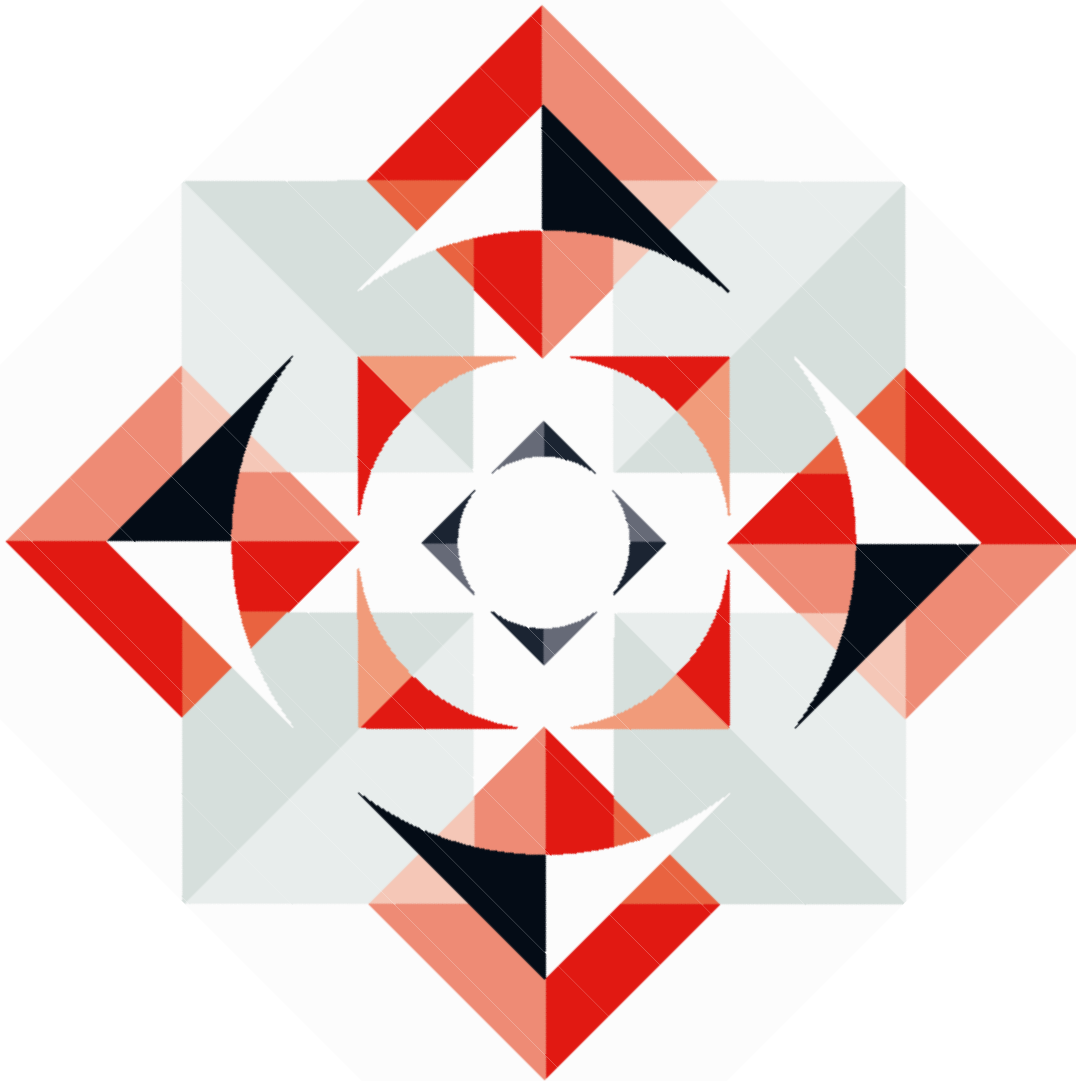


Employment law in Japan – an overview



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Introduction

Although its historically high economic growth has long since passed, Japan's economy is still one of the largest in the world. This economic strength, combined with the fact that Japan is a relatively mature market in the Asia Pacific region with a rich and unique culture, means that Japan remains a popular place for Western companies to do business. This inbrief outlines some of the key areas of Japanese employment law relevant to businesses operating in Japan.

Our Hong Kong office coordinates employment and immigration/global mobility support across the Asia Pacific region (including Japan).

This publication provides general guidance only: expert advice should be sought in relation to particular circumstances. Our Hong Kong office can source Japanese law advice through its links with local firms in Japan.

The employment law landscape

Japanese employment law is very employee friendly – some employment rights are even written into the national constitution!

The principal statutes regulating the employment relationship are the Labour Standards Act ("LSA") (which sets out minimum conditions of employment) and the Labour Contracts Act (which codifies court decisions that are well accepted principles of Japanese law).

Arguably the most notable feature of Japan's employment environment is its restrictive unfair dismissal laws. These laws afford a very high level of job security to permanent full time employees and have helped to contribute to the still prevalent (albeit weakening) concept of "lifetime employment" under which employees tend to stay in the one job. To circumvent the difficulties associated with dismissals, many Japanese employers are reluctant to take on permanent, full-time employees. Some estimates place up to two-fifths of Japan's working population as non-permanent staff.

Commencing employment

Structuring the employment relationship

A foreign entity cannot carry on business or generally engage employees in Japan without a local corporate presence (be that a subsidiary, branch or representative office).

Types of employment

There are two main categories of employment: open term (permanent) employment and fixed term employment. Fixed term contracts of up to 3 years are permitted. However, if an employee works continuously for more than five years on fixed term contracts with at least one renewal, the employer must convert the employment period to indefinite at the employee's request. Employment can also be full time or part time.

In addition to fixed term employees, hiring dispatch (agency type) workers is also very popular because of the difficulties in terminating the employment relationship (see the "Terminating employment" section below). This area is, however, heavily regulated and caution is advised.

The employment contract

Certain terms and conditions must be set out in writing for employees. There are no formalities or language requirements that need to be complied with although the contract should be in a language that is understandable to the employee. Employment contracts are normally short and simple, and are complemented by more detailed work rules.

Probationary periods of three to six months are common for permanent employees, but they are not mandatory. Although the test for terminating employment during probationary periods is seen by some as being somewhat more relaxed, an employer may still face difficulties in justifying dismissal.

Work rules

Work rules are very important in Japan and include information on matters such as working hours, holidays, and issues relating to salary. They are mandatory for employers of 10 or more employees and must be submitted to the Labour Standards Inspection Office (LSIO), a regulatory body. An employer generally enjoys the freedom to unilaterally amend the work rules provided it first consults with employees over the changes and back changes all considered reasonable.

Key minimum employment rights

Working time

As a general rule, an employer cannot require an employee to work over 8 hours a day or 40 hours a week. An employer may, however, require an employee to work overtime if a separate agreement is entered into with a union or employee representatives that is filed with the LSIO. An employee is entitled to at least 125% to 175% of their normal pay for overtime hours depending when the overtime was performed. Employees in managerial positions are generally exempt from overtime entitlements. Other than payments for work performed late at night (from 10pm to 5am). It can also prove difficult (especially for overseas employers) to track employee's overtime entitlements, and disputes in relation to this are fairly common, in particular around whether or not an employee is exempt from overtime.



An employer must grant at least one day off work per week or four days off per four weeks.

Leave

Employees with at least six months' service and who have worked 80% or more of their designated workdays in the preceding six months/year are entitled to annual paid leave of 10 to 20 days depending on their length of service.

Unused annual leave can be carried over to the immediately following year.

A female employee may take up to six weeks' unpaid maternity leave before her expected date of delivery and is not generally permitted to return to work within eight weeks after giving birth. There is no requirement to pay during maternity leave but employees generally receive about two-thirds of pay from a national insurance plan. There is no statutory paternity leave.

Employees are entitled to child care leave until a child is one year old (which can be extended in some circumstances), and employees who care for family members are also entitled to family care leave of up to 93 days. Both types of leave require certain criteria to be met and are unpaid, although it is generally possible for an employee to recover about 50 to 67% of their salary through a national insurance plan.

An employer is not strictly required to grant sick leave to an employee for non-work-related injuries or illness although in practice most do so.

Wages and social insurance

There are two types of minimum wage: "regional minimum wage" (determined according to the location of the workplace) and "industrial minimum wage" (determined according to the particular industry).

Twice yearly bonuses (generally in the region of two to three months' salary), paid in summer and at the end of the year, are common but not required by law.

An employer must take part in four types of social insurance schemes: workers' accidents compensation insurance and unemployment insurance (usually referred together as "labour insurance"), and health insurance and welfare pension insurance (commonly referred to

collectively as "social insurance"). In general terms, all employers must contribute to labour insurance schemes and social insurance schemes.

Terminating employment

It is exceedingly difficult for an employer to lawfully terminate permanent employment. Conduct, performance and redundancy situations that would clearly justify termination in many countries often do not warrant dismissal in Japan.

A dismissal will be invalid as an abuse of rights if it "lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms". Terminations not meeting this high threshold will be null and void. The legal remedy is reinstatement rather than compensation.

There is also a statutory notice period of 30 days, but no statutory severance pay or formula. Redundancies are not common and no special rules apply to collective redundancies, apart from notifying the Public Employment Security Offices.

In practice, many employers offer employees voluntary separation packages in termination situations. This approach allows employees to "save face", typically by choosing to resign in return for a severance package.

In contrast to a permanent employee, a fixed-term contract employee can be terminated on the expiry of the fixed term. However, early termination prior to expiry of the fixed term is not allowed unless there are "unavoidable circumstances" – which is a high threshold.

Mandatory retirement is lawful provided the retirement age is set at 60 years or above, and mandatory retirement systems are common. However, employers are generally required to take measures to maintain employment up to 65.

Discrimination

Discrimination on the grounds of nationality, creed, social status, sex, pregnancy/maternity, age, disability and union membership is prohibited. Equal treatment is also required for part-time employees or fixed-term contract employees.

Both sexual harassment and so-called "power harassment" are prohibited and such claims

have been increasing recently. Power harassment is a type of bullying unique to Japan where an employee abuses their position to a colleague's detriment.

Resolving disputes

An employee can bring a claim to a labour tribunal or a civil court. The labour tribunal process is less formal than the civil court process although tribunal hearings are held in private. The number of labour tribunal claims has been increasing steadily in recent years but the majority of cases settle before the hearing. Monetary awards of typically between six to 12 months' pay are awarded in dismissal cases. Either party can appeal a tribunal finding to a civil court.

Litigation in the civil courts is generally slow and expensive. An informal mediation system is also available but is not widely used.

Protecting the business

Restrictive covenants are common and may be enforceable as long as they are reasonably necessary to protect the employer's legitimate business interests, taking into account broadly the same factors as the UK courts.

Employee representation

Employees have the right to form and join unions although their popularity and influence has waned in recent decades. Even when no union exists, employers are often required to deal with employee representatives elected by the majority of employees of the company. An employer is required to enter into a formal agreement with a trade union or employee representatives in certain situations (for example, regarding overtime work or flexible working arrangements).

Business transfers

There is no automatic transfer of employment in business transfer situations. However, a dismissal due to the business transfer will still be difficult to justify.

Data protection

The Personal Information Protection Act (“PIPA”) regulates the collection, disclosure and storage of employees’ personal information. The PIPA prohibits an employer from using employees’ personal information for undisclosed or unauthorised purposes.

Ahead of these changes, employers should consider whether their existing work rules may require amendment to comply with the new requirements.

Employment law reforms

A package of work-style reform bills passed through Japanese parliament in June 2018. The bills include the following key reforms: imposing new limits on overtime hours; establishing a system of special requirements for “Sophisticated Professionals” which would exempt employees engaged in certain specialised work from the regulations on working hours; and eliminating unreasonable differences between the working conditions of regular employees and those of part-time, fixed-term and dispatched employees.

The implementation of the system for “Sophisticated Professionals” is expected to commence from April 2019. In addition to the mandatory caps on overtime hours under the current laws (45 hours per month and 360 hours per year in normal seasons), the new mandatory caps in busy seasons (720 hours per year) as well as the mandatory cap on the aggregate hours of overtime work and holiday work (100 hours per month and average 80 hours monthly) will be introduced in April 2019 for large-sized enterprises (and in April 2020 for small and medium-sized enterprises). The guidelines on equal working conditions for regular and non-regular employees will be binding in April 2020 for large-sized enterprises (and in April 2021 for small and medium-sized enterprises).

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