PANORAMIC NEXT

Labour & Employment

JAPAN

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In this *Panoramic Next* guide, leading employment law practitioners from across the globe discuss the most consequential recent trends and developments that employers should know about, while also sharing their insights into best practices and potential future developments.

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Japan

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ABOUT

Ayako Kanamaru is a partner of Oh-Ebashi LPC & Partners. Her employment practice covers all areas of employment management issues, including harassment, reorganisation, redundancies and labour disputes before the courts. She regularly represents multinational and domestic companies and provides flexible advice considering each client's industry.

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Q&A

WHAT ARE THE MOST IMPORTANT NEW DEVELOPMENTS IN YOUR JURISDICTION OVER THE PAST YEAR IN EMPLOYMENT LAW?

The working-age population is declining in Japan due to a declining birthrate and an increasing number of elderly people. To address this issue, the 'work style reform' has been promoted to improve working environments and promote flexible and diverse work styles. Two key developments in this regard are the upper limit on overtime work and the passage of an act to protect freelancers.

Upper limit on overtime

The grace period for the application of the upper limit on overtime work regulation (per Limit Regulation) for some industries has ended and employers in all industries must comply with such regulation.

In Japan, the Labour Standards Act (LSA) stipulates that working hours should, in principle, be no more than 40 hours per week and eight hours per day, and an employer must conclude a labour-management agreement in case an employer causes its employees to engage in overtime work. The upper limit on the hours worked in excess of the statutory working hours is stipulated in the LSA, which was amended by the 'work style reform.' Specifically, the principle of the Upper Limit Regulation is that overtime work should be limited to 45 hours per month and 360 hours per year. And even in cases where there are temporary special circumstances and a labour-management agreement is executed, the upper limit should be less than 100 hours of overtime and holiday work per month, 720 hours of overtime per year and an average of 80 hours of overtime and holiday work for any two to six month period.

These revisions aim to ensure workers' health, improve labour productivity and work-life balance.

The Upper Limit Regulation was applied from April 2019 (from April 2020 for small and medium-sized enterprises) except for the construction industry, automobile industry and doctors. For such industries, it was applied from April 2024, when the grace period ended.

Specifically, for construction, the regulation is applied to all cases except for restoration and reconstruction work in the event of a disaster. As for the automobile industry, the upper limit on overtime working hours for cases with a special clause in a labour-management agreement is 960 hours. As for doctors, the upper limit on overtime working hours for cases where a special clause is included in a labour-management agreement is 1,860 hours as a maximum depending upon certain job levels.

The Freelance Act came into effect

The Act on Ensuring Proper Transactions Involving Specified Entrusted Business Operators (Freelance Act) to protect persons working as freelancers came into effect in Japan in November 2024. In light of the diversification of working styles in Japan, the Freelance Act aims at optimising transactions and improving the work environment for freelancers so they can stably engage in the services with which they have been entrusted as enterprises, thereby contributing to the sound development of the national economy.

For the optimisation of such transactions, the Freelance Act requires a client enterprise that has outsourced work to a freelancer to indicate matters such as the details of the work and the amount of remuneration. It also requires the client enterprise to pay remuneration to the freelancer by a certain deadline, which is set within 60 days after the completion of the work or the delivery of the product. The Act prohibits a client enterprise that has outsourced work to a freelancer from engaging in the following acts:

- refusal to receive the work from the freelancer without grounds attributable to the freelancer;
- reducing the amount of remuneration without grounds attributable to the freelancer;
- returning the delivered product or creation to the freelancer without grounds attributable to the freelancer;
- unjustly setting an amount of remuneration at a level conspicuously lower than the price ordinarily paid; and
- coercing the freelancer to purchase goods or use services as designated by the client enterprise without good reason.

The Act also provides that the client enterprise must not unjustifiably harm the interest of the freelancer by:

- causing the freelancer to provide money, services or other economic gains to the client enterprise; or
- causing the freelancer to change the details of the work or perform the work again without grounds attributable to the freelancer.

The Act also makes it obligatory for a client enterprise to consider the balance between work and childcare/family care. Also, the client enterprise is required to take measures to establish a necessary system for dealing with harassment of freelancers, such as creation of a consultation service.

In light of the Freelance Act, companies that engage freelancers have reviewed their agreements and transactions with freelancers, and taken necessary measures to comply with the law.

WHAT UPCOMING LEGISLATION OR REGULATION DO YOU ANTICIPATE WILL HAVE A SIGNIFICANT IMPACT ON EMPLOYMENT LAW IN YOUR JURISDICTION?

In recent years, the Childcare and Caregiver Leave Act has been actively revised to enable employees to balance work with childcare and nursing care, and, especially, the rate of men taking childcare leave is increasing.

The amendment to the Act on Childcare Leave, Caregiver Leave, and Other Measures for the Welfare of Workers Caring for Children or Other Family Members (Act No. 76 of 1991) (the Childcare and Caregiver Leave Act) will come into effect in phases in April and October of 2025.

As the amendment to the Childcare and Caregiver Leave Act covers a wide range of issues, we will not go into all the details, but this article will explain the main changes. What is important for companies is that it is inevitable that companies will need to revise their Childcare and Caregiver leave rules, which are part of the employment regulations, in compliance with the amendment, and early action is required. The main revisions are as follows.

Currently, short-term leave to care for sick or injured children is allowed until the child joins elementary school, but the scope of eligible children will be expanded to include children who have completed the third grade of elementary school. This expansion has impacted the scope of the employees who are entitled to enjoy this leave. In addition to this expansion, school entrance ceremonies and graduation ceremonies will be added to the circumstances where an employee is eligible to use this leave. Additionally, previously, employees who had been employed for less than six months could be exempted from such leave, but this will no longer be the case.

Workers raising children under the age of three may request exemption from restrictions on overtime work. After the revision, the scope of workers who can make a claim will be expanded to include workers who are raising children who are not yet enrolled in elementary school.

The three revisions above will take effect on 1 April 2025.

Furthermore, from 1 October 2025, employers will be required to select and take two or more of the following five optional measures for employees who are raising children aged three or older and not yet of elementary school age.

1. Changes to start times;
2. Introduction of remote work system (10 days or more per month);
3. Establishment and operation of childcare facilities, etc;
4. Granting leave to support balancing childcare and work for 10 days or more; or
5. Introduction of a short-time working system, including measures to cap the scheduled daily working hours at six hours in principle.

Regarding (3), for most companies, since it is not realistic to operate childcare facilities by themselves, this can be covered by introducing arrangements for babysitters and covering the cost.

Leave under (4) above can be non-paid.

In terms of (2) and (4) above, in principle, employees shall be eligible to choose remote work or to take leave on an hourly basis.

These changes will affect the allocation of human resources of companies and require companies to consider which systems to introduce in advance, taking into account its business and human resource environment.

In addition, for the systems introduced by an employer from the above list, during the one year up to one month before the worker's child turns three years old (ie, from the time the child is one year and 11 months old to two years and 11 months old), the employer must inform the worker in principle, in a meeting (including online) or writing, of the details of two or more systems introduced by the employer, the contact point for applying to use the system (HR department, etc), and the systems regarding restrictions on an exemption from overtime, restrictions on overtime work and late-night work, and confirm such worker's intentions individually.

HOW HAS THE #METOO MOVEMENT IMPACTED THE INVESTIGATION OR SETTLEMENT OF HARASSMENT OR DISCRIMINATION CLAIMS IN YOUR JURISDICTION?

In Japan, the highest profile #MeToo movement case involved a female journalist who went public using her real name in 2017 with the sexual assault she suffered at the hands of a male journalist. Although the criminal case was not prosecuted due to insufficient evidence, the victim filed a civil lawsuit for damages against the male journalist. In July 2022, the Supreme Court turned down the appeal from the male journalist, and the Tokyo High Court decision, which found that he had committed the sexual assault and ordered him to compensate the victim for damages in the amount of ¥3.32 million, was finalised.

During the period the #MeToo movement was spreading, in 2019, several not-guilty verdicts were handed down at the district court level in sexual assault cases due to the high burden of proof in criminal cases. This led to the spread of a demonstration movement called the Flower Demonstration, in which people wore flowers to appeal for the eradication of sexual violence.

After these movements, the revised Penal Code was passed by the Diet and came into effect in July 2023, unifying the crimes of 'forcible sexual intercourse' and 'quasi-forcible sexual intercourse' into 'sexual intercourse without consent.' As the provisions of the previous forcible and quasi-forcible sexual intercourse crimes were abstract in wording, and there is a high burden of proof in criminal cases, convictions were difficult to obtain. Through this unification, sexual acts without consent were clarified as a crime, and in addition to the 'assault and threat' stipulated in the old law as a requirement for punishment, eight specific acts such as 'use of economic and social status,' 'causing fear and surprise' and 'psychological reactions caused by abuse' were also stipulated. Furthermore, under the revised Penal Code, the country's age of consent for sexual intercourse was raised to 16 from 13.

In addition, sexual assaults in the entertainment industry have come to light and in recent years, the sexual assault of minors perpetrated by the founder of Johnny & Associates (the company name was changed and is currently SMILE-UP. Inc), one of the leading talent agencies in Japan, has become a major issue. Several years passed after the founder, Johnny, passed away, in March 2023, BBC News brought these sexual assaults to light. After the BBC's report, several victims spoke out in public about the sexual abuse they had suffered, and more and more victims spoke up. The company set up a special team of outside experts to prevent a recurrence and the team submitted an investigation report in August of 2023. In this report, the facts of sexual abuse committed by Johnny in the past were acknowledged, and the team proposed measures to prevent a recurrence, including compensation for the victims. After that, the company set up a victim relief committee (the Committee) and indicated that it would provide compensation that exceeded the legal requirements, including reducing time barriers and evidence. The Committee explained that the compensation is calculated taking into account the degree of harm and the horrific nature of the harm such as the nature of the offence, the duration and frequency of the offence, and the age of the victim at the time of the offence, considering the characteristics and particularities of this case, and it also takes into account the amount of compensation for emotional distress and residual disability.

In Japan, sexual harassment in the workplace is defined as 'acts in the workplace that cause an employee to suffer disadvantages in their working conditions or harm to their work environment due to sexual conduct, and the employee's response to such sexual conduct' under the Equal Opportunity Act. Also, it provides that employers must take necessary measures to prevent sexual harassment in the workplace. Furthermore, the sexual harassment guidelines issued by the Ministry of Health, Labour and Welfare (MHLW) specify the details of specific preventive measures, including (1) clarifying and promoting policies on sexual harassment prevention, (2) establishing a system to respond appropriately to employee consultations, (3) ensuring prompt and appropriate responses after incidents, (4) protecting the privacy of those involved in consultations or post-incident responses and (5) raising awareness about the prohibition of adverse treatment based on consultations or cooperation in light of the facts. These statutory requirements were available before the #MeToo movement but not many cases were reported to companies and systems to handle such issues were immature.

Owing to the recent amendment of the Whistleblower Protection Act, companies with more than 300 employees are obliged to establish necessary systems to respond appropriately to internal reports from June 2022. Although acts subject to reporting under this Act are limited, harassment issues, including sexual harassment, are increasingly being reported to companies and such cases have become one of the most reported issues in internal reporting systems.

According to the laws and guidelines above, the employer is required to take specific preventive measures and respond appropriately, including conducting sufficient investigation into the facts. Not only for employees in an employment relationship but also for freelancers, a client enterprise is required to take measures to establish a necessary system for dealing with the harassment of freelancers under the Freelance Act.

WHAT ARE THE KEY FACTORS FOR COMPANIES TO CONSIDER REGARDING THE ENFORCEMENT OF RESTRICTIVE COVENANTS AGAINST DEPARTING EMPLOYEES?

Restrictive covenants, such as non-compete clauses and non-solicitation clauses, are often included in the work rules, employment agreements and/or separate agreements. Basically, these covenants are agreed voluntarily between the parties and considered valid unless the covenants are so extensive and restrictive as to be considered to be against public policy or morality.

Since employees are not legally obliged to and have no incentive to, accept restrictive covenants, it is extremely difficult to include such covenants, especially non-compete clauses, in a separate agreement when an employee is departing unless fair special compensation is offered.

Therefore, such covenants, if necessary, need to be proposed and accepted upon joining a company either in the form of an employment agreement or a special agreement, because, at such time, the company has bargaining power over its employees.

At the same time, it is important to note, however, that an employee is guaranteed the freedom to choose his or her occupation (article 22(1), Constitution of Japan) and such guarantee of freedom includes the right to secure the employee's livelihood. Any non-compete clause that restricts this freedom, therefore, comes with the inherent risk that it will threaten the employee's livelihood. Accordingly, non-compete clauses will be deemed contrary to public policy and void if the restrictions go beyond what is considered necessary and reasonable, taking into consideration various factors, such as the following:

- whether it is intended to protect the legitimate interests of the employer;
- the employee's position before resignation;
- the types and scope of business to be restricted;
- the geographical area covered;
- the period during which competition is prohibited; and
- whether the employer provided compensation.

There are plenty of court cases regarding this issue, however, such judgments vary case-by-case, and it is extremely difficult to find specific criteria for judgment of whether a non-compete clause is contrary to public policy.

Generally, the narrower the scope of the restriction, the less likely that a non-compete clause will be considered contrary to public policy and void. For employers that wish to include a non-compete clause that generally prohibits an employee from working directly or indirectly in competition with the company's business, it is understood that the standards for determining enforceability are quite high and the company must consider paying significant compensation in exchange for such a covenant. However, instead of seeking such broader restrictions, for example, if the employer includes a non-compete clause that specifically prohibits an employee from joining a direct competitor (identifying such competitors), the cases where such a non-compete clause is deemed to be contrary to public policy seem to be decreasing. In any event, when drafting non-compete clauses, all of the above factors should be adequately taken into account for such clauses to be valid and enforceable.

In contrast to non-compete clauses, non-solicitation clauses specifically included in the employment agreement or a separate agreement at the time of resignation do not, in principle, restrict any right guaranteed under the Constitution of Japan, and such clauses are generally considered to be enforceable.

IN WHICH INDUSTRY SECTORS HAS EMPLOYMENT LAW BEEN A HOT TOPIC RECENTLY? WHY?

The construction and logistics industries are drawing attention considering the recent application of the Upper Limit Regulation applied from April 2024.

In addition to the application of the Upper Limit Regulation, for vehicle drivers in the logistics industry, the revised improvement standards notice issued by the MHLW (Revised Notice), which is enforced through administrative penalties under the Freight Motor Vehicle Transportation Business Act, was applied to regulate the total hours truck drivers spend at work (working hours plus rest periods), and further strengthened so that allowable working hours are shorter than before. The background of this amendment is that the vehicle transport industry has the highest number of work-related injuries, and the long working hours and excessive work by truck drivers were becoming an issue in Japan.

As a result of these amendments, it has been suggested that if no specific measures are taken, there is a possibility that transport capacity will be limited by a certain percentage based on the statistics of the Ministry of Land, Infrastructure, Transport and Tourism. There are cases where what could previously be transported by one person in one day now needs to be transported by two people over two days. For long-distance transport, if the same operating methods as before are used, there is a possibility that they will violate the Revised Notice in relation to working hour regulations.

Thus, in the logistics industry, it is necessary to review the way drivers work and the way transportation is carried out to comply with the employment regulations and meet the needs of businesses.

Further, industries that do a lot of business with freelancers, such as logistics and IT services, are also required to comply with the Freelance Act, including the conclusion of contracts, reviewing transactions and taking required measures.

WHAT ARE THE KEY POLITICAL DEBATES ABOUT EMPLOYMENT CURRENTLY PLAYING OUT IN YOUR JURISDICTION? WHAT EFFECTS ARE THEY HAVING?

In the Liberal Democratic Party presidential election held in September of 2024, the relaxation of dismissal regulations became a topic of discussion.

There are a wide range of issues surrounding dismissal, and it is often the subject of political controversy whether to introduce a system in which, in the event of an invalid dismissal, the employer pays a certain amount of money at the employee's request and the employment agreement is terminated upon such payment.

Regarding the monetary settlement system when dismissal is invalidated, the Working Conditions Subcommittee of the Labour Policy Council of the MHLW published a report in May of 2017 on the 'Study Group on the State of a Transparent and Fair Labour Dispute Resolution System, etc'. Upon issuing the report, the MHLW set up a study group consisting of experts in labour law, civil law, and civil procedure law, and has been discussing, analysing and sorting out technical and/or legal points for its introduction and disclosed its findings in a report in April of 2022.

In response to this report, the Japanese Trade Union Confederation, or RENGO issued a statement criticising the report and demanding that a situation must be created in which unfair dismissals do not occur, and that such monetary settlement system may legitimise unfair dismissal or be used as a means of restructuring.

In Japan, employers are not allowed to dismiss employees at their will like in the United States, and strict requirements must be satisfied for dismissal to be valid. Article 16 of the Labour Contract Act (Act No. 128 of 2007), which was enacted to formulate the accumulation of previous court precedents, states that 'If a dismissal lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, it is treated as an abuse of rights and is invalid.' Courts have interpreted this provision strictly in favour of workers.

Therefore, the hurdles for companies to dismiss an employee due to poor performance or business reasons such as restructuring are extremely high and there always remains a risk that the dismissal will be invalidated. As a result of such risk, employers will not be able to predict the validity of a dismissal, which hinders job mobility in the labour market.

Under the current Japanese system, when dismissing an employee, in case the dismissal is contested, the supervisor or person in charge is required to spend a reasonable amount of time collecting evidence regarding the employee's poor performance. Upon the collection of the relevant evidence, the company shall give strict warnings, provide opportunities for improvement and confirm that there are no signs of improvement in advance of the dismissal. However, even if the company takes all such necessary preparations, there is no way to predict whether the dismissal would be considered valid. In practice, when dismissal is contested in labour tribunals or courts, many cases are resolved through mutual settlement, but the amount of settlement money varies on a case-by-case basis, and some cases include one or two years' worth of monthly salary or more. Furthermore, even if a certain reason for dismissal is recognised, if the circumstances do not justify the dismissal and the employee wishes to return to work, even if the company offers a severance package, the employee will still have a right to remain employed until retirement.

In response to the current situation, by introducing a monetary settlement system in the event of invalidation of dismissal, companies will be able to convert the risk of dismissal into monetary terms and to foresee the risks associated with scheduled dismissal. As a result, it is expected that it will be easier to hire new employees to start new businesses.

The Inside Track

WHAT ARE THE PARTICULAR SKILLS THAT CLIENTS ARE LOOKING FOR IN AN EFFECTIVE LABOUR & EMPLOYMENT LAWYER?

When it comes to labour matters, if clients wish to resolve them risk-free, client's options will be limited and client's costs will increase as a result. Therefore, after appropriately assessing risks, we present a concrete solution for resolving labour issues practically and effectively and provide our clients with the necessary measures and communication strategies in an easy-to-understand manner.

WHAT ARE THE KEY CONSIDERATIONS FOR CLIENTS AND THEIR LAWYERS WHEN HANDLING EMPLOYMENT DISPUTES?

In practice, many employment disputes are resolved through court or out-of-court settlements. Therefore, while seeking to obtain a judgment in favour of the client at trial, we must consider when and under what conditions it would be in the best interest of the client to reach a settlement and discuss with the client at every stage. Based on such considerations, we always suggest what steps should be taken to lead to a desirable settlement and to achieve a settlement in favour of the client.

WHAT ARE THE MOST INTERESTING AND CHALLENGING CASES YOU HAVE DEALT WITH IN THE PAST YEAR?

We regularly handle cases of investigations into harassment-related allegations. These cases are challenging because where there are conflicting statements or no witnesses, there are limitations on what the investigation can discover, and it is often difficult to determine whether harassment has occurred. In case the accused person was part of the top management of the company, the matter also affects corporate governance issues. We provide our clients with detailed advice, including preservation of evidence, communication with employees and interviews with related personnel, to determine the facts and propose appropriate remedial measures.

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