

THE EMPLOYMENT
LAW REVIEW

NINTH EDITION

Editor
Erika C Collins

THE LAWREVIEWS

THE
EMPLOYMENT
LAW REVIEW

NINTH EDITION

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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 ninth 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 eight 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 2017 in nations across the globe, and this is the topic of the second general interest chapter. In 2017, many countries in Asia and Europe, as well as 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 gender, 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.

In 2015, we introduced the fourth and newest general interest chapter, which discusses the interplay between religion and employment law. In 2017, 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 ninth edition of *The Employment Law Review* includes 46 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, and I wish to thank our publisher. I also wish to thank all of our contributors and my associate, Marissa Mastroianni, for her invaluable efforts to bring this edition to fruition.

Erika C Collins

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February 2018

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Ms Collins represents US and non-US employers in all aspects of company growth and restructuring, from office openings, executive hires and workforce expansions to company downsizing, employment terminations, mass lay-offs and office closures. She advises clients on preparing competitive employment packages and agreements, such as separation, expatriate and consulting agreements, that are compliant with local laws, as well as on payroll, benefits and vacation issues. Ms Collins regularly conducts multi-country audits of employment laws and practices in order to provide advice to clients regarding compliance with data privacy, fixed term contracts, outsourcing, and working time and leave regulations among numerous other issues.

Additionally, Ms Collins advises employers on sexual harassment and other misconduct allegations, as well as cross-border investigations. She also is experienced in conducting due

diligence on international subsidiaries and advising on applicable business transfer laws and employee transition issues in cross-border M&A transactions.

Ms Collins is the editor of *The Employment Law Review*, which covers employment laws in 46 countries. In addition to authoring numerous articles on international employment topics, Ms Collins is a regular speaker at the International Bar Association and the American Bar Association. Topics on which she has written and spoken recently include: cross-border transfers of executives; global mobility issues for multinationals; employment issues in cross-border M&A transactions; the landscape of issues in international employment law; global diversity programmes; the intersection of EU privacy and anti-discrimination laws; and cross-border investigations.

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JAPAN

*Shione Kinoshita, Shiho Azuma, Yuki Minato, Hideaki Saito, Hiroaki Koyama,
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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 Act (CCFCLA)³ and the Part-time Employment Act (PEA).⁴ In addition, 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.

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.

1 Shione Kinoshita, Shiho Azuma and Yuki Minato are partners, and Hideaki Saito, Hiroaki Koyama, Keisuke Tomida, Tomoaki Ikeda and Momoko Koga 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.

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

Local labour bureaus are the supervisory agencies with regard to the EEOA, the PEA and the WDA.

II YEAR IN REVIEW

On 28 March 2017, the Council for the Realisation of Work Style Reform announced the Action Plan for the Realisation of Work Style Reform. The Action Plan is a part of the Abe administration's economic policy: 'In order to realise the revival of the Japanese economy, it is necessary to improve added value productivity through promotion of investment and innovation. It is also important to improve the labour force participation rate. To achieve these goals, it is necessary to create a Japanese society in which everyone has something to live for and can maximise their abilities.' Recognising such matters, the Abe administration announced that 'we will pursue a society that allows us to select a suitable, diverse, and flexible way of working corresponding to each individual's will and ability.' The goal is to implement action plans in nine areas. Among them, two important areas are restricting long working hours and 'realising equal pay for equal work to improve working conditions for irregular workers'.

Regarding the restriction of long working hours, the Ministry of Health, Labour and Welfare (MHLW) announced the Emergency Plan to Extirpate Overwork Death, etc., in response to a famous suicide case, revealed in October 2016, in which 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 MHLW also announced the Guidelines on Measures to be Taken by Employers to Appropriately Recognise Working-Hours of Employees. When an employer requires employees to work more than the statutory working hours, the employer must enter into a labour-management agreement (Article 36 of the LSA, see Section VI.i). The government is planning to introduce a new regulation for the maximum limitation of overtime working hours under a labour-management agreement with criminal liabilities. It is expected that the maximum limitations on overtime working hours will be less than 100 hours per month, an average of 80 hours per month over a period of two to six months and 720 hours per year (such hours are the sum of overtime work and holiday work –this criteria is known as the 'excessive work death standard').

Regarding realising equal pay for equal work to improve working conditions of irregular workers, there were many court cases based on Article 20 of LCA in 2017. The main legal issue in these cases, in a situation where the employment conditions for a fixed-term employee are different from those for an open-term employee under the same employer, was whether 'unreasonable labour conditions' existed, under Article 20 of the LCA. However, in these cases, the courts ordered the employers to pay only small amounts of money (such as a special working allowance for the New Year holiday period) considering the totality of circumstances, such as the difference between the nature of the regular employees' work and that of contract employees' work, and the range of human resources used between them.

III SIGNIFICANT CASES

There were two noteworthy cases heard by the Supreme Court in Japan in 2017.

i **Koshinkai Medical Corporation (7 September 2017)**

In this case, a doctor (the plaintiff) was employed by a medical corporation (the defendant) with an agreed annual salary of ¥17 million. It was also agreed that the annual salary would include premium wages for overtime working hours (the Agreement). However, the plaintiff claimed that the Agreement was void and that the medical corporation should pay premium wages for actual overtime working hours of the plaintiff, in addition to the annual salary.

A district court and an appellate court held that the Agreement was valid because, considering the doctor's work and the amount of the annual salary, the Agreement did not include any stipulation that poses a risk to the protection of the plaintiff as an employee.

However, the Supreme Court held that the Agreement was void. While it agreed that a base or annual salary should include an allowance for overtime working hours, it ruled that the amount corresponding to the wage for normal working hours and the amount corresponding to the premium wage must be clearly distinguished in the employment agreement. In this case, the Court held that it could not distinguish between the Agreement and the amount corresponding to the wage for normal working hours, which rendered the Agreement void. The Court ordered that the defendant must pay premium wages for the plaintiff's actual overtime working hours in addition to the annual salary.

ii **H Kyodo-Kumiai (2 March 2017)**

In this case, an employer (the defendant) hired an employee (the plaintiff) to let the employee handle matters regarding a labour union. However, the necessity of correspondence with a labour union gradually became unnecessary. As this result, there was no work available for the employee and consequently the employer fired the employee. The employee claimed that the termination of the employment was void because it lacked an objectively reasonable ground.

A district court applied general criteria (see Section XII.ii) that determine whether a redundancy is deemed reasonable and appropriate in general societal terms. The court subsequently held that the dismissal was invalid, as the general criteria (i.e., necessity, efforts to avoid redundancy, reasonable selection and reasonable process) were found to be absent in this case.

In contrast, the appellate court held that although the employee was hired for a specific purpose, this purpose ceased to exist after the employee was hired. Therefore, the dismissal was reasonable and appropriate, and valid. The Supreme Court approved the decision of the appellate court.

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 its employee less strictly 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 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

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.

8 Such as market surveys and collecting information.

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.

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

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

10 Article 32 of the LSA.

11 Article 119, Paragraph 1 of the LSA.

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%

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 that 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.

¹² Article 36 of the LSA.

¹³ Article 41 of the LSA.

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, 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 (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).

14 Article 3 of the LSA.

15 Article 89 of the LSA.

16 Article 90 of the LSA.

17 Items 1–3, Article 89 of the LSA.

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 the worker with relevant documents (e.g., work rules and employment agreement) in a language that he or she understands. 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 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

18 Article 92 of the LSA.

or representative is referred to as an 'employee representative', this is very different to the works councils established and regulated in many European countries. 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 became 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

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

19 Article 15, Paragraph 1 of the APPI.

20 Article 16, Paragraph 1 of the APPI.

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.

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

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 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, 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

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.

31 Article 2, Paragraph 3 of the APPI.

32 Article 17, Paragraph 2 of the APPI.

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.

ii Redundancies

As mentioned in subsection i, above, 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.

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 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.'

- 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.

XIV OUTLOOK

The most important issue regarding employment in Japan is the reduction in the labour force as a result of the declining birth rate, ageing society and a declining population. The effective job opening-to-application ratio is rising and the current rate is beyond 2 per cent, which is the highest on record. This reveals that it is highly necessary to utilise the potential workforce, such as women and elderly people who had not been considered part of the labour force, by implementing the Action Plan for the Realisation of Work Style Reform (see Section II). While the system of support for workers with families, such as childcare and nursing care, is being reformed by an amendment to the CCFCLA, the understanding of this system in the workplace is insufficient. Issues such as 'maternity harassment' (harassment towards women who are pregnant or have given birth) and shortage of nursery facilities make it difficult for women to balance childcare and work. Improving this situation is essential to realise gender equality.

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