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Atsumi & Sakai

EMPLOYMENT LAW OVERVIEW
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I. GENERAL OVERVIEW

1. INTRODUCTION

Japanese employment laws mainly cover employer-employee relationships. These laws apply to all employees working in Japan regardless of their nationality. However, board members as defined under the *Company Act* (2005) as well as independent contractors are not categorised as employees subject to Japanese employment laws, in principle, and therefore are not protected under Japanese employment laws.

2. KEY POINTS

- Japanese employment laws mainly cover employer-employee relationships. Board members and independent contractors are, in principle, not categorised as employees.
- There is no “at will” employment in Japan. Japanese law requires that termination of regular employment shall be considered objectively, deemed reasonable, and appropriate upon social convention, which is read rigidly in light of Japanese judicial precedent.
- Regulation concerning overtime work has been strengthened with the recent legislative amendments. In principle, work on statutory public holidays and late-night work requires extra allowance in addition to the normal wage.
- Japanese law provides various protections against discriminative treatments not only by reason of nationality, creed, social status or gender, but also due to the association with union activities, or taking childcare or nursing care leave. There is also a prohibition against unreasonable differences between full-time permanent employees and non-regular employees. Furthermore, an employer’s obligation to prevent harassment has been strengthened in light of the recent legislative amendments.
- Dominant majority unions in Japan are deemed as enterprise unions. The unionisation rate in Japan has been considerably and continuously declining.

II. PRE-EMPLOYMENT CONSIDERATIONS

LIMITATIONS ON BACKGROUND CHECKS

There is no statutory limitation on background checks in Japan. However, due to the sensitive nature of data gathered, certain information requires careful handling. The Act on the *Protection of Personal Information (2003)* provides that sensitive personal information such as race, creed, social status, medical history, criminal record, and the fact of having suffered damage by a crime must not be collected, in principle, unless an applicant's consent is obtained. Furthermore, the guidelines based on the *Employment Security Act (1947)* provide that an employer is prohibited from acquiring information which may become a cause for social discrimination. This includes, but is not limited to, information pertaining to race, ethnic group, social status, family origin, domicile or birthplace, creed, personal beliefs, or history of union membership. In practice, for the purpose of lawfully searching an individual's background, informed consent from each individual employee or prospective employee, and specifying the purpose of and the items subject to said background check, is commonly utilised. It is also common practice to ask for a declaration of criminal records and to require a medical examination. This sensitive information shall be collected in a socially acceptable method and securely retained.



III. EMPLOYMENT CONTRACTS

1. MINIMUM REQUIREMENTS

While an employment contract may be in written or verbal form, when concluding an employment contract, the following conditions must be clearly provided in written form:

- term of employment;
- place of employment and job description;
- start and finish time, overtime work, rest period, days off, leave and change in shifts;
- determination, calculation and payment of wages (except retirement allowances and special wages); and
- resignation (including grounds for dismissal).

2. FIXED-TERM/OPEN-ENDED CONTRACTS

Generally, the maximum term of a fixed-term employment contract is three years. However, there is an exception for employees who possess expert knowledge, skills or experience, or who are 60 years of age or older, in which case the maximum term of the employment contract is five years.

In the situation where a fixed-term employment contract with the same employer has been repeatedly renewed, and its total contract term exceeds five years, the employee is entitled to apply for conversion of his/her fixed-term employment into an indefinite term, from the day following the date of expiration of the fixed-term employment contract, and the employer is deemed to accept the application. In addition, the total contract term may be reset by setting certain cooling-off periods (e.g. six months for one year, or additional fixed-terms). Similar to above, an exception exists for employees who possess expert knowledge, skills

or experience, or who are continuously employed after the mandatory retirement age, which is subject to an approval by a Director General of the relevant Labour Bureau.

3. TRIAL PERIODS

In Japan, it is common practice to set a probationary period of three to six months for new hires, effective from the hiring date. While there are no legal requirements regarding the length of the probationary period, the probationary period would be regarded as void if it is unreasonably long due to it being against public order and morals. The probationary period may also be further unilaterally extended in accordance with the work rules and/or the employment contracts. In practice, however, probationary periods are deemed as temporary periods for employers to review an employee's qualities and abilities before the employee is able to transition into a regular employment. Consequently, an employer is expected to decide whether to accept or reject the employee as a regular employee after the probationary period has concluded. An extension of the probationary period is only permitted if there is a strong necessity, and reasonable reasons exist, for which the employer must continue the review of an employee's qualities and abilities. Accordingly, an employer will face a significantly higher hurdle when the company tries to terminate an employee's employment during the extended probationary period, as compared to the termination after the expiration of the initial probationary period.

4. NOTICE PERIODS

Advance notice of termination must be provided at least 30 days prior to dismissal. An employer may also provide a payment in lieu of such notice, which amounts to the 30 days or more of the salary

amount. Notice periods can also be shortened by the number of days for which the payment in lieu of notice has been made. The advance notice period is not applicable when the employer dismisses an employee under the probationary period, within fourteen days after the date of the commencement of the probationary period.



IV. WORKING CONDITIONS

1. SALARY

'Wage', as defined under the *Labour Standards Act (1947)*, means any kind of payment made from an employer to its employees as remuneration for their work including wage, salary, allowance and bonus. Wages must be paid in the appropriately designated currency and paid in full directly to employees. Wages, other than extraordinary wages and bonuses, must also be paid to employees periodically at least once a month on a specifically designated date. The amount of minimum wage in each prefecture is regulated in accordance with the *Minimum Wages Act (1959)*.

Work on statutory holidays and late-night work (between 10 p.m. and 5 a.m.) requires extra allowance in addition to the normal wage. Statutory holiday allowance must be at least 35% of the normal hourly wage. Late-night work allowance must be at least 25% of the normal hourly wage.

2. OVERTIME

Over-time work of up to 60 hours per month must be at least 25% of the normal hourly wage, and over-time work that exceeds 60 hours per month must be at least 50% of the normal hourly wage. Employees in managerial and supervisory positions as defined under the *Labour Standards Act* are exempt from the overtime regulations as discussed above. However, the late-night work allowance is still applicable thereto.

3. HEALTH AND SAFETY IN THE WORKPLACE

A. EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

The Labour Contract Act (2007) has acknowledged in its written policy an employer's obligation to take necessary care to ensure the physical and mental health and safety of its employees. *The Industrial Safety and Health Act (1972)*, in conjunction with *the Labour Standards Act*, provides employers with a compulsory obligation to secure the safety and health of employees in the workplace, as well as to facilitate the establishment of a comfortable working environment, by promoting comprehensive and systematic countermeasures concerning the prevention of industrial accidents, taking measures for the establishment of standards for hazard prevention, clarifying the safety and health management responsibility, and the promotion of voluntary activities with a view to preventing industrial accidents.

One of the predominant obligations of employers under *the Industrial Safety and Health Act* concerns the establishment of an organisation for safety and health management. This includes appointment of a General Safety and Health Manager and designating such person with ultimate responsibility regarding such matters. In addition, employers are to appoint relevant officers to support the General Safety and Health Manager. These include the appointment of an industrial doctor, the establishment of a safety and health committee (if the employer employs 50 regular employees or more), and the appointment of an operation chief (if the employees engage in work which requires prevention-control of industrial accidents).

The Industrial Safety and Health Act further requires employers to establish measures for preventing dangers, risks and other impairments to the health of its employees, as well as promoting safety and health education and facilitating medical examinations for employees.

V. SOCIAL MEDIA AND DATA PRIVACY

1. RESTRICTIONS IN THE WORKPLACE

An employer can restrict the employee's use of Internet and/or social media in the workplace during working hours. This is because employees are obliged to devote themselves fully to their duties at the workplace during working hours.

A. CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

Work email accounts and computer systems in the workplace belong to the employer and may therefore be monitored, accessed and reviewed by the employer under Japanese law. However, such access, if permitted, is possible only so far as the following conditions are met before such access is sought: (i) the employer expressly discloses the purpose of monitoring to the employees in question in advance, (ii) the employer provides the employees in question with the relevant and applicable company rules; (ii) the employer identifies the person responsible for implementing the monitoring; and (iv) draws the company rules stipulating the implementation of monitoring and announces them to the employees.

The monitoring shall be subject to an audit in order to confirm that it is properly implemented as monitoring, accessing and reviewing the employees' electronic communications would be regarded as an acquisition of the employees' personal information.

VI. AUTHORISATIONS FOR FOREIGN EMPLOYEES

REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

Foreign employees who wish to apply for a long-term visa should first obtain a Certificate of Eligibility ('COE'). A COE is a document issued by the Ministry of Justice in Japan. In order to obtain the COE, a sponsor in Japan is required. Sponsors can be employers, schools or relatives. The sponsor in Japan must contact the appropriate local immigration office in order to apply for the COE. Once the COE has been issued, the foreign employee is then able to apply for a visa before the Japanese embassy or consulate in the country where the foreign employee resides. The COE should be submitted to an immigration inspector with a valid visa for landing permission at the port of entry, within three months from the date of issue. Once living in Japan, the foreign employee must notify the local city ward office of his/her place of residence.

Long-term visas can be provided for any type of work visa designated by Japanese law, for which the permitted standard period of stay in Japan is five years, three years, one year, or three months. A foreign employee who is currently working for an organisation outside Japan and will subsequently be transferred to that organisation's Japanese office for a limited period, may be eligible for a work visa as an intra-company transferee. Requirements for obtaining an intra-company transferee visa are as follows: (i) the two entities have a certain capital relationship; (ii) the employee has been engaged in activities which is covered by "engineer" or "humanity, international service" in that foreign company for at least one year immediately before transfer to Japan; and, (iii) the employee will receive a salary after transfer to Japan at the same level or

more than that of which a Japanese national would receive by engaging in the same type of work. A foreign employee who does not fall under these categories may be eligible for other types of work visas if the foreign employee has a direct contract with the relevant entity in Japan.

A foreign employee is prohibited from engaging in activity outside the scope permitted in their work visa. However, performing activities outside the scope of their work visa is permissible subject to approval granted by the Minister of Justice.

VII. TERMINATION OF EMPLOYMENT CONTRACTS

1. GROUNDS FOR TERMINATION

Japanese law requires that termination of regular employment shall be considered objectively, deemed reasonable, and appropriate upon social convention, which is read rigidly in light of Japanese judicial precedent. Under Japanese law all dismissals are deemed individual dismissals. Typical grounds for termination include the following: (i) an employee's inability to provide labour due to injury, disability, illness or permanent damage, significantly poor performance, or loss of the trust relationship due to material fraud in an application for employment; (ii) breach of work responsibilities and duties, orders, or workplace disciplines, policies and internal rules; and (iii) loss of job responsibility, redundancy due to business downsizing, economic reasons, or corporate dissolution. All grounds for dismissal shall be provided in the work rules or in the employment contract.

Termination due to economic reasons such as redundancies is strictly restricted in Japan. Japanese judicial precedent has established the practice that the following four factors should be met: (a) necessity of decreasing the number of employees; (b) necessity of adopting the "unilateral termination of employment contract" method as a means of employment adjustment; (c) adequate selection of the employees whose employment contracts are to be terminated; and (d) adequacy of the termination procedure. Importantly, with regards to (b), it requires that the employer fulfills its best effort obligation to avoid the termination. With respect to an employment contract with an indefinite term, the termination due to redundancy is considered to be as a last resort under Japanese labour law, and is only permitted where employers have no choice but to terminate the employment of their

employees. The management of the employer must have made a best effort to avoid the termination. This means that the employers should use any available means within the company prior to the termination to satisfy their best effort obligation to avoid termination. This includes, but is not limited to, reduction of compensation for directors, curbing new hires, soliciting voluntary retirement, encouraging early retirement, personnel relocation and employee transfers.

As to a fixed-term employment contracts, an employer may not dismiss employees until the expiration of the employment term thereof without "unavoidable reasons". The "unavoidable reasons" are read narrowly and considered to be more rigid than the requirement of being objectively reasonable in the case of an indefinite term employment contract.

Furthermore, an employer shall not dismiss an employee during a period of absence from work for medical treatment with respect to work-related injuries or illnesses. Also, an employer shall not dismiss an employee within 30 days thereafter. In addition, an employer shall not dismiss any woman during a period of absence from work before and after childbirth, nor within 30 days thereafter.

2. INDIVIDUAL DISMISSALS

Under Japanese law all dismissals are deemed individual dismissals.

A. IS SEVERANCE PAY REQUIRED?

Under Japanese law, there is no statutory obligation to pay severance allowance upon termination, except in circumstances when payment is in lieu of notice.

VIII. RESTRICTIVE COVENANTS

USE AND LIMITATIONS OF GARDEN LEAVE

Garden leave is a tool by which an employer can prevent departing employees from performing their regular duties. Typically, the employee will be prevented from attending the workplace, but will still receive full pay. This has the effect of restricting the employee's access to customers, clients, staff and information, and hampers their ability to work for a competitor. If an employer wishes to put an employee on garden leave there must, in most circumstances, be an express term in the employment contract permitting it to do so. Otherwise, they could be breaching the employee's implied right to work and therefore be in breach of contract.

IX. TRANSFER OF UNDERTAKINGS

1. EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

In a share transfer, there will be no change in the employment conditions and status; therefore, no transfer of employees' rights and obligations will take place.

In a merger, regardless of whether it occurs through absorption or consolidation, any rights and obligations under the employment contracts subject to the merger, will be automatically and comprehensively transferred to the post-merger entity.

In a corporate split, regardless of whether it occurs through absorption or incorporation, the employees mainly subject to the transferred business and defined as such in the corporate split plan or agreement, will be automatically transferred. Therefore, any rights and obligations thereunder will be automatically and comprehensively transferred.

An employee who is mainly subject to the transferred business, but is not defined in the corporate split plan or agreement, has the right to raise an objection, with the result that the employee will be subsequently transferred.

Adversely, an employee who is not mainly subject to the transferred business, however defined in the corporate split plan or agreement, has a right to raise an objection, with the result that the employee will not be subsequently transferred. The employment contracts which are not transferred to the successor remain with the predecessor, and the general rules on collective dismissals apply.

2. REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

In a business transfer, through an asset transfer, employees will not be automatically transferred. Although the buyer and the seller may agree to include employment contracts in the business to be sold, if however, an employee refuses to consent to the transfer of his/her employment contract, the employment contract will not be transferred. Those employment contracts which are not transferred to the successor, remain with the predecessor and the general rules on collective dismissals apply.

X. EMPLOYEE BENEFITS

1. SOCIAL SECURITY

There are two separate systems concerning social security in Japan. Both of these systems are run by the Japanese government. The systems are: (i) the social insurance schemes (i.e. the employee pension insurance and the employee health insurance), and (ii) the labour insurance schemes (i.e. the workers' accident compensation insurance and the unemployment insurance).

2. HEALTHCARE AND INSURANCES

Social insurance schemes are designed to secure the life of workers by paying income-based contributions in the case of old age, disability or death. An employer that is a corporation, or one that is a sole proprietor hiring five or more employees, has a legal obligation to provide its employees with the employee pension insurance and the employee health insurance. Labour insurance schemes have been established in an effort to secure the employment of workers with jobs, and to pay unemployed workers unemployment and other benefits. These benefits paid to unemployed workers are for the purpose of stabilising their life and promoting reemployment. Furthermore, all employers are obliged to provide employees with the workers' accident compensation insurance and the unemployment insurance. The benefits of the social insurance and labour insurance schemes are covered by the mandatory contributions paid by workers and employers. A worker employed in Japan will be insured, regardless of whether or not the worker is a Japanese national.

3. REQUIRED LEAVE

A. HOLIDAYS AND ANNUAL LEAVE

While the statutory holidays must be granted once every week or four times every four weeks, it is

common practice to provide holidays in addition thereto (e.g. Saturdays, Sundays, national public holidays).

Under the *Labour Standards Act*, employers must grant paid annual leave to employees who have been employed continuously for 6 months or more. The employee must have attended work for at least 80% of the scheduled working days in the previous fiscal year to receive the paid annual leave. The statutory minimum number of days of paid annual leave depends on the employee's length of continuous service:

- 6 months of service = 10 days of paid annual leave
- 1 year and 6 months = 11 days
- 2 years and 6 months = 12 days
- 3 years and 6 months = 14 days
- 4 years and 6 months = 16 days
- 5 years and 6 months = 18 days
- 6 years and 6 months or more = 20 days

The unused paid annual leave can be carried forward to the next year. Generally, paid annual leave may be taken in full day units. However, employers may allow the employees to take leave in half day units. It is also allowed to grant paid annual leave on an hourly basis by executing the labour management agreement with such a provision. However, the total amount of days of such paid annual leave is limited to no more than 5 days. Furthermore, employers are obliged to ensure the use by their employees of at least 5 days of paid annual leave per year.

B. MATERNITY / PATERNITY LEAVE

A pregnant employee can take up to six weeks (or 14 weeks in the case of multiple fetuses) of maternity leave before childbirth, and eight weeks after childbirth, under the Act on the *Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave (1991)* (the "*the Child Care and Nursing Care Act*"). Furthermore, employers shall not have

a woman work within 8 weeks after childbirth. However, in the case where such a woman has so requested to work; provided, that 6 weeks have passed since childbirth, and the work activities to be performed are such that a doctor has approved as having no adverse effect on her, then this Act shall not prevent an employer from having the woman return to work.

In addition, an employee (regardless of gender) who has been employed for at least one year or more, is entitled to take childcare leave for a child aged less than one year (or until the child becomes one year and two months old, one and half years old, or two years old). This is subject to certain conditions respectively, and does not include certain employees, such as those with fixed-term employment that would not continue after the child turns one. Moreover, the employer is not obliged to pay the employee during maternity leave and childcare leave.

C. SICKNESS / DISABILITY LEAVE

While there is no legislation concerning sick or disability leave arising from employment, many employers implement their own rules regarding sick leave and/or payment during periods of sickness. The employer may settle the term of sick leave where an employee is suspended. Furthermore, this may become a cause for dismissal if the employee does not recover before the term of sick leave expires. As to employee's injury, sickness and disability due to employment, the *Industrial Accident Compensation Insurance Act (1947)* covers a large part of the compensation.

D. ANY OTHER REQUIRED OR TYPICALLY PROVIDED LEAVE

Nursing Care Leave: Under the *Child Care and Nursing Care Act*, an employee who has been employed for at least one year or more and is nursing a family member who requires nursing, is entitled to take nursing care leave for 93 days in total per family member. This does not include certain employees such as those with fixed-term employment that would end within 93 days. Furthermore, the employer is not obliged to pay the employee during nursing care leave.

4. PENSIONS: MANDATORY AND TYPICALLY PROVIDED

There are no mandatory pensions provided to employees in Japan. However, in practice, a number of companies have voluntarily structured a variety of pension schemes including, but not limited to (i) defined payment plans, (ii) defined contribution plans, and (iii) decrease/eliminate existing pension plans.

Furthermore, there are no statutory benefits available to employees in Japan. However, in practice, a number of companies have started adopting a variety of incentive plans including, but not limited to, performance bonuses, share options, profit sharing schemes and employee stock ownership plans.

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