administration in the Job Creation Bill: Introductory Note (Background Note) for the Preparation of the Problem Inventory List (D.I.M.), which explains as follows (16):

"The addition of administrative measures in the form of "standards" in Article 39 paragraph (1) is an implication of the risk-based approach. However, as per the analysis in Article 1 above, this bill does not yet accommodate administrative actions related to "granting N.I.B." N.I.B. is legal for low-risk business activities. This article determines the conditions/requirements for administrative actions in the form of permits, standards, dispensations, and concessions. However, this article does not yet have provisions regarding conditions or requirements for administrative actions for granting N.I.B. Bill 39, paragraph (8) states that "Permits, Dispensations or Concessions must not cause state losses." This provision appears to be absent from considering the potential for state losses due to "standard" and "N.I.B. granting" administrative actions. "In fact, the process of granting standard certificates and N.I.B.s has the potential to harm the state if there are deviations from the provisions of laws and regulations."

In this document, KPPOD proposes to add the substance of providing N.I.B. in Article 39 of the Government Administration Law to the Job Creation Bill, however, it turns out that in the Job Creation Law which has been promulgated the provision for granting N.I.B. is not regulated.

Based on the provisions of Article 1 number 19A of the Government Administration Law as amended by the Job Creation Law, it is stated that Standards are Decisions of authorized



Government Officials or Institutions recognized by the Central Government as a form of approval for statements to fulfill all requirements stipulated in accordance with the provisions of statutory regulations. Thus, the Standard is also a State Administrative Decision by definition. Then, in further regulations, it is stipulated in the amendment to Article 39 paragraph (3) of the Government Administration Law that Standards are a form of licensing that is issued with approval before activities are carried out and the activities to be carried out are standardized. Amendments to Article 39 paragraph (7) of the Government Administration Law also emphasize that standards apply from the moment the applicant declares a commitment to fulfill standard elements so that there is no need to issue a decision, which, of course, takes a long time if done with prior approval by an authorized official or body.

State Administrative Decisions are actions taken by state administrative bodies or officials in the field of public law.(6) In the Big Indonesian Dictionary, action means something that is done, actions, or actions carried out to overcome something.(17) According to Van Vollenhoven, state administrative bodies or officials' actions, in another sense, as governmental actions (*bestuurhandelingen*), are actions spontaneously and independently by high and low authorities to maintain the interests of the state and the people.(18) According to Van Der Pot, as quoted by E. Utrecht, there are 4 (four) conditions for the validity of a State Administrative Decree, namely. (19):

1. State Administrative Decisions must be made by the authorized organ (*bevoegd*) to make them.
2. Because the State Administrative Decree is a statement of will (*wilsverklaring*), its formation must not contain any juridical deficiencies (*geen juridical gebreken in de wilsvorming*); that is, it must not contain coercion, error, or fraud.
3. State Administrative Decisions must be given the form (*form*) specified in the regulations on which they are based, and their preparation must take into account the method or procedure for making the State Administrative Decisions, wherever the method is expressly stipulated in the basic regulations.
4. The content and objectives of the State Administrative Decree must be in accordance with the content and objectives of the basic regulations.

Meanwhile, according to Van Der Wel, the requirements for the validity of a State Administrative Decree are divided into two, namely material requirements and formal requirements. Material requirements include (6):

1. The state apparatus that makes decisions must have power.
2. In the will, the state apparatus that makes decisions must not be lacking.
3. Decisions must be based on certain circumstances (situations).
4. Determinations must be able to be carried out without violating other regulations, according to their content and objectives, in accordance with the regulations on which the determination is based.

Formal requirements include:

1. The conditions determined in connection with the preparation for making the decision and in relation to the way in which the decision is made must be fulfilled.
2. The decree must be given a prescribed form.
3. The conditions specified in connection with the implementation of this decision must be fulfilled.
4. The specified period between the occurrence of the matters that cause the decision to be made and the announcement of that decision must not be exceeded.

The similarities in the opinions of Van Der Pot and Van Der Wel regarding the conditions for the validity of State Administrative Decisions, namely (6):

1. Made by an official who has authority.
2. Must not contain deficiencies or defects of will.



3. Must have a shape.
4. The content and objectives must be in accordance with the regulations on which it is based.

In the similarity of the opinions mentioned above, there is an element of a statement of will (wilsverklaring) from a Government Official or Body that is authorized to use its will to issue a Decision or Action. This wilsverklaring element makes giving time to Government Officials or Bodies to issue Decisions or Actions reasonable as an obligation to fulfill the public's right to receive public services in accordance with Law Number 25 of 2009 concerning Public Services.

According to N.M. Spelt and Ten Berge (9). This element of will is also an element in the definition of Licensing, namely as "Consent," which requires a "statement of will." If, within the specified time limit, a Decision or Action is not issued, then it is reasonable to assume that it has granted the decision. This statement of intent (wilsverklaring) is not reflected in the publication of the Standard. In contrast, a State Administrative Decision takes effect from the moment the applicant declares a commitment to fulfill the elements of the Standard so that there is no need for a decision to be issued from an authorized official or body and takes effect immediately. Such conditions are as follows: when the applicant declares a commitment to fulfill the standard elements, the authorized official or body is forced to issue a State Administrative Decree in the form of the Standard without being given time to express his will. This certainly contradicts the definition of the decision itself, which is issued based on "authority."

Based on the provisions of Article 1 point 5 of the Government Administration Law, authority is the right possessed by Government Agencies and Officials or other state administrators to make decisions and take action in administering government. If authority is the right of Officials and Agencies, then in issuing standards, Officials and Agencies are forced to use their rights. This is contrary to the adage of *Juru suo uti Nemo cogito*, or No one is forced to use his rights (a person cannot be forced to use his rights) because the use of authority is a manifestation of a perfect will (there is no juridical deficiency in the formation of a will or geen juridische gebreken in de wilsvorming) (20).

Setting Standards as State Administrative Decisions also conflicts with the principle of publicity adopted in the Government Administration Law as regulated in Article 60 of the Government Administration Law, which states that new decisions can be binding if they have been accepted or announced.

If testing is carried out against standards as State Administrative Decisions in the State Administrative Court, then as regulated in Article 25 paragraph (5) of Law Number 48 of 2009 concerning Judicial Power, and Article 1 number 10 and Article 47 of Law Number 51 2009 concerning the Second Amendment to Law Number 5 of 1986 concerning the State Administrative Court (U.U. et al. Court) that State Administrative Disputes or Administrative Disputes are the authority of the State Administrative Court, which consists of the State Administrative Court (P.T.U.N.) and the State Administrative High Court (P.T.T.U.N.).

The most common objects of dispute in State Administrative Disputes are State Administrative Decisions (the embodiment of Written Public Legal Acts/*Geschreven Publiekrechtelijke-Rechtshandelingen*) and Government Actions (the embodiment of Factual Acts/*Feitelijke handelingen*) as regulated in Article 1 point 9 of the Administrative Justice Law State Enterprises *jis*. Article 1 number 7, Article 1 number 8, and Article 87 of the Government Administration Law (20). Therefore, all types of decisions, whether in the form of declarative or constitutive decisions, and factual actions can become the object of dispute in the State Administrative Court. Likewise with Standards, because in the definition in Article 1 number 19A of the Government Administration Law *jo*. Article 175 point 1 of the Job Creation Law, Standards are decisions so they can also be sued at the State Administrative Court after taking administrative measures (*vide* Articles 75 to 78 of the Government Administration Law) by



community members (persons or civil legal entities) whose interests are harmed by Standards (vide Article 53 paragraph (1) of the State Administrative Court Law).

If we look back at the definition of Standards in Article 1 number 19A of the Government Administration Law, which states that "Decisions of authorized Government Officials or Institutions recognized by the Central Government as a form of approval for statements to fulfill all requirements stipulated in accordance with the provisions of statutory regulations," So the question is how to determine the object of the dispute in testing standards at the State Administrative Court? Meanwhile, according to Article 39 of the Government Administration Law, standards apply from the moment the applicant declares a commitment to fulfill the standard elements, so that from the moment the applicant declares a commitment to fulfill the standard elements, a decision is deemed to have been issued in accordance with Article 3 paragraph (1) of the State Administrative Courts Law, so that proof of "Receipt of the Statement Fulfillment of Standard Elements by Officials or Government Agencies" can be used as evidence in court that the Standard Decision has been applied.

#### **D. Conclusion**

This should represent a concise conclusion of the research and must answer the objective of the study.

Risk-Based Business Licensing divides licensing based on the level of business risk and business scale. The level of business risk is divided into low risk, medium risk, and high risk. Medium risk is divided into medium-low risk and medium-high risk. Meanwhile, the business scale is divided into micro, small, medium, and large scales, according to the amount of capital required to carry out business activities outside of land and buildings. Business licensing documents for low-risk and low-medium-risk are N.I.B., and standard certificates are issued automatically. Meanwhile, business licensing documents for medium to high risk are N.I.B. and standard certificate, and for high risk are N.I.B. and permits issued based on verification results from ministries/institutions and technical services in accordance with their authority. The business licensing procedure is carried out by business actors by first registering their business activities through O.S.S. Based on risk level validation; the O.S.S. system will determine the level and type of business licensing documents in accordance with statutory provisions.

According to several experts, one of the conditions for the validity of a State Administrative Decree is the will of the authorized government body or official. N.I.B. and standard certificates, which are issued automatically as a State Administrative Decree, have eliminated the opportunity for government agencies or officials to make decisions and take action in administering government. This has implications for confusion in determining the object of the dispute regarding state administration lawsuits filed by people whose interests are harmed by the publication of the N.I.B. and Standards, which are automatically issued.

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It contains only a list of related literature cited by the authors in the paper. The reference list should be written in Vancouver styles.

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