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Japan

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General labour market and litigation trends

Over the last few years, there have been several developments in the Japanese labour legislation based on the so-called "Work Style Reform", a strategic plan issued by the Japanese government in order to realise a society where people can choose how to work depending on their respective circumstances. This plan has been embodied in several pieces of legislation including the Labour Standard Act ("**LSA**"), Labour Contract Act, Act on Improvement of Personnel Management and Conversion of Employment Status for Part-Time Workers and Fixed-Term Workers, Industrial Safety and Health Act, Act on Comprehensive Promotion of Labor Measures and Stabilisation of Employment of Employees and Enrichment of Their Working Lives, Etc., among others.

Items stipulated under the Work Style Reform include the following: (a) the regulation on long working hours (such as lowering the maximum limit on overtime work by law, mandating to ensure the use of annual paid leave, mandating the employers to check and comprehend the actual working hours of the employees, mandating employers (including small- to mid-size employers) to pay the increasing overtime work allowances, etc.); (b) regulations on flexible working style (such as relaxing the regulations on flex-time working hours, establishing a new working system for highly professional workers, etc.); and (c) ensuring the choices on working style by employees (such as ensuring "equal pay for equal work", strengthening the accountability of employers, establishing new administrative alternative dispute resolutions ("**ADRs**") for employment disputes, amendments to the child/family care leave system, enhancing the restrictions on harassment at working environments, etc.).

That said, the impact of COVID-19 greatly affected the labour market despite these amendments to the laws and regulations. The annual unemployment rate of 2021 was 2.8%, almost the same as the previous year, and the number of unemployed persons currently stands at 1.71 million, a decrease by 0.23 million compared to the previous year. Looking at the number of cases of an individual labour dispute resolution system (provided by the government for the dispute resolutions between an employer and an employee regarding working conditions and/or working environment), the total number of cases increased to 1.29 million (which aggregated the numbers of general labour consultations, advice/recommendations and mediations newly accepted in 2020). Among these disputes, bullying/harassment in the working environment has remained the most popular topic. While the related parties can bring the cases to the court, these administrative ADRs seem to be of significant help because it is cheap and swift. Looking at the number of labour disputes at the courts, the number of cases has also been increasing regarding both normal labour litigations and labour tribunal cases. Assuming the lengthy impact of COVID-19, the number will keep increasing going forward.

Redundancies, business transfers and reorganisations

Under the Japanese law, it is very difficult to terminate the employment contract due to business reasons of the employer and the following general requirements have been formulated by Japanese courts in determining the validity of the dismissal: (a) necessity of labour reduction (such as financial deterioration of the employer); (b) necessity in selecting dismissal over other available measures (for example, whether the employer could have avoided dismissal by using other means such as soliciting for early retirement); (c) appropriateness of the selection of the employee being dismissed; and (d) appropriateness of the dismissal procedure (for example, whether the employer provided sufficient explanation and opportunities for consultation). If an employee does not dispute the validity of the dismissal, the dismissal will become effective; however, if the employee disputes the validity of the dismissal, he/she would ultimately be considered to have been duly dismissed only if the court determines that the above-mentioned criteria have been met. If the dismissal is determined to be invalid, the employees are reinstated to the original position, together with the back-pay of the durations between the dismissal and the reinstatement.

In the case of business transfer (i.e., not the "company split" under the Companies Act), the transferor is required (i.e., current employer) to obtain the employees' consent in order to transfer the employment contracts together with the business. On the other hand, in the case of company split under the Companies Act, special regulations will apply in accordance with the Act on the Succession to Labor Contracts upon Company Split ("**Labor Contract Succession Act**"). To summarise, under this Labor Contract Succession Act, an employer can transfer: (a) the employees whom it employs and that is prescribed by the Ordinance of the Labor Contract Succession Act as primarily engaged in the business that the successor company will succeed to; and (b) the employees whom it employs (other than those falling within item (a)) and with respect to whom there are prescriptions in the split contract to the effect that the successor company will succeed to the employment contract, as far as it takes the following steps: (i) to stipulate in the split contract (plan) to the effect that those employees are to be transferred; (ii) to conduct discussions with the union representing the majority of the employees in all of the workplaces, or, in case there is no such union, with the representative of the majority of the employees in all of the workplaces, in order to obtain the understanding and cooperation of the employees (discussions for all employees); (iii) to conduct discussions with each of the employees who are subject to the transfer (discussions for the employees to be transferred); and (iv) to notify in writing of (x) whether or not there are any provisions in the split contract (or split plan) to the effect that the successor company will succeed to the employment contract, (y) the deadline date for filing an objection, and (z) other items provided by the Ordinance. It should be noted that, regardless of whether the company chooses a business transfer or company split, or in any occasion, the employer cannot change the current employment conditions without the consent of the employee, except in the case the employer makes lawful and valid changes to the work rules. Work rules are usually incorporated into the employment contract, and the employer can change the employment conditions by changing those work rules by satisfying the following requirements: (a) the employer informs the employees of the changed work rules; and (b) the changes to the work rules are reasonable in light of (i) the extent of the disadvantage to be incurred by the employee, (ii) the necessity for changing the working conditions, (iii) the appropriateness of the contents of the changed rules, (iv) the status of negotiations with a labour union or similar, and (v) any other circumstances pertaining to the change to the rules. In the case that the employer changes the work roles in accordance with the above requirements, it is also required to: (a) ask the opinion of the union/employer representing the majority of the employees; and (b) submit the changed rules to the competent Labour Standards Inspection Office.

Business protection and restrictive covenants

It is lawful and common for an employer to include the duties of confidentiality in the employment contract and/or work rules. Furthermore, the Unfair Competition Prevention Act restricts the employees to disclose any confidential information of the employer for the purpose of gaining illicit gain or causing injury of the employer; in this regard, the employees implicitly owes duties of confidentiality during and after the employment.

On the other hand, a non-competition covenant (after the employment is terminated) is generally considered a restriction on the free choice of employment, which is considered a basic human right protected in the Japanese Constitution, and thus deemed invalid and unenforceable except where there are reasonable grounds. Based on court precedents, the courts take the following factors into consideration when deciding the validity and enforceability of non-competition covenants: (i) whether there is a clear non-competition clause in the employment contract or the work rules; (ii) whether there is a necessity for the employer to have the non-competition covenant; (iii) whether the restriction is necessary and reasonable in scope; and (iv) whether the employee is sufficiently compensated for the restriction. With respect to factor (ii), if the employee's position is close to top management or the employee deals with very important or sensitive confidential information of the company, it is generally understood that there is a necessity for the employer to impose a non-competition covenant on the employee to protect their legitimate interest. With respect to factor (iii), generally speaking, the period and scope of restriction in relation to geographical area and business categories are considered. With respect to factor (iv), generally speaking, if the employer does not give financial benefits to compensate the employee for a non-competition covenant, courts tend to decide that this factor would not be satisfied. In some cases where the employee receives a high salary, courts have decided that factor (iv) has been satisfied since the compensation for the non-competition covenant was included in the basic salary, even though the company did not grant compensation specifically for the non-competition covenant.

With respect to a non-solicitation obligation, there are no major court precedents or well-established views regarding the validity and enforceability of a non-solicitation covenant, but looking at a few precedents regarding the non-solicitation covenants, the courts have determined that a former employee's solicitation of his/her former employer's existing employees constitutes tort and ordered the employee to compensate the former employer where the solicitation was carried out in a manner that is not socially acceptable.

If such covenant does not limit its scope in relation to geographical area, it is generally considered as being effective even outside Japan. The covenant without any duration may be considered unnecessarily and unreasonably restrictive; and the court may interpret that the covenant is valid only for a limited time.

Discrimination protection

The LSA provides that employers must not use the nationality, creed or social status of any worker to discriminate against him/her with respect to wages, working hours or other working conditions. The LSA also provides for the principle of equal wages for men and women.

In addition to the general rules under the LSA, other rules which prohibit discrimination include the following: (a) Employment Security Law, prohibiting employers from discriminating against a person by reason of any previous profession, membership of a labour union, race, nationality, creed, sex, social status and family origin; (b) Act on Securing, etc. of Equal Opportunity and Treatment between Men and Women in Employment (the "**Equal**

Employment Opportunity Act"), prohibiting discriminatory treatment based on sex in relation to (i) recruitment and employment, (ii) assignment (including allocation of duties and grant of authority), promotion, demotion and training, (iii) loans for housing and other similar fringe benefits as provided by ordinance, (iv) change in job type and employment status, and (v) encouragement to retire, mandatory retirement age, dismissal, and renewal of the employment contract; (c) the Equal Employment Opportunity Act prohibiting the disadvantageous treatment of female employees due to marriage, pregnancy, childbirth, and requesting absence from work which is permitted under the LSA; and (d) ministry ordinances under the Employment Measures Act and the Equal Employment Opportunity Act, prohibiting the advertisements to specify restrictions on age and gender of potential employees except in certain cases in soliciting or recruiting potential employees through advertisements on job information websites or taking other similar actions.

Regarding sexual harassment in the workplace, as part of the latest update under the Work Style Reform, the Equal Employment Opportunity Act provides that employers are required to establish necessary measures in terms of employment management to give advice to workers and to cope with any problems regarding employees, and take other necessary measures so that employees do not suffer any disadvantage in their employment conditions by reason of their responses to sexual harassment in the workplace or in their working environments. The measures employers are required to take under the Equal Employment Opportunity Act are more specifically explained in relevant guidelines issued by the government. In addition, the latest amendment to the Equal Employment Opportunity Act prohibits any kind of mistreatment of employees who allege they have been victims of sexual harassment.

Protection against dismissal

Under Japanese law, termination by employers have been strictly regulated, and such restriction has not changed. An employer may only terminate or dismiss an employee on grounds that are objective, justifiable and reasonable, and any termination or dismissal which is not on those grounds is invalid and deemed an abuse of the rights of the employer. In general, the reasons can be: (i) incapacity (due to health or performance-related reasons) and lack of qualification; (ii) misconduct; (iii) operational necessity; or (iv) a request from a labour union based on a union shop agreement. It should be highlighted that the Japanese courts strictly interpret the requirement of an "objective, justifiable and reasonable" ground, and a dismissal is deemed lawful only where: the cause of dismissal is of a significant degree; there is no other way to avoid the dismissal; and there is almost no factor on the employee's side that could be taken into consideration in favour of the employee.

In addition to the above-mentioned general restriction, an employer is not entitled to dismiss an employee on any of the following grounds: (i) nationality, creed or social status; (ii) being a labour union member or having performed justifiable acts of a labour union; (iii) sex and, for a female worker, marriage, pregnancy, childbirth or having taken leave from work before and after childbirth; (iv) having taken childcare leave or family care leave under the Act on Childcare Leave, Caregiver Leave, and Other Measures for the Welfare of Workers Caring for Children or Other Family Members ("**Child/Family Care Leave Act**"); (v) having reported the employer's breaches of employment protection laws to the relevant government agencies; (vi) having sought the advice of, or filed an application for mediation by, the head of the Labour Standard Inspection Offices; and (vii) having reported a violation in accordance with the Whistle-blower Protection Act ("**WPA**"). Also, an employer cannot

dismiss a part-time employee who is considered to be equivalent to an ordinary employee due to the only reason being that he/she is a part-time employee.

An employer is also prohibited from dismissing: (i) an employee during a period of absence from work for medical treatment with respect to work-related injuries or illnesses or within 30 days after his/her recovery; and (ii) a female employee during a period of absence from work before and after childbirth, which is taken in accordance with the LSA or within 30 days thereafter. In the case that the court determines the dismissal to be illegal, the employee is to be reinstated and the employer is required to make a back-payment of the wages for the duration from the dismissal to the reinstatement.

Statutory employment protection rights (such as notice entitlements, whistleblowing, holiday, parental and maternity leave, etc.)

As basic protections, there are regulations for the minimum requirements of employment conditions (generally stipulated in the LSA), which include the following: (a) the limitation of working hours (eight hours per day, 40 hours per week in general, without labour-management agreement executed between the employer and the representative employee/labour union representing majority of the employees at the workplace) and additional payment requirements for the works exceeding prescribed working hours (125% of the average wage for overtime work and 135% for holiday work, plus an additional 25% for late-night work provided from 10pm to 5am); (b) requirements for breaks (at least 45 minutes when working hours exceed six hours, and at least one hour when working hours exceed eight hours); (c) employers' obligation for reasonable effort to secure certain intervals between the end-of-work time for a day and the start-of-work time for the next day (newly established under the Work Style Reform); (d) holidays (at least one day per week as a general rule); (e) paid leave requirements (number of days will depend on the length of service of each employee) and employers' obligation to designate at least five days of annual leave per year (newly established under the Work Style Reform); and (f) 30 days prior notice (or payment *in lieu*) for the termination unilaterally made by the employer. There is also a minimum wage requirement under the Minimum Wages Law, and minimum wage is to be determined depending on the districts and industries (for example, the current minimum wage in Tokyo is JPY 1,041).

Under the Child/Family Care Leave Act and LSA, the employees' rights as parents and caregivers are protected (however, the employers are not required to pay wages during child/family care leave). The latest amendments of this Act became in force from 1 January 2021 (amendment under the Work Style Reform) which enables the employees to take child/family care leave on an hourly basis.

The WPA stipulates the protection of whistleblowing. Insofar as the requirements are satisfied, WPA restricts the dismissal, termination of dispatch, and disadvantageous treatment to the whistleblowing employees in general, and such dismissal, termination of dispatch and disadvantageous treatment becomes null and void. The latest amendments to WPA (amendment under the Work Style Reform) includes the employers' obligation to implement the necessary systems to take proper care of the whistleblowing and to protect the confidentiality of the information which could identify the whistleblowing employee, and the expansion of the scope of "whistle-blower".

It would be worth noting that, under the Act on Stabilization of Employment of Elderly Persons, the employer is prohibited to stipulate a mandatory retirement age that is less than 60 years old and also is required to take measures to secure stable employment of

employees until they reach 65 years old. The latest amendment of this act was enacted in April 2021, which stipulates the employers' obligation to make an effort to extend the employment until 70 years old assuming the recent ageing society.

Worker consultation, trade union and industrial action

"Labour unions" are defined under the Labour Union Act ("**LUA**") as organisations or federations formed voluntarily by and composed mainly of workers for the main purposes of maintaining and improving working conditions and raising the economic status of the workers; however, the following groups are not considered "labour unions": (a) a group which admits persons who represent the interests of the employer including directors and workers in supervisory positions; (b) a group which receives the employer's financial assistance in paying the organisations' operational expenditures; (c) a group whose purposes are confined to mutual aid service or other welfare services; and (d) a group whose purposes are principally political or social movements. A union is not required to file any application with authorities to be recognised as a "labour union"; however, it is required to file evidence with the Labour Relations Commission and demonstrate that all the requirements described above are satisfied when it takes legal actions, including applications for the examination of cases of unfair labour practice.

The establishment of a labour union and its activities are guaranteed as basic labour rights under the Japanese Constitution and the LUA which stipulates these rights in detail. A labour union has the right to request an employer to enter into collective bargaining on any issue, provided that the issue relates to the labour union itself or the status of a worker who is a member of the union, regardless of the number of members. An employer is required to accept such a request and faithfully negotiate; the refusal of an employer to enter into collective bargaining without proper reason could be determined an unfair labour practice which is prohibited by the LUA.

In addition, the following acts of an employer are prohibited as unfair practices: (a) discharging or discriminating against an employee due to him/her being a member of a labour union, having tried to join or organise a labour union, or having performed proper acts of a labour union; (b) making it a condition of employment that an employee must not join or must withdraw from a labour union; (c) controlling or interfering with the formation or management of a labour union; (d) giving financial support to defray the labour union's operational expenses; and (e) treating an employee in a disadvantageous manner because he/she has filed a complaint with the Labour Relations Commission.

An employer must ask the opinion of the labour union organised by a majority of the employees at a workplace concerning certain labour matters, including setting up or amending work rules of the workplace (*see* above). Furthermore, a labour union has the right to act collectively, which includes the right to strike. The LUA gives workers who engage in proper and justifiable actions immunity from criminal and civil liabilities and protection from unfavourable treatments by their employer.

Please note that there is no work council system in Japan.

Employee privacy

Employees' data, insofar as it falls within "personal information", is protected under the Act on the Protection of Personal Information ("**APPI**"), its Ordinance and related guidelines. An employer is obliged to comply with the APPI as a "personal information-handling business operator" in dealing with employees' personal information. The obligations of a

personal information-handling business operator under the APPI include the following: (a) undertaking necessary and appropriate measures to safeguard personal information; (b) not using personal information except to the extent necessary for the purposes disclosed to the subject individuals; (c) not disclosing personal information to any third party (subject to certain exemptions); (d) conducting necessary and appropriate supervision over employees and contractors; and (e) obtaining the employees' consent in advance of the provision to a third party in a foreign country (or ensuring that the third party in the foreign country has a system for continuously taking actions equivalent to those that a personal information-handling business operator must take in handling personal information pursuant to the provisions of the APPI).

The email accounts, telephones, and computer systems belong to the employer and should be used only for business operations in general; and from this perspective, as a general rule, such equipment can be monitored if the monitoring is carried out for a business necessity. However, in carrying out the monitoring under the guidelines issued by the Personal Information Protection Commission (the Japanese data protection supervisory authority), an employer is recommended to take certain measures, including: (a) communicating the purpose of the monitoring to the employees in advance; (b) clearly identifying the manager responsible for managing the monitoring; (c) drawing up internal rules regarding monitoring and communicating them to the employees in advance; and (d) auditing the monitoring programme to ensure that it is being carried out appropriately.

It should be noted that the APPI has been amended in 2020, which includes: (a) expanding of the rights of the data subject; (b) increasing the obligations of personal information-handling business operator; (c) establishment of a new concept of "pseudonymised data" in order for more active data utilisation; (d) increasing the maximum penalty of the crime related to the data; and (e) expansion of the obligations of personal information-handling business operators located outside of Japan (to make them subject to a penalty). These amendments will be in force from April 2022 (except those stipulations relating to the criminal penalty, which have already in force).

An employer may carry out background checks before hiring, insofar as it acquires personal information of job applicants lawfully. Under the APPI, an employer must notify or make public the purpose for which it intends to use the personal information they have acquired when acquiring personal information (except in some cases, including where, judging from the circumstances, it can be said that the utilisation purpose is clear). Also, an employer is prohibited from acquiring sensitive personal information (such as information regarding race, ethnicity, and criminal history) of a job applicant without his/her consent. That said, in practice, an employer usually requires a job applicant to submit a filled-in template *curriculum vitae* ("**CV**") which contains questions regarding personal information, including criminal records. Such acquisition and use of personal information of the job applicant by the employer would be deemed lawful and valid because the applicant is deemed to have given his/her consent when he/she submitted the CV to the employer, and, given the circumstances in which the CV was submitted, it can be recognised that the utilisation purpose is clear. While criminal records are held by the police and employers do not have the means to check them directly, a typical template CV enables an employer to obtain and utilise such information legally for the purpose of background checks. On a separate note, the ancillary guidelines to the Employment Security Law, as a general rule, restrict an employer's acquisition of some kinds of sensitive personal information of job applicants, including race, ethnicity, opinions and creed, or history of union memberships.

In addition to the background checks, the employer would be entitled to conduct other checks, including a body-check and inventory inspection for the purpose of protecting the other employees and providing them with a safe working environment if there is any suspicious situation regarding the employee. While such inspections would be preferably prescribed in the work rules, the employees will be required to comply with the instructions of the employer unless he/she has reasonable grounds to reject it.

Other recent developments in the field of employment and labour law

Several pieces of legislation and special treatments have been provided by the government to deal with the circumstances under COVID-19, which include: (a) relaxing the requirements for the governmental employment adjustment subsidies; (b) a provision of support money and benefits for workers forced to take leave due to COVID-19; and (c) issuance of guidelines for "working from home" ("**WFH**") and a provision of subsidies to the companies implementing WFH. The situation is still uncertain, and the countermeasures by the government have been and will be implemented as occasion may demand.

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