

# Japan

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## SCOPE OF LAWS

### 1. Do the main laws that regulate the employment relationship apply to:

- Foreign nationals working in your jurisdiction?
- Nationals of your jurisdiction working abroad?

#### Laws applicable to foreign nationals

Japanese laws generally apply to all employees working in Japan regardless of their nationality. However, where an expatriate is employed by an employer outside Japan and assigned to its Japanese branch or subsidiary, the expatriate and the employer usually agree to the foreign law being the governing law, either explicitly or implicitly. The agreement concerning the governing law is effective, provided that both of the following prevail, in the case of conflict with the governing law (*Act Stipulating General Rules for the Application of Laws of Japan*):

- Japanese public policy.
- Mandatory employment-related statutes, such as the Labour Standards Act.

#### Laws applicable to nationals working abroad

Regardless of the governing law provided in the employment agreement, Japanese laws concerning dismissals may apply to an employee who is employed by an employer in Japan and assigned to a branch or subsidiary outside Japan (*see Question 17*).

## EMPLOYMENT RESTRICTIONS AND INCENTIVES

### 2. Are there any age or nationality restrictions on managers or company directors? If so, please give details.

#### Age restrictions

There are no age restrictions specifically applicable to managers or company directors. However, there is a general restriction prohibiting the employment of a child. An individual is considered a child until the first 31 March after he reaches 15 years of age.

#### Nationality restrictions

There are no nationality restrictions on managers or company directors.

### 3. Are any grants or incentives available for employing people? If so, please give details.

There are various grants or incentives available for the employment of specific types of persons through the referral system at

the Employment Security Bureau (*Kokyo Shokugyo Antei Sho*). These persons include:

- Older persons.
- Disabled persons.
- Single mothers.

There is also a subsidy available for an employer who employs someone as its own employee who was originally employed by an agency, and dispatched to the employer by the agency (*see Question 12, Part-time employees*).

Finally, there is a tax incentive available for the employment of disabled persons.

## WORK PERMITS

### 4. What permits do foreign nationals require to work in your country? Please explain:

- How these permits are obtained.
- How much they cost.
- How long the process takes.

#### Required permits

Generally, resident status under a working visa is required for foreign nationals working in Japan under one of the following categories:

- Investor or business manager.
- Engineer.
- Specialist in humanities or international services.
- Transferee within a company of a company group.
- Professor.
- Artist.
- Person conducting religious activities.
- Journalist.
- Legal or accounting profession.
- Medical profession.
- Researcher.
- Instructor.



- Entertainer.
- Skilled labour.

### Obtaining permits

A foreign national can apply for a working visa by following the following consecutive steps:

- Applying for a certificate of eligibility from the immigration authority in Japan before entering Japan.
- Applying for a visa at a local Japanese consulate or embassy before leaving the foreign national's home country.
- Obtaining landing permission (that is, a working visa (*see above, Required permits*)) from a Japanese border official when arriving at the airport in Japan.
- Completing the alien registration procedures once living in Japan.

### Cost

The application fee for a working visa is normally JPY3,000 (as at 1 August 2010, US\$1 was about JPY86). Any fees charged by the lawyer assisting with the immigration procedures are additional to this amount.

### Length of process

The time usually required for this process is around four to seven weeks.

## TERMS OF EMPLOYMENT

### 5. What terms govern the employment relationship? In particular:

- Is a written employment contract or statement of employment terms required?
- Are any terms implied by law into the employment contract (in addition to the terms referred to in *Question 1*)?
- Are collective agreements with trade unions or employee representatives common (generally or in specific industries)?

### Written employment contract

Japanese law does not require a written employment contract for the hiring of an employee. However, on hiring an employee, the employer must notify an employee in writing of certain employment terms and conditions, such as the employee's (*Labour Standards Act*):

- Salary.
- Working hours and days off.
- Leave.
- Period of employment and termination.

### Implied terms

The Labour Standards Act and other relevant employment-related statutes provide minimum labour standards which are incorporated as terms and conditions of the employment agreement (for example, minimum standards for dismissal, salary, working hours and days off, overtime work, annual paid leave, maternity leave and work-related injury and sickness).

In addition, if an employer establishes work rules setting out the fundamental employment terms and conditions applicable to all employees or enters into a labour collective agreement with a labour union, those terms and conditions are incorporated into the employment terms and conditions (*see below, Collective agreements*).

### Collective agreements

A collective labour agreement with a labour union applies only to the union members. However, if 75% or more of the employees are members of the labour union, then this agreement applies to all of the employees. An employee can join a labour union and seek to be represented by it, whether it is an enterprise union organised within the employer or an external union. Collective bargaining in Japan between an employer and a union does not require a majority of the employees to be represented by that union.

## MINIMUM WAGE

### 6. Is there a minimum wage? If so, please give details, in particular whether it applies to all employees, regardless of their age and experience.

There are statutory minimum wages applicable to all employees regardless of age and experience, which vary depending on the location and type of industry. However, the wages of some types of employees, such as seriously disabled persons and employees on probation may be less than the statutory minimum wage, subject to the consent of the Chief of the Labour Bureau.

## WORKING TIME

### 7. Are there restrictions on working hours? If so, please give details.

Employees must work no more than (*Labour Standards Act*):

- Eight hours per day.
- 40 hours per week.

This excludes rest periods.

An employer is allowed to make its employees work beyond the statutory maximum working hours only when those hours are agreed in a labour-management agreement that has been both:

- Concluded with an employee representative or a union representing a majority of the employees.
- Filed with the Labour Standards Inspection Office.

### 8. Is there a minimum holiday entitlement? If so, please give details. How many public holidays are there in a year and are they included in the minimum holiday entitlement?

### Days off

Employees are entitled to at least either one day off per week, or four days off per four weeks (*Labour Standards Act*).



### Annual leave

It is not a legal requirement for public holidays (currently 15 days) to be included as days off.

An employer must grant, at a minimum:

- On the completion of six months' employment: ten days of annual paid leave.
- After 18 months' employment: 11 days.
- After 30 months' employment: 12 days.
- For each subsequent year of service: two more days of annual paid leave, up to a maximum annual paid leave allowance of 20 days.

## ILLNESS AND INJURY PAY

### 9. What rights do employees have to time off in the case of illness or injury? Is that time off paid? Can an employer recover from the state sick pay granted to its employees?

Employees are not statutorily entitled to time off or sick leave, either paid or unpaid, due to non-work-related injury or illness.

## PARENTS AND CARERS

### 10. What are the statutory rights of employees who are parents or carers (including those of disabled children and adult dependants)? How is employees' pay affected during periods of leave?

#### Maternity rights

A pregnant employee who anticipates giving birth within six weeks (or 14 weeks in the case of a multiple birth) can request leave from her employer (*Labour Standards Act*). The employer is not allowed to have a female employee work within eight weeks after giving birth, except where:

- She wishes to resume her duties after six weeks after giving birth.
- A medical doctor certifies that the resumption of her work will not cause any problems.

The employer does not have to pay for that leave unless the employment contract or the work rules provides otherwise, although mandatory health insurance will pay a proportion of the employee's salary (*see Question 20*).

#### Parental rights

An employee with a child under one year of age is entitled to childcare leave, subject to certain conditions up until the child's first birthday (in some specific circumstances, under 14 months or under 18 months) (*Act on the Welfare of Workers Who Take Care of Children or Other Family Members, Including Childcare and Family Care (Welfare of Workers who Take Care of Family Members Act)*).

An employee with a child who has not yet reached elementary school is also entitled to daily leave of up to five days (ten days in the case of multiple children) per year to care for a sick or injured child (*Welfare*

*of Workers who Take Care of Family Members Act*). A child attends elementary school on 1 April after he or she reaches six years of age.

An employee whose child is under three years of age is also entitled to a shortened working hours arrangement (six hours a day) for up to one year and either no overtime work or a reduced overtime work arrangement (*Welfare of Workers who Take Care of Family Members Act*).

The employer does not have to pay for leave or non-worked hours, unless the employment contract or work rules provides for this.

#### Carers' rights

Subject to certain conditions, an employee with a family member in situations requiring care is entitled to take (*Welfare of Workers who Take Care of Family Members Act*):

- Leave or shortened working hours for up to 93 days per person requiring care.
- Daily leave of up to five days per family member requiring care (ten days, in the case of multiple family members requiring care) per year.

The employer does not have to pay for leave or non-worked hours, unless the employment contract provides for this.

## CONTINUOUS PERIODS OF EMPLOYMENT

### 11. Does a period of continuous employment create any benefits for employees? If individual employees are transferred to a new entity, are they deemed to retain their period of continuous employment?

#### Benefits

Employee entitlements to annual paid leave increase with their period of continuous employment (*see Question 8, Annual leave*). Although it is not statutorily required, it is common for companies to have retirement allowance rules under which employees are entitled to a retirement allowance, the amount of which is calculated based on their period of continuous employment.

#### Transfer

If employees are transferred to a new entity, they will not retain their period of continuous employment unless they are transferred by way of a corporate transaction, such as a:

- Share transfer.
- Corporate merger.
- Company split (that is, where a company's rights and obligations are succeeded to by another company).

## TEMPORARY AND AGENCY WORKERS

### 12. To what extent are temporary and agency workers entitled to the same rights and benefits as permanent employees?

#### Contract employees

An employer can hire an employee for a fixed period (that is, as a contract employee). There is no limitation on the purposes which



contract employees are hired for. The period of employment of contract employees can be specified as being either:

- The period necessary for the completion of a specific project.
- Any fixed period not exceeding three years (in exceptional cases, this may be five years).

There are no statutes requiring that employers provide the same rights and benefits to contract employees that are provided to permanent employees.

Neither an employer nor a contract employee is allowed to terminate the employment agreement during the contract period unless both:

- The employment contract provides otherwise.
- There is an unavoidable reason that is considered more serious than one of the “justifiable causes” required to dismiss a permanent employee (see *Question 17*).

On the expiry of the fixed period, the employment agreement generally automatically terminates. Regardless of the fixed period in the agreement, an employer’s refusal to renew the period of employment requires a “justifiable cause” as if the situation involved the dismissal of a permanent employee, if either the:

- Employee has been working as if he is a permanent employee.
- Employer has given the employee an expectation of long-term employment in the course of hiring, employment, or renewal of the contract employee.

### Part-time employees

Employers can hire employees on a part-time basis, as well as on a permanent or fixed-period basis (see *above, Contract employees*).

Employers cannot engage in discriminatory treatment against part-time employees considered to be equivalent to full-time employees concerning (*Act on Improvement, etc. of Employment Management for Part-Time Workers*):

- Wage decisions.
- The implementation of education and training.
- The use of welfare facilities.
- Other treatment.

Employers are also required to provide their part-time employees with the opportunity to be promoted to full-time employees by taking any of the measures specified in the Act. Whether part-time employees qualify for the following depends on their working hours, period of employment and other conditions:

- Mandatory health insurance.
- Nursing-care insurance.
- Welfare annuity insurances.
- Social and employment insurance.

Licensed employment agencies can dispatch their employees (that is, agency staff) to clients on a temporary basis subject to various regulations (*Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Con-*

*ditions for Dispatched Workers*). If a client intends to continue using agency staff beyond the statutory limited dispatch period (usually one year, or three years if the opinion of the employees’ representative is obtained) for the same work at the same work location, the employer must offer direct employment to the agency staff at the agency staff’s request. For certain work to which the statutory limited dispatch period does not apply, the employer must offer direct employment to the agency staff irrespective of the agency staff’s desire to be employed by the company, if both:

- The client has used the agency staff for more than three years on a continuous basis.
- That client then desires to employ an individual directly to take on that work.

## DATA PROTECTION

### 13. What statutory data protection rights do employees have?

The Constitution provides privacy rights. In addition, the Act on the Protection of Personal Information protects the personal data rights of employees of business persons or entities that use and manage a database containing more than 5,000 persons’ personal data. The personal data of those employees cannot be:

- Used for any purpose other than the purposes specified in advance by their employer.
- Transferred or disclosed by their employer to a third party without their consent.

## DISCRIMINATION AND HARASSMENT

### 14. What protection do employees have from discrimination or harassment, and on what grounds?

#### Discrimination

Any discriminatory treatment concerning an employee’s wages, working hours and other working conditions by reason of the employee’s nationality, creed or social status is prohibited (*Labour Standards Act*). In addition, employers are prohibited from discriminating against employees on the basis of sex, including (*Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment*):

- Marital status.
- Pregnancy.
- Childcare.
- Other reasons relating to the employee’s sex.

There is no specific qualifying period for claims. However, there is a two year limitation period for wage claims, and the general limitation rules under the Civil Code apply to claims for damages (three years for claims under tort and ten years for contract).

#### Harassment

Employers must prevent sexual harassment by taking necessary pre-emptive measures (*Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment*).



Employers who fail to take pre-emptive measures to prevent sexual harassment face the risk of administrative action for non-compliance, such as the Ministry of Health, Labour and Welfare:

- Providing corrective orders.
- Publicly announcing the employer's non-compliance.

Additionally, employers have the obligation to provide a safe working environment for employees, under the Labour Contract Act and contractually under employment agreements (see *Question 22*). This includes an obligation to:

- Protect their employees from sexual harassment.
- Resolve any sexual harassment problems appropriately on a timely basis.

A breach of these obligations can result in civil liability in tort or for breach of contract.

The general limitation periods apply (see *above, Discrimination*).

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### 15. Do whistleblowers have any protection? If so, please give details.

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#### Whistleblower Protection Act

Whistleblowers are protected from retaliation by their employers for raising or reporting certain violations of the law or matters considered to be matters of public interest (*Whistleblower Protection Act*). A "violation of the law" means a violation of one of the statutes specifically designated by the Act's supplemental ordinances as:

- Protecting life and body.
- Protecting consumers.
- Preserving the environment.
- Ensuring fair competition.
- Protecting individual assets and other interests (in addition to the life and body).

Employers must also respond to whistleblowing by their employees, as appropriate, on a timely basis. Actions to be taken by employers are set out in the "Guidelines for Private Enterprises regarding the Whistleblower Protection Act".

Generally, employer cannot, as a result of an employee engaging in the types of whistleblowing specified by the Act:

- Dismiss or reassign that employee.
- Otherwise discriminate against that employee in relation to the employee's:
  - compensation;
  - terms and conditions of employment; or
  - privileges of employment.

#### Other whistleblowing provisions

The Whistleblower Protection Act does not restrict any other whistleblower protection provisions in other statutes. For example, an employer who treats disadvantageously an employee who reports violations of the Labour Standards Act may be subject to criminal punishment.

## DISMISSALS AND REDUNDANCIES

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### 16. What rights do employees have when their employment contract is terminated? Please provide information on:

- Notice periods.
  - Severance payments.
  - Any procedural requirements for dismissal.
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#### Notice periods

An employer must give 30 days prior notice of a dismissal or payment in lieu (*Labour Standards Act*). An employer can dismiss an employee without providing this statutory notice when:

- An employee on probation is dismissed within 14 days from the hiring date.
- An employee is dismissed for serious misconduct (with the Labour Standards Inspection Office's prior approval).
- An employee is dismissed, with the Labour Standard Inspection Office's prior approval, because operations have ceased because of:
  - a natural catastrophe;
  - an act of God; or
  - any other unavoidable circumstance.

#### Severance payments

There is no statutory requirement for severance payments. However, many employers discretionally establish retirement allowances. These normally calculate the retirement allowance on the basis of the:

- Length of employment.
- Final monthly base salary of the qualified employee.
- Reason for the employee's retirement.

#### Procedural requirements

There are no statutory procedural requirements, other than the requirement for notice (see *above, Notice periods*).

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### 17. What protection do employees have against dismissal? Are there any specific categories of protected employees?

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Any dismissal requires an objectively reasonable cause to justify that dismissal (*Labour Contract Act*). Dismissal without a "justifiable cause" is considered illegal and void as an "abuse of the dismissal right". Any agreement contrary to this principle is void. Therefore, an at-will employment agreement (that is, an employment agreement which the employer may terminate at its discretion without any cause) is void. What constitutes a "justifiable cause" varies and depends on the circumstances of the particular case.

Employers are prohibited from dismissing their employees during:

- Statutory leave for medical treatment concerning any work-related injuries or sickness and for 30 days afterwards.
- Statutory maternity leave and 30 days afterwards.



In addition, the dismissal of a female employee at any time during her pregnancy or for one year following giving birth is void unless the employer proves that the dismissal is not due to:

- The fact that the employee:
  - is pregnant;
  - gave birth; and
  - applied for or is on statutory maternity leave.
- Any other reason relating to her pregnancy or giving birth.

## 18. What rules apply on redundancies?

Redundancy alone is not considered a justifiable cause for dismissal. Where a dismissal is proposed due to business reasons, the following four factors must generally be considered:

- The necessity for a reduction in the workforce.
- Whether all efforts to avoid dismissal have been exhausted.
- The existence of objective standards to determine who is to be dismissed and a fair application of those standards when selecting the targeted employees.
- The following of proper procedures and due process.

Generally, it is very difficult to meet these requirements in the context of a dismissal for business reasons. In particular, employers must implement a voluntary termination scheme for their employees before resorting to dismissal. Failure to implement such a scheme may result in a court subsequently judging that the dismissal was void.

Even if an employer were to shut down its operations or enter bankruptcy, it does not automatically meet the requirements for a legitimate dismissal for business reasons. The employer must ensure that it has taken appropriate steps to meet the four requirements.

Specific rules apply where an employer dismisses 30 or more regular employees at one working place for a business reason within one month, or where 30 or more regular employees resign at the request of the employer for a business reason within one month. In that case, the employer must submit a plan in the specified form setting out how the employer proposes to support the employees with finding new jobs to the Labour Security Office one month before the day when the first employee will leave the employer (*Employment Measures Act*).

## TAXATION OF EMPLOYMENT

### 19. What is the basis of taxation of employment income for:

- **Foreign nationals working in your jurisdiction?**
- **Nationals of your jurisdiction working abroad?**

#### Foreign nationals

Japanese income tax payable by an individual depends on the individual's "taxpayer" status, regardless of the taxpayer's nationality. A taxpayer is classified primarily as either a:

- **Resident.** Broadly, a resident is any person who:
  - has a domicile in Japan; or

- has resided in Japan continuously for more than one year.

A resident is categorised as a non-permanent resident if he:

- does not intend to remain permanently in Japan; and
- has a domicile or residence in Japan for a continuous period of not more than five years when considered cumulatively out of the preceding ten years.

A foreign national who enters Japan to start employment that requires the employee to stay in Japan continuously for one year or more is presumed by the tax authority to be a non-permanent resident from the date of the employee's entry into Japan.

An employee is presumed to be a permanent resident if that employee:

- possesses a permanent residence visa; or
- has actually been residing in Japan for more than five years, cumulatively, out of the preceding ten years.

All residents are subject to withholding income tax at progressive rates of up to about 50% on the resident's income, whether domestic or foreign sourced (*see Question 20*).

However, for non-permanent residents, only foreign-sourced income paid within or remitted into Japan is subject to withholding income tax.

- **Non-resident.** A non-resident is subject to withholding tax on the non-resident's domestic-sourced income at the flat rate of 20%, if that non-resident has a permanent establishment in Japan.

#### Nationals working abroad

As with foreign nationals, taxation depends on residency (*see above, Foreign nationals*). The tax authority considers a Japanese national who has exited Japan to assume a job normally requiring a stay outside of Japan continuously for one year or more to be a non-resident from the date of the Japanese national's exit from Japan.

### 20. What is the rate of taxation on employment income? Are any other taxes or social security contributions levied on employers and/or employees? If so, please give details, including the rates.

Employment income, such as salary income, is subject to two different types of withholding tax:

- **National income tax.** Progressive tax rates are applied. These are, as of 1 July 2010, 10%, 20%, 23%, 33% and 40%, depending on the income amount (for example, 40% applies to an income exceeding JPY18 million).
- **Local inhabitants' tax.** A flat rate is charged. This is set at the local level (for example, in Tokyo, as of 1 July 2010, the amount is 10% plus a fixed amount of JPY4,000).

Employers and employees pay contributions to employee mandatory social and labour insurance programmes. The amount of the contributions is determined by statute on the basis of the employee's salary. The current rates of contributions are as follows (as of 1 July 2010):

- **Health insurance.** The rate varies depending on each local prefecture (for Tokyo, the rate is 9.32%). The premiums are shared equally between the employer and the employee.



- **Nursing-care insurance.** The rate is 1.50%. The premiums are shared equally between the employer and the employee.
- **Welfare annuity insurance.** See *Question 26*.
- **Worker's accident compensation insurance.** The rate varies depending on the type of business concerned, and ranges from 0.3% to 10.3%. It is payable solely by the employer.
- **Employment insurance.** The rate varies depending on the type of business concerned. However, the rate is usually 1.55% (the employee pays 0.6% and the employer pays 0.95%).

## LIABILITY

### 21. Are there any circumstances in which:

- **An employer can be liable for the acts of its employees?**
- **A parent company can be liable for the acts of a subsidiary company's employees?**

#### Employer liability

An employer is liable for any of its employee's illegal or tortious acts against third parties, including other employees, if that conduct is carried out in the course of the employee's duties for the employer.

#### Parent company liability

A parent company is not liable for any illegal or tortious conduct of its subsidiary's employees. However, under the doctrine of "piercing the corporate veil", a parent company can assume its subsidiary's liability where either:

- It uses the existence of the subsidiary to inappropriately avoid liability.
- The subsidiary exists artificially for that purpose.

### 22. What are an employer's obligations regarding the health and safety of its employees?

An employer has a statutory obligation under the Labour Contract Act and a contractual obligation to take necessary measures to have its employees work safely. This includes:

- Providing its employees with a safe working environment.
- Protecting its employees from work-related accidents (that is, injury and sickness, including mental illness).

If an employer negligently breaches this obligation, causing a work-related accident involving an employee, the employer is liable to pay compensatory damages to the employee.

Employees must (*Industrial Safety and Health Act*):

- Have their employees undergo a medical check-up on hire and annually afterwards at the employer's cost. The employer is also responsible for making appropriate arrangements, as necessary, based on the results of the medical check-up.
- Arrange a medical consultation for an employee who has performed extreme overwork, if the employee so requests, and take appropriate measures based on the results of the consultation.

- Implement a safety and health management system, the type of which depends on the:
  - number of employees;
  - type of business concerned.

## REPRESENTATION AND CONSULTATION

### 23. Are employees entitled to management representation (such as on the board of directors) or to be consulted about issues that affect them? Is employee consultation or consent required for major transactions (such as acquisitions, disposals or joint ventures)?

#### Management representation

Employees are not entitled to management representation.

#### Consultation

The advance individual consent of the employee is required when an employer decides to:

- Transfer an employee's employment.
- Make a disadvantageous change in an employee's employment terms and conditions.

In addition, when reassigning or relocating an employee, advance individual consultation may be required, for example, to ensure that the employee has an opportunity to care for family members.

#### Major transactions

There is no statutory requirement for employers to consult with employees in the case of major transactions, except for a transaction involving a corporate split (see *Question 24, Remedies*). However, an employer may be required to have advance consultation with a union of a transaction that will affect the employees if this is provided by a collection agreement, or requested by the union.

### 24. What are the remedies that are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

#### Remedies

Generally, employees can only claim on an individual basis that a change in their employment terms and conditions is not effective because of the employer's failure to consult with or obtain consent from them (see *Question 23, Consultation*).

There is an exception for employees who are transferred under a corporate split under the Supplementary Provision of Act of 2000 to Amend the Commercial Code and the Act on the Succession of Labour Contracts upon Company Split. If the employer fails to consult with the employees as required by the act, the corporate split is arguably void. However, it is more commonly thought that the employees can claim that the actual transfer of employment on the corporate split is not effective rather than that the corporate split itself is ineffective.

#### Employee action

Employees have no available remedy to legally prevent an employer's proposed transaction from proceeding. However, in



practice, an employee can force the employer not to proceed by having a labour union initiate a collective bargaining process. An employee can seek to be represented by a union, whether unionised within or outside the employer, at any time. A majority of employees is not needed for collective bargaining.

## TRANSACTIONS

**25. Is there any statutory protection of employees on a business transfer? In particular:**

- Are they automatically transferred with the business?
- Are they protected against dismissal (before or after the disposal)?
- Is it possible to harmonise their terms of employment with other (existing) employees of the buyer?

### Automatic transfer

When a business is transferred, neither the employees nor their rights are automatically transferred, unless the business transfer was done through a corporate transaction, such as a:

- Share transfer.
- Corporate merger.
- Company split.

### Protection against dismissal

When an employer dismisses an employee due to a business transfer, the general rules of dismissal for business reasons apply (see *Question 18*). This means that the fact that an employee's job will no longer remain after the business transfer is not in itself a justifiable cause for dismissal. When determining whether a dismissal is lawful, the following factors are considered:

- Whether the employer's decision to enter into the business transfer was necessary or reasonable.
- Whether the employer had offered the employee a reasonable opportunity to resign voluntarily by offering a reasonable package as an alternative to the transfer.
- Whether the employer had tried to retain the employee by reassigning the employee to another position.
- To what extent the employer had communicated with the employee in good faith about the:
  - background of the business transfer;
  - need to request the employees to transfer or otherwise resign.

### Harmonisation

A reduction in salary or other benefits when harmonising the terms and conditions of employees on a transfer can be made invalid unless the employee individually agrees to them, particularly if a court finds the changes to be unreasonable. In determining whether the proposed changes are unreasonable, the court will balance the:

- Disadvantage to the employee.
- Necessity of reducing the salary or other benefits.

Generally, any change resulting in a reduced base salary for an employee is likely to be considered to be unreasonable, and therefore invalid, unless the relevant employee has consented to the change.

## PENSIONS

**26. Do employers and/or employees make pension contributions to the state in your jurisdiction? If so, please give details of:**

- The contributions payable.
- The tax treatment of those contributions.
- The monthly amount of the state pension.

### Contributions

Employers must participate in the welfare annuity insurance (*Kosei Nenkin*) programme, which is funded and managed by the governmental authority, the Japan Pension Service (*Nihon Nenkin Kiko*). It is mandatory for all employees aged less than 70 years old working in Japan.

The premium is statutorily determined based on the employee's compensation. As at July 2010, the premium is 15.704% of an employee's "standard wage", subject to a statutory maximum of JPY97,364.80 per month. This premium is payable equally by the employee and the employer. Standard wage is the statutory amount allocated to each range of employees' compensation, broken down into 30 classes. For example, for an employee whose monthly compensation ranges from JPY195,000 to JPY210,000, a standard wage of JPY200,000 is allocated.

### Tax

Employer contributions can be deducted from the employee's income as a deductible expense for corporate tax purposes. Employee contributions can be deducted from the employee's income as deductible social insurance premiums for income tax purposes.

### Monthly amount

The monthly pension amount is largely determined by the:

- Total amount of contributions.
- When the pension is to start to be received.

**27. Is it common (or compulsory) for employers to provide access, or contribute, to supplementary pension schemes for their employees? Do such schemes provide pensions the value of which:**

- Can usually be determined at the start of the arrangement (for example, the value is linked to the employee's salary)?
- Cannot usually be determined at the start of the arrangement (for example, the value is dependent on employer and employee contributions and investment return on those contributions)?

In addition to the mandatory welfare annuity insurance programme, employers usually establish retirement allowance schemes for their employees. They set out rules specifying:



- How employees qualify for those allowances.
- The calculation method of the retirement allowance.

The retirement allowance amount is usually calculated based on the:

- Length of employment.
- Employee's final monthly base salary.
- Reason for the employee's retirement.

The employer normally pays the retirement allowances to the employee in a lump sum on the termination of the employee's employment.

Employers can participate in or establish any of the various pension plans managed by independent funds or fund management companies, for example the:

- Welfare pension fund (*kosei nenkin kikin*), which is intended to complement the employees' mandatory welfare annuity insurance (see *Question 26*).
- Defined-benefit (*kakutei kyufu*) pension plan, that is, a plan where the employer promises a specified monthly benefit on retirement, rather than one where the monthly benefit depending on investment returns.
- Defined-contribution (*kakutei kyoshutsu*) pension plan, that is, where the contributions are specified but future benefits may vary depending on the returns on investment.

Employee benefits under these plans depend on the terms and conditions that the employer provides, although the employees' length of service, compensation and contributions are relevant factors.

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**28. Is there a regulatory body that oversees the operation of supplementary pension schemes? If so, please briefly summarise the regulatory framework.**

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The Ministry of Health, Labour and Welfare must authorise a welfare pension fund.

A defined-benefit pension plan must be managed by either:

- A fund established by the employer and authorised by the Ministry.
- A fund management company engaged by the employer in accordance with an agreement between the employer and its employees that is approved by the Ministry.

A defined-contribution pension plan must be managed by either:

- The employer.
- A fund management company engaged by the employer in accordance with an agreement between the employer and its employees that is approved by the Ministry.

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**29. Are any tax reliefs available on contributions to supplementary pension schemes (by the employer and employees)? If so, please give details.**

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Employer contributions to a welfare pension fund, a defined-benefit pension plan and a defined-contribution pension plan can

be deducted from income as a deductible expense for corporate tax purposes. Employee contributions to a welfare pension fund and a defined-benefit pension plan can be deducted from income in the form of a social insurance deduction (one of the income deduction items) for income tax purposes.

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**30. Is there any legal protection of employees' pension rights on a business transfer? In particular:**

- Do supplementary pension rights qualify as acquired rights that transfer automatically under national legislation?
  - If not, is there any other protection for pension rights on transfer?
- 

When a business is transferred, neither the employees nor their rights and obligations can be automatically transferred, unless the business transfer was done through a corporate transaction (see *Question 25, Automatic transfer*). When an employee is transferred by agreement, the method of the transfer determines whether the employee's rights are transferred.

Transfers can be carried out through either:

- Transferring each individual employment contract with each employee's consent. This means that all rights are automatically transferred. Therefore, the employee retains rights to the pension even after the transfer. However, the pension plan may provide that the fund or the agreement with the fund management company cannot be transferred. However, the terms of the pension usually provide that the employee is entitled to benefits on the transfer.
- Terminating each employee's individual employment contract with the transferor and concluding a new individual employment contract with the transferee. This means that all the employee's rights under the first employment contract, including pension rights, are liquidated with the transferor on termination.

An employee's rights in a defined-contribution pension plan can remain with the employee for a different employer in certain circumstances (for example, where an employee is transferred to a company that has a defined-contribution pension plan).

---

**31. Can the following participate in a pension scheme established by a parent company in your jurisdiction:**

- Employees who are working abroad?
  - Employees of a foreign subsidiary company?
- 

**Employees working abroad**

Employees working abroad (for example, in a foreign branch) are qualified to participate in a pension plan established by the company under the same conditions as those employees working in Japan. Employees can enjoy the same tax treatments in relation to their contributions if they are subject to income tax in Japan (see *Question 29*).

**Employees of a foreign subsidiary company**

Employees working at the foreign subsidiary of a Japanese parent company are not qualified to participate in the parent company's pension plan, except for the company's discretionary retirement allowance or pension plan. A discretionary plan is managed purely



by the employer at its own discretion, unlike a supplementary pension plan, which is operated under laws controlled by the Ministry (see *Question 27*).

## BONUSES

### 32. Is it common to reward employees through contractual or discretionary bonuses? Are there restrictions or guidelines on what bonuses can be awarded? If so, please give details.

There are no statutes requiring the payment of bonuses in Japan. However, it is relatively common to pay performance bonuses based on the employer's and/or the employee's performance, with the employer having a discretionary right to determine the payment amount. A fixed bonus or a commission is not treated as a bonus.

## IP

### 33. If employees create IP rights in the course of their employment, do the employees or the employer own the rights?

#### Patentable inventions

Any patentable invention made by an employee is owned by the employee and not assignable to the employer by the employee under an advance agreement. However, the employer automatically has a non-exclusive licence over the patent rights concerned, when the employee's invention (*Patent Act*):

- Falls, by its nature, within the scope of the employer's business.
- Is a result of the employee's present or past duties performed on the employer's behalf.

The employer can also agree with the employee beforehand that the right to obtain a patent in respect of the employee's invention will be transferred to the employer, on the condition that the employee is entitled to reasonable compensation. An agreement can determine this compensation in advance, for example, under the employer's work rules, or another legitimate process. If the compensation is not determined in advance, the employee can demand that reasonable compensation be determined by taking into account the:

- Employer's interest in the invention.
- Employer's contribution to the invention.
- Commercial applications of the invention.
- Employee's benefits received from the employer.
- Other relevant circumstances.

#### Copyright

A person is presumed to be the author of a work if that person's name, title, generally known pen name, abbreviation or other substitute for true name is indicated as the name of the author in the customary manner either (*Copyright Act*):

- On the original of the work.
- When the work is offered to or made available to the public.

However, any copyright, including moral copyright, relating to the work undertaken by an employee becomes, unless agreed otherwise, the employer's property if the work is:

- Produced within the scope of the employee's employment.
- Made under the employer's initiative.
- Made available to the public with the employer's name as the author.

#### Other IP rights

Similar rules to patentable rights apply to other intellectual property rights, such as designs and devices (see *above, Patentable inventions*).

## RESTRAINT OF TRADE

### 34. Is it possible to restrict an employee's activities during employment and after termination? If so, in what circumstances can this be done? Must an employer pay its former employees remuneration while they are subject to post-employment restrictive covenants?

#### Non-competition

A non-compete covenant operating during employment is generally enforceable. However, a post-employment non-compete covenant is, in principle, void and unenforceable as being contrary to the right to the freedom to choose one's employment under the Constitution of Japan. There are limited exceptions when a post-employment non-compete covenant is enforceable, for example, where it is necessary to protect the employer's legitimate business interests and the burden imposed on the employee is reasonable. In these cases, generally the employee must receive compensation for entering into the non-compete covenant.

#### Protection of confidential information

A confidentiality covenant entered into during employment is generally enforceable. In terms of enforceability, a post-employment confidential covenant would be considered more likely to be enforceable compared to a post-employment non-competition covenant.

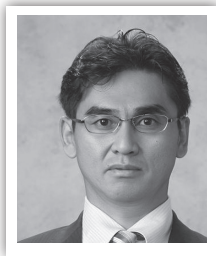
## PROPOSALS FOR REFORM

### 35. Are there any proposals to reform employment law or pensions law in your jurisdiction?

The Japanese Diet is currently discussing a bill setting out some amendments to the Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers (see *Question 12, Part-time employees*).



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- Advising a major US audio equipment company on the reorganisation of its group companies in Japan and the management of the employees involved in this reorganisation.
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