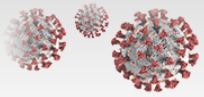

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5. Labor Law (3)*

Due to the impact of COVID-19, some employers may be forced to make work force reduction or wage cuts. Unlike the Western countries, there are strict laws against work force reduction and wage cuts in Japan. Even under the current circumstances, the existing laws will still apply in Japan. Therefore, employers must carefully consider the following when making work force reduction or wage cuts:

- **Dismissal Due to Business/Economic Necessity**
  - ✓ Dismissal of employees on a non-fixed term contract is restricted under Article 16 of the Labor Contract Act ("LCA") which provides that dismissal which is without objectively reasonable grounds or which is inappropriate in general societal terms will be deemed as invalid due to abuse of rights. Japanese courts will take into account the following four factors to determine the validity of dismissal based on employer's business/economic necessity:
    (1) Necessity to reduce workforce
    (2) Efforts were made to avoid dismissal
    (3) Reasonability for selecting employees who will be dismissed
    (4) Proper procedures
  - ✓ Although employer's deterioration in earnings due to the impact of COVID-19 may fall under Factor (1) above, dismissal must also meet other factors provided above to be valid. For example, employer must try other measures less severe than dismissal such as job rotation and soliciting voluntary resignation in order to meet Factor (2) above, select the employees who will be dismissed based on reasonable criteria in order to meet Factor (3) above, and sufficiently explain to and discuss with labor union (if any) / employees in order to meet Factor (4) above. However, employers need to take note that it is very difficult to meet these four requirements because Japanese courts are strict when deciding whether to accept the validity of dismissal.

- **Non-renewal of Fixed-term Labor Contract**
  - ✓ In principle, fixed-term labor contract ends with expiration of contract term. Article 17 of the LCA stipulates that employer may not dismiss an employee until the expiration of term of labor contract of such employee unless there are unavoidable circumstances. The hurdle for Japanese courts to accept the validity of dismissal of employee under fixed-term labor contract is higher than the hurdle for accepting the validity of dismissal of employee under non-fixed-term contract.
  - ✓ Also, it should be noted that employer's refusal to renew employee's fixed- term contract is restricted in Japan under certain circumstances.

    Specifically, Article 19 of the LCA provides that in the following cases, unless employer's refusal to renew the fixed-term labor contract is based on objectively reasonable grounds and is socially acceptable, the fixed-term labor contract is deemed to be automatically renewed under the same labor conditions as the labor conditions prescribed in the existing fixed-term labor contract:
    (1) Fixed-term labor contract of employee has been renewed repeatedly and therefore, non-renewal of such contract can be reasonably deemed as dismissal of such employee under non-fixed-term labor contract.
    (2) Continuation of employment of employee even after expiration of term of fixed-term labor contract of such employee is deemed to be reasonably foreseeable with respect to such employee.
  - ✓ When employer's business deteriorates and employer is forced to reduce its workforce despite its management efforts to avoid such reduction, it is a common practice in Japan for such employer to refuse to renew the term of fixed-term labor contracts before dismissing the employees under non-fixed-term contract. However, as explained above, employers should note that refusal to renew the fixed-term contract is restricted under certain situations even upon expiration of term of such contract.

- **Withdrawal of Employment Offer**
  - ✓ In the Supreme Court case (*Supreme Court, July 20, 1979, Minshuu vol.35-5 pp.582*), the court held that in case employee receives an offer letter from employer, it is often interpreted that the contractual relationship between employer and employee, which comes into full force as of scheduled employment start date and which is subject to the

* Continued from our previous issue.

employer's right to cancel the employment, is established even if the employer decides not to employ the employee as of the scheduled employment start date. It should be noted that the employer may exercise such cancellation right only if there are objectively reasonable grounds in light of purpose of such cancellation right and such cancellation is appropriate in general societal terms under the Japanese law.

- **Worker Dispatching**

Under worker dispatching, dispatched worker is employed by dispatching business operator ("Temp Agency") and is dispatched to Temp Agency's client ("Client") to engage in the Client's work based on worker dispatch contract between Temp Agency and Client.

- ✓ Termination of Employment Contract by Temp Agency
  Due to the fact that contractual relationship exists between dispatched worker and Temp Agency, Article 16 or Article 17 of the LCA will apply in case the Temp Agency terminates the worker dispatch contract. Even if the Client refuses to receive the services performed by dispatched worker, such fact alone does not constitute objectively reasonable grounds for the Temp Agency to dismiss the dispatched worker.
- ✓ Termination of Worker Dispatch Contract by Client
  Dispatched worker is dispatched to the Client based on worker dispatch contract between Client and Temp Agency. According to Article 29-2 of the Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers ("Worker Dispatching Act"), if Client terminates a worker dispatch contract "for reasons attributable to the Client" during the term of such contract, the Client is obligated to take necessary measures to try to secure the employment of dispatched worker such as ensuring new employment opportunities and bearing the costs of Leave Allowance payable by the Temp Agency. The MHLW announced that even if the Client suspends its business in response to the "self-restraint request" from prefectural governor pursuant to the declaration of state of emergency, the Client will not necessarily be absolved from its obligation to take the measures provided in Article 29-2 of the Worker Dispatching Act. Therefore, when the Client terminates a worker dispatch contract due to COVID-19 pandemic, the Client still needs to carefully consider the necessity of taking such measures.

- **Wage Cuts**

- ✓ Article 9 of the LCA stipulates that once working conditions are agreed between employer and employee or are stipulated in the employer's work rules, the employer cannot unilaterally change the working conditions to conditions which are more unfavorable to the employee than the conditions provided in the existing labor contract with such employee or the employer's work rules.
- ✓ Japanese courts tend to be cautious in finding agreements regarding the change in employee's working conditions. In the Supreme Court case (*Supreme Court, February 19, 2016, Minshuu vol.70-2 pp.123*), the court held that the existence of agreement regarding the changes in working conditions should be determined based on whether there are sufficient objectively reasonable grounds to determine that employees executed their labor contracts at their own free will. Therefore, it is necessary for employer to provide its employees with a detailed explanation on the necessity of wage cuts and the amounts of employees' salaries after such wage cuts in advance.

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