



# ICLG

The International Comparative Legal Guide to:

## **Employment & Labour Law 2018**

### **8th Edition**

A practical cross-border insight into employment and labour law

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EDITORIAL

Welcome to the eighth edition of *The International Comparative Legal Guide to: Employment & Labour Law*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of labour and employment laws and regulations.

It is divided into two main sections:

One general chapter titled “Where Next for the Gig Economy?”.

Country question and answer chapters. These provide a broad overview of common issues in labour and employment laws and regulations in 41 jurisdictions.

All chapters are written by leading labour and employment lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Stefan Martin and Jo Broadbent of Hogan Lovells International LLP for their invaluable assistance.

The *International Comparative Legal Guide* series is also available online at [www.iclg.com](http://www.iclg.com).

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# Japan

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## 1 Terms and Conditions of Employment

### 1.1 What are the main sources of employment law?

The two principal sources of employment law are the Labour Standards Act (the “LSA”) and its Enforcement Ordinance, both of which provide minimum standards for the terms and conditions of employment contracts. In addition, the Labour Union Act (the “LUA”) governs collective labour relationships, while the Labour Contract Law (the “LCL”) governs individual labour relationships by providing for the principles under which a labour contract is to be entered into or changed through voluntary negotiations between a worker and an employer. The LCL also governs other basic matters concerning labour contracts. Other important sources of employment law include the Industrial Safety and Health Act, the Employment Security Act, the Act on Improvement, etc. of Employment Management for Part-Time Workers, and the Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers (the “Temporary Staffing Services Law”).

The Japanese government is currently discussing draft legislation to amend employment regulations (including the LSA and the LCL) and improve the working environment, focusing mainly on the problems of long working hours and wage gaps between regular workers and non-regular workers. The draft legislations are expected to be submitted to and discussed in the Diet in 2018.

Some important court decisions also function as a source of law. The decisions of the higher courts, especially the Supreme Court, are seen as a source of law for lower courts, which usually hesitate to render judgments that contradict higher court rulings as such judgments would likely be overruled at the higher courts.

### 1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

The LSA defines a “worker” as someone who is employed at and receives wages from a business or office, regardless of the type of occupation, and a worker is protected by Japan’s employment law. Independent contractors or self-employed people who enter into an outsourcing contract with a company and certain company executives, such as board members and corporate officers, who can work at their own discretion, are not protected under employment law as they are not considered “workers”. The distinction between an independent contractor and a company executive on the one hand, and a worker protected by employment law on the other hand,

should be made based on the person’s actual working conditions (not only by job title or the form or name of the contract) by taking into account various factors such as whether: (i) he/she has any discretion to refuse assignments; (ii) he/she is under someone’s control and should follow specific instructions regarding his/her work; (iii) the place and time for work are fixed; (iv) other persons are allowed to do the work; and (v) he/she is receiving wages in exchange for providing the work.

Workers who are protected by employment law can be classified into the following categories:

- i) non-fixed-term workers (the so-called “regular workers”);
- ii) fixed-term workers, whose term of employment must not exceed three years (or five years in certain cases stipulated in the LSA);
- iii) part-time workers, whose prescribed working hours are shorter than those for regular workers; and
- iv) temporary workers or dispatched workers, who are employed by temporary staffing agencies and dispatched to other companies under the Temporary Staffing Services Law.

### 1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

An employment contract does not have to be in writing; an oral agreement for employment is effective. However, an employer is required to expressly provide certain key employment terms and conditions in writing to their workers. These key terms and conditions include matters concerning:

- i) the period of the employment contract;
- ii) the place of work and job description;
- iii) the start time and the end time for working hours, possible overtime work, break-time, rest period, rest days, and change in shifts (if the worker will work two or more shifts);
- iv) the determination, calculation and payment of wages (except retirement allowance and extraordinary wages (such as bonuses)), and the dates for the calculation of wages, payment of wages and wage increases; and
- v) the termination of employment (including regarding resignation, retirement, dismissal or any other cause for termination).

### 1.4 Are any terms implied into contracts of employment?

The minimum standards set out in the LSA are implied into employment contracts with fixed-term workers (see question 1.2), if

the contract is silent, or if it provides terms which are less favourable for the workers than the minimum standards set out in the LSA.

If a certain employment term is applied repeatedly and continuously for a long period of time, it is possible for that term to be implied into the employment contract on the basis of an implied agreement and general custom or practice.

In addition, under the LCL, a fixed-term employment contract may be deemed renewed: (i) if the status of the fixed-term employment contract is not substantively different from a non-fixed-term employment contract due to repeated renewals; or (ii) when the continuation of employment can reasonably be expected even after the expiration of the term of the fixed-term employment contract, unless there is a justifiable reason not to renew the fixed-term employment contract upon expiration and non-renewal is deemed to be socially acceptable.

### 1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

The LSA and its Enforcement Ordinance set down minimum employment terms and conditions, such as the following terms.

- i) An employer can require their workers to work longer than the statutory maximum hours, i.e., eight hours a day and 40 hours a week, only if they enter into a labour-management agreement (known as an “**Article 36 Agreement**”) with a union organised by a majority of the workers at the workplace or, where no union exists, with a worker representing a majority of such workers, and file such agreement with the local Labour Standards Inspection Office.
- ii) If an employer extends the working hours beyond the statutory maximum hours, the employer must pay higher wages for each overtime hour equal to 125 per cent of the normal wages per work hour. For each overtime hour in excess of 60 overtime hours in one month, the rate for each overtime hour increases to 150 per cent of the normal wages per work hour. Small- and medium-sized employers, defined as employers whose capital amount, amount of investment or number of workers falls below certain thresholds, are currently exempt from the 150 per cent overtime rate; however, the LSA is expected to be amended to abolish this exemption in 2019.
- iii) An employer is also required to pay higher wages equal to 135 per cent of the normal wages per work hour for work on holidays.
- iv) An employer must also pay an additional 25 per cent of the normal wages per work hour for work from 10pm to 5am. If a worker works overtime between 10pm to 5am, the employer must pay wages at the rate of 150 per cent of the normal wages per work hour (i.e., 125 per cent as overtime pay plus 25 per cent as night shift pay). If a worker works between 10pm to 5am on holidays, the employer must pay wages at the rate of 160 per cent of the normal wages per work hour (i.e., 135 per cent as holiday pay plus 25 per cent as night shift pay).
- v) An employer is required to give break times during working hours for at least 45 minutes when working hours exceed six hours, and for at least one hour when working hours exceed eight hours.
- vi) An employer is required to give workers at least one day off per week; however, this rule does not apply to an employer who provides workers with four days off or more over any four-week period.
- vii) An employer is required to grant the stipulated minimum number of days of annual paid leave to a worker in accordance with the length of service of a worker, if the worker has been employed continuously for six months and has worked at least 80 per cent of the working days during such six-month period.

- viii) An employer must pay at least the minimum wage under the Minimum Wages Law. Minimum wages are fixed according to regulations for each district or for certain industries.

### 1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

As long as both the employer and the union (the collective bargaining parties) have the authority to agree on the subject terms and conditions, which must not be less favourable for the workers than the minimum standards set out in the LSA, they can agree on any terms and conditions during collective bargaining. In practice, collective bargaining agreements generally include major terms and conditions of employment such as wages and other benefits, days off, paid leave, notice periods, promotions, transfers and disciplinary procedures. The employer is not required to discuss or agree on matters concerning the company’s organisation and high-level management which are not directly related to employment conditions.

Collective bargaining usually takes place at the company or workplace level, but it can take place at the industry level as well.

## 2 Employee Representation and Industrial Relations

### 2.1 What are the rules relating to trade union recognition?

The LUA defines “**labour unions**” as organisations or federations of unions formed voluntarily by and composed mainly of workers for the main purposes of maintaining and improving working conditions and raising the economic status of the workers; however, the following groups are not “labour unions”:

- i) a group which admits persons who represent the interests of the employer including directors and workers in supervisory positions;
- ii) a group which receives the employer’s financial assistance in paying the organisations’ operational expenditures;
- iii) a group whose purposes are confined to mutual aid service or other welfare services; and
- iv) a group whose purposes are principally political or social movements.

A union is not required to file any application with authorities to be recognised as a “labour union”, but it is required to file evidence with the Labour Relations Commission and demonstrate that all the requirements described above are satisfied when it takes legal actions, including applications for examination of cases of unfair labour practice.

### 2.2 What rights do trade unions have?

The establishment of a labour union and its activities are guaranteed as basic labour rights by the Constitution of Japan and the LUA which stipulates these rights in detail. A labour union has the right to request an employer to enter into collective bargaining on any issue, provided that the issue relates to the labour union itself or the status of a worker who is a member of the union, regardless of the number of members. An employer is required to accept such a request and faithfully negotiate with the labour union; and the refusal of an employer to enter into collective bargaining without proper reasons could be an unfair labour practice which is prohibited by the LUA.



In addition, the following acts of an employer are prohibited as unfair practices:

- i) discharging or discriminating against an employee due to him/her being a member of a labour union, having tried to join or organise a labour union, or having performed proper acts of a labour union;
- ii) making it a condition of employment that an employee must not join or must withdraw from a labour union;
- iii) controlling or interfering with the formation or management of a labour union;
- iv) giving financial support to defray the labour union's operational expenses; and
- v) treating an employee in a disadvantageous manner because he/she has filed a complaint with the Labour Relations Commission.

An employer must hear the opinion of the labour union organised by a majority of the workers at a workplace concerning certain labour matters, including setting up or amending employment rules of the workplace.

Furthermore, a labour union has the right to act collectively, which includes the right to strike. The LUA gives workers who engage in proper and justifiable actions immunity from criminal and civil liabilities and protection from unfavourable treatments by their employer.

### 2.3 Are there any rules governing a trade union's right to take industrial action?

Industrial actions (or labour dispute actions) should be taken "properly" in order to enjoy the protection of the LUA. The LUA provides that in no case should acts of violence be construed as justifiable acts of labour unions, but does not provide specific rules as to what constitutes a proper industrial action. Generally, courts take into account the purpose and manner of an action in deciding whether or not it was proper.

With respect to procedural requirements, many labour unions are required to conduct a vote among their members before calling a strike under their constitutions, and a prior notice of a strike is sometimes required by the collective bargaining agreement between the union and the employer; however, these are not statutory requirements.

### 2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

Employers are not required to set up works councils in Japan.

### 2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

Not applicable, please see question 2.4.

### 2.6 How do the rights of trade unions and works councils interact?

Not applicable, please see question 2.4.

### 2.7 Are employees entitled to representation at board level?

Workers have no statutory entitlement to representation at the board level.

## 3 Discrimination

### 3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

The LSA provides that employers must not use the nationality, creed or social status of any worker to discriminate against him/her with respect to wages, working hours or other working conditions. The LSA also provides for the principle of equal wages for men and women.

### 3.2 What types of discrimination are unlawful and in what circumstances?

In addition to the general rules under the LSA mentioned in question 3.1, other rules which prohibit discrimination include the following:

- i) The Employment Security Law prohibits employers from discriminating against a person by reason of any previous profession, membership of a labour union, race, nationality, creed, sex, social status and family origin.
- ii) The Act on Securing, etc. of Equal Opportunity and Treatment between Men and Women in Employment (the "Equal Employment Opportunity Act") prohibits discriminatory treatment based on sex in relation to the following matters:
  - a) discrimination in recruitment and employment;
  - b) assignment (including allocation of duties and grant of authority), promotion, demotion and training;
  - c) loans for housing and other similar fringe benefits as provided by ordinance;
  - d) change in job type and employment status; and
  - e) encouragement to retire, mandatory retirement age, dismissal, and renewal of the employment contract.
- iii) The Equal Employment Opportunity Act also prohibits the disadvantageous treatment of female employees due to marriage, pregnancy, childbirth, and requesting absence from work which is allowed under the LSA.
- iv) When the employer solicits or recruits potential employees through advertisements on job information websites or taking other similar actions, the advertisements must not specify restrictions on age and gender of potential employees except in certain cases stipulated in the ministry ordinances under the Employment Measures Act and the Equal Employment Opportunity Act.

### 3.3 Are there any defences to a discrimination claim?

Generally speaking, most of the rules explained in questions 3.1 and 3.2 do not require an employer to grant the same terms and conditions to all workers, and thus, if an employer successfully demonstrates that the alleged discriminatory treatment is based on justifiable grounds, the treatment may be deemed to be not discriminatory.

When a discriminatory act in question is done by one worker or more, and is not a company-wide problem, the court may find that the employer is not liable for the discriminatory conduct if the employer has taken adequate measures to prevent such discriminatory conduct.

### 3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Workers have different ways of enforcing their discrimination rights depending on the situation. These ways include filing a civil lawsuit or an application for a labour tribunal proceeding, and requesting the court or labour tribunal to:

- i) declare the treatment (such as the discriminatory dismissal, transfer or assignment order) as null and void;
- ii) order the employer to reinstate him/her (in case of dismissal); and
- iii) order the employer to compensate him/her for any damage which he/she has suffered due to the discriminatory treatment. In Japan, a worker cannot request punitive damages but can request damages for mental suffering.

Employers can settle claims at any time before or after they are initiated.

### 3.5 What remedies are available to employees in successful discrimination claims?

Please see question 3.4.

### 3.6 Do “atypical” workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

- i) Fixed-term workers  
Under the LCL, if a labour condition of a fixed-term labour contract is different from the counterpart labour condition of a non-fixed-term labour contract, the difference in the conditions is not necessarily unreasonable, considering the differences in the duties of the workers, the extent of responsibility accompanying the said duties, the changes in the duties and work locations, and other factors.
- ii) Part-time workers  
The Act on Improvement, etc. of Employment Management for Part-Time Workers provides for the following rules:
  - a) With regard to a part-time worker: whose work description and level of work responsibilities are equal to those of regular workers at the same place of business; who has signed a labour contract without a definite period; and whose job description and assignment are likely to be changed within the same range as those of regular workers, then in light of the practice at said place of business and other circumstances, throughout said part-time worker’s employment period, the employer must not engage in discriminatory treatment regarding wages, education and training, use of welfare facilities and other dealings by reason of being a part-time worker.
  - b) An employer should endeavour to decide the wages (excluding commutation allowances, retirement allowances and others specified by ordinance) of part-time workers with due consideration to a balance with regular workers, and by taking into consideration relevant matters such as job description, job performance, job motivation, and abilities or experience of the part-time workers.
- iii) Temporary workers  
The Temporary Staffing Services Law, which was amended in 2015, provides that temporary staffing agencies should endeavour to decide the wages of the temporary workers they employ and dispatch to other companies with consideration to the working conditions of workers and conditions of the

labour market, and having a balance with the wage levels of workers who engage in the same types of duties at the companies receiving the temporary staffing services.

In addition, as stated in question 1.1, the Japanese government is currently discussing draft labour legislation including amendments, with one focus being on wage gaps between regular workers and non-regular workers. The draft legislation is expected to be submitted to and discussed, in the Diet in 2018.

## 4 Maternity and Family Leave Rights

### 4.1 How long does maternity leave last?

Mandatory maternity leave lasts 14 weeks in general (six weeks before childbirth, and eight weeks after childbirth). The LSA prohibits an employer from:

- i) making a female worker who is expecting to give birth within six weeks (the period should be increased to 14 weeks in the case of multiple foetuses) work, if she requests maternity leave; and
- ii) having a female worker work within eight weeks after childbirth (unless she has requested to work six weeks after childbirth, and a doctor confirms that returning to work has no adverse effect on her).

In addition, a worker is entitled to take childcare leave for a child of less than one year of age (or until the child turns two years old, if some requirements are met).

### 4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

A female employee is not entitled to salary during maternity leave or childcare leave, unless her employment contract or the employment rules of her employer stipulate otherwise. However, she is entitled to the following allowances under insurance laws.

First, a female employee who gives birth is entitled to receive childbirth allowance equal to two thirds of her daily salary from the health insurance association she has joined.

Second, a female employee who takes childcare leave is entitled to receive childcare allowance from the health insurance association she has joined, until the child turns one year old (or until the child turns one and a half years old, if some requirements are met).

### 4.3 What rights does a woman have upon her return to work from maternity leave?

Employers are prohibited from treating a female employee in a disadvantageous manner because of maternity leave or childcare leave. Thus, an employer is generally required to enable a female employee to return to her original work after her maternity leave or childcare leave. Assigning her to a different position or reducing her wages can be deemed unlawful, if either is due to her taking maternity leave or childcare leave.

In addition, a female employee who is raising an infant under one year old is entitled to time to care for the infant for at least 30 minutes twice a day, in addition to the normal rest periods.

### 4.4 Do fathers have the right to take paternity leave?

A male employee is entitled to childcare leave. He is entitled to only one period of childcare leave in general; however, if the first period

of childcare leave ends within eight weeks from the childbirth, he is entitled to a second one. He is not entitled to salary during such leave, unless his employment contract or the employment rules of his employer stipulate otherwise.

#### **4.5 Are there any other parental leave rights that employers have to observe?**

An employee who is taking care of a child under elementary school age is entitled to take a day off to take care of an injured or sick child for up to five working days per fiscal year (or up to 10 working days if the worker has two or more children under elementary school age). He/she is not entitled to salary during such leave, unless his/her employment contract or the employment rules of his/her employer stipulate otherwise.

#### **4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependants?**

An employee is entitled to take a day off to take care of a family member who requires nursing care for up to five working days per fiscal year (or up to 10 working days if the worker has two or more family members requiring nursing care). This leave can be taken in half-day increments. An employee is not entitled to salary during such leave, unless his/her employment contract or the employment rules of his/her employer stipulate otherwise.

## **5 Business Sales**

#### **5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?**

When a business is sold through a share transfer, no transfer will take place because there will be no change in employer.

In a business sale through an asset transfer, employees do not automatically transfer. The transferee (the buyer) and the transferor (the seller) may agree to include employment contracts in the business being sold, but if a worker refuses to consent to the transfer of his/her employment contract, the employment contract will not transfer to the transferee.

#### **5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?**

In a share sale, the employment conditions and status will not change. Collective agreements entered into before the share sale, and in force as of the share sale, will continue to be in force and their conditions will not change merely because of the share sale.

In an asset transfer, an employment contract can be transferred to the buyer transferee (i) by including the employment contract in the business to be sold, or (ii) by having the worker resign from the transferor and enter into a new employment contract with the transferee. In the former case, the terms and conditions of the employment contract will remain the same even after the transfer unless otherwise agreed between the transferee and the worker. In the latter case, the terms and conditions may change depending on the work rules of the transferee or the new employment contract. Collective labour agreements will not transfer, unless otherwise agreed between the transferor, the transferee and the union.

#### **5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?**

On a business sale either by a share transfer or an asset transfer, a worker does not have any specific statutory rights regarding information and consultation, but generally speaking, the employer should provide sufficient information and faithfully consult with the workers when asking them to consent to the transfer. There is no statutory requirement regarding the time necessary for the process.

#### **5.4 Can employees be dismissed in connection with a business sale?**

A business sale by itself will not justify the dismissal of employees, and thus, the general rules on dismissals apply to dismissals in connection with a business sale (see question 6.3).

#### **5.5 Are employers free to change terms and conditions of employment in connection with a business sale?**

An employer cannot freely change the terms and conditions of employment in connection with a business sale. If an employer would like to change the terms and conditions of individual employment contracts, they are required to obtain the consent of the workers. If they would like to make changes to the work rules which are disadvantageous to the workers, justifiable reasons for the changes are required.

## **6 Termination of Employment**

#### **6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?**

Yes. An employer is required to provide at least 30 days' advance notice to the employee, or to pay the average wage the employee would earn for a period of not less than 30 days *in lieu* of notice ("**Payment in lieu of Notice**"). The number of days for the advance notice can be reduced by the number of days for which the employer pays the average wage.

#### **6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?**

Yes, an employer can require employees to serve a "garden leave" if the employer pays wages to the employees during that period.

#### **6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?**

An employer may only terminate or dismiss an employee on grounds that are objective, justifiable and reasonable, and any termination or dismissal which is not on those grounds is invalid and deemed an abuse of the rights of the employer. In general, the reasons can be:



- i) incapacity (due to health or performance-related reasons) and lack of qualification;
- ii) misconduct;
- iii) operational necessity; or
- iv) request from a labour union based on a union shop agreement.

Japanese courts strictly interpret the requirement of an ‘objective, justifiable and reasonable’ ground. Usually a dismissal is deemed lawful only where: the cause of dismissal is of a significant degree; there is no other way to avoid the dismissal; and there is almost no factor on the employee’s side that could be taken into consideration in favour of the employee.

In cases of dismissal due to business reasons of the employer, the following general requirements have been formulated by Japanese courts in determining the validity of the dismissal:

- i) necessity of labour reduction, such as financial deterioration of the employer;
- ii) necessity in selecting dismissal over other available measures (for example, whether the employer could have avoided dismissal by using other means such as soliciting for early retirement);
- iii) appropriateness of the selection of the employee being dismissed; and
- iv) appropriateness of the dismissal procedure (for example, whether the employer provided sufficient explanation and opportunities for consultation).

If an employee does not dispute the validity of the dismissal, the dismissal will become effective. But if the employee disputes the validity of the dismissal, he/she would ultimately be considered to have been duly dismissed only if the court determines that the above-mentioned criteria have been met.

If a collective labour agreement requires an employer to obtain the consent of a labour union to dismiss employees, a dismissal without such consent will be considered null and void.

#### **6.4 Are there any categories of employees who enjoy special protection against dismissal?**

Yes, there are categories of employees who enjoy special protection against dismissal. An employer is prohibited from dismissing the following categories of employees:

- i) an employee during a period of absence from work for medical treatment with respect to work-related injuries or illnesses or within 30 days after his/her recovery; and
- ii) a female employee during a period of absence from work before and after childbirth which is taken in accordance with the LSA or within 30 days thereafter.

In addition, an employer is not entitled to dismiss an employee on the any of the following grounds:

- i) nationality, creed or social status;
- ii) being a labour union member or having performed justifiable acts of a labour union;
- iii) sex and, for a female worker, marriage, pregnancy, childbirth or having taken leave from work before and after childbirth;
- iv) having taken childcare leave or family care leave under the Act on the Welfare of Workers who Take Care of Children or Other Family Members Including Child Care and Family Care Leave;
- v) having reported the employer’s breaches of employment protection laws to the relevant government agencies;
- vi) having sought the advice of, or filed an application for mediation by, the head of the Prefectural Labour Offices; and

- vii) having reported a violation in accordance with the Whistle-blower Protection Act.

Also, an employer cannot dismiss a part-time employee who is considered to be equivalent to an ordinary employee, only due to the reason that he/she is a part-time employee.

#### **6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?**

Please see questions 6.3 and 6.9.

Employees are not entitled to compensation on dismissal. However, an employer is generally required to make Payment *in lieu* of Notice (see question 6.1). In addition, since the validity of a dismissal is strictly examined by Japanese courts if disputed, employers often provide employees with severance payment to facilitate voluntary resignation. The amount of severance pay varies significantly with each company; however, in many cases, it is calculated based on the employee’s length of service.

#### **6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?**

As a general rule, advance notice of termination (see question 6.1) is required. In addition, any termination procedures stipulated under the employment rules or collective labour agreements must be followed.

It is also desirable to notify the employee of the reasons for the dismissal and provide him/her an opportunity for self-vindication. Further, if so requested by the employee, an employer is required to provide him or her, without delay, with a certificate which certifies the period of employment, the type of work of the employee, the employee’s position, the wages, or the cause of retirement (if the cause for retirement is dismissal, the reason for the dismissal must also be provided).

#### **6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?**

An employee can bring a claim against the employer for declaratory judgment (determining that the dismissal is void and invalid) or a decision to confirm his/her position as an employee, by filing a petition for labour tribunal proceedings, provisional injunction or litigation.

If the court (in the case of provisional injunction or litigation) or the labour tribunal (in the case of labour tribunal proceedings) determines that a dismissal is null and void, the employer must reinstate the employee and pay the employee’s wages or salary since the date of dismissal (so-called “back pay”) with interest. In principle, if the dismissal is judged to be invalid and the employee is reinstated, the employee cannot claim for damages. However, if any communication or action by the employer in relation to the dismissal is considered to be a tortious act, a claim for damages may be admitted.

#### **6.8 Can employers settle claims before or after they are initiated?**

Yes, employers can settle claims at any time before or after they are initiated.

### 6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

Yes, an employer does have additional obligations when dismissing a number of employees at the same time. In case of any of the following dismissals, the employer must notify the competent public job-placement office of the dismissal of:

- i) 30 or more employees within one month;
- ii) five or more employees who are aged 45 years or older within one month; or
- iii) an employee with disability.

With respect to dismissals due to business reasons of the employer, please see question 6.3.

### 6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

Employees can dispute the validity of mass dismissals by filing a petition with a court or a labour tribunal.

If the four criteria discussed in question 6.3 are not satisfied, the dismissal will be considered null and void, in which case the employer must reinstate the dismissed employees and provide back pay (see question 6.7).

## 7 Protecting Business Interests Following Termination

### 7.1 What types of restrictive covenants are recognised?

In a typical case, restrictive covenants include non-compete clauses, non-solicitation clauses and confidentiality clauses.

### 7.2 When are restrictive covenants enforceable and for what period?

Generally speaking, a non-competition covenant is considered a restriction on the free choice of employment, which is considered a basic human right in Japan, and thus deemed invalid and unenforceable except where there are reasonable grounds (under case law). Based on court precedents, courts take the following factors into consideration when deciding the validity and enforceability of non-competition covenants:

- i) whether there is a clear non-competition clause in the employment contract or the rules of employment;
- ii) whether there is a necessity for the employer to have the non-competition covenant;
- iii) whether the restriction is necessary and reasonable in scope; and
- iv) whether the employee is sufficiently compensated for the restriction.

With respect to factor ii), if the worker's position is close to top management or the worker deals with very important or sensitive confidential information of the company, it is generally understood that there is a necessity for the employer to impose a non-competition covenant on the worker to protect their legitimate interest. With respect to factor iii), generally speaking, the period and scope of restriction in relation to geographical area and business categories are considered. With respect to factor iv), generally speaking, if

the employer does not give financial benefits to compensate the employee for a non-competition covenant, courts tend to decide that this factor would not be satisfied. In some cases where the employee receives a high salary, courts have decided that factor iv) has been satisfied since the compensation for the non-competition covenant was included in the basic salary even though the company did not grant compensation specifically for the non-competition covenant.

With respect to a non-solicitation obligation, there are no major court precedents or well-established views regarding the validity and enforceability of a non-solicitation covenant, but there are a few precedents where courts have determined that a former worker's solicitation of his/her former employer's existing workers constitutes tort and ordered the worker to compensate the former employer where the solicitation was done in a manner that is not socially acceptable.

If a worker has agreed to a confidentiality covenant or confidentiality obligations are included in the work rules regarding certain confidential information of the employer, the worker must abide by that covenant. If a confidentiality covenant does not limit its scope in relation to geographical area, the covenant is generally considered as being effective even outside Japan. A confidentiality covenant without any duration may be considered as unnecessarily and unreasonably restrictive and therefore the court may interpret that the covenant is valid only for a limited time.

### 7.3 Do employees have to be provided with financial compensation in return for covenants?

There is no statutory requirement that an employer must provide workers with financial compensation in return for covenants, but the provision of financial compensation is an important factor in deciding whether a covenant is valid (see question 7.2).

### 7.4 How are restrictive covenants enforced?

Covenants are normally enforced through a provisional remedy. A provisional remedy (preliminary injunction) is a temporary remedy which is granted by the court before deciding on the merits to avoid substantial damage or imminent danger to the petitioner. The court will order a provisional remedy only if there exists:

- i) a right that needs to be preserved; and
- ii) a necessity to preserve that right.

Unlike in a decision on the merits (main lawsuit), the level of proof for provisional remedy is merely *prima facie*.

An employer may also claim for damages suffered due to the former worker's breach of a covenant.

## 8 Data Protection and Employee Privacy

### 8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

Employees' data, insofar as it falls within "personal information", is protected under the Act on the Protection of Personal Information (the "APPI"), its Enforcement Ordinance and related guidelines. An employer is obliged to comply with the APPI as a "personal information-handling business operator" in dealing with employees' personal information. The obligations of a personal information-handling business operator under the APPI include the following:

- i) undertaking necessary and appropriate measures to safeguard personal information;

- ii) not using personal information except to the extent necessary for the purposes disclosed to the subject individuals;
- iii) not disclosing personal information to any third party (subject to certain exemptions); and
- iv) conducting necessary and appropriate supervision over employees and contractors.

The first significant amendment to the APPI entered into force on 30 May 2017. Under the amended APPI, in providing personal information of an employee to a third party in a foreign country, the employer is obliged to:

- i) obtain the employee's consent in advance to the provision to a third party in a foreign country; or
- ii) ensure that the third party in a foreign country has a system for continuously taking actions equivalent to those that a personal information-handling business operator must take in handling personal information, pursuant to the provisions of the APPI.

Without taking the above-mentioned measures, the employer is prohibited from transferring employees' personal information to a third party in a foreign country.

## 8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

The APPI generally entitles an individual to demand a personal information-handling business operator to disclose the retained personal information that can identify him/her. Thus, an employee has the right to know what kind of personal information is held by the employer, unless there is a reason for the employer not to disclose the retained personal information.

It is generally understood that an employer may refuse to disclose, for example, details of a personnel evaluation as it may seriously interfere with them implementing their business properly.

## 8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Yes, an employer may carry out background checks, insofar as it acquires personal information of job applicants lawfully.

Under the APPI, an employer must notify or make public the purpose for which it intends to use the personal information they have acquired, when acquiring personal information (except in some cases, including where, judging from the circumstances, it can be said that the utilisation purpose is clear). Also, an employer is prohibited from acquiring sensitive personal information (such as information regarding race, ethnicity, and criminal history) of a job applicant without his/her consent. In practice, however, an employer usually requires a job applicant to submit a filled-in template CV which contains questions regarding personal information, including criminal records. Such acquisition and use of personal information of the job applicant by the employer would be deemed lawful and valid, because the applicant is deemed to have given his/her consent when he/she submitted the CV to the employer, and, given the circumstances in which the CV was submitted, it can be recognised that the utilisation purpose is clear.

While criminal records are held by the police and employers do not have the means to check them directly, a typical template CV enables an employer to obtain and utilise such information legally for the purpose of background checks.

On a separate note, the ancillary guidelines to the Employment Security Law, as a general rule, restrict an employer's acquisition

of some kinds of sensitive personal information of job applicants, including regarding race, ethnicity, opinions and creed, or history of union memberships.

## 8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

The email accounts, telephones, and computer systems belong to the employer and should be used only for business operations in general. From this perspective, as a general rule, such equipment can be monitored if the monitoring is carried out for a business necessity. However, in carrying out the monitoring, an employer must take the following measures below, regarding personal information of employees.

When a personal information-handling business operator has an employee handle personal information, it must exercise necessary and appropriate supervision over that employee to ensure control of the security of personal information. This supervision may include things such as monitoring the employee's actions online, or video monitoring the employee.

The Guidelines Concerning Measures to be Taken by Entities to Ensure the Proper Handling of Personal Information Relating to Employment Management highly recommend an employer who wants to monitor employees to take certain measures, including:

- i) communicating the purpose of the monitoring to the employees in advance;
- ii) clearly identifying the manager responsible for managing the monitoring;
- iii) drawing up internal rules regarding monitoring and communicating them to the employees in advance; and
- iv) auditing the monitoring programme to ensure that it is being carried out appropriately.

## 8.5 Can an employer control an employee's use of social media in or outside the workplace?

An employer can control and restrict an employee's personal use of social media in the workplace, as employees are obliged to devote themselves to performing their work at the workplace. The employer, however, may not control or restrict an employee's personal use of social media outside the workplace, except in limited circumstances, for example, where an employee intends to leak business secrets or defame the company.

# 9 Court Practice and Procedure

## 9.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

There are two main venues which have jurisdiction to hear employment-related complaints:

- i) an ordinary court, consisting of one or three qualified judges; and
- ii) a labour tribunal consisting of one qualified judge and two laypersons who have specialised experience in labour relations.

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**9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?**

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At an ordinary court, once an action is brought, it will go through the submission of pleadings, oral proceedings and the examination of evidence. In these proceedings, conciliation is not mandatory before a complaint can proceed.

On the other hand, proceedings at the labour tribunal are usually held for up to three hearings to hear the allegations of both parties and examine evidence. In these proceedings, conciliation is mandatory before a decision can be rendered by the tribunal, if there is a possibility for the case to be resolved by settlement.

In both proceedings, the employee has to pay a fee to the court to submit a claim or a petition. The amount of the fee is based on the amount demanded by the employee in his/her claim or petition.

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**9.3 How long do employment-related complaints typically take to be decided?**

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It takes approximately 12 months (on average) for an employment-related complaint before an ordinary court to be decided. If the complaint is brought before the labour tribunal, deliberations can take anywhere from 75 days to 90 days in general.

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**9.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?**

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Yes, both decisions by an ordinary court of first instance and a labour tribunal can be appealed. If a case which was pending before a labour tribunal is appealed, it will automatically move to an ordinary court. The average deliberation period at the appellate court is approximately six months.

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