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## Japan
## Employment and Labour Law

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This country-specific Q&A provides an overview of employment and labour laws and regulations applicable in Japan.

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# Japan: Employment and Labour Law

## 1. Does an employer need a reason to lawfully terminate an employment relationship? If so, state what reasons are lawful in your jurisdiction?

Yes. Regular full-time employees are usually employed for an indefinite term and the employer's right of unilateral termination for such employees is strictly limited in Japan. Article 16 of the Labour Contract Act ('LCA') stipulates that 'a dismissal shall, where the dismissal lacks objectively reasonable grounds and is not considered to be appropriate in light of social convention, be treated as an abuse of right to dismiss and invalid'.

Reasonable grounds for dismissal that have been recognised by the courts can be roughly categorised into the following 4 types:

- incompetence or poor performance,
- violation of a disciplinary rule,
- business necessity, and
- failure to join a trade union where union membership is compulsory.

Unless such a reasonable ground exists, any dismissal of an employee is void. Furthermore, even if a reasonable ground exists, the dismissal could still be void if it 'is not considered to be appropriate in light of social convention'. What this standard entails is that the court would generally only acknowledge a dismissal to be valid if the ground for dismissal is of a serious level and no circumstances exist on the employee's side that would render the dismissal to be overly severe.

As to fixed-term employment, a stricter rule applies to termination during the term. Article 17 of the LCA provides that, absent a 'compelling reason', an employer may not terminate fixed-term employment prior to its expiration.

Compared with such termination, not renewing a fixed-term employment is generally easier. However, in certain circumstances, the non-renewal of fixed-term employment could be nearly as difficult as the dismissal of employees employed for an indefinite term.

Under Article 19 of the LCA, if an employee requests the renewal of a fixed-term contract in either of the following cases, the employer shall be deemed to have accepted such request unless it can prove that there are reasonable grounds not to renew the contract:

- if the contract has been renewed repeatedly, rendering it the equivalent of a contract with an indefinite term, or
- where the employee had a reasonable expectation that the contract would be renewed.

In addition, under Article 18 of the LCA, an employee who has been employed by the same employer under a fixed-term contract that has been renewed at least once and has continued in effect for more than five years may request the contract to be converted into a contract with an indefinite term (please see reply to Question 23).

## 2. What, if any, additional considerations apply if large numbers of dismissals (redundancies) are planned? How many employees need to be affected for the additional considerations to apply?

In a redundancy situation, precedent requires that courts apply a strict standard in determining the validity of dismissals. Specifically, a court is required to consider the following four factors in this determination:

- the business necessity of reducing personnel,
- the employer's effort to avoid the dismissal (e.g. reduction or suspension of recruitment, transfers, solicitation of voluntary retirement, etc.),
- the appropriateness of the process for determining which employees will be dismissed, and
- the appropriateness of the termination proceedings, including providing reasonable explanation to the dismissed employees.

There is no material difference in the legal requirement for large numbers of dismissals compared with that for a single dismissal. The employer would need to prove the necessity of reducing such a large number, but generally the same rules apply.

As for procedural requirements in case of termination of employment of 30 or more employees or five or more elderly employees due to redundancy, please see Question 10.

 

### 3. What, if any, additional considerations apply if a worker's employment is terminated in the context of a business sale?

There are no additional considerations that would apply to termination in the context of a business sale. The business sale and surrounding facts would be considered in determining the existence of reasonable grounds for dismissal.

### 4. Do employees need to have a minimum period of service in order to benefit from termination rights? If so, what is the length of the service requirement?

The employer is obliged to give advance notice of termination to the employee (please see Question 5 and 6). However, this obligation does not arise under the following circumstances:

1. When the employee is employed by daily basis and terminated within one month from the first employment date;
2. When the employee is employed under a fixed-term employment contract for a period of two months or shorter without extension or renewal;
3. When the employee is employed for a seasonal duty under a fixed-term employment contract for a period of four months or shorter without extension or renewal; or
4. When a probationary period is set forth under an employment contract and the employee is dismissed during the probationary period and within the first 14 days of employment.

Other than this point, employees do not need to have a minimum period of service to benefit from termination rights.

### 5. What, if any, is the minimum notice period to terminate employment? Are there any categories of employee who typically have a contractual notice entitlement in excess of the minimum period?

The minimum notice period for dismissal is 30 days (Article 20, paragraph 1 of the Labour Standards Act). There are no such categories of employee who typically have a contractual notice entitlement in excess of the minimum period, but contracts with senior-level employees sometimes set forth a longer notice period.

### 6. Is it possible to make a payment to a worker to end the employment relationship instead of giving notice?

Yes, the employer may make a payment equivalent of 30 days' average salary in lieu of notice. The employer may also shorten the notice period by making a payment equivalent to average salary for the days reduced from such notice period (Article 20, paragraph 2 of the Labour Standards Act).

### 7. Can an employer require a worker to be on garden leave, that is, continue to employ and pay a worker during their notice period but require them to stay at home and not participate in any work?

Yes, as long as the employer pays salary, it can generally require its employee to stay at home and not participate in any work during his notice period.

### 8. Does an employer have to follow a prescribed procedure to achieve an effective termination of the employment relationship? If yes, describe the requirements of that procedure or procedures.

There are no statutory procedures for lawful dismissal except for the required notice period of 30 days or payment in lieu of notice (please see reply to Questions 4 and 5).

### 9. If the employer does not follow any prescribed procedure as described in response to question 8, what are the consequences for the employer?

In principle, a dismissal without the 30-day advance notice or payment in lieu of notice is still valid as a notice of termination, and the employment ends at the expiry of 30 days after notice or when the employer makes payment in lieu of notice, whichever is earlier.

### 10. How, if at all, are collective agreements relevant to the termination of employment?

In the case where a collective agreement is entered into between an employer and a trade union regarding the termination of employment, the employer must follow the terms of such agreement.

A provision commonly seen in collective agreements

 

regarding the termination of employment is one that requires the employer to consult with the trade union when the employer intends to dismiss an employee. If the employer fails to comply with this provision, the dismissal may be considered void as lacking reasonable grounds.

## 11. Does the employer have to obtain the permission of or inform a third party (e.g local labour authorities or court) before being able to validly terminate the employment relationship? If yes, what are the sanctions for breach of this requirement?

In principle, the employer does not need to obtain the permission of or inform a third party before terminating the employment relationship, unless required under an agreement with a third party such as a trade union (please see reply to Question 9).

When the termination of employment due to redundancy (including both dismissals and solicited resignations) of 30 or more employees is expected to occur within one month, the employer must create a support plan for re-employment, submit it to a local public job-placement office and obtain its approval at least one month before the "first" termination of employment occurs (Article 24, paragraph 1 of the Employment Measures Act) ('EMA').

Similarly, when the termination of employment for any reason (including both dismissals and solicited resignations) of 30 or more employees is expected to occur within one month, the employer must file a notification of large-scale termination with a local public job-placement office at least one month before the "first" termination of employment occurs (Article 27, paragraph 1 of the EMA). If the reason for the termination is redundancy, and the employer has submitted a support plan for re-employment as required, then the employer would be deemed to have filed the large-scale termination notification.

Also, if the termination of employment due to redundancy (including both dismissals and solicited resignations) of five or more elderly employees (employees whose ages are 45 or over but below 65) is expected to occur within one month, the employer must file a notification of termination of elderly employees with a local public job-placement office at least one month before the "last" termination of employment occurs (Article 16, paragraph 1 of the Act on Stabilization of Employment of Elderly Persons) ('ASEEP'). If the employer has submitted a large-scale termination notification pursuant to the preceding paragraph, then the employer would not need to file the notification of termination of elderly employees.

Employers who fail to file a notification with the local public job-placement office are subject to a penalty of fine up to 300,000 yen in case of a large-scale termination notification (Article 40, paragraph 1, item 1 of the EMA) and 100,000 yen in case of a notification of termination of elderly employees (Article 57 of the ASEEP).

## 12. What protection from discrimination or harassment are workers entitled to in respect of the termination of employment?

The Labour Standards Act prohibits discrimination against employees on the grounds of nationality, creed or social status, with respect to all aspects of the employment relationship including termination (Article 3).

The Act on Securing of Equal Opportunity and Treatment between Men and Women in Employment ('Equal Opportunity Act') prohibits discrimination based on gender in a broad range of areas including retirement and dismissal (Article 6).

The Equal Opportunity Act specifically prohibits employers from dismissing, or otherwise treating unfavourably, female employees for getting married, becoming pregnant, giving birth, or requesting maternity leave or other entitlements based on pregnancy or childbirth (Article 9).

In addition, dismissing or otherwise discriminating against male and female employees for exercising their statutory rights to take childcare leave or family care leave is prohibited by the Act on Childcare Leave, Family Care Leave, and Other Measures for the Welfare of Workers Caring for Children or Other Family Members.

There are no statutes that specifically target any type of harassment directly in relation to the termination of employment, but harassment either of a sexual nature, or based on superiority within the workplace (known as 'power harassment'), that drives an employee to resignation would constitute a tort giving rise to potential liability on both the employer and the offending individual.

## 13. What are the possible consequences for the employer if a worker has suffered discrimination or harassment in the context of termination of

 

## employment?

In the case where an employee is dismissed or forced to resign due to unlawful discrimination or harassment, and the employee challenges the validity of the dismissal or resignation, it is likely that the dismissal or resignation will be deemed void and the employee will be reinstated to his/her original position unless a monetary settlement is reached between the parties. In such a case, the employer must pay unpaid salary for the period from the dismissal or resignation until the reinstatement. The employer may also be required to compensate the employee for emotional damages due to the discrimination or harassment and/or resulting termination.

## 14. Are any categories of worker (for example, fixed-term workers or workers on family leave) entitled to specific protection, other than protection from discrimination or harassment, on the termination of employment?

Yes, (i) fixed-term employees, (ii) employees taking maternity leave and (iii) employees taking leave due to work-related injuries or illnesses are entitled to specific protection.

The dismissal of fixed-term employees during their term of employment requires a 'compelling reason' which is considered to be narrower than the 'reasonable grounds' required for the termination of employment of an indefinite term (please see reply to Question 1).

Employers are prohibited from dismissing an employee while on maternity leave and within 30 days after the end of such leave (Article 19, paragraph 1 of the Labour Standards Act).

Employers are prohibited from dismissing an employee while on leave due to a work-related injury or illness and within 30 day after the end of such leave, unless the employer pays compensation equivalent to the employee's average salary for 1,200 days when the employee does not recover from the injury or illness for 3 years (Article 19, paragraph 1 of the Labour Standards Act).

## 15. Are workers who have made disclosures in the public interest (whistleblowers) entitled to any special protection from termination of employment?

Yes. Dismissal of an employee who made disclosures in the public interest is void under certain circumstances as set forth in Article 3 of the Whistleblower Protection Act. For example, if an employee informs the company of a Reportable Fact as defined in the said Act that the employee considers to have occurred or is about to occur, and is dismissed as a result, such dismissal would be void. The same applies to the dismissal of an employee who reported to the pertinent administrative agency of a Reportable Fact when there are reasonable grounds to believe that the Reportable Fact has occurred or is about to occur; or when the employee considers that a Reportable Fact has occurred or is about to occur and reports it in writing, disclosing the employee's identity.

## 16. In the event of financial difficulties, can an employer lawfully terminate an employee's contract of employment and offer re-engagement on new less favourable terms?

The same strict standard explained in Question 2 is applied in determining the validity of unilateral termination in the event of financial difficulties even when such re-engagement is offered.

Generally speaking, an employer may not change its employee's terms and conditions to the detriment of the employee without his/her consent, except where the change is minor and reasonable. Courts tend to deem changes of employment terms and conditions to be unreasonable if such changes will have a substantial impact on the employee's livelihood, such as reduction of wage.

## 17. What, if any, risks are associated with the use of artificial intelligence in an employer's recruitment or termination decisions? Have any court or tribunal claims been brought regarding an employer's use of AI or automated decision-making in the termination process?

There are no specific legal regulations on the use of artificial intelligence in an employer's recruitment or termination decisions.

Since an employer has broad discretion in hiring, it would be generally able to use artificial intelligence in its recruitment decisions unless it engages in discrimination and/or it has security issues.

Whether or not an employer uses artificial intelligence in its termination decisions, any dismissal of an employee is

 

void unless a reasonable ground exists. Please see Question 1.

To date, we are not aware that any such claim has been brought to court.

### 18. What financial compensation is required under law or custom to terminate the employment relationship? How is such compensation calculated?

If an employer has reasonable grounds to dismiss an employee as required under the Labour Contract Act, the employer does not have any legal obligation to compensate the employee for the termination. However, as it is very difficult to meet the legal requirements for dismissal, employers typically solicit the voluntary resignation of employees by offering financial compensation.

There is no statutory requirement or guideline regarding the financial compensation to be offered in such a situation. The amount offered is usually determined based on such factors as the reason for the termination, the employer's size and financial conditions, the employee's performance level, length of service years, age and salary. Severance pay within the range of three to 18 months of the employee's monthly base salary would be considered standard practice in Japan.

### 19. Can an employer reach agreement with a worker on the termination of employment in which the employee validly waives his rights in return for a payment? If yes, in what form, should the agreement be documented? Describe any limitations that apply, including in respect of non-disclosure or confidentiality clauses.

Yes, an employer can reach such an agreement with an employee.

The validity of such an agreement is not denied even if it is not in writing. In practice, however, such agreements are often made in writing because without a written document there is a high probability that the employer will be unable to prove the agreement in the event of a dispute over its existence or non-existence. There is no prescribed format for this document.

In principle, there is no limitation on the waiver of employee's rights as long as the employee consents voluntarily. Notably, however, recent court decisions have shown a reluctance to acknowledge the employee's voluntary consent especially in cases where the employee waives a significant portion of his rights. Employers are encouraged to provide a detailed and accurate explanation on the content of the rights to be waived before obtaining the employee's consent.

Non-disclosure and confidentiality clauses are generally binding if they specify the scope of the information that cannot be disclosed.

### 20. Is it possible to restrict a worker from working for competitors after the termination of employment? If yes, describe any relevant requirements or limitations.

Yes, it is possible to a certain extent. In principle, workers have a contractual obligation not to compete with their employer while employed, but their constitutional right to freedom of occupation needs to be respected after the termination of employment. Therefore, provisions in company rules or agreements that restrict employees from working for competitors after the termination of employment are only enforced by a court if they are reasonable in duration, geographic area, and scope of business or activity.

### 21. Can an employer require a worker to keep information relating to the employer confidential after the termination of employment?

Yes. To avoid any doubt, employers should stipulate in their work rules, and ideally in a separate agreement with each employee, that the employees owe a confidentiality obligation not only during employment but also after the termination of employment. Also, employers are recommended to provide a clear definition of confidential information in the work rules or the agreement, in order to provide guidance to the employees and help uphold the enforceability of the confidentiality provision in case there is a breach.

### 22. Are employers obliged to provide references to new employers if these are requested? If so, what information must the reference include?

No. It should be noted that information relating to a former employee constitutes personal information under the Act on the Protection of Personal Information, and should not in principle be provided to a third party without the former employee's consent.

 

### 23. What, in your opinion, are the most common difficulties faced by employers in your jurisdiction when terminating employment and how do you consider employers can mitigate these?

The most common difficulties faced by employers in terminating employment are the extremely high standard that needs to be met for dismissing an employee, and the lack of clarity of the standard. It is often difficult for an employer to know for certain if the termination would be legal, as the determination is made based on comprehensive consideration of relevant factors. Furthermore, the consequence of having a dismissal challenged and losing is significant because the employer would be required to reinstate the employee; in order to avoid such a result, the employer would have no choice but to reach a settlement by paying an amount that is satisfactory to the employee.

In order to mitigate these difficulties, unless reasonable grounds for dismissal clearly exist, employers should aim to reach an agreement with the employee for voluntary resignation. This requires a concession on the part of the employer, as it usually entails an offer of severance payment to the employee, but enables the employer to avoid the risks discussed above if the employee agrees to resign.

### 24. Are any legal changes planned that are likely to impact the way employers in your jurisdiction approach termination of employment? If so, please describe what impact you foresee from such changes and how employers can prepare for them?

No specific legislation is currently under consideration with respect to termination issues.

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