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Atsumi & Sakai

EMPLOYMENT LAW OVERVIEW  
**JAPAN** 2021-2022

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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 child care 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.

## 3. LEGAL FRAMEWORK

Employment law in Japan is predominantly based upon the following sources:

- (i) the Constitution (1946);
- (ii) laws, in particular, compulsory laws including but not limited to the Labour Standards Act (1947), the Labour Contract Act (2007), the Minimum Wage Act (1959), the Industrial Safety and Health Act (1972), the Industrial Accident Compensation Insurance Act (1947), the Act on Securing, etc. of Equal Opportunity and Treatment between Men and Women in Employment (1972) (the “Equal Opportunity Act”), 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 “Child Care and Nursing Care Act”), the Act on Improvement of Personnel Management and Conversion of Employment Status for Part-Time Workers and Fixed-Term Workers (1993) (the “Part-Time/Fixed-Term Employment Act”), the Labour Union Act (1945), the Employment Security Act (1947) and the Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers (1985) (the “Worker Dispatch Act”);
- (iii) government ordinances and implementation regulations;

- (iv) collective bargaining agreements;
- (v) company's work rules; and
- (vi) employment contracts.

Furthermore, administrative authorities have published various guidelines relating to labour laws. The purpose of these guidelines is to assist in the legal interpretation of the applicable laws. These guidelines are not legally binding, however, they are widely accepted as the social standard and/or best practices in Japan. In particular, Supreme Court precedent has the potential to have considerable influence on the application of labour and employment laws in market practice and Japanese custom.

## 4. NEW DEVELOPMENTS

One of the most significant legislative changes impacting the operations of employers in Japan is due to the recent overhaul of employment legislation, following the enactment of the Work Style Reform Act (the "Reform Act"). The Reform Act has had a substantial impact on employees due to the following notable changes: (i) amendments to the working hours system; (ii) ensuring the use of annual paid leave; (iii) tracking of working hours; and (iv) "equal work, equal pay".

As to (i) working hours system, the Labour Standards Act provides a limitation on the number of overtime hours of employees as a general rule (e.g. not more than 45 hours per month and 360 hours per year). However, prior to the Reform Act, employers were, in exceptional circumstances, allowed to request employees to work overtime in excess of these limits if "special circumstances" existed (e.g. during busy periods). The Reform Act amended the relevant provisions of the Labour Standards Act, and modified this practice significantly by introducing a legal cap on the total number of overtime hours employees are permitted to work. These amendments came into effect in April 2019.

As to (ii) annual paid leave, in practice, it has been common in Japan for employees to not utilise the majority of their annual paid leave. Furthermore, employees frequently allow their annual paid leave to lapse. The Reform Act amended the relevant provisions of the Labour Standards Act, and has

introduced an obligation on employers to ensure that their employees utilise at least 5 days of annual paid leave per year (or during a period that can be designated by the employer). These amendments came into effect in April 2019.

As to (iii) tracking of working hours, the Reform Act amended the Industrial Safety and Health Act and introduced a new legal obligation on employers to accurately track their employees' working hours by utilising methods indicated in the ministry ordinance. These methods include implementing the 'clock-in/clock-out' method of recording time via employees' ID cards and/or recording the time employees log in and out of their work computers. These changes have been introduced in an effort to curb excessive working hours as well as to assist employers in monitoring the health of their employees. The amended guidelines have provided greater clarity for employers regarding the methods they should use to monitor the working hours of their employees. These amendments came into effect in April 2019.

As to (iv) "equal work, equal pay", the Reform Act amended the Part-Time/Fixed-Term Employment Act, and has introduced the requirement for workers to receive fair and equal treatment irrespective of their job status. Furthermore, the Reform Act prohibits irrational disparity between 'regular' and 'non-regular' employees. These amendments have resulted in a requirement for reasonable equal treatment of regular employees (i.e. full-time permanent employees) and non-regular employees (which includes fixed-term contract employees, part-time employees, and dispatch employees). These amendments came into effect in April 2020.

Another noteworthy legislative change pertains to the amendments of the Equal Opportunity Act and the Act on Comprehensive Promotion of Labour Policies (1966), both of which came into effect in June 2020. The amendments require employers to introduce measures to prevent harassment by establishing a consultation system, and prohibit the dismissal or mistreatment of workers who consult or cooperate with a harassment-related investigation.

Another major legislative change pertains to the amendments on the Act on Stabilisation of Employment of Elderly Persons (1971), which are due to come into effect in April 2021. Under the

amendments, an employer whose employees have reached the age of 65, shall endeavor to apply one of the following measures to such employees until they reach the age of 70: (a) a raise of retirement age; (b) introduction of a continuous employment system; (c) abolition of retirement age; or (d) measures other than employment by executing the labour-management agreement (specifically, a system for continuous outsourcing contracts or a system allowing for employees to engage in social contribution activities on a continuous basis). It is important to note that this is only an obligation for employers to make such efforts and is not a mandatory obligation. There are no sanctions imposed on employers for not implementing any of the measures, (a)-(d), as outlined above.

# II. HIRING PRACTICES

## 1. 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.

## 2. DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

A foreign employer does not need to work through a local entity in order to hire an employee in Japan, as far as the service engaged by the representative office to which the employee belongs, is limited to certain preparatory and auxiliary activities (e.g. market survey, information gathering, purchase of goods and advertisements). The representative office conducting the preparatory and auxiliary activities for a foreign employer would, in general, not be considered as a permanent establishment. On the other hand, if a foreign employer commences any direct business or operation, which could be subject to taxation in Japan (e.g. contract execution or sales activities), the foreign employer would need to establish a local entity. Otherwise, the representative office would likely be considered as a permanent establishment. Regardless of whether or not a local entity is established in Japan, a foreign employer is obliged to provide its employees, hired and working in Japan, with social insurance and employment insurance.



### 3. 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 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 typically 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 manner and securely retained.

### 4. RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

The guidelines advise that an employer should refrain from asking questions of an applicant or requesting information which would lead to social discrimination, including, but not limited to, the following:

- domicile of origin and/or birthplace;
- family members' circumstances, such as their job, relationship, health, social status, education, income and assets;
- housing situation, such as layout of rooms, number of rooms, type of housing and neighborhood facilities;
- life and home environment;
- religion;
- political party support;
- philosophy and personal creed (e.g. beliefs and values that govern one's life);
- person to respect;
- personal beliefs;
- union membership or activities, student movements or social movements; and
- preferred newspapers, magazine and books.

# 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 and exit policies and procedures (including grounds for dismissal).

## 2. FIXED-TERM /OPEN-ENDED CONTRACTS

Generally, the maximum duration 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.

A similar exception exists for employees who possess expert knowledge, skills or experience, or who are continuously employed after the mandatory retirement age, subject to approval by a Director General of the relevant Labour Bureau.

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 a one year contract).

## 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, a probationary period is presumed void if it is unreasonably long, as this goes against public order and morals. The probationary period may also be further unilaterally extended in accordance with the work rules and/or the employment contract. In practice, however, probationary periods are transient in nature, temporarily allowing 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 reasonable and compelling need for the employer to continue to evaluate an employee's qualities and abilities. Accordingly, an employer will face a significantly greater hurdle when the company tries to terminate an employee's employment during the extended probationary period, compared to a 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 corresponds to 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. MINIMUM WORKING CONDITIONS

An employer who regularly employs 10 or more employees per workplace is required to prepare the work rules in accordance with the Labour Standards Act. The work rules must contain pertinent details relating directly and significantly to the working conditions. The employer's work rules are to be submitted to the competent Labour Standards Inspection Office. An employment contract stipulating any working conditions that fail to meet the standards established by the work rules will be deemed invalid, and the conventional directives will supplant the nullified elements of the agreement. An employer may not change the work rules in any way that would disadvantage its employees, without obtaining the employees' prior consent, unless such modifications to the work rules is considered reasonable.

## 2. SALARY

The term 'wages' refers to any kind of payment made from an employer to its employees as remuneration for their work (e.g. wage, salary, allowance and bonus). Wages must be paid in full directly to the employee and in the appropriately designated currency. An employee's wages, other than extraordinary wages and bonuses, are paid periodically (at least once a month on a specifically designated date).

In addition to the normal wage, work performed on statutory holidays and late-night work (between 10 p.m. and 5 a.m.) requires an extra allowance; the statutory holiday allowance must be at least 35% of the normal hourly wage, while the late-night work allowance must be at least 25% of the normal hourly wage.

## 3. MAXIMUM WORKING WEEK

Generally, the statutory working hours are 8 hours per day and 40 hours per week. Statutory holidays must be granted once every week or four times every four weeks. Designated working hours may be further decided within the statutory working hours.

Flexible working hours arrangements are permissible, subject to certain requirements under the Labour Standards Act. The variable working hours system is possible by providing in the work rules or labour-management agreements, that the employer may have its employees work in excess of the statutory working hours, without paying overtime allowance, as long as the average working hours per week over a certain specific period does not exceed 8 hours per day or 40 hours per week. In addition, the flexible working hours system is possible by providing in the work rules and labour-management agreements, that employees have the discretion to determine their start and finish times under certain conditions. The discretionary working system can be applied for expert employees who possess special skills, or employees in a certain position that involves engaging in planning, proposing, researching and analysing matters of business operations.

## 4. OVERTIME

Compensation for overtime work of up to 60 hours per month, must be at least 25% of the normal hourly wage and overtime 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 abovementioned

overtime regulations; however, the late-night work allowance is still applicable.

## 5. HEALTH AND SAFETY IN THE WORKPLACE

The Labour Contract Act 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, in conjunction with the Labour Standards Act, mandates employers 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 averting industrial accidents.

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

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.

### B. COMPLAINT PROCEDURES

No specific administrative complaint procedures are provided for under Japanese law with regard to health and safety in the workplace. Nonetheless, the Labour Standards Inspection Offices accept complaints concerning health and safety in the workplace. However, in practice, they will not proceed to the enforcement stage unless they find an infringement of the Labour Standards Act and the Industrial Safety and Health Act.

### C. PROTECTION FROM RETALIATION

Under Japanese law, an employer is required to protect the privacy of a consulter and harasser in cases involving harassment in the workplace. An employer is further prohibited from the dismissal or mistreatment of employees who make a consultation or cooperate with an investigation concerning harassment. A complaint against the employer concerning harassment, should generally be made under a breach of contract or as an action in tort based on the Civil Act (1896).

# V. ANTI-DISCRIMINATION LAWS

## 1. BRIEF DESCRIPTION OF ANTI-DISCRIMINATION LAWS

Various protections exist with regards to anti-discrimination laws in Japan, as outlined below.

The Labour Standards Act prohibits discrimination with respect to wages, working hours or working conditions, by reason of nationality, creed or social status. The Act further states that an employer shall not engage in discriminatory treatment between men and women with respect to wages.

The Equal Opportunity Act contains a general prohibition on employers directly discriminating against workers on the basis of gender in relation to the allocation of duties, training, benefits, occupational functioning and status, and dismissal.

The Child Care and Nursing Care Act prohibits the discriminatory of any employee who applied for, or utilised, child care or nursing care leave and other measures under this Act.

The Employment Measures Act (1966) prohibits discrimination based on age for hiring, although some exceptions for setting age requirements are provided for in the Act.

The Act on the Promotion of Employment of Persons with Disabilities (1960) generally obliges employers to hire employees with disabilities. Furthermore, the Act prohibits discriminatory treatment on the basis of disability.

The Labour Union Act prohibits disadvantageous treatment of employees for activities pertaining to their involvement with labour unions. Such activities include, but are not limited to, being

a union member, attempts to join or organise a labour union, or having performed proper activities of a labour union.

## 2. EXTENT OF PROTECTION FOR EMPLOYEES WITH DISABILITIES

The Equal Opportunity Act also contains a prohibition on indirect discrimination on the basis of gender. For example, this includes acts or practices that have the effect of inadvertently placing women at a distinct disadvantage, compared to men. An exception to this general principle exists if there are justifiable reasons for the difference in conduct towards the individuals of different gender, such as, for example, an employer chooses to require transfer experience to other parts of the business/locations as a condition for promotion. However, an employer is not required to grant the same conditions to all employees. Therefore, disparate treatment of male and female employees (e.g. gender differences) could be considered impartial (non-discriminatory) if there are justifiable reasons for doing so.

## 3. PROTECTIONS AGAINST HARASSMENT

Sexual harassment can be defined as: (i) any disadvantages in the employee's working conditions (such as dismissal, demotion or salary cuts) by reason of their response to sexual speech and behavior at the workplace; or (ii) any harm in their working environment by reason of exposure to sexual speech and behavior.

The Equal Opportunity Act requires employers to introduce measures to prevent sexual harassment,



including a mandate to clarify the relevant policy and inform and educate their employees on such policies. Furthermore, employers must establish consultation desks to respond to complaints from employees; facilitating a prompt and appropriate investigation that can be carried out effectively upon learning of incidents of sexual harassment; instituting measures to protect the privacy of both the accuser and the accused; and prohibiting the dismissal or mistreatment of workers who consult or cooperate with a sexual harassment-related investigation.

The recent amendment of the Equal Opportunity Act, which came into force in June 2020, strengthens such measures and compels employers to try and cooperate with other companies (e.g. through interviews and/or investigations) in cases where an employee of the company has sexually harassed employees of the other company, in order to enhance the effectiveness of the other company's employment measures and prevent potential sexual harassment incidents stemming from the interaction between companies and their employees.

Power harassment can be defined as damaging behavior, which takes advantage of a superior position in a working relationship. The recent amendments on the Act on Comprehensive Promotion of Labour Policies, which came into force in June 2020, requires employers to introduce measures to prevent power harassment. Employers must establish consultation procedures to prevent power harassment. The law also prohibits the dismissal or mistreatment of workers who make a complaint regarding power harassment.

Furthermore, any employer that does not abide by the recommendations for improvement discussed above, could be publicly named.

## **4. EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS**

The Act on the Promotion of Employment of Persons with Disabilities obliges employers with more than 45.5 employees, to hire employees

with disabilities and to increase the representation of its employees with disabilities to reach at least 2.2% of their workforce. This representation percentage of employees with disabilities is due to increase to 2.3% in January 2021. Employers who do not achieve the statutory employment rate for disabilities shall be subject to a payment of certain levies, in proportion to the difference between their actual employment rate and the statutory employment rate.

Furthermore, the Act on the Promotion of Employment of Persons with Disabilities prohibits discriminatory treatment on the basis of disability. The Act also requires employers to provide reasonable accommodations. Employers are obliged to make best efforts with regards to these prohibitions and obligations. Further details are provided under the relevant guidelines. Reasonable accommodations as required under the Act, is defined as necessary and appropriate modifications and adjustments that do not impose a disproportionate or undue burden (which is largely equivalent to the definition of reasonable accommodations as provided by the Convention on the Rights of Persons with Disabilities). If a person with a disability expresses an intention to remove social barriers, the employer is required to undertake the appropriate consideration (i.e. a positive action of change or adjustment) with regards to providing services and/or accepting him/her as an employee, albeit depending on the circumstances as well as the individual disability characteristics of the employee, and to the extent that there is no disproportionate or undue burden imposed against the employer. An employer is also required to establish a consultation system to respond to disabled employees and to protect the privacy of a consulter. An employer is further prohibited from the dismissal or mistreatment of employees who request a consultation for accommodations.

There are no mandatory obligations imposed on employers to provide accommodations with regard to religious practices.

## **5. REMEDIES**

An employee may bring a discrimination claim against the employer by filing a civil lawsuit before the appropriate court, or through a

petition for proceedings before the appropriate labour tribunal. The employee is entitled to seek a declaratory judgment determining that the discriminatory treatment is null and void, or an order of compensation of damages due to the discriminatory treatment. An employee may also make a request for administrative mediation at the prefectural labour bureau, with regards to the discriminatory treatment. It is also possible for an employee to report an employer's equal pay practice to the appropriate Labour Standards Inspection Office, which may commence an investigation and possibly a criminal prosecution, depending on the discrimination claim. In practice, however, a criminal prosecution is extremely rare.

Furthermore, the directors of Prefectural Labour Offices can provide employers with advice, guidance and recommendations with regard to the discriminatory treatment. The directors can also require employers to provide reports on issues covered by the Equal Opportunity Act.

## 6. OTHER REQUIREMENTS

Japanese law does not impose any (generally) applicable laws or regulations that require an employer to disclose, report on, or take positive action in order to ensure equality. However, there is a requirement for employers to employ a certain number of workers with disabilities and to report their workforce statistics to the government, annually.

# VI. PAY EQUITY LAWS

## 1. EXTENT OF PROTECTION

The Reform Act amended the Part-Time/Fixed-Term Employment Act and the Worker Dispatch Act, which came into effect in April 2020, has introduced the requirement for workers to receive fair and equal treatment, irrespective of their job status. Furthermore, the Act prohibits any irrational disparity between ‘regular’ and ‘non-regular’ employees.

With regards to part-time/fixed-term employees, an employer is prohibited from differentiating the base salary, bonus and other benefits, in such a manner that there exists an unreasonable difference between part-time/fixed-term employees and regular employees. The reasonableness is determined based on: (i) the content of the assignments and the level of responsibility thereof; (ii) the scope of possible changes of such duties and the position; and (iii) other relevant factors, as may be deemed appropriate in light of the nature of such treatment.

An employer is prohibited from discriminating against part-time/fixed-term employees, as compared to regular employees, with regards to their duties and their positions, for the sole reason of being categorised as part-time/fixed-term employees. An employer is required to provide opportunities to utilise welfare facilities that are available to its regular employees, and designated under the government ordinance, to its part-time/fixed-term employees. An employer is obliged to explain to its part-time/fixed-term employees the contents and reasons for any differential treatment compared to its regular employees. An employer is further prohibited from any disadvantageous treatment of an employee who requests such an explanation.

With regards to dispatch employees, the dispatching company is obliged to ensure the equal or balanced treatment of dispatched workers, wherein the non-dispatched workers are treated equally or as a result

of satisfying the requisite conditions, affording fair and equal treatment protections, in accordance with the provisions established under a labour-management agreement. The dispatching company is obliged to explain to the dispatch employees the contents of treatment and working conditions at the time of hiring and the commencement of the dispatch. Furthermore, the dispatching company is also required to explain to the dispatch employees the contents and reasons for differential treatment with the equivalent employees at the recipient company. The dispatching company is further prohibited from any disadvantageous treatment of an employee who requests such an explanation.

The guidelines corresponding to the amended Act, set out the basic criteria for salaries and benefits, education, training and welfare entitlements, together with concrete examples of reasonable and unreasonable treatment, differentiating between regular and non-regular employees.

## 2. REMEDIES

A non-regular employee may bring a claim against the employer by filing a civil lawsuit before the appropriate court, or through a petition for proceedings before the appropriate labour tribunal.

The amended Act developed administrative Alternative Dispute Resolution (administrative ADR) mechanisms to cover situations of equal treatment of non-regular employees (part-time/fixed-term employees and dispatch employees), in order to provide assistance to non-regular employees to settle disputes in a prompt and efficient manner, and without the involvement of court proceedings. Furthermore, the amended Act allows for the relevant administrative authorities to issue administrative advice, guidance and/or recommendations against the employer with regards to the treatment of the fixed-term employees, in addition to that of the part-time employees and the dispatch employees.

Non-compliance of administrative advice, guidance and/or recommendations may be subject to publication. An employer is further prohibited from any disadvantageous treatment of an employee who makes a request for such administrative ADR and/or administrative measures.

The amended Act does not impose statutory sanctions or penalties with regards to non-compliance of equal treatment of non-regular employees. The amended Act only provides for the administrative advice, guidance and/or recommendations.

### **3. ENFORCEMENT/ LITIGATION**

To date, we do not have any noteworthy enforcement pronouncements or ongoing litigation relating to the equal pay practices which came into force in April 2020, to report.

### **4. OTHER REQUIREMENTS**

Japanese law does not impose upon employers, any mandatory obligations to undertake positive actions with respect to pay discrimination, gender equality or equal pay.



# VII. 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; (iii) 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.

## 2. EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

When an employee disparages the employer or divulges confidential information via social media, the possible remedies available to the employer include a request to the employee or the website administrator, to have the content removed as expeditiously as possible; and then consider whether to take legal and/or disciplinary action(s) against the employee for such conduct. The employer needs to evaluate if any of the grounds for disciplinary action and/or legal action is met. The employer further needs to evaluate whether to bring a criminal complaint for defamation, claim damages in tort and/or for breach of contractual obligations.

# VIII. TERMINATION OF EMPLOYMENT CONTRACTS

## 1. GROUNDS FOR TERMINATION

Japanese law requires that the termination of a regular employment relationship shall be considered objectively, deemed reasonable and appropriate upon social convention, which is read rigidly in light of Japanese judicial precedent. 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 set out in the work rules or in the employment contract.

Termination due to economic reasons such as redundancies is rigorously 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 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.

With regards to 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 are considered to be more rigid than the objectively reasonable requirement, 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.

### 3. SEPARATION AGREEMENTS

#### A. IS A SEPARATION AGREEMENT REQUIRED OR CONSIDERED BEST PRACTICE?

Generally, any employment contract may be terminated upon agreement between an employer and employee. Since dismissals are severely restricted in Japan, soliciting voluntary retirement is a common practice used to reach an agreement with an employee, terminating his/her employment contract.

#### B. WHAT ARE THE STANDARD PROVISIONS OF A SEPARATION AGREEMENT?

Solicitation of voluntary retirement is commonly offered with an amount to pay salaries of several months to one year, as the special retirement allowance. The amount of special retirement allowance is not governed by Japanese law however, but rather is agreed upon between the employee and employer, and in practice, would necessarily vary depending on the circumstances. Furthermore, in the case of redundancy, the conditions surrounding the application for voluntary retirement should be fair and reasonable. In other words, issues would arise if the targeted employees had no choice but to apply for voluntary retirement and/or if such conditions could be deemed to be targeting only specific employees.

#### C. DOES THE AGE OF THE EMPLOYEE MAKE A DIFFERENCE?

Theoretically, the age of the employee does not make a substantial difference. In practice however, age could play a significant role, since separation agreements are subject to employer-employee negotiations.

#### D. ARE THERE ADDITIONAL PROVISIONS TO CONSIDER?

Additionally, consideration should be given to employing restrictive covenants.

### 4. REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

An employee may bring a claim against the employer and seek a declaratory judgment determining that their dismissal is null and void. An employee may also bring a claim for a decision confirming his/her position as an employee, by filing a petition before the labour tribunal for the commencement of labour tribunal proceedings or before the courts, with a request for provisional injunction(s) or by bringing a claim/dispute for litigation. If a dismissal is found to be null and void, the employee may return to the company.

Generally, an employee may also demand payment of the employee's withheld wages or salary for the period since the date of dismissal up to the time of judgment, with interest. A claim seeking reversal of a dismissal is not barred by the statute of limitation. However, in general, a five-year statute of limitation period applies to claims for wages, retirement allowances and other labour-related entitlements under the Labour Standards Act.

### 5. WHISTLEBLOWER LAWS

The Whistleblower Protection Act (2004) protects whistleblowers who come forward with information regarding criminal activity in the workplace relevant to life, body, property, and other interests of citizens, that has occurred or is about to occur. Consequently, employers are required to appoint an appropriate point of contact within the company, who is to be located either within the premises of a particular workplace, or at an outside location where the relevant administrative organ of the

company operates, to receive and respond to any of the abovementioned concerns as may be raised by an employee whose intentions are lawful and trustworthy. An employer is prohibited from any disadvantageous treatment of the whistleblower on the basis of such whistleblowing. Furthermore, under the Whistleblower Protection Act, a dismissal of the whistleblower on such grounds will be declared null and void.



# IX. RESTRICTIVE COVENANTS

## 1. DEFINITION OF RESTRICTIVE COVENANTS

Restrictive covenants are not legally defined under Japanese law. However, such covenants are allowed as concomitant obligations under the principle of good faith arising from the employment contract during the term of employment, and even after termination of the employment contract. Generally, restrictive covenants have to be valid to the extent necessary and reasonable, as provided for in the work rules and regulations or the specific employment contract.

## 2. TYPES OF RESTRICTIVE COVENANTS

### A. NON-COMPETE CLAUSES

During the term of employment, an employee is prohibited from competing with his/her employer. Non-compete clauses are considered as an employee's concomitant obligation under the principle of good faith arising from the employment contract. Regarding the validity of non-compete clauses, after termination of the employment contract, the courts have a tendency to judge such clauses very strictly, in accordance with the precedent recently established. Therefore, the scope of the non-compete obligation should be reasonably limited and restricted to those obligations which are actually necessary to protect the company's interests.

The factors utilised in evaluating the validity of a non-compete clause include, but are not limited to, the following items: (i) job position and responsibility; (ii) scope (e.g., type, region) of the services provided; (iii) confidentiality and

importance of the services provided; (iv) duration of the non-compete obligation following the termination; and (v) alternative compensation. Accordingly, non-compete clauses after termination of an employment contract would be considered valid only if the scope of services is reasonably limited, and the confidentiality and importance of the services is deemed to be extremely high. Furthermore, non-compete clauses that are likely to be considered valid by the courts, are those in which the term of the non-compete obligations is within one year, and compensation for such obligations is provided in a reasonable manner.

### B. NON-SOLICITATION OF CUSTOMERS

It is possible to compel an employee to refrain from soliciting customers after termination of the employment contract, by providing such a clause in the work rules or the specific agreement. The factors used to consider the validity of clauses regarding the non-solicitation of customers, are basically the same as those for non-competition clauses.

### C. NON-SOLICITATION OF EMPLOYEES

It is possible to require an employee to refrain from soliciting former employees after termination of the employment contract, by providing such a clause in the work rules or the specific employment agreement. The factors used to consider the validity of clauses regarding the non-solicitation of former employees, are basically the same as those for non-competition clauses.

### 3. ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

Under Japanese law, there are two types of court actions that are possible against a breach of the non-compete clauses and non-solicitation obligations after termination: (i) demanding an injunction and (ii) filing a claim for damages. With regards to an injunction demand, the plaintiff is required to prove that the company's business profits, in actuality, have already been infringed or are in serious danger of being infringed. With regards to a claim for damages, the plaintiff is required to prove the occurrence of actual damages, as well as a causal connection between the breach and the actual damages caused.

### 4. 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 clause in the employment contract permitting the employer to do so. Otherwise, the employer could be violating the employee's implied right to work and therefore be in breach of contract.

# X. 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.

# XI. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

## 1. BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

The Labour Union Act defines a “labour union” as organisations or federations of unions, formed voluntarily by and composed mainly of workers. The main purpose of such labour unions is to maintain and improve working conditions and raise the economic status of the workers. Any organisation or federation is excluded from “labour union” under the Act, if any of the following conditions are met: (i) if it allows for the participation of individuals who represent the interests of the employer, including directors and workers in supervisory positions; (ii) if it receives financial assistance from the employer to pay for the organisation’s operational expenditures; (iii) if its purposes are confined to mutual aid services or other welfare services; or (iv) if its purposes are principally political or social movements.

Dominant majority unions in Japan are deemed enterprise unions. These are organised at each company or group level, and which only represent employees thereof. However, consolidated unions allow anyone to join, including those individuals who are beyond a single company. The unionisation rate in Japan has been considerably and continuously declining. This rate has been less than 20% in the last fifteen years.

A labour union is not required to file an application of any kind with authorities in order to be recognised as a “labour union” under the Labour Union Act. However, labour unions are required to submit evidence to prove that the above-mentioned requirements have been met when seeking to participate in the procedures provided

for under the Act, or alternatively, when pursuing remedies afforded therein, including cases that involve filing a motion for unfair labour practices before the Labour Relations Commission.

## 2. RIGHTS AND IMPORTANCE OF TRADE UNIONS

A labour union organisation and its activities are guaranteed as basic labour rights by the Constitution and the Labour Union Act, irrespective of size and unionisation rate. A labour union has the right to initiate a collective bargaining request to the employer as well as to go on strike. Mandatory bargaining is within the employer’s control. Such bargaining concerns working conditions, other treatment of union members and management of collective labour relations. An employer has a duty to accept such a request for bargaining and negotiate with the labour union in good faith.

The following types of activities by employers are prohibited as unfair labour practices: (i) disadvantageous treatment by reason of being a union member, having tried to join or organise a labour union, or having performed proper activities of a labour union; (ii) refusal to bargain collectively without justifiable reasons; (iii) dominance and interference in union administration by controlling or interfering with the formation or management of a labour union, or giving financial assistance to pay the labour union’s operational expenses; or (iv) disadvantageous treatment by reason of having filed a motion with the Labour Relations Commission.

In addition, the employer is required to execute a labour-management agreement with a labour union representing a majority of the employees

at the workplace, for certain statutory matters deemed mandatory, including, but not limited to, matters concerning (i) requests for employees to work overtime and/or on public holidays; (ii) adopting an irregular working hours system; and (iii) deducting certain expenses from salaries paid to employees. An employer is also required to consider the opinion of the majority union, when providing or amending the work rules.

### 3. TYPES OF REPRESENTATION

Labour unions are private voluntary associations. Therefore, labour unions have the ability and discretion to organise and operate their respective unions as they see fit. Also, a labour union is a self-governing association. Furthermore, works councils do not exist in Japan.

#### A. NUMBER OF REPRESENTATIVES

There is no statutory requirement concerning the representation of labour unions under Japanese law.

#### B. APPOINTMENT OF REPRESENTATIVES

There is no statutory requirement concerning the representation of labour unions under Japanese law.

### 4. TASKS AND OBLIGATIONS OF REPRESENTATIVES

The main task of the union representatives is to communicate with the employer on behalf of the union, and to provide their opinion or decision in response to the employer's proposal(s). If there is a labour union representing a majority of employees at the workplace, the representative of such a union should take a role as a signatory of the labour-management agreement for certain mandatory statutory provisions, such as (i) requesting that employees work overtime and on public holidays; (ii) adopting an irregular working

hours system; (iii) deducting certain expenses from salaries paid to employees; and (iv) communicating the union's opinion on the workplace rules, when such rules have been provided and/or amended by the employer.

### 5. EMPLOYEES' REPRESENTATION IN MANAGEMENT

In principle, employee representation in management is not a concept recognised under Japanese law.

### 6. OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

If a labour union has not been established or is otherwise non-existent, the employer is required, in such cases, to execute a labour-management agreement with the employees' designated liaison officer, who has been charged with representing a majority of the employees at the workplace, in connection with specific mandates as prescribed by law (see above). An employer is also required to consider the opinion of the employees' representative, when providing or amending the work rules.



# XII. 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 AND 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 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 child care leave for a child aged less than one year (or until the child becomes one year and two months old, one and a 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 and a half years old. Moreover, the employer is not obliged to pay the employee during maternity leave and child care leave.

## C. SICKNESS AND 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 automatic termination 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 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 under fixed-term employment arrangements, whose employment would come to end within 6 months and 93 days after the scheduled commencement date of nursing care leave. 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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Atsumi & Sakai is a multi-award-winning, independent Tokyo law firm, and one of the ten largest full-service firms in Japan. Our labour and employment practice group offers practical advice to clients on all matters regarding HR and labour relations that both Japanese and international companies face, including the resolution of labour disputes and litigation before labour courts and tribunals. Atsumi & Sakai has been recognised as a leading firm for labour and employment law by various legal directories, including, among others, Chambers, The Legal 500, Best Lawyers and Asialaw Profiles.

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