

Japan

Introduction

The primary statutes in Japan governing the employment relationship are the Labor Standards Law (“*rôdô kijunhō*”) (the “LSL”), an accompanying “Enforcement Ordinance” N° 23 (the “Ordinance”) and the new Labor Contracts Law, which went into effect on March 1, 2008 (the “LCL”).

The LSL sets out basic standards for working conditions. Employers are expected to endeavor to exceed those standards. Any working conditions stipulated in an employment contract falling below such minimum standards are invalid

The new LCL codifies unwritten principles and long-established case law in connection with the establishment, change and termination of employment contracts. The purpose of the LCL is to protect employees and to stabilize employment relationship by expressly providing the basic principle that employment contracts should only be entered into or changed by voluntary negotiation between employers and employees, along with other basic rules. The LCL primarily affects two areas related to termination:

- (i) Codification of the standard for dismissal ; and
- (ii) Codification of the terms and standard for termination of fixed term contracts.

Also relevant to employment relationships are the rules of employment required of employers (the “Work Rules”), the individual employment contracts, any existing union labor contracts and case law.

Terminations

Restrictions On Employers

Dismissal of an employee in Japan can be a difficult and expensive undertaking. This is attributable in part to the expectation of “lifetime employment” for Japanese employees and the difficulty that seasoned employees have in moving from one job to another with comparable pay considering the lack of fluidity in the Japanese job market.

Japanese law does not require an employer to enter into a written employment contract upon hiring an employee, and thus an employment contract can be oral. In practice, it is common for Japanese companies to hire an employee without entering into a written employment contract. However, under the LCL, an employer and employee are encouraged to confirm the working conditions in writing as much as possible. Further, under the LSL, an employer is required to specify in writing the following items to an employee at the time of hiring:

- (i) Matters regarding the method of determination, computation and payment of wages; dates of closing of accounts; and matters regarding wage increases;
- (ii) The working place and content of the work assignment;
- (iii) The starting time and leaving time, rest hours, paid leave, rest days, holidays and change of shift times;
- (iv) Matters regarding retirement, including all bases for discipline and dismissal; and
- (v) The term of employment.

An employer must also specify any company rules relating to the five issues above at the time of hiring. However, these items are typically included in the company's Work Rules, and an employer may give a copy of its Work Rules to the employee instead of separate individual notice. The matters generally included are:

- (i) A retirement allowance, bonus allowances, bonuses and minimum wages;
- (ii) Expenses to be borne by workers for food, work equipment and other such expenses;
- (iii) Safety and sanitation;
- (iv) Vocational training;
- (v) Accident compensation and relief for injury and illness not related to work;
- (vi) Commendations and sanctions; and
- (vii) Temporary suspensions.

If actual working conditions are different from those stated in the employment contract, the employee may terminate the contract without notice. Working conditions below

the standards provided in the LSL are also invalid. In such circumstances, the employer must replace the invalid conditions by the standards provided in the LSL. Working conditions below the standards provided in the Work Rules are also invalid; in those cases, the employer must change its working conditions to conform to the standards provided for.

Fixed Term Contracts

Whether a contract is for a fixed term or an indefinite length is important in Japan. A fixed term contract that is of questionable enforceability may be deemed to be an employment contract for an indefinite term. This means that, instead of automatically terminating at the end of the contract term, the contract will be deemed continuous, and normal justifiable reasons must be established to justify termination of the employment relationship.

With a cultural backdrop of lifetime employment, the term of an employment contract in Japan can be indefinite. If, however, an employment agreement provides for a definite term, such term may not exceed:

- (i) Three years; or
- (ii) Five years in regard to the following special types of employees:
 - An employee with highly special expertise, technique or experience in one of the categories designated by the Minister of Labor; or
 - An employee 60 years of age or older.

The Ministry of Health, Labor and Welfare issued standards for the conclusion, renewal and non-renewal of fixed term employment agreements. These standards are designed to protect employees in the current job market where the erosion of “lifetime employment” has resulted in an increase in the use of fixed term employment agreements.

The standards for fixed term contracts are as follows:

- Upon entering into a fixed term employment agreement, the employer is required to clearly state to the employee whether the agreement potentially allows for renewal. Where renewal is possible, the employer is required to clearly state the standards for the renewal decision, such as any matters to be considered in the determination to renew. Although the employer does not

need to state this in writing, the Ministry of Health, Labor and Welfare recommends it to be in writing, and, as a practical matter, it should be included in the written agreement to avoid challenge by employees;

- Upon renewal after more than one year of employment, and where there has been at least one renewal already, the employer should endeavor to set forth as long a period as possible in accordance with the actual conditions of employment and the desires of the employee;
- If an employer decides not to renew the fixed term agreement where there has been at least three renewals already, or after completion of one year of employment, the employer must provide at least 30 days' notice to the employee; and
- Where an employer notifies the employee of non-renewal, the employer must issue a certificate stating the reasons for the non-renewal if requested by the employee.

The Labor Standards Inspection Office can provide necessary “advice” and “guidance” to help employers apply the new standards.

Notwithstanding the foregoing, an employment contract that requires a definite period for the completion of a project may be entered into with a term that exceeds these maximum periods.

In addition, the LCL provides that that an employer cannot terminate a fixed term employment agreement prior to expiration of the term unless there is an unavoidable reason for such termination. Further, the LCL encourages employers not to make the term of a fixed term agreement shorter than necessary, taking into consideration the purpose of the employment, in order to avoid repeated renewals.

Fixed probationary periods are also common in Japan but do not allow for indiscriminate terminations. Employers may be allowed to establish probationary periods for new employees for up to a maximum of one year, although probationary periods of three to six months are most common in practice. A probationary period is still considered regular employment, but the employer may terminate in some cases where the employee is unsuitable for the job. Although an employer has more flexibility in deciding to terminate an employee on probation, the employer is still

required to have a justifiable reason why the employee is not suitable for permanent employment. The particular standards restricting the freedom of employers to dismiss workers during probation are developed in case law.

Conditions Of Termination

Under Japanese law, an employment contract is terminated when:

- (i) The employee voluntarily resigns;
- (ii) The term of a fixed term contract expires;
- (iii) The employee reaches the retirement age designated by the employer;
- (iv) The employer dismisses the employee;
- (v) The employer does not retain the employee for permanent employment upon expiration of the employee's probationary period; or
- (vi) The employee does not return to work when his or her leave of absence has expired.

In cases where the employer chooses to dismiss the employee, there are several categories of grounds for dismissal constituting justification for termination under case law doctrines, assuming that these are provided for in the Work Rules or employment contract. These grounds include mental or physical incapacity for work, poor performance, delinquent attitude or lack of cooperation, significant misconduct or dereliction of duty, or economic necessity of the employer.

Whether the grounds are reasonable is a question of fact that depends on the circumstances of the actual dismissal. Under several case law precedents, dismissals on the grounds of poor performance can be justified, but only if the facts and circumstances are adequately proven by objective evidence. As a general rule, in order to dismiss an employee on the grounds of poor performance it is necessary to prove with extreme clarity that the employee lacks the ability to perform his or her role and that there is little or no room for remedy of such inability through education or training. That said, the standard of proof in such cases is generally lower where the employee in question has been retained for a specialized role for which he or she is paid highly in consideration of career experience or specific qualifications. In such cases the reasonableness of the dismissal will be determined with a stronger focus on the individual's ability to carry out the duties required of the specific

position in question. It is generally therefore easier to justify the dismissal of such specialized employees in comparison to lower level employees who have been hired as graduate recruits.

Japanese case law has also developed extensive restrictions on what constitutes justifiable cause for dismissal. An employer may not abuse its rights, and thus, any dismissal not made for justifiable reasons will be void. The LCL codifies this long-established case law. This principle supersedes any provision of a contract or work rule that is favorable to an employer. In light of the tradition of lifetime employment and the difficulty of employees in changing employers, Japanese case law has established the doctrine known as the “abuse of the right of dismissal,” which is derived from the Civil Code of Japan. Underlying the doctrine is the notion that rights shall be exercised honestly, fairly and loyally.

Under this doctrine, the employer has an additional duty not to abuse its right to dismiss employees. If that right is found to have been abused, a dismissal may be ruled ineffective by a court and the worker may return to work or receive monetary compensation. Accordingly, it is essential that any dismissal be on reasonable grounds in order that it not be found to be an abuse of the right to dismiss (and consequently found to be invalid). “At will” employment is illegal and unenforceable in Japan.

Notice Provisions/Consequences Of A Failure To Provide The Required Notice

Under the LSL, an employer may theoretically terminate the employment of an employee at any time upon giving prior notice of 30 days, or by a payment in lieu thereof, if justifiable reasons exist. However, the following types of termination are strictly prohibited:

- (i) Discriminatory termination on the grounds of nationality, creed or social status;
- (ii) Termination during a leave of absence for a work-related illness or injury or within 30 days thereafter;
- (iii) Termination during the period of maternity leave or within 30 days thereafter;
- (iv) Discriminatory termination of a female employee;

- (v) Termination of an employee on the grounds of marriage, pregnancy, childbirth, or for having taken maternity leave, paternity leave, childcare leave or nursing care leave; or,
- (vi) Termination on the grounds that an employee is a member of a labor union, has attempted to join or organize a labor union, or has engaged in legitimate union activity.

The requirement that an employer give 30 days' notice can be extended by employment contract, Work Rules, a collective bargaining agreement or case law. Since the relevant employment contract or Work Rules may place restrictions on termination of the employment, their specific terms should be consulted before a dismissal.

If there is a collective agreement between the employer and a labor union, it might also be necessary to consult with the union prior to a dismissal.

In addition, the LSL prescribes that the "grounds for dismissal" must be included in the employer's Work Rules. Moreover, under the Enforcement Ordinance, employers must provide employees with a written explanation of the employer's grounds for dismissal upon entering into the employment contract. This must be presented together with the presently required documentation setting out general terms and conditions of employment.

The LSL also provides that an employee who receives notice of dismissal from an employer may require the employer to provide a certification setting out the reasons for dismissal. Upon receipt of such a request, the employer must provide the relevant certificate without delay. This may mean providing the certificate before the final day of employment. Further, the LSL requires an employer to provide a certification setting out the reasons for dismissal if an employee makes such request between the date of the notice of dismissal and the date of dismissal. Upon receipt of such a request, the employer must provide the relevant certificate without delay.

Dispute Resolution

In the past, civil lawsuit was the only method to resolve individual labor disputes, and typically, a dismissed employee raised a claim to a court and sought an interlocutory "provisional disposition order" to preserve his or her employment

status (“*chii-hozen karishobun*”). A provisional disposition order is similar in effect to a preliminary injunction. Requests for a provisional disposition order are almost always granted by Japanese courts.

However, an extra-judicial procedure to assist resolution of individual labor disputes was introduced under the Law on Promoting Resolution of Individual Labor Disputes (*kobetsu funsou kaiketsu sokushin hou*) which was enacted in 2001. Under the law, either party to a labor dispute can consult with a regional office of Labor Bureau, including the Labor Standards Inspection Office (OSIO), and the Labor Bureau may give its advice or instruction to facilitate dispute resolution between the parties, or arrange mediation by “Dispute Coordinating Committee” as necessary.

Furthermore, the Labor Judgment Law (*rodo shinpan hou*), which went into effect on April 1, 2006, introduced a special judicial procedure in order to facilitate speedy, appropriate and effective resolution in court. Under the law, a labor Judgment Committee consisting of one judge and two specialists who are familiar with labor issues reviews a dispute, encourages a settlement and, if such settlement attempt fails, renders a labor judgment. In principle, a case is reviewed within three meeting dates. If a settlement is reached, it has the same effect as an in-court settlement. Where a judgment is rendered and a party challenges the Judgment Committee’s ruling, the appeal is tried in the same fashion as a regular civil trial. However, we note that available statistics indicate that almost 80% of cases subject to the Judgment Committee system have been resolved without being subject to appeal and proceeding to civil trial. It is expected that the number of motions under this system will increase due to its proven effectiveness.

Larger Scale Dismissals/Personnel Adjustments

In general, the basic concepts and rules concerning the dismissal of individual employees are also applicable to larger scale lay-offs or personnel adjustment dismissals. The three main methods for reducing employee numbers in Japan are (i) adjustment dismissals (i.e. dismissal on account of reorganization or downsizing); (ii) the solicitation of voluntary resignations; and (iii) involuntary early retirement and resignations.

Against the background of the lifetime employment system in Japan, case law has been established that “adjustment dismissals” (“*seiri-kaiko*”) for economic reasons will be lawful where the following requirements are satisfied:

- (i) There must be a strong economic necessity to reduce the number of employees (e.g., the company has been having financial difficulties for at least two consecutive years);

The existence of the economic need will be recognized if the personnel reduction measure is based on a business slump, decline or economic downturn affecting the employer, or if the dismissals are otherwise unavoidable. Although there is no established standard to measure the strength of an economic necessity in this context, Courts have generally found that such necessity exists where an employee is threatened with the closure of its business if it continues to employ its existing number of employees.

- (ii) Fair and non-discriminatory criteria must be used in the selection of employees to be dismissed;

Even if a certain number of employees must be dismissed on account of unavoidable economic reasons, the employer must still establish reasonable standards and apply them fairly when selecting persons to be dismissed. In establishing the standards, the factors which may be taken into consideration include the performance of each employee (including the number of absences from work or any breaches of business conduct or work rules), the length of service of each employee and other similar factors.

- (iii) The employer has attempted to use other less drastic methods of reducing staff levels (e.g., transfers to other sections, solicitation of early retirement or voluntary resignations, the suspension of hiring new employees, etc.); and

When a personnel reduction is carried out, an employer, pursuant to its duties under the faithfulness principle, is required to resort to transfers, the secondment of employees to other companies, temporary layoffs, solicitation of early retirement and such other similar measures in order to avoid the dismissal of employees. Where adjustment dismissals have been carried out without any effort to take other measures such as transfers or the solicitation of voluntary retirement, if a terminated employee challenges his or her termination (in a lawsuit, etc) such dismissals will almost always be held to be abuses of the employers' right of dismissal.

(iv) The procedures applied in dismissing the employees must be proper.

Case law precedents have held that an employer is required, pursuant to the faithfulness principle, to explain in good faith to the employees the reasoning behind the adjustment dismissal, in addition to its timing, scale and method.

The four factors may not be always weighted equally, for example, if one factor is very strong, less strict standards may be applied to the other factors than in the other cases. However, courts generally consider each of the four factors and determine the reasonableness of the adjustment dismissal under the totality of circumstances.

Practically speaking, however, unilateral termination by an employer based on adjustment dismissal is generally a last resort in Japan, due to the difficulty for the employer to prove that the employer satisfies all requirements as discussed above, as Japanese courts tend to be pro-employees. In light of the foregoing, the solicitation of voluntary resignations or the implementation of an early retirement program is the most practical way to terminate the employment of an individual employee and to reduce the work force generally.

Voluntary resignation involves the termination of the contract of employment at the option of the employee. It is common in Japan for the employer to discuss the situation with the employee and for those discussions to result in the employee agreeing in writing to voluntarily resign. In general, Japanese labor law requires, as a matter of equal treatment of all employees, that any solicitation of voluntary resignations be directed to all employees of a company. It may be necessary to offer the employees severance pay in the form of a severance incentive program to successfully negotiate a voluntary resignation.

As long as the proposed solicitation of resignations is conducted in a purely voluntary manner and does not involve any element of “force,” there are no restrictions or conditions on the implementation of such a plan. To avoid legal claims, it is advisable that the process for the solicitation of voluntary resignations satisfy the following conditions:

- (i) The solicitation process is necessary for rational economic reasons;
- (ii) “Due process” is observed in the enforcement of the solicitation process; and
- (iii) The conditions of the solicitation process are reasonable and fair.

It is quite common that solicitation is targeted toward specific employees through a practice referred to as “tapping on the shoulder” (“*kata tataki*”). In the “tapping on the shoulder” approach, a formal announcement of the company’s intention to solicit voluntary resignations is followed by a series of private interviews between company executives and employees. In these private meetings, the executive conducting the interview can, as appropriate, indicate by implication to each employee: (i) that the company is happy with the employee’s performance and that the voluntary resignation program should be ignored (sometimes referred to as “reverse tapping on the shoulder”) or (ii) that the company is not satisfied with the particular employee’s performance and that the staff reduction would provide an opportune time to seek other employment. This process often results in lawsuits brought by disgruntled employees.

It is common for a company to fail to reach its target of employee reductions after implementing a series of calls for voluntary retirement. In these circumstances, the issue arises as to whether the company may dismiss targeted employees who do not take up the “hint” to voluntarily resign after being “tapped on the shoulder.” In these circumstances, targeted employees who decline to resign or retire voluntarily should not be terminated outright in view of the danger of litigation, unless each termination falls within the requirements for adjustment dismissal for economic necessity or is justified on its own merits.

Termination Indemnities

The LSL does not require an employer to pay a retirement allowance to its employee upon dismissal, resignation or any other termination. The LSL leaves this issue to other voluntary regulations and agreements. Therefore, the starting point for analysis is to confirm the retirement allowance rules set out in the work rules or the applicable employment contract. Generally, the retirement allowance rules contain a table outlining the rates of retirement allowance that an employee is entitled to receive upon retirement. The employee’s pay normally will be based on the current monthly salary (excluding bonuses or allowances).

Laws On Separation Agreements, Waivers, And Releases

When an employee is terminated, a company often asks the employee to sign a release, although this is not an established labor custom in Japan. Apart from the convenience of having written proof of the consent to termination, the release makes the employee aware of important issues such as confidentiality, indemnity

and fiduciary duties. Under Japanese contract theory, each employee has fiduciary and loyalty obligations to the employer during that employee's continued employment, and therefore a reasonable restrictive covenant during such employment is generally enforceable.

Alternatively, in cases concerning an important employee who is very close to the employer's proprietary information, an employer may consider paying a certain reasonable allowance in consideration for his or her confidentiality obligations (an "allowance for confidentiality," or "*kimitsu-hoji-teate*") during the employment instead of a payment after the termination of employment. This type of payment may work to provide just cause for securing the full enforceability of a non-competition covenant after termination, given that Japanese case law holds that an allowance paid to an employee during employment, rather than after termination, may serve as compensation that can justify a non-competition obligation.

Employment Discrimination

Laws On Employment Discrimination

Under the LSL, an employer cannot terminate the employment of an employee based on nationality, creed or social status. Further, Japan's "Laws Concerning Equality of Employment Opportunities and Benefits Between Genders" (the "Equal Treatment Law") specifically prohibits employment discrimination against women in the areas of recruiting, hiring, intra-company transfers and promotions.

A guideline issued by the Ministry of Health, Labor and Welfare with respect to appropriate actions to be taken by employers under the Equal Treatment Law (the "Equal Treatment Guideline") provides specific guidelines as to what employers can and cannot do. For instance, discriminatory ads for men only are specifically prohibited. Asking certain types of interview questions only to members of one gender is also prohibited, such as asking female applicants in job interviews whether they will continue to work even after they are married and have children.

However, the Equal Treatment Guideline contains some exceptions to the anti-discrimination provisions of the law. These exceptions make it possible, for instance, for fashion designers to recruit models of a specific gender and for movie producers to do the same with their actors/actresses. High priests and "shrine maidens" who administer Shinto ceremonies can be recruited specifically from among men and women, respectively.

Potential Employer Liability For Employment Discrimination

The Equal Treatment Law provides a mechanism that would publicly reveal the names of employers that violate the law and that do not comply with corrective recommendations issued by the authorities. The Equal Treatment Law also makes it easier for aggrieved parties to start a mediation process by allowing one party to the dispute to unilaterally start the process. The law also formally introduces a concept of “positive action,” similar to “affirmative action” under U.S. employment law. Employers are encouraged to rectify past and existing discrepancies in the treatment of male and female workers by taking steps above and beyond merely ensuring that gender discrimination is not committed.

Sexual Harassment

Laws On Sexual Harassment

The Equal Treatment Law prohibits, and a guideline issued by the Ministry of Health, Labor and Welfare with respect to the actions to be taken by employers to prevent sexual harassment (the “Sexual Harassment Guideline”) defines, two types of sexual harassment in the workplace. One is a sexual harassment that results in unfavorable treatment or retaliation toward the victim (“Retaliation-type Harassment”) and the other is a sexual harassment that causes deterioration of the work environment (“Environment-type Harassment”).

Retaliation-type Harassment occurs when a worker receives an unfavorable treatment, including a dismissal, demotion or reduction in pay, based on the worker’s reaction to a sexual statement or conduct that was made against the worker’s will. For example, if a manager demanded a sexual relationship with a worker, and terminated the worker because the worker rejected such relationship, such action would constitute Retaliation-type Harassment.

Environment-type Harassment occurs when the work environment of a worker deteriorated because of the other’s sexual statement or conduct, which was made against the worker’s will, and such deterioration of environment causes significant negative effect to the performance of the worker. For example, a supervisor frequently touches a worker’s hips or breasts, and as a result, the worker loses his or her motivation to work. Also, for example, a picture of a naked woman was posted in the office, despite a worker’s complaint, and it caused emotional distress to the worker that negatively affected the worker’s performance.

The Equal Treatment Law requires an employer to take necessary measures to prevent a sexual harassment from occurring, including establishment of a system to receive claims from its employees and to properly react to such claims. The measures to be taken by employers are provided in the Sexual Harassment Guidelines.

Further, sexual harassment cases can be brought under Article 709 of the Civil Code, which provides under general tort law that: “A person who violates intentionally or negligently the right of another is bound to make compensation for damage arising therefrom.”

Regarding vicarious liability of employers, litigants generally cite Article 715 of the Civil Code. It states: “A person who employs another to carry out an undertaking is bound to make compensation for damage done to a third person by the employee in the course of the execution of the undertaking; however, this shall not apply if the employer has exercised due care in the appointment of the employee and in the supervision of the undertaking or if the damage would have ensued even if due care had been exercised.” Also, if sexual harassment arises due to a breach of the employer’s responsibility under the contractual relationship of employment (which includes, as mentioned above, a responsibility to monitor and maintain the work environment,) this may constitute grounds for liability of the employer to compensate the aggrieved employee under Article 415 of the Civil Code.

Damages awards for sexual harassment generally range from about 800,000 yen to 11 million yen, and the size of such awards is expected to rise.

Power Harassment

Recently, the number of claims and disputes related to “power harassment” has been increasing. The definition of “power harassment” has not been fully established by court or by law, but, broadly, it is bullying at the workplace, and the following factors are generally considered:

- Whether the harasser has a power over the victim. Unlike the case of sexual harassment, the harasser could be a subordinate; e.g., an IT expert harasses his or her supervisor who does not have sufficient expertise in IT.
- The harasser uses his or her power beyond the scope of his or her duties, such as instruction, training or order necessary for business.

- The power has been used continuously, and as a result, the dignity of the victim has been illegally and regularly denied or interfered with.
- Such conduct results in deterioration of work environment for the victim or damage to his or her physical or mental health.

There is one recent court case in which a district court upheld a plaintiff's argument that there was power harassment by the plaintiff's supervisor who impliedly forced the plaintiff to resign. An increasing number of similar cases are expected to be filed with the courts.