



# **FROM HIRING TO FIRING**

## **A BASIC GUIDE TO THE JAPANESE EMPLOYMENT LAW LIFE CYCLE**



## HIRING

As a general rule, employers in Japan can freely determine the person they would like to hire as an employee, provided that discrimination on the basis of certain protected categories is not permitted. Employees are generally hired under one of the following categories:

- Regular employee (*seisha-in*)
- Fixed term contract employee (*keiyaku sha-in*)
- Part-time employee (*arubaito or paato*)

Japanese labour laws give a very high level of protection, especially to regular employees. Once hired, the employer right to dismiss a regular employee is severely restricted. Japanese law will invalidate a dismissal as an abuse of rights if the dismissal:

- (a) lacks “objectively reasonable grounds”; and
- (b) is not considered to be appropriate in general societal terms.

In practice, these requirements makes it very difficult for an employer to justify dismissal of an employee. While fixed term employment contracts are one way to avoid the inflexible termination rules it may become more difficult for an employer to recruit good candidates. In addition, the Labour Contract Act requires employers to provide a fixed term contract employee with employment for an indefinite term (i.e., they will become

an indefinite term employee under the same terms and conditions of employment) if they have worked for more than five years on two or more fixed term agreements and there has been no break in employment of six months or longer.

### Recruitment

Recruiting in Japan is often done by placing advertisements on job information websites or through use of employment or recruitment agencies or temporary staff providers. There is also an established process mainly for hiring of new graduates, and employers may participate in career fairs or recruiting events conducted on university campuses or sites especially prepared for such events. Generally speaking, recruitment by specified age and gender is prohibited.

### Making an offer of employment

The Labour Standards Act does not require the employer to use a contract of employment, but the employer must provide the employee with certain terms and conditions of employment in writing. An employer can fulfill this requirement by giving employees a written employment contract and by providing the employee with a copy of the company’s ‘work rules’ (*shuugyou kisoku*). Japanese employment contracts are traditionally short and simple, although many foreign affiliated employers prefer to use a localized version of their standard global template of the employment contract.

## Use of staffing agencies

Other than direct hiring, dispatched employees/staffing (*haken*) is popular with Japanese businesses in order to avoid the difficulties associated with terminating an employment contract. Employees sent by a staffing agency (*haken sha-in*) are directly employed by the staffing agency and not by the company utilizing the employees' labour. However, under the current law, there are limitations on the positions that can be filled by such dispatched employees and the period of time limits the employees can be used for the same position, which may be subject to the amendment mentioned below. A company cannot take on a dispatched employee who used to be employed by the utilizing company if that person left the utilizing company within the past year (there is an exception for re-hired employees who mandatorily retired from the utilizing company). Since worker dispatching is highly regulated, some companies use workers sent by outsourcing-vendor companies who are not properly registered as dispatching companies under the Worker Dispatch Act (*Roudousha Haken Hou*). This arrangement is called a "disguised outsourcing arrangement" (*gisou ukeoi*) and is a violation of the Worker Dispatch Act. In order to address this issue, on and after

October 1, 2015, if companies use a disguised outsourcing arrangement, in principle, such companies will be deemed to offer direct (regular) employment to the dispatched workers from the outsourcing companies.

The Worker Dispatch Act may be amended shortly<sup>1</sup>. The effective date of the amendment has not been determined but it is expected that the amendments will become effective from September 1, 2015.

The proposed amendments will (i) change the length of time that a utilizing company can utilize dispatched employees; (ii) eliminate one of the two types of dispatching licenses that are available (the less regulated and more easily obtainable dispatching license (*Tokutei Roudousha Haken*)); and (iii) require dispatching agencies to make offers of regular employment to dispatched employees or take other measures to protect the employment status of dispatched employees under certain circumstances.

When the amendments are passed, utilizing companies would be able to use dispatched employees without a risk of misclassification<sup>2</sup>, but with limitations on how long specific individuals can provide services, though the dispatch periods are subject to extensions.

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<sup>1</sup> As of March 16, 2015 but subject to changes through discussions in the National Diet.

<sup>2</sup> Currently, the time period a utilizing company may use dispatched employees is based on the "duties" to be performed not the "person" performing the duties. When the work falls under certain fields of work there is currently no time limit with respect to how long the dispatched employee may be used. However, there are times when it is not clear whether a dispatched employee's work duties falls squarely under one of the these categories and there is a risk of misclassification and, thus, a risk of violating the period of time the dispatched employee may be utilized.

With respect to the time limitations for which a dispatched employee may be sent to work at a company, the amendments would:

- a. eliminate the current specialized fields of work for which there are no restrictions with respect to how long the utilizing company may accept dispatched employees for the same duties;
- b. limit the time the utilizing company can utilize the same dispatched employee at the same business unit of the same workplace to a period of up to three years;
- c. limit the time the utilizing company can utilize any dispatched employees at the same workplace to a period of up to three years; and
- d. allow the time period set out in (c) to be extended for further three-year periods if the utilizing company obtains opinions from the employee (or, a union, if any, representing a majority of the employees) for each extension<sup>3</sup>. Any extension would remain subject to the three-year limitation with respect to utilizing the same dispatched worker at the same business unit of the same workplace set forth in (b).

Importantly, if the dispatched worker is a regular, non-fixed term, employee of the dispatching agency, the limitations do not apply.

### Work Rules (*shuugyou kisoku*)

In Japan, most of the terms and conditions of employment are stipulated in the employer's work rules. Employers with ten or more employees in a workplace are required to create work rules and file them with the Labour Standards Inspection Office. The work rules will constitute part of the employment contract and must stipulate certain terms and conditions of employment, such as:

- wages;
- working hours and breaks;
- holidays and leave;
- termination of employment;
- disciplinary action (i.e., types of action and reasons of action); and
- other general matters that apply at the workplace.

Before filing, the work rules must be submitted to a representative of the majority of employees (or a union to which a majority of the employees belong if one exists) for comment. While employee comments do not need to be accepted by the employer, the comments should be considered in good faith. While it is not mandatory, in practice if a company creates separate work rules for other

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<sup>3</sup> Consent is not required, it is only necessary to obtain opinions and consider them in good faith.

types of employees (e.g., creating work rules only for fixed-term employees separating from the work rules for permanent/regular employees) it may help the company more effectively manage its work force.

The same procedures are required to amend the work rules. If an amendment to the work rules are detrimental to existing employees, such an amendment may not be enforceable against existing employees. Therefore, the employer-company should keep this in mind when creating work rules for the first time.

### **Cancellation of an offer (*naitei-torikeshi*)**

Once an employer has made a formal offer of employment to a prospective employee and the prospective employee has accepted the offer, the Japanese courts recognize that a certain employment relationship has been established, even if the employee has not yet started work. While an employer may cancel an accepted offer prior to the actual start date, a court may treat such conduct as invalid or illegal unless the cancellation was for reasonable grounds (e.g., the employee provided false information on a material topic) and would be considered socially acceptable.

### **Immigration**

Foreign nationals who wish to live and work in Japan must obtain the requisite work visa. However, a ‘working visa’ does not, in itself, permit a foreign national to live or work in Japan. Upon entry, the individual will be granted the appropriate ‘status of

residence’ which will determine the extent of the individual’s ability to live and work in Japan. Pursuant to an amendment to the Immigration Control and Refugee Recognition Act, from April 2015 preferential treatment will be given to workers engaged in advanced academic research activities, advanced specialized technical activities and advanced business management activities. Foreign nationals employed and working in Japan will also be subject to the same employment laws as Japanese nationals, even if their employment contract purports to be governed by the laws of another jurisdiction.

### **Employment contract**

Individual employment contracts are usually short since both parties can generally refer to the work rules for terms and conditions of employment. If there is any discrepancy between the terms and conditions in the work rules and those in the employment contract, the provision that is most favorable to the employee will apply. This means that it is possible to grant certain employees additional benefits (that are not included in the work rules) by contract.

Probationary periods are common in Japan, and will normally range from three to six months and should not exceed one year including extension thereof. During the probationary period, an employee can be dismissed if the employer has objectively reasonable grounds to do so, and the dismissal would not be considered

unreasonable in general societal terms.

However, this test is construed quite broadly for employees who are serving a probationary period, and it is generally considered somewhat easier to validly dismiss an employee in their probationary period than afterwards.

If an employer wishes to be able to extend a probationary period, the right to do so should be specifically set forth in the work rules and employment contract.

### **Fixed-Term employment contracts**

Due to the significant restraints on terminating employees, employers may consider entering into fixed-term employment contracts.

Japanese law permits fixed-term employment contracts of up to three years in length (or longer in some limited circumstances).

The employment contract will generally terminate at the end of the stated term but can be renewed by the parties. Whether or not the employment contract is renewable, and the criteria for renewal, must be stated in the agreement. In addition, it is important that an employer keep in mind that if a fixed-term agreement is renewed repeatedly, the relationship with the employee may be deemed to be similar to a regular employment relationship and it will be more difficult not to renew the employment contract. Also, as noted above, recent changes to the Labour Contract Act could have an impact on the use of fixed-term agreements for periods of more than five years.

### **Collective Agreements**

There are two types of collective agreements. The most common is a *labour-management agreement* which is an agreement between management and either the representative of the majority of employees in the workplace or a labour union to which a majority of the employees belong. The second type of agreement is a *collective bargaining agreement* (“CBA”) which is between a labour union and an employer only. CBA’s are not particularly common in Japan as the proportion of the workforce in Japan that is unionized has fallen below 18% according to research of Ministry of Health, Labour and Welfare (“MHLW”). Labour-management agreements are required in order to implement certain terms and conditions (such as overtime, flex-time, discretionary working hours, etc.) and are very common.

## **MANAGING**

### **Hours of work**

Employers cannot require employees to work for more than eight hours per day or 40 hours per week unless they enter into a labour-management agreement with either a labour union or a representative employee of the majority of employees in the workplace. The agreement must set out the maximum hours of overtime work (currently 45 hours per month unless agreement includes a special clause allowing for additional overtime in exceptional circumstances).

## Rest Days

An employer must provide at least one rest day per week, or four days off per four week period. This day off does not have to be on a weekend, and in many industries (such as

retail or restaurants) it is common to stipulate a weekday as the day off. Even if an employer provides employees with both Saturdays and Sundays off, only one of these days will be the statutory holiday<sup>4</sup>, which is important for the calculation of overtime.

## Overtime

Minimum overtime rates are:

<b>Work on prescribed working days and non-statutory holidays</b>	
Basic Overtime Rate	125% of base hourly wage
Late night overtime (between 10:00 P.M. and 5:00 A.M.)	150% of base hourly wage (25% added)
Overtime work in excess of 60 hours/month <sup>5</sup>	150% of base hourly wage
Late night overtime in excess of 60 hours/month	175% of base hourly wage

<b>Work on statutory holidays</b>	
Basic hourly wage	135% of base hourly wage
Late night overtime on a statutory holiday	160% of base hourly wage (25% late-night allowance added)

Many employers adopt an overtime inclusive arrangement, under which a certain amount of overtime allowance (“Fixed Overtime Allowance”) is included in the base salary. Under this arrangement, even if an employee does not work overtime at all, such Fixed Overtime Allowance must be paid and only employees who work in excess of the Fixed

Overtime Allowance are entitled to additional overtime allowance other than the Fixed Overtime Allowance. Due to recent supreme court’ judge’s supplemental comments to decisions and other lower courts’ cases which strictly interpret the lawfulness of this arrangement, if a company decides to use this arrangement it should be careful how

<sup>4</sup> A statutory holiday is one day off per week and four days off per four weeks under the law. The law does not specify which day must be designated a statutory holiday. It is permissible to or not to specify either Saturday or Sunday is a statutory holiday.

<sup>5</sup> Please note that small to mid-sized companies are currently exempted from the last two rates in the table above but that exemption likely end in 2019.

it describes the Fixed Overtime Allowance in the work rules and the employee's employment agreement.

There are some limited exemptions from the obligation to pay overtime allowance. The most relevant one for most companies is the exemption from overtime for "persons in positions of supervision or management".

The Japanese courts and the labour authorities have interpreted this exemption narrowly, and it may be difficult to determine whether an employee meets the criteria.

The MHLW has issued several guidelines to determine whether an employee falls under the management exemption from overtime. Generally, a supervisory or managerial level employee is interpreted to mean "a person who is substantially in a body of the management in terms of labour management and planning of the management strategy". Whether the employee is a supervisory or managerial level employee will be determined according to the actual situation of the employee and not simply by his or her title or grade. More specifically:

- a Supervisor/Manager should be in a position which is not suitable to be bound by fixed working hours.
- a Supervisor/Manager must have duties, responsibilities and authority which are important enough to require the employee to work regardless of fixed working hours or holidays.

- a Supervisor/Manager should be compensated fairly considering their managerial position.

Even if an employee is exempted from payment of overtime allowance due to their supervisory or managerial position, they are still entitled to "late night work allowance" of 25% of base hourly rate for any hours worked between 10:00 P.M. to 5:00 A.M.

A planned amendment to the Labour Standards Act will create a new exemption category. With respect to workers whose scope of duties is clear and who meet certain annual salary requirements (at least JPY 10 million per year), the regulations on working hours, holiday and late-night work allowances shall not apply when such workers engage in a business that requires highly specialized expertise provided the employer takes basic steps (e.g., steps to protect the employees' health and obtaining the employees' consent). However, if the hours worked in an office by the employees under this system exceed certain hours, their employers will be obligated to ensure that such workers receive clinical supervision and guidance from a doctor in person.

In addition to the above exemption, certain "discretionary workers" may be conclusively presumed to work a certain number of hours per day (e.g., eight hours per day)

regardless of the actual number of hours worked<sup>6</sup>. Generally, there are two types of discretionary working systems:

- (i) Discretionary work system for specialized occupations;
- (ii) Discretionary work system for planning work.

A planned amendment to the Labour Standards Act will add broaden the scope of the employees who can be covered under (ii) of the discretionary work system.

### Benefits and entitlements

*Annual paid leave* – An employee who has been continuously employed for six months and whose attendance has been at least 80% of the total number of working days during that period, is entitled to a minimum of ten days’ annual paid leave on the day after completing six months of employment. The entitlement increases by one day per year for the following two years and by two days per year thereafter, up to a maximum of 20 days per year. Unused annual paid leave expires after two years if not used. Under a planned amendment to the Labour Standards Act, in principle, employers will be required to make employees use their annual paid leave of five days per year and to specify the dates if such employees are granted ten days or more annual paid leave per year.

An employee may take annual paid leave on an hourly basis up to the number of hours equivalent to five days, if an appropriate labour-management agreement has been concluded.

Companies are not required to purchase out unused annual paid leave when employees leave companies unless otherwise provided in the work rules or employment contracts.

*Sick leave* – an employer is not required to grant paid leave to an employee who is absent from work as a result of illness or injury, unless the work rules or employment contract provide otherwise.

*Maternity leave, childcare leave, family care leave* – a pregnant employee is entitled to maternity leave for a period of six weeks before the expected date of birth and eight weeks after the birth. An employee who lives with and is raising a child up to one year of age (and in some cases, up to 18 months of age) is eligible for child care leave. In addition, employees are eligible for family care leave of up to 93 days to care for a family member. These absences are unpaid unless otherwise provided in the work rules or the employment contract. An employee will generally receive an allowance equivalent to a certain percentage of their base salary under the national unemployment insurance scheme during these periods.

*National holidays*<sup>7</sup> – There are currently 15 national holidays in Japan (from 2016, there will be 16 national holidays.). While not legally required, many employers recognize the national holidays as holidays to provide additional holiday work allowance for workers who are required to work.

<sup>6</sup> Classification as a “discretionary worker” is limited to certain professions defined under the law (e.g., lawyers, certain types of engineers) and is subject to certain other limitations and requirements.

<sup>7</sup> A national holiday does not always mean a statutory holiday mentioned above.

## Wages

There are two types of minimum wage.

A *district minimum wage* applies to all employees in a district regardless of their age or experience. A *minimum wage by industry* applies to employees working in a particular type of industry, excluding those under 18 years of age or aged 65 years or older. The wages of Japan-resident employees must be:

- paid in Japanese yen in cash (although payment by bank transfer is common, and is permitted as long as the employee agrees to it);
- paid directly to each employee;
- paid in full (an employer cannot set-off its obligation to pay wages to an employee against any monetary obligations the employee owes to the employer without the employee's consent); and
- paid at least once a month on a specified date.

## Taxation

How an individual is taxed in Japan depends upon whether they are classed as a non-resident, temporary resident or permanent resident. Permanent residents are taxed on their worldwide income, regardless of where it is earned and where it is paid. Non-residents are taxed only on Japanese source-income. Temporary residents are taxed on Japanese

source-income and income that is earned outside of Japan but paid to them in Japan. The tax rates on ordinary income range from 5% to 45%.

Employers are responsible for making withholdings for employees and making a year-end adjustment for employees who earn less than JPY20 million per year.

## Pensions

Japan has a government sponsored pension plan that an employer and employee each pay into. The plan pays to an employee benefits if the employee has been paying into the system for at least 25 years (although this is scheduled to be amended to ten years in April 2017).

All individuals employed in Japan pay into the system, even foreign nationals working in Japan, unless they are nationals of a country which has a social security treaty with Japan and can meet the requirements under the relevant treaty. If certain requirements are met, foreign nationals may have a portion of their payments refunded after leaving Japan, but this refunded portion is limited.

Many companies establish private pension plan such as defined contribution pension plans and defined benefit pension plans while it is not statutorily required to do so.

## Retirement Allowances

There is no legal requirement that employers provide a retirement allowance. However, many Japanese companies stipulate a

mandatory retirement age within the work rules and elect to provide a retirement allowance (a one-time lump sum payment) when an employee retires. The retirement allowance is generally calculated with reference to the years of service, and in most cases is payable when an employee leaves the company even prior to reaching retirement age.

### **Workplace safety and health**

Employers are required to keep the workplace reasonably safe and clean. Employees are required to follow the instructions of their employers regarding health and safety.

Depending upon the number of employees and the kind of work involved, an employer may be required to appoint a safety and health promoter or a health promoter, a health supervisor and/or a safety supervisor at its workplace, including a physician who is available to see employees. Further, employers with 50 or more employees are required to form a health committee, and employers of certain industries with 50 (or 100 for some industries) or more employees are required to form a safety committee (or a health and safety committee in place rather than forming two different committees).

Recently, claims for stress related mental illness or fatigue caused by work have increased in Japan. If employees make a claim for a stress related illness caused

by work, employers are often placed into a difficult position of arguing that the employee's illness is not work related.

Employers are required by law to provide an annual health checkup for all employees. There are many clinics that cater to organizations that require this service. Also, employers are required to provide stress checkups for employees under certain conditions.

### **Data privacy**

The receipt, maintenance of and access to personal information relating to an individual is regulated by the *Act on the Protection of Personal Information*. A proposed amendment to the privacy law was submitted to the Diet in March 2015. The definition of personal information under the current act is information about a living individual which can identify the specific individual by name, date of birth or other description contained in such information. The proposed amendment would clarify that personal information also includes information such as fingerprint data, facial-recognition data, passport numbers and driver's license numbers. In addition, the amendment will likely provide that an employer cannot obtain sensitive information such as race, religion, social status, medical history and criminal records without the individual's consent.

Generally speaking, upon the collection of such information, the collector must notify the person of the purpose of the use of such information, and thereafter must take necessary and proper measures to prevent leakage or loss of the information and take other reasonable steps to control the security of the personal information.

In addition, the party maintaining such information is required to adopt internal regulations designed to ensure the confidential and secure maintenance of such information as long as it is held. Disclosure of personal information to third parties is strictly limited. Parent and affiliated companies are considered third parties and a Japanese entity is, in principle, not permitted to freely exchange employee information to its related entities. Certain service providers, such as payroll service providers, are not considered to be third parties in some circumstances. Also, the amendment provides that when a company intends to provide personal information to a third party overseas, in principle, the company must obtain prior consent from the individual.

## FIRING

As previously mentioned, Japanese labour laws offers strong protections to employees. There is no concept of ‘at-will’ employment in Japan and termination of employees generally must be for ‘cause’.

### Dismissal for cause

The main point to keep in mind for employers in Japan is that *it is very difficult to terminate employees*. Behavior and performance that would clearly be “cause” for dismissal in many jurisdictions would not be considered sufficient to warrant termination in Japan. While employers do have a right to dismiss employees, a dismissal will be regarded as an ‘abuse of rights’ under Japanese law and therefore invalid, if a court determines that the dismissal lacks ‘reasonable’ grounds and is not ‘socially acceptable’. In general, this is a very high standard to meet. The following grounds of termination may possibly be considered ‘reasonably and socially acceptable’, although the validity of any termination will depend on the individual circumstances in each case:

- serious misconduct – such as theft or violence in the workplace;
- serious insubordination and failure to correct the action after clear warnings are given;
- serious and on-going poor performance, after formal warnings have been given, training has been provided and other positions have been explored, and it is determined that the training is ineffectual and no other suitable positions exist;
- provision of material false information about one’s background that impacts performance (such as claiming to be

fluent in a foreign language and having very limited language skills where such skills are definitely required for the position); and

- a loss of or significant and continuous lack in ability/capability to perform work duties (such as non work-related sickness or injury).

The grounds for dismissal should be stated in the work rules and employment letter. However, an employer must, in all cases, have valid reasons for terminating an employee in Japan and this applies irrespective of whether or not the work rules or an employment contract purports to give the employer an express right to terminate the employment relationship under certain circumstances. Simply placing the grounds for dismissal in the work rules and employment letter cannot validate what is otherwise an invalid termination. For example, if the work rules state that insubordination is grounds for dismissal, this will not validate a termination for minor insubordination by an employee.

### **Reductions in force**

During the recent financial crisis and recession, many employers have considered downsizing their workforce in Japan. Case law in Japan has developed four requirements which must be met in order to justify terminations based on the economic conditions of the company. The conditions are:

- (a) there must be a strong economic necessity to reduce the workforce;

- (b) there must be a necessity to terminate employees, in other words, the employer must have taken all reasonable steps to avoid terminations;
- (c) the employees to be dismissed should be selected using a reasonable and fair standard; and
- (d) termination procedures must be reasonable and proper.

When undertaking an analysis based on these factors, courts tend to review the overall circumstances of the dismissal and consider the termination on a case-by-case basis. In practice, it is extremely difficult for an employer to satisfy these four requirements. Typically, reductions in force are achieved through “early retirement” or “voluntary separation” programs or severance packages offered to employees.

### **Notice of termination**

Employers must give at least 30 days’ notice of dismissal or provide payment of base salary in lieu of notice. This also applies to disciplinary dismissals, although an employer can dismiss an employee without notice (or payment in lieu) if it obtains prior approval from the Labour Standards Inspection Office; this is very rare.

### **Resignation**

It is customary for the work rules to specify that an employee must give 30 days’ notice of resignation. However, under the Japanese Civil

Code, employees may generally terminate an employment agreement with two weeks' notice. The Civil Code will prevail over any longer requirement contained in the work rules or a contract and if an employee insists on two weeks' notice, such notice will be valid.

### **Retirement**

It is common for employers to specify a retirement age in the work rules. There is a prohibition on setting the retirement age at less than 60 years of age. In circumstances where the retirement age is set at less than 65 years of age, the law requires an employer (1) to raise the retirement age to 65 years of age, (2) to establish a system to re-employ employees who wish to work past the retirement age until they reach 65 years of age or (3) to abolish the provision providing the retirement age. Only employers which already executed a labour-management agreement regarding re-hiring criteria for employees who wish to work through 65 years of age by March 31, 2013 can apply such criteria until March 31, 2025 for limited circumstances and can re-hire only employees who meet the criteria.

### **Confidential information/post-termination restrictive covenants**

Confidential information that is disclosed to, or becomes known to employees is often protected by Japanese employers through confidentiality/non-disclosure agreements in employment contracts or the work rules, as well as with restrictive covenants or non-compete agreements. These kind of restrictive agreements are permissible and could be enforceable in Japan provided that they are reasonable in scope and duration. Enforceability is highly dependent on the circumstances of each case. Factors such as the type and sensitivity of the confidential information that will become known to the employee and the potential damage to the employer must be considered when drafting such provisions. Japanese courts will closely examine the geographic scope covered by any restraint agreement, whether the restraint is necessary to protect a legitimate business interest and whether reasonable consideration was given to the employee.

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