

Covid-19: employment issues under Japanese labour law



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The Ministry of Health, Labour and Welfare of Japan (MHLW) announced on 11 September 2020 that the number of employees who have been terminated (or will be terminated) from their employment in connection with the Covid-19 pandemic had reached 54,817 (including 25,334 non-regular employees). The Covid-19 pandemic continues to have a significant impact on the work environment in Japan. Many employers were forced to reduce their workforce or make wage cuts despite strict regulation of such workforce reduction and wage cuts in Japan. The Covid-19 pandemic also required companies to introduce new working practices, such as remote working or procedures in the work environment that prevent the spread of Covid-19.

Workforce reduction

Dismissal for 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. The LCA further requires unavoidable circumstances to dismiss fixed-term employees during their employment term. Japanese courts will take into account the following four factors to determine the validity of dismissal based on employer's business/economic necessity:

- 1) The necessity of reducing the workforce.
- 2) If efforts were made to avoid dismissal.
- 3) The reasons for selecting the employees that 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 criteria provided above to be valid. For example, an employer must try other measures that are less severe than dismissal, such as job rotation and soliciting voluntary resignation in order to meet factor 2) above. In order to meet factor 3) above, the employer must select the employees who will be dismissed based on reasonable criteria, and sufficiently explain to and discuss with a labour union in order to meet factor 4). 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 labour contract

In principle, fixed-term labour contracts end with the expiration of the contract term. Article 17 of the LCA stipulates that employer may not dismiss an employee until the expiration of their contract unless there are unavoidable circumstances. The hurdle for Japanese courts to accept the validity of dismissal of employees under fixed-term labour contracts during the contract term is higher than the hurdle for accepting the validity of dismissal of employees under non-fixed-term contracts.

It should also be noted that an employer's refusal to renew an 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 contract is based on objectively reasonable grounds and is socially acceptable, the contract is

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deemed to be automatically renewed under the same conditions as the existing contract:

- 1) The fixed-term contract has been renewed repeatedly and therefore, non-renewal of such contract can be reasonably deemed as dismissal of the employee.
- 2) The continuation of employment of the employee after the expiration of the fixed-term contract is deemed to be reasonably foreseeable.

When an employer's business deteriorates and it is forced to reduce its workforce despite management efforts to avoid such reduction, it is a common practice in Japan for such employer to refuse to renew fixed-term contracts before dismissing employees that are under non-fixed-term contracts. However, as explained above, employers should note that refusal to renew the fixed-term contract is restricted under certain situations even upon expiration of such a contract.

Payments to employees during the suspension of business

During the declaration of a state of emergency by the Japanese government,

many business operators suspended their business in response to the 'self-restraint requests' from prefectural governors. The companies voluntarily shut down their manufacturing sites and offices and placed their employees on leave due to the deterioration of the business environment. During a period when the business is suspended, payments to employees are made, as provided below in accordance with Japanese law.

Leave allowance

In general, an employer does not have an obligation to pay their employee's salary unless the employee carries out work for the employer. However, Article 26 of the Labor Standards Act (LSA) provides that, if an employee is absent from work for reasons attributable to the employer, the employer is required to pay 60% of the employee's average wage as an allowance during the period of absence (leave allowance). This is a mandatory requirement which is intended to guarantee the basic income of employees. The term 'reasons attributable to the employer' includes business disruptions occurring close to the area where the employer can exercise its influence. However, it does not include business disruption due

to *force majeure*, such as natural disaster or war. Therefore, employer does not have an obligation to pay the leave allowance if the employer placed employees on leave due to *force majeure*.

Under the current circumstances, the MHLW announced the following two criteria for leave of absence due to *force majeure*:

- i) Leave of absence must be due to an event occurring outside the scope of employer's business; and
- ii) Leave of absence must be due to an event which is inevitable despite employer's utmost effort to perform duty of care, which the employer is required to perform as an ordinary business owner.

Employment adjustment subsidy

If employers are forced to reduce their business activities for economic reasons but maintain their employment contracts with employees by temporarily placing them on leave (temporary layoff) instead of dismissing them, the Japanese government reimburses the employers' costs for the leave allowance under the employment adjustment subsidy (*koyo chousei jyoseikin*). Currently, the MHLW is in the process of implementing

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special measures for employers affected by the Covid-19 pandemic, such as expansion of the scope of the subsidy and simplification of the application procedures. Specifically, the current subsidy rate has been increased up to 75% of the leave allowance for large-sized companies and 100% of leave allowance for small and medium-sized companies. The maximum amount of the subsidy per day per employee has been increased from JPY8,370 to JPY15,000.

Issues within the workplace under Covid-19

Employer's duty of care

Article 5 of the LCA provides that employers must provide necessary care to their employees to ensure their physical safety (duty of care). Under Covid-19, employers are required to create working environments where infection risk is eliminated by taking measures such as encouraging employees to work remotely, wear masks, and take their temperature every day. MHLW and some industry organisations have developed guidelines which employers can refer to.

If an employee cannot work for a while, suffers after effects or even dies because of Covid-19 infection in the working environment where an employer fails to

fulfil duty of care, and sufficient causal relationship between the employee's damage and the lack of duty of care is proven, the employer is required to compensate for the damages. MHLW provides its view on workers' accident compensation under Covid-19 as follows, which is helpful when determining the causal relationship:

- 1) If it is clear that there was an infection source in the working environment, the employer is required to pay workers' accident compensation.
- 2) Even if the infection route cannot be identified, if an employee is working in an environment where infection risk is relatively high, such as: (i) a work environment where some workers, including the employee in question, are infected; or (ii) a work environment where the employee frequently comes in contact with clients, customers, etc, it is highly probable that such employee's infection is caused by their work. Therefore, appropriate determination of whether or not employee's infection is caused by work should be made by considering the unique circumstances of each case.

Accordingly, it is highly likely that employers will be required to compensate an employee if such employee has worked in the work environment described in (i) or (ii) above, unless causal relationship can be denied due to other unique circumstances.

Management of employees while remote working

In order to prevent further expansion of Covid-19 infection, many companies have adopted remote working.

Management of working hours

If an employer does not adopt a 'deemed working hours' system (defined below), the employer is required to manage employees' working hours according to guidelines developed by MHLW. As for remote working, it is difficult for an employer to record employees' working hours by directly confirming them or by using timecard or IC card. If adopting a self-report system, an employer must:

- i) carefully explain to employees that they need to accurately record and report their working hours;
- ii) investigate whether or not actual working hours correspond to reported

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working hours by taking measures such as checking the hours by computer as necessary; and

- iii) not take any measures to prevent employees from appropriately reporting their working hours, such as by setting an upper limit on their overtime working hours.

Article 38-2 of the LSA provides that if all or part of an employee's working hours include work outside of the workplace and it is therefore difficult to calculate such employee's working hours, the number of hours worked is deemed to be the prescribed working hours; provided, however, that if the employee's work will normally require a number of working hours in excess of prescribed working hours, the employee is deemed to have worked the number of hours normally necessary to carry out such work (a 'deemed working hours' system). Deemed working hours systems can be adopted for remote working only if (i) it is not necessary for employees to promptly respond to employer's instructions and (ii) it is not necessary for employees to perform the work according to employer's detailed instructions at all times. Even if a deemed working hours system is

adopted, it is still necessary for an employer to allow employees to take a break and to pay employees extra for any work conducted on holidays or late at night. Therefore, employers should instruct employees to take a break at prescribed time and not to work on holidays or late at night without obtaining employer's prior approval.

Prevention of prolonged working hours

Remote working may lead to prolonged work because it is difficult for employers to sufficiently manage employees' working hours. Therefore, employers should take appropriate measures to prevent their employees from having health problems due to prolonged working hours. The guidelines provided by MHLW propose the following prevention measures:

- i) restrictions on sending email;
- ii) restrictions on access to systems;
- iii) prohibition on working overtime, on holidays and late at night as a general rule; and
- iv) give warning to employees working for prolonged hours.

Healthcare for employees remote working

In order to maintain health of the remote employees, an employer is required to take the following healthcare measures under Industrial Safety and Health Act and relevant ordinance:

- i) medical examination and necessary action according to its results;
- ii) doctor's interview with employees working for prolonged hours and necessary actions according to its results;
- iii) calculation of working hours on overtime work and work on holidays;
- iv) provision of information to a doctor in order for such doctor to conduct appropriate interview; and
- v) questionnaire on stress and necessary actions according to its results. ■