

## Client Alert

30 March 2020

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## COVID-19 (Coronavirus): Obligations and Other Considerations for Employers in Japan

The recent outbreak of COVID-19 (novel coronavirus) raises challenging issues for employers in Japan. Now is the time for employers to revisit their health and safety protocols and install procedures to minimize the risk of the outbreak affecting their staff, while at work or travelling for work. The following alert outlines the main employer obligations and important considerations for employers in Japan.

Please note that the response of governments to the COVID-19 outbreak is evolving rapidly, and it is important for employers to regularly check for updates with the Japanese government (as the information set out below may change).

We also encourage you to contact Baker McKenzie Tokyo if you have any further questions relating to the information we have provided.

### 1. Employer's general obligation to maintain a safe workplace

#### 1.1 Legal framework

An employer in Japan has a contractual duty to maintain the safety of its employees and provide an appropriate work environment that is conducive to the comfortable performance of work duties by its employees.

An employer trying to maintain a safe workplace in light of the COVID-19 outbreak could be justified in implementing measures such as requiring employees to work from home, having temperature checkpoints at office entrances and rescheduling business trips. The key is that any measures taken by the employer must be proportionate to maintaining employee safety and an appropriate work environment.

#### 1.2 What should an employer do if:

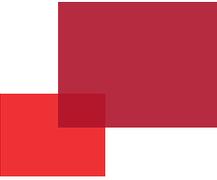
- (a) an employee may be infected with COVID-19?

The employer should prohibit the suspected employee from coming to the office, and where the suspected employee is unable to work remotely, the employer must request that the employee take a leave of absence.

As it is the employer in this instance that is instructing the employee to take a leave of absence, the employer needs to pay 60% of the suspected employee's salary during his/her leave of absence (see section 2.1 below for an overview of the relevant payment rules).

We note that if the suspected employee cannot carry out his/her duties due to illness, he/she needs to apply for sick leave according to the employer's work rules, with the effect that salary payment during the leave period shall be in accordance with the employer's work rules.

- (b) an employee is confirmed to be infected with COVID-19?



The employer should prohibit the employee from engaging in his/her duties and coming to the office and request that the employee take a leave of absence.

It would be ideal to continue to pay 60% of the confirmed employee's salary during his/her leave of absence. That said, according to FAQ 4-2 issued on the website of Japan's Ministry of Health, Labour and Welfare,<sup>1</sup> if the employee is confirmed to be infected with COVID-19 and the local authorities order the infected employee not to work (pursuant to the Act on the Prevention of Infectious Diseases and Medical Care for Patients with Infectious Diseases), the employer may make no payment during such employee's leave of absence. Therefore, there are some instances in which an employer is not required to pay an infected employee's salary.

We note that the infected employee can also apply for paid sick leave (if any) according to the employer's work rules.

## 2. Business shutdown

Given the wide-reaching impact of the COVID-19 outbreak, we have seen governments reacting to stop the spread of COVID-19 by imposing trading restrictions on businesses and closing borders to foreign nationals, among other actions. These government-imposed restrictions or shutdowns have consequentially had a major impact on employers and their workforces.

Therefore, it is important that employers in Japan understand their obligations with respect to paying employee salaries during a partial or full business shutdown due to COVID-19.

### 2.1 General rules

In Japan, there are essentially three scenarios in which an employer's salary payment obligation to its employees will be reduced. The three scenarios differ based on where the "attribution" for the absence from work lies. The three scenarios are as follows:<sup>2</sup>

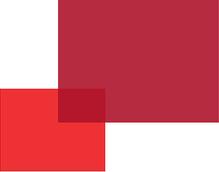
Shutdown Scenario	% of Full Salary Payment
Due to a government order/instruction	Possibly: 0% Ideally: 60%
An employee is infected by COVID-19 or otherwise	Possibly: 0% Ideally: 60%
Business slowdown	60%

As you can see from the above, unless there is essentially a force majeure event, an employer will be required to continue paying its employees a percentage of their total salaries in the event that they are instructed to take a leave of absence. In other words, from an employment perspective, a

<sup>1</sup>

[https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/kenkou\\_iryou/dengue\\_fever\\_qa\\_00007.html#Q4-1](https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/kenkou_iryou/dengue_fever_qa_00007.html#Q4-1)

<sup>2</sup> See Article 26 of the Labor Standards Act.



business slowdown due to the COVID-19 outbreak would generally not be considered a force majeure event.

Therefore, if an employer puts an employee on leave based on a reason attributable to the employer, payment of 60% of the employee's average salary would be required. This is a mandatory legal requirement and cannot be avoided by employee consent.

On the other hand, if a lockdown is clearly unavoidable (e.g., it is due to a government-mandated lockdown), this may constitute a force majeure event. In such a case, the reason for placing the employee on leave would not be viewed as attributable to the employer, with the effect that no salary payment to employees would be required.

There is one additional point that employers in Japan should note. While the above obligations relating to payment are set out in Japan's Labor Standards Act, there is a point of qualification set out in Japan's Civil Code.<sup>3</sup> Namely, where an employer forces an employee to take leave and that decision is negligent or similarly wrongful, the employee may still be entitled to 100% of his/her salary. An example of this would be where an employee is unilaterally terminated but a court subsequently finds the unilateral termination to be invalid and reinstates the employee. Such an employee may be entitled to 100% of his/her salary during the period from the termination date to the reinstatement date.

## 2.2 Employment Adjustment Subsidy and other subsidies

### (a) Overview

The Japanese Government has made available an employment adjustment subsidy (雇用調整助成金) to employers facing a business slowdown due to the COVID-19 outbreak. Subject to certain other conditions being met (the key conditions are described below), the subsidy is designed to provide assistance to employers who have chosen to place their employees on leave by paying 60% of their average salaries (the statutory minimum) rather than reducing headcount (i.e., implementing a redundancy program).

### (b) Subsidy conditions

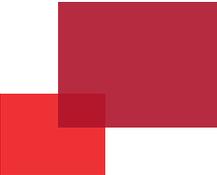
Among other things, the key conditions of the employment adjustment subsidy are as follows:

- (i) the employer's financial performance over the previous one month is down 10% or more compared with the same month in the previous year;
- (ii) the subsidy amount is calculated based on the number of employees (not contractors) employed by the employer;
- (iii) the employer needs to continue to pay at least 60% of daily salary to employees who take leave pursuant to the Labor Standards Act; and
- (iv) even if some employees take leave while others continue to work, the employer can apply for the subsidy.

### (c) Procedures

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<sup>3</sup> See Article 536.2 of Japan's Civil Code.



The application form and other relevant forms need to be prepared and filed with each local Labor Bureau with jurisdiction over a location at which an employer has employees. Also, a labor management agreement needs to be concluded between the employer and an employee representative (or labor union, if any).

(d) Amount of subsidy

As of 1 March 2020, depending on whether an employer is a large company or a small to medium-sized company, the subsidy amount shall be as follows:

- 1/2 of an employee's daily salary for large companies; and
- 2/3 of an employee's daily salary for small to medium-sized companies,

with a maximum amount of JPY 8,330 per person per day. The subsidy can be applied for up to 100 days per year.

As for the differences between large companies and medium-sized and small companies, please refer to the table below. If an employer falls below any of the thresholds listed below, it will be considered to be a small to medium-sized company.

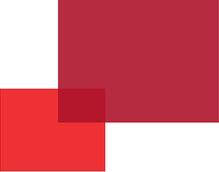
Type of business	Capital	or	Number of employees on an ongoing basis
Retail Business	¥50,000,000 or less	or	No more than 50
Service Business	¥50,000,000 or less	or	No more than 100
Wholesale Business	¥100,000,000 or less	or	No more than 100
Others	¥300,000,000 or less	or	No more than 300

(e) Other subsidies

In addition to the employment adjustment subsidy, the Japanese government offers a subsidy for teleworking. This subsidy was not introduced to combat the COVID-19 outbreak but may be useful given that more employees are working from home to try and slow the spread of the virus. Only small to medium-sized companies (not large companies) may apply for the subsidy, which covers the cost of purchasing equipment for teleworking. The maximum amount payable is JPY 1,000,000 per employer.

If an employee's child needs to stay home because of a school closure and the employee has to take paid leave to care for the child, an employer may apply for a special subsidy (100% salary but with a maximum of JPY 8,330 per person per day). This subsidy is also paid to the employer (not directly to employees).

Finally, according to the website of Japan's Ministry of Health, Labour and Welfare, the Japanese government is considering the creation of a special subsidy (in a fixed amount of JPY 4,100 per day per person) to be paid to self-



employed persons and contractors who have to take leave to care for children who need to stay at home because of school closures. The detailed terms of this subsidy have not yet been determined and will be announced by the Ministry in due course.

### **3. Reducing the number of work days/shortening working hours**

In response to the COVID-19 outbreak, employers are trying to develop alternate working arrangements to avoid the need to reduce headcount during this health and economic crisis, such as reducing the working week to less than five days.

In Japan, in principle, if an employee's employment agreement or the employer's work rules provide for a five day working week, the employer cannot unilaterally reduce the working days from five days and proportionately reduce the salary paid to the employee.

However, where reasonable grounds exist (e.g., a business slowdown due to the COVID-19 outbreak) or where each employee consents, an employer can unilaterally reduce the number of work days as long as the employer pays at least 60% of employees' salaries for days on which they are not required to work. Also, in such a case, it is permissible to reduce working hours and proportionately reduce salary provided that at least 60% of an employee's salary is paid for a day even if the number of working hours are reduced to less than 60% of the number of regular work hours.

### **4. Reduction in force**

Where all alternate working arrangements have been exhausted to try and maintain an employer's headcount, an employer may need to consider forced redundancy-type measures.

In Japan, a forcible reduction in a workforce due to economic reasons is possible subject to a "four factor test." We set out below an overview of the relevant requirements.

#### **4.1 Unilateral termination**

Generally speaking, unilateral termination (which is the relevant type of forced redundancy) in Japan is not a straightforward process. In fact, a unilateral termination will be considered an abuse of right and therefore null and void if it is not based on objectively reasonable grounds. The termination needs to be recognized as socially acceptable.

It may still be possible to justify a unilateral termination due to economic reasons if the relevant circumstances pass the very stringent "four factor test."

The four factors are as follows:

- (i) a strong economic necessity to reduce the number of employees exists;
- (ii) the employer has exhausted other less drastic methods before resorting to unilateral termination (e.g., suspension of hiring new employees; reduction of management compensation; suspension of salary increases; reduction of bonuses; reduction of overtime work; reducing usage of contractors; inviting voluntary resignation; and transfer to other sections/secondment, etc.);

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- (iii) fair and non-discriminatory criteria must have been used in selecting the employees who were terminated; and
- (iv) the employer has provided sufficient explanations to and consulted with the employees or the union.

Although it would be necessary to look at the specific financial/business situation the employer is facing, generally speaking, it is difficult to satisfy the "four factor test" and, as such, in practice, it is generally safer and recommended to end employment based on mutual agreement with each employee by offering a certain amount of *ex-gratia* severance (i.e., via a voluntary redundancy program).

#### 4.2 Unilateral termination and COVID-19

As to whether the COVID-19 outbreak could be an "economic reason" justifying a headcount reduction via forced redundancies remains to be seen over the coming months. Nonetheless, particular attention would need to be paid to whether the employer's financial health is declining and will continue to decline due to the COVID-19 outbreak. If so, the COVID-19 outbreak may potentially satisfy item (i) of the "four factor test." However, an employer would still need to satisfy the other factors before proceeding with the forced redundancies via unilateral terminations.

### 5. Other relevant issues

#### 5.1 Remote work arrangements

An employer can require an employee to work from home if having the employee at the office poses a risk to the health and safety of other staff. In general, if an employee is required to work from home, the employee should continue to receive his/her full pay and benefits.

#### 5.2 Requiring employees to use annual paid leave

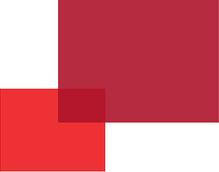
It would be permissible to just encourage or ask employees to use their paid annual leave on an entirely voluntary basis (i.e., without applying any pressure).

However, it is not permissible to force employees to exhaust their paid annual leave. This is because a Japanese legal principle exists under which an employee must be allowed to take annual paid leave on any day he/she chooses.<sup>4</sup> In exceptional cases where the employer needs to have the employee work in order to maintain its business operations, the employer may change the timing of the employee's annual paid leave. However, this exception is not relevant to an employer requiring employees to exhaust their annual leave.

#### 5.3 Employees' refusal to come to work

Employees can only refuse to come to work if there is a clear risk to their health and safety which makes their work impossible to perform. This may apply, for example, if there is a confirmed COVID-19 case at the workplace, the employee's workstation is in close proximity to the working location of the infected employee (i.e., within the same open plan office) and the workplace has not been cleaned. If, however, it is possible for the employee to work

<sup>4</sup> Article 39.5 of Japan's Labor Standards Act.



remotely, for example, the employee will have an obligation to work under the employment agreement.

Alternatively, employees may be entitled to various forms of statutory and contractual leave (e.g., annual leave, sick leave, maternity leave, etc.) which the employee may be able to use depending on the circumstances.

#### 5.4 Requiring employees to see a doctor

Generally, an employer can require its employees to see a doctor but only if reasonable grounds for doing so exist under the circumstances.

If there is a provision in the employer's work rules which authorizes the employer to instruct an employee with certain symptoms to see a doctor, then the employer may do so pursuant to the provision. Even in the absence of such a provision, an employer may be justified in requiring an employee to see a doctor so that the employer can discharge its obligation to ensure the health and safety of its employees.

[www.bakermckenzie.co.jp/en](http://www.bakermckenzie.co.jp/en)

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