



## An overview of Japanese employment law

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*Japanese employment law is employee-friendly and rife with pitfalls for employers. From hiring to firing, there are issues unique to Japan to consider when deciding whether to offer employment in Japan.*

Employees in Japan enjoy significant protection under Japanese employment law and through well-established court precedents. Guidelines and notices issued by the Ministry of Health, Labour and Welfare (MHLW) are also employee-friendly. In addition, cultural norms and societal expectations such as the traditional concept of 'lifetime employment' play important roles in the employer/employee relationship.

### **The employment offer and work rules**

Employers must provide employees with certain terms of employment in writing. Japanese employment contracts are short and simple, and usually supplemented by the work rules. There is no requirement that the contract be in Japanese.

Employers with 10 or more employees must create work rules and file them with the Labour Standards Inspection Office. The work rules are an important part of the employment contract and must stipulate certain terms and conditions of employment, such as wages, working hours and leave, termination and discipline. Work rules must be submitted to a representative of the majority of employees (or a majority union if one exists) for comment prior to filing. If there is any discrepancy between the work rules and the employment contract, the provision that is most favourable to the employee takes priority.

### **Fixed-term contracts**

Due to difficulties associated with terminating employees, employers are increasingly hiring employees for fixed terms of employment. Fixed-term agreements are generally required to be for three years or less. If the contract is renewable, the criteria to be used when making the renewal decision must be provided in writing at hiring. If an employee works continuously for more than five years on fixed-term agreements with one or more renewals, the employer must convert the employment period into an indefinite term if the employee makes such a request.

### **Staffing agencies and probationary periods**

The use of dispatched employees is popular because the employment relationship remains with the dispatching agency. This eases some of the difficulties associated with terminations. The area is heavily regulated and there are limitations on the positions that can be filled by dispatched employees and time limits on how long dispatched employees can be used for the same position. Violations of the rules could result in the receiving company being deemed to have made an offer of employment to the dispatched employee. The government is currently deliberating on further amendments regarding, for instance, the time limits for which dispatched workers can be used.

Probationary periods are common in Japan. They are typically three to six months and should not exceed one year. Even during or at the end of the probationary period, an employee can be terminated only if the termination is objectively reasonable and socially acceptable. Although, this test is somewhat easier to meet for probationary employees, it may still be difficult to justify the termination.

### **Overtime and late-night work**

The minimum overtime allowance is 125% of the employee's salary. In addition to this overtime allowance, there is an allowance of 25% of salary for late-night work between 10pm and 5am. There are numerous types of overtime allowances such as overtime on a rest day, late-night overtime on a rest day, and overtime in excess of 60 hours per month that can increase the allowance to up to 175% of the employee's salary. 'Managers' do not receive overtime allowances but are entitled to late-night work allowances.

Employers are required to enter into and annually renew a labour-management agreement with the representative of a majority of the employees (or a majority union if one exists) before requiring any employee to work overtime.

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### **Leave rights**

**Annual leave:** newly hired employees are generally granted 10 days’ paid annual leave after the completion of six months’ service. The entitlement rises by one day a year for the following two years and by two days a year thereafter, up to a maximum of 20 days. Unused leave expires after two years. Employers are not required to buy unused annual leave.

**Sick leave:** there is no requirement to grant sick leave unless the work rules or employment contract provide otherwise.

**Maternity, childcare and family care leave:** expectant mothers are entitled to six weeks’ leave before the expected delivery (14 weeks for multiple births) and eight weeks after giving birth. An employee raising a child of up to one year old (or one and a half under some conditions) is eligible to take childcare leave until the child reaches one (18 months in special cases). Childcare leave must be taken at once and not as several short leave periods. Employees can also take family care leave for up to 93 days. These leave periods are generally unpaid.

### **Terminations based on performance or misconduct**

Terminations in Japan can be exceedingly difficult. An employee can be dismissed only if the employer has objectively reasonable grounds to do so and the dismissal would not be considered unreasonable in general societal terms.

Poor performance or misconduct that justifies termination in other countries often does not warrant it in Japan. A termination that is not justified will be deemed an abuse of the employer’s termination rights. Such a termination is a nullity and the employee will be reinstated with back pay if the employee seeks such relief. The grounds for dismissal should be stated in the company’s work rules and/or employment contract. However, even if an action is stated to be a ground for termination in the work rules and/or employment contract, such a provision will not be enforceable if a court deems it too harsh. Due to the difficulty in justifying a termination, many employers offer severance agreements and pay some consideration in exchange for the employee’s voluntary resignation and waiver of claims against the employer. Employers must give at least 30 days’ notice of dismissal or provide payment in lieu of notice.

### **Reductions in force and redundancy terminations**

There are no redundancy statutes in Japan. Courts use a four-part test to determine whether terminations based on the economic conditions of the company are justified.

The elements are: (i) economic necessity; (ii) the employer must have taken reasonable steps to avoid terminations; (iii) the employees to be dismissed should be selected using reasonable and fair standards; and (iv) termination procedures must be reasonable. It is extremely difficult for an employer to satisfy this test. As such, reductions in the workforce are usually achieved through the offer of severance packages.

### **Retirement, pensions and allowances**

There is a prohibition on setting the retirement age at below 60 years. When the retirement age is lower than 65, the employer must (i) raise the retirement age to 65; (ii) establish a system to re-employ employees who wish to work past the retirement age until they reach 65; or (iii) abolish the retirement age.

There is a national pension plan to which employers and employees contribute. Employees receive benefits if they have paid into the plan for about 25 years (this may be lowered to 10). Foreign nationals are required to join the plan, unless they are from a country with a social security treaty with Japan and meet the treaty requirements. Foreign nationals who have contributed to the pension scheme may have a portion of their contributions refunded to them after they leave Japan.

Employers are not required to pay retirement allowances to employees. However, many employers pay a one-time, lump-sum payment based on the length of service. In addition, employers are increasingly offering private pension plans to employees.

### **Post-termination restrictive covenants**

Non-compete clauses are permissible. Whether the provisions are enforceable is determined case by case. Courts will examine many factors, including the geographic scope of the restraint, whether it protects a legitimate business interest and whether consideration is paid to the employee. There is no specific amount that must be paid, but nominal amounts will probably not help an employer seeking to enforce a non-compete covenant.

### **Conclusion**

Japanese employment laws appear to be fairly typical and easy to comply with on an initial reading, but there are many unwritten rules, court precedents and cultural norms that impact how the laws are interpreted and applied, such as guidelines and notices issued by the MHLW. These rules, precedents and norms need to be taken into account before action is taken to avoid potential traps and disputes with your workforce in Japan.