
THE EMPLOYMENT LAW REVIEW

EIGHTH EDITION

EDITOR
ERIKA C COLLINS

LAW BUSINESS RESEARCH

THE EMPLOYMENT LAW REVIEW

The Employment Law Review
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ERIKA C COLLINS

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EDITOR'S PREFACE

Every winter we survey milestones and significant events in the international employment law space to update and publish *The Employment Law Review*. At that time, I read the Preface that I wrote for the first edition back in 2009. In that first edition, I noted that I believed that this type of book was long overdue because multinational corporations must understand and comply with the laws of the various jurisdictions in which they operate. This continues to hold true today, and this eighth edition of *The Employment Law Review* is proof of the continuously growing importance of international employment law. It has given me great pride and pleasure to see *The Employment Law Review* grow and develop over the past seven years to satisfy the initial purpose of this text: to serve as a tool to help legal practitioners and human resources professionals identify issues that present challenges to their clients and companies. As the various editions of this book have highlighted, changes to the laws of many jurisdictions over the past several years emphasise why we continue to consolidate and review this text to provide readers with an up-to-date reference guide.

Our first general interest chapter continues to track the variety of employment-related issues that arise during cross-border merger and acquisition transactions. After a brief decline following the global financial crisis, mergers and acquisitions remain active. This chapter, along with the relevant country-specific chapters, will aid practitioners and human resources professionals who conduct due diligence and provide other employment-related support in connection with cross-border corporate M&A deals.

Global diversity and inclusion initiatives remained a significant issue in 2016 in nations across the globe, and this is the topic of the second general interest chapter. In 2016, many countries in Asia and Europe, as well as North and South America, enhanced their employment laws to embrace a more inclusive vision of equality. These countries enacted anti-discrimination and anti-harassment legislation as well as gender quotas and pay equity regulation to ensure that all employees, regardless of sex, sexual orientation or gender identity, among other factors, are empowered and protected in the workplace. Unfortunately, there are still many countries where certain classes of individuals remain under-protected and under-represented in the workforce, and multinational companies still have many challenges with tracking and promoting their diversity and inclusion initiatives and training programmes.

The third general interest chapter focuses on another ever-increasing employment law trend in which companies revise, or consider revising, social media and mobile device management policies. Mobile devices and social media have a prominent role in and impact on both employee recruitment efforts and the interplay between an employer's interest in protecting its business and an employee's right to privacy. Because companies continue to implement 'bring your own device' programmes, this chapter emphasises the issues that multinational employers must contemplate prior to unveiling such a policy. 'Bring your own device' issues remain at the forefront of employment law as more and more jurisdictions pass, or consider passing, privacy legislation that places significant restrictions on the processing of employees' personal data. This chapter both addresses practice pointers that employers must bear in mind when monitoring employees' use of social media at work and provides advance planning processes to consider prior to making an employment decision based on information found on social media.

Last year we introduced the fourth and newest general interest chapter, which discusses the interplay between religion and employment law. In 2016, we saw several new, interesting and impactful cases that further illustrate the widespread and constantly changing global norms and values concerning religion in the workplace. Religion has a significant status in societies throughout the world, and this chapter not only underscores how the workplace is affected by religious beliefs but also examines how the legal environment has adapted to such beliefs. The chapter explores how several nations manage and integrate religion in the workplace, in particular by examining headscarf bans and religious discrimination.

In addition to these four general interest chapters, this eighth edition of *The Employment Law Review* includes 48 country-specific chapters that detail the legal environment and developments of certain international jurisdictions. This edition has once again been the product of excellent collaboration. I wish to thank our publisher, in particular Gideon Robertson and Iain Wilson, for their hard work and continued support. I also wish to thank all of our contributors and my associate, Ryan Hutzler, for his invaluable efforts to bring this edition to fruition.

Erika C Collins

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Chapter 29

JAPAN

*Shione Kinoshita, Shiho Azuma, Yuki Minato, Hideaki Saito, Keisuke Tomida
and Tomoaki Ikeda¹*

I INTRODUCTION

The laws in Japan governing collective labour relationships are the Labour Union Act (LUA) and the Labour Relations Adjustment Act. Regarding individual labour relationships, there are laws protecting minimum working conditions, such as the Labour Standards Act (LSA), the Minimum Wages Act, the Industrial Safety and Health Act (ISHA), and the Industrial Accident Compensation Insurance Act. These laws are traditional Japanese labour laws established after World War II and based on the Constitution of Japan.

In recent years, Japan has experienced important changes to its labour laws. The Labour Contract Act (LCA) was enacted in 2007 and sets out basic regulations on employment agreements. The revision of the LCA (effective from April 2013) includes important amendments for fixed-term employment. The Equal Employment Opportunity Act (EEOA)² entered into effect in 1986 and has been revised several times. Since 2007, the EEOA has broadened protections for employees so that both male and female employees will not suffer any disadvantages based on their sex. Employees' rights are also expanded by other laws, such as the Child Care and Family Care Leave Act³ and the Part-time Employment Act (PEA).⁴ Besides, the Worker Dispatch Act (WDA) enacted in 1985 and amended in 1999 extended the scope of occupations that were covered under the worker dispatching system. As a result, the worker dispatching system was considered a social problem, so the WDA was amended in 2012 and in September 2015.

1 Shione Kinoshita, Shiho Azuma and Yuki Minato are partners and Hideaki Saito, Keisuke Tomida and Tomoaki Ikeda are associates at Dai-ichi Fuyo Law Office.

2 The Act on Securing, etc. of Equal Opportunity and Treatment between Men and Women in Employment.

3 The Act on the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave.

4 The Act on Improvement, etc. of Employment Management for Part-time Workers.

Each labour law has a different supervision and conflict-resolution system, so the overall system is complicated. The LUA stipulates the Labour Relations Commission system. A local labour relations commission (established in each prefecture) and its supervising agency, the Central Labour Relations Commission, conduct mediation, conciliation and arbitration to settle collective labour disputes.

In contrast, ordinary courts settle individual labour disputes. Additionally, since the inception of the labour tribunal system in 2006, labour tribunals have also been competent to settle such disputes. Local labour departments (governmental agencies) also conduct mediations to settle such disputes.

The Labour Standards Inspection Office (LSIO) is the supervisory agency concerning the LSA, the Minimum Wages Act, the ISHA and the Industrial Accident Compensation Insurance Act.

Local labour bureaus are the supervisory agencies concerning the EEOA, the PEA and the WDA.

II YEAR IN REVIEW

Since Japan is an ageing society with a low birth rate, many workers often permanently stop working to take care of their children or other family. To prevent this, and help workers to continue working while caring, the CCFCA and the EEOA were amended in March 2016. Under these amendments, the system for family care was greatly amended. The major points of these amendments are:

- a* an employee may take caregiver leave amounting to 93 days, divided over up to three separate periods, every time he or she has a family member who is in a condition requiring care; and
- b* in addition to caregiver leave, employees may be subject to short-time work, flexible hours systems, staggered working hours or a system where an employer provides financial assistance for family care (provided, however, that an employer may choose which system will apply for an employee in question).

Also, an employer is obligated to prevent any hostile environment that is caused by any action of his or her managers or colleagues against an employee who becomes pregnant, gives birth, or takes child or family care leave (this is known as the ‘Obligation to prevent hostile environment maternity harassment’). It has already been prohibited to carry out any adverse treatment against an employee who makes a request regarding child care (such as reduction of work). After these amendments, an employer is also required to prevent any hostile environment where any employee is reluctant to exercise his or her rights regarding child or family care because of any action of his or her managers or colleagues. These amendments will become effective on 1 January 2017.

Hot topics regarding working style in Japan include overwork death, caused by excessive work and stress at work, and suicide as a result of mental illness induced by work. There was a court case concerning a female employee who started working at one of the most famous advertising agencies just after graduating from university, suffered mental illness because of working long hours and subsequently killed herself. The court held that the mental disorder was caused by working long hours, and that the subsequent suicide is recognised as

an 'industrial accident'. After the proceedings, the Labour Office has started administrative measures against and a criminal investigation into the advertising agency. The prevention of overworking is the biggest challenge facing employment relationships in Japan.

III SIGNIFICANT CASES

There are two noteworthy cases regarding fixed-term employment held by appellate courts. The main legal issue under these cases was, under a situation where employment conditions for a fixed-term employee are different from those for a non-term employee and where both employees are hired by the same employer, whether the situation is regarded as 'unreasonable labour conditions' under Article 20 of the LCA.

The facts of the first case are as follows: the plaintiffs were truck drivers who terminated their employment contract because they reached the retirement age (60). Just after the termination, they were hired as fixed-term employees by the same employer. The plaintiffs argued that the amount of their salary as fixed-term employees was approximately 20 per cent lower than that of their salary before their retirement age and that this situation should be regarded as unreasonable labour conditions (*Nagasawa Unyu* case, 2 November 2016, Tokyo High Court). The decision held by the lower court of this case attracted public interest. The lower court held that applying new employment conditions for the fixed-term employees was a violation of Article 20 because their job descriptions and staffing system (i.e., job transfer) for the regular employees were not different from those for the fixed-term employees. Also, the lower court held that the employment conditions for regular truck drivers should be applied for the fixed-term employees (i.e., the plaintiffs). However, the Tokyo High Court disaffirmed the holdings and held that whether or not there was violation of Article 20 should be decided based on the totality of circumstances, such as 'content of the duties of the workers', and 'its staffing system'. The Tokyo High Court held that it is commonplace in Japanese society that the amount of salary for fixed-term employees after their retirement age is generally reduced as compared to that for regular employees. Therefore, it held that the reduction in salary for the plaintiffs is not in violation of Article 20. We can say that the decision made by the Tokyo High Court tolerates employment practice related to retirement age.

The main issue in the other case is whether the difference between the regular employees' salaries and those of contract employees should be regarded as unreasonable working conditions (*Hamakyorex* case, 26 July 2016, Osaka High Court).

The court held that while the content of the regular employees' work and that of contract employees' work are the same, the range of the utilisation of human resource between them is different, and that we need to carefully consider the difference of working conditions between them when applying Article 20 of the Labour Contract Act. The court finally held that not giving 'accident-free allowance', 'working allowance', 'food allowance' or 'commutation allowance' to contract employees is regarded as unreasonable labour conditions because of their fixed-term employment, and that the defendant (the employer) is liable for tort liability because the defendant did not improve such situation. This case is generally considered as one precedent regarding the correction of non-regular employee salaries.

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

An employment contract is established when an employer and a job applicant agree that: (1) the job applicant shall work for the employer; and (2) the employer shall pay a salary to the job applicant as consideration. If the employer has its work rules stipulating reasonable working conditions and has informed its employees of the work rules, the contents of an employment contract shall be based on the working conditions provided by the work rules without any consent of the job applicant. A job applicant and an employer may enter into or change, by agreement, an employment contract that includes working conditions different from those under the work rules. However, any parts of an employment contract that stipulate working conditions that do not meet the standards established by the work rules shall be invalid. In this case, the invalid portions shall be governed by the standards established by the work rules.

There is no statutory requirement concerning the form of an employment contract, so an employer and a job applicant may orally enter into an employment contract. However, to let the job applicant understand his or her rights and duties under the contract, the employer must notify the job applicant in writing of certain employment conditions⁵ before or upon entering into the employment contract.⁶ The employer can fulfil this requirement by giving the applicant a written employment contract or by providing a copy of its work rules.

Fixed-term employment is lawful, but the term cannot be longer than three years, except in some limited circumstances.

ii Probationary periods

Although there is no regulation concerning probationary periods, an employer may set a limited probationary period under case law in Japan. Many employers use probationary periods to train and to evaluate their employees to determine whether they should be retained as fully fledged employees.

An employer generally sets forth probationary periods in its work rules. A general range of probationary periods is from one to six months and a typical probationary period is three months. Extremely long probationary periods will be void because of violation of the public policy.

It is generally understood that the usual probationary period is designed to reserve the employer's right of cancellation. The employer may dismiss less strictly its employee during a probationary period than its regular employee; however, even during the probationary period, 'reasonable and socially acceptable' grounds are required to dismiss the employee. This means that an employer is required to show a lack of fitness of its employee based on facts⁷ in order to properly exercise its reserved cancellation rights.

iii Establishing a presence

Whether a foreign company is required to register will be decided based on its intended business in Japan. In a case where a foreign company intends to only conduct preparatory

5 Such as wages, working hours, term of contract, workplace, and the nature of the work.

6 Article 15, Paragraph 1 of the LSA.

7 These could be low job-performance ratings and unsatisfactory attitudes.

or supplemental tasks,⁸ the foreign company may establish its representative office in Japan without any registration. However, if a foreign company intends to continuously operate its business in Japan, it must register itself with the relevant legal affairs bureau. In this case, while the foreign company does not have to establish its branch office in Japan, it must at least register its representative in Japan or its branch office (if any) in Japan.

Unless a foreign company intends to continuously operate its business in Japan, it may engage an independent contractor without its registration in Japan. An independent contractor will constitute a permanent establishment (PE) of the foreign company under certain conditions;⁹ provided, however, that there are exemptions for independent contractors under Japanese taxation laws. In a case where a foreign company has its PE in Japan, its Japanese-sourced income shall be subject to corporate tax.

There are four insurance benefits in which a company is legally obliged to participate: (1) workers' accident compensation insurance; (2) employment insurance; (3) health insurance and nursing care insurance; and (4) employees' pension insurance.

Salary income is subject to withholding tax under the Income Tax Act. Under the withholding tax system, a payer of salary income in Japan must calculate the amount of income tax payable, withhold the amount of income tax from the income payment, and pay it to the government.

V RESTRICTIVE COVENANTS

Given its personal, continuous character, an employment contract requires a relationship of trust between the parties. In more concrete terms, each party is required to act in good faith in consideration of the other's interest. Therefore, during the term of employment, an employee shall undertake obligations to keep trade secrets, to refrain from competitive activities, and not to damage the employer's reputation or confidence even if there is no provision about the obligations under any employment contract or work rules.

By contrast, an employee has its rights to choose or change his or her job, so an employee does not automatically undertake non-compete obligations after leaving a job without any agreement to that effect. Therefore, if the employer wants its employees to undertake post-termination non-compete obligations, it must enter into such an agreement with the employees or have corresponding work rules, both setting forth the obligations. Non-compete obligations are direct restrictions on a former employee's freedom to choose his or her occupation, so courts will decide their enforceability based on a variety of factors, such as whether the duration and scope of the obligations are clearly stated in an agreement or work rules and whether additional and sufficient compensation for the obligations is provided to the former employee.

8 Such as market surveys and collecting information.

9 Including a condition that the contractor is authorised to conclude contracts on behalf of the foreign company in Japan.

VI WAGES

i Working time

Statutory working hours

The LSA stipulates overly rigid regulations on working hours. In principle, an employer must not require or approve of employees working more than eight hours a day or 40 hours a week (excluding rest periods) without a labour-management agreement.¹⁰ These are generally known as the ‘statutory working hours’. If an employer violates this regulation, it will bear criminal liability.¹¹

Where an employer wants to require employees to work more than the statutory working hours, the employer must enter into a labour-management agreement either with a labour union (if any) or an employee that represents the majority of employees at a workplace (if the union does not exist), and then to notify the relevant government agency of the agreement.¹²

Exemptions to statutory working hours

As the exceptions to regulations on statutory working hours, the LSA stipulates certain modified working-hour systems, such as flexitime and annual, monthly, or weekly modified working-hour systems. Under these systems, an employer may require its employees to work beyond the statutory working hours to the extent permitted by law.

Exemption for managers

Further, certain employees, such as those in management, are exempted from the regulations on statutory working hours.¹³ This means that an employer may require the exempted employees to work in excess of the statutory working hours without entering a labour-management agreement.

ii Overtime

Legally speaking, the LSA does not require an employer to pay its employees a salary based on working hours. However, it is understood that, in practice, wages and working hours are associated when it comes to overtime pay. Under certain conditions, an employer may let its employees work overtime, with the LSA requiring the following minimum salary premiums for all employees except those who are exempted from the regulations on statutory working hours:

Work in excess of statutory working hours	25%
Work in excess of statutory working hours exceeding 60 hours in a month	50%
Work on statutory days off	35%
Work late at night (between 10pm and 5am)	25%
Work late at night in excess of statutory working hours	50%
Work late at night in excess of statutory working hours exceeding 60 hours in a month	75%
Work late at night on statutory days off	60%

10 Article 32 of the LSA.

11 Article 119, Paragraph 1 of the LSA.

12 Article 36 of the LSA.

13 Article 41 of the LSA.

Employees who are exempted from the regulations on statutory working hours (e.g., employees in management) are entitled to a minimum premium of 25 per cent for work late at night (between 10pm and 5am). However, such employees are not entitled to receive the other premiums.

VII FOREIGN WORKERS

There is no limit on the number of foreign workers whom an employer can employ under the Japanese laws. The Japanese employment laws are applicable to the foreign workers who are employed and work in Japan regardless of whether their employer is a foreign company or a domestic company.

Additionally, an employer must not use the nationality of any employees as a basis for engaging in discriminatory treatment concerning certain working conditions, such as wages and working hours.¹⁴

When an employer enters into an employment contract with a foreign person other than a special permanent resident, the employer must notify a relevant job-placement office of the person's information, such as its name, resident status, and birth date. The employer is also required to give notice to a relevant job-placement office in the case of the person's retirement.

Any foreign national who enters to Japan to work must obtain a working visa at a Japanese diplomatic missions abroad. Also, any foreign national must generally receive landing permission when he or she arrives at a port of entry, a time when his or her residence status and period of stay in Japan will be determined. The foreign national can conduct activities within its resident status. The foreign national can only reside in Japan for his or her period of stay. A foreign national who wishes to continue conducting the same activities in Japan with his or her current resident status beyond the period of stay must apply for an extension of the period no later than the last day of the period.

As mentioned in Section IV.iii, *supra*, there are four insurance benefits in Japan. These benefits also cover foreign workers.

All individuals, regardless of nationality, are classified as either residents or non-residents under Japanese tax laws. In general, residents have an obligation to pay income tax on their worldwide income (including salary income). By contrast, non-residents are obliged to pay income tax on any income from domestic sources (including salary income from employment in Japan).

VIII GLOBAL POLICIES

The adoption of work rules is mandatory for any employer who hires 10 or more employees on a continuing basis. This employer must submit its work rules to the relevant local LSIO.¹⁵ When establishing its work rules, an employer must hear an opinion of either a labour union

14 Article 3 of the LSA.

15 Article 89 of the LSA.

(if applicable) or an employee (if there is no union in the workplace) that represents the majority of the employees at a workplace. When submitting its work rules to the relevant local LSIO, the employer must attach a document stating the opinion.¹⁶

The work rules must include the following information:¹⁷

- a* working hours (including holiday, leave, shift changes, breaks, and the start and end of the working day);
- b* wages (including the methods for determination, calculation, and payment of wages; and the dates for closing accounts for wages and for payment of wages); and
- c* termination (including grounds for dismissal).

Work rules must also cover the following if the employer has a policy relating to these matters:

- a* termination allowances (including the scope of covered employees; methods for determination, calculation, and payment of termination allowances; and the dates for payment of such allowances);
- b* special and minimum wages;
- c* the cost to be borne by employees for food, supplies or other expenses;
- d* safety and health;
- e* vocational training;
- f* accident compensation and support for injury or illness outside the course of employment;
- g* commendations and sanctions; and
- h* other matters applicable to all employees at the workplace.

The work rules must not infringe any laws and regulations or any collective agreement applicable to the workplace in question.¹⁸

In order to amend work rules, the employer must request an opinion on its amendment from either a union or an employee (if there is no union in the workplace) that represents the majority of the employees at the workplace. The employer and the employees may, by agreement, amend the work rules. However, if (1) the employer informs its employees of the changed work rules, and (2) the changed work rules set forth reasonable working conditions in light of relevant circumstances (such as disadvantages to be incurred by the employees; the need for the change; the contents of the changed work rules; and the status of negotiations with a labour union or a representative employee), the employer may amend its work rules without the employees' consent.

IX TRANSLATION

When employing foreign workers, an employer is not required to provide them with relevant documents (e.g., work rules and employment agreement) in a language they understand. However, to avoid conflicts, it is appropriate to explain key working conditions in a language comprehensible to foreign workers so that they can understand the terms and conditions under their employment contracts. Furthermore, an employer should display warning

16 Article 90 of the LSA.

17 Items 1–3, Article 89 of the LSA.

18 Article 92 of the LSA.

letters and its safety and health rules at a workplace, both written in languages employees understand. If an industrial accident happens under a situation where there is no such display at a workplace, the situation will be regarded as evidence that an employer has not complied with its duties of safety and of safety education.

X EMPLOYEE REPRESENTATION

There is no definition of employee representation under Japanese law. However, in certain situations, the LSA requires that an employer hear an opinion of or enter into a labour-management agreement with either (1) a labour union organised by a majority of the employees at a workplace (where such a union exists); or (2) a person representing the majority of the employees at a workplace (where a union does not exist). While in practice, the union or representative are referred to as an 'employee representative', this is very different to the works councils established and regulated in many European countries, for instance. When the employees at a workplace select a person to represent them, the person must be selected through democratic procedures. Further, the employees cannot select a person in management as their representative. The employee representative is an ad hoc representative, so, in general, there is no term for the representative.

On the other hand, where an employer enters into a collective agreement concerning working conditions, a labour union will be party to that agreement. The Constitution of Japan guarantees workers' right to organise and to bargain and act collectively, so a labour union must remain independent from an employer. In contrast to the United States and Europe, corporate unions are more popular than industry unions in Japan. Once a collective agreement is executed, any employment agreement that does not meet working conditions under the collective agreement will be void and be replaced with the collective agreement. In a case of collective bargaining, an employer must negotiate in good faith with a labour union.

XI DATA PROTECTION

i Requirements for registration

Data protection in Japan is governed by the Act on the Protection of Personal Information (APPI). The APPI was amended on 3 September 2015. This amendment covers a wide range, including clarification of the definition of personal information, the foundation of the Personal Information Protection Commission and introduction of provisions relating to sensitive information. Most parts of the amendment will become effective by 8 September 2017. There is no required registration in relation to data protection under Japanese laws.

When handling personal information, a company shall, as much as possible, specify the purpose for its use of personal information (the purpose).¹⁹ In principle, no company can handle personal information beyond the scope necessary to achieve the purpose without obtaining the prior consent of the data subject.²⁰

19 Article 15, Paragraph 1 of the APPI.

20 Article 16, Paragraph 1 of the APPI.

When acquiring personal information, a company must promptly notify the person of, or publicly announce, the purpose unless the company has already publicly announced the purpose.²¹ In addition, when a company directly acquires personal information from a person in writing, the company must expressly show its purpose to the person in advance.²²

A company must not, in principle, provide any personal data to any third parties without obtaining the prior consent of the person.²³

A company must keep personal data accurate and up to date within the scope necessary for the achievement of the purpose. Once the purpose is achieved, a company needs to delete personal data without delay.²⁴ Also, a company must take necessary and proper measures for the prevention of leakage, loss or damage, and for other security control of the personal data.²⁵ A company must exercise necessary and appropriate supervision over its employees to ensure the security control of the personal data.²⁶

ii Cross-border data transfers

A company must, in principle, obtain the prior consent of the person when it provides personal data to any third party.²⁷ The same shall apply for cross-border transfer of personal data.²⁸

It should be noted that a company does not have to obtain the prior consent of the person under certain cases²⁹ because these cases shall not be regarded as transfer of personal information to any third parties. The same shall apply for the cross-border transfer of personal data if a company provides personal data to (1) any third party in a foreign country that has regulations for personal information protection at the same level as Japanese ones; or (2) any third party in a foreign country who puts into place a system compliant with the standards prescribed by rules of the Personal Information Protection Commission as is necessary to continuously take of measures corresponding with measures that business operators handling personal information ought to carry out pursuant to certain provisions under APPI with regard to the handling of personal data.³⁰

iii Sensitive data

The amendment of the APPI newly defines sensitive information. ‘Sensitive information’ means personal information that contains descriptions that have been specified by Cabinet Order to require special consideration in handling so as to avoid any unfair discrimination, prejudice or other disadvantage to an individual based on person’s race, creed, social status,

21 Article 18, Paragraph 1 of the APPI.

22 Article 18, Paragraph 2 of the APPI.

23 Article 23, paragraph 1 of the APPI.

24 Article 19 of the APPI.

25 Article 20 of the APPI.

26 Article 21 of the APPI.

27 Article 23, paragraph 1 of the APPI.

28 Article 24 of the APPI.

29 The cases are stipulated in Article 23, paragraph 5 of the APPI.

30 Article 24 of the APPI.

medical history, criminal records or the fact that a person has incurred damages through an offence, etc.³¹ A company must not acquire sensitive personal information without in advance obtaining the person's consent to do so, except in certain circumstances.³²

Certain guidelines also set forth additional rules concerning sensitive personal information, such as information relating to race, ethnic group, social status, family origin, income and medical records. Further, if a company abusively uses such sensitive information, this might be regarded as a violation of privacy or an invasion of personal rights and so the company might be held liable for damages arising from the violations or invasion.

iv Background checks

Because it has the freedom to employ and choose from among its applicants, an employer may collect personal information about its job applicants (such as information related to their credit records) to a reasonable extent as a background check when it decides to employ an applicant. However, when collecting sensitive information, such as criminal records, an employer must not acquire it without the applicant's prior consent.

Such collection needs to be carried out by commonly accepted proper methods and care should be taken not to infringe on the dignity of applicants' personality and privacy.

XII DISCONTINUING EMPLOYMENT

i Dismissal

As a general rule, employment will only be terminated for cause by an employer in Japan. There is no concept of termination 'at will'.

Cause for dismissal includes poor performance, repeated misconduct, serious misconduct, redundancy, and medical incapacity. However, an employer's right to dismiss its employee is severely restricted. Article 16 of the LCA stipulates that a dismissal will, if it lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, be treated as an abuse of right and be invalid.

Other laws (such as the LSA) set forth certain restrictions on dismissals, such as restrictions on dismissals during periods of maternity leaves or medical treatment of work-related injuries.

Where an employer wishes to dismiss its employee, the employer must provide at least 30 days' advance notice. An employer who does not give the 30-day notice is required to pay the average wage for a period of not less than 30 days, except under certain conditions.³³ An employer is not generally required to give notice to a works council or trade union when the employer dismisses its employee.

Based on its work rules, an employer may dismiss its employee because of a disciplinary action (punitive dismissal). In a case of punitive dismissal, courts will judge the validity of the dismissal pursuant to Article 15³⁴ as well as Article 16 of the LCA.

31 Article 2, paragraph 3 of the APPI.

32 Article 17, paragraph 2 of the APPI.

33 Article 20 of the LSA.

34 Article 15 of the LCA stipulates that 'in a case where an employer takes disciplinary action against its employee, if the disciplinary action lacks objectively reasonable grounds and is

ii Redundancies

As mentioned in subsection i, *supra*, the validity of the redundancy is also judged by whether it lacks objectively reasonable grounds and whether or not it is considered to be appropriate in general societal terms. However, under case law, it is necessary to meet the following criteria so that the redundancies are deemed reasonable and appropriate in general societal terms:

- a* Necessity: the business circumstances of the employer are in a situation that renders redundancies unavoidable and necessary.
- b* Efforts to avoid redundancy: in short, redundancies should be the measure of last resort.
- c* Reasonable selection: the standards for selection of employees who are subject to redundancies were reasonable and redundancies were fairly carried out.
- d* Reasonable process: the employer conducted sufficient consultations with its employees and labour unions.

XIII TRANSFER OF BUSINESS

i Merger

In a merger, employment contracts between a target company and its employees shall be automatically transferred to an acquiring company. Therefore, employees of the target company shall be employees of the acquiring company as of the effective date of the merger. Their working conditions remain the same at the acquiring company, so employees are not materially disadvantaged. This is why there is no specific Japanese labour law to protect employees affected by a merger.

ii Asset transfer

In a case of asset transfer, each asset (including employment contracts) shall be transferred from a seller to a purchaser according to an asset purchase agreement. However, Japanese law requires employers to obtain consent from each employee to validly transfer their employment contracts to the purchaser. The employees may decide whether they continue working at their current employer, so there is no specific Japanese labour law to protect employees affected by asset transfer.

iii Company split

In a case of a company split, a part or all of the company's assets and liabilities (including employment contracts) constituting a particular business of a seller shall be transferred from a seller to an acquirer based on a company split plan or agreement. While the Companies Act sets forth general procedures for the company, the Labour Contract Succession Law regulates the transfer of employment contracts in the cases of a company split because the company split will have a large effect on employees.

not found to be appropriate in general societal terms in light of the characteristics and mode of the act committed by the worker pertaining to the disciplinary action and any other circumstances, the disciplinary order will be treated as an abuse of right and be invalid.'

XIV OUTLOOK

The Japanese government is trying to correct 'long working hours for regular employees' and disparity between regular and fixed-term employees ('work-style reforms'). The expected changes in law are the amendment of Article 36 of the LSA (which stipulates the limitation of overtime work with a labour-management agreement) and the amendment to create a system that promotes taking paid leave. In addition, the Japanese government is considering how to apply the concept of 'equal work, equal pay' in Japanese employment relationships in order to promote the improvement of non-regular employees' working conditions. While the Japanese government intends to announce certain guidelines on this issue, it is open to question with regard to how to make the concept ('equal work, equal pay') conform with the traditional regular employment system. Moreover, we need to consider how to solve labour shortage, which has arisen as a result of the ageing society and low birth rate.

Appendix 1

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Shione Kinoshita is a partner at Dai-ichi Fuyo Law Office. She graduated from Waseda University in 1982 and earned an LLM from the University of Illinois College of Law in 1992. She served as a vice chairman of Dai-ichi Tokyo Bar Association in 2004–2005. She was a visiting professor of the University of Tokyo School of Law in 2010–2013 and has been a vice president for human rights of the Tokyo Institute of Technology since 2013. She has been involved in a number of labour cases including collective bargaining, labour management, and litigation in the District, High and Supreme Courts, as well as before labour tribunals. She also handles non-contentious negotiation and settlement matters. Her clients include major companies in the retailing, data processing, manufacturing, and financial services as well as governmental agencies.

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