COVID-19: EMPLOYMENT POLICIES AND FACTSHEET FOR COMPANIES IN JAPAN

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Asia Labor, Employment & Workplace Safety

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The outbreak of the novel coronavirus ("COVID-19") continues to affect employment and business relationships in Japan. Companies are facing a number of issues in dealing with the current situation and the myriad potential upcoming scenarios.

The intention of this factsheet is to provide answers to frequently asked questions in relation to business and employment in Japan. The answers reflect the current situation regarding the expansion of COVID-19 in Japan (as of March 23, 2020). As the situation may further develop and change quickly, answers may change as well and may require amendments from time to time.

We will continue to monitor the situation in Japan including information published by the competent Japanese authorities, such as the Ministry of Health, Labour and Welfare ("MHLW").

This factsheet shall not replace legal advice and it should not be regarded as a comprehensive or conclusive summary. Before relying on this factsheet we recommend that individual advice be obtained, taking into account any specific individual circumstances as well as new developments.

1. WHAT MEASURES ARE EMPLOYERS IN JAPAN REQUIRED TO TAKE IN RESPONSE TO THE CORONAVIRUS ("COVID-19")?

In Japan, the Industrial Safety and Health Act imposes upon employers a general duty of care with respect to the work environment, health, and safety of employees. Employers are required to "endeavor to ensure the safety and health of workers in workplaces through creating a comfortable working environment and improving working conditions," this includes prevention from contracting or spreading infections in the workplace.

Reasonable measures include giving instructions to employees regarding hand washing, providing hand sanitizer, ensuring proper indoor ventilation, sanitizing public or common spaces within the office and other related measures, monitoring the health of employees, and instructing employees on best practices to avoid contractions of COVID-19 in light of their duties. Employers are also permitted and advised to monitor employees and visitors for other respiratory symptoms such as coughing, runny nose, and breathing difficulties.

Employers who do not take adequate measures are at risk of damages claims from employees in the event an employee contracts an infectious disease due to the employer's failure to prevent the spread of infection in the workplace.

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Further, the MHLW recommends employers implement (i) a Telework (work from home) system, and/or (ii) change the hours which employees arrive at and leave the work place - while still working their normal working hours per day. It is legally permissible to implement these changes without being granted any specific consent from respective employees under Japanese law.

2. CAN AN EMPLOYER IN JAPAN IMPLEMENT SAFETY CONTROLS, SUCH AS NON-INVASIVE TEMPERATURE SCANS OF EMPLOYEES AND/OR CUSTOMERS ENTERING THEIR PREMISES?

There are no employment, privacy, or other legal impediments to implementing such measures. As discussed above, an employer is required to give the necessary consideration to securing the work environment, health, and safety of their employees, therefore it is possible to implement non-invasive temperature scanning for employees and visitors entering its facilities, but employers should keep in mind the following:

1. Consent of the employee or visitor who wants to enter the facility is required. It is not necessary to draft any special consent form for such purposes and oral consent should be practical and acceptable.
2. If any personal information is collected and stored via such temperature scanning, this information should be treated in accordance with applicable data privacy laws.

3. ARE EMPLOYEES OBLIGED TO CONTINUE WITH BUSINESS TRAVEL?

Employers may not require employees to travel to Iran, San Marino, Korea, China, some regions of Italy, Switzerland, and Spain because the government has issued a notice to strengthen border control measures. Specifically, the measures call upon people arriving from Europe, Iran, Egypt, Korea, China, and roughly 40 other countries to wait 14 days at a location designated by the quarantine station chief and to refrain from using public transportation. Also, returning residents in Japan will be required to use private vehicles, and not to use public transportation when returning to their homes.

4. WHAT IS AN EMPLOYER´S OBLIGATION TOWARD EMPLOYEES WHO CANNOT COME TO WORK OR TELECOMMUTE DUE TO MEDICALLY (OR GOVERNMENT) REQUIRED QUARANTINE OR IN CASE GOVERNMENT DECIDES TO CLOSE A SITE AND EMPLOYEES CANNOT TELECOMMUTE?

If an employee is prevented from working due to having been infected by COVID-19 or due to a medical quarantine, he/she should take sick leave. Sick leave taken in such cases may be treated as normal sick leave used at any other time and payment of sick leave allowance by the employer is not required (Article 26 of the Labor Standards Law). If certain requirements are met, the employee may be entitled to the health insurance sickness and injury allowance.

5. WHAT IS AN EMPLOYER´S OBLIGATION IN CASE THE EMPLOYER DIRECTS EMPLOYEES NOT TO COME TO WORK, TO TELECOMMUTE, OR IN THE EVENT AN EMPLOYER DECIDES TO CLOSE A WORKSITE?

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COVID-19 has been designated as an infectious disease under the Act on Prevention of Infectious Diseases and Medical Care for People with Infectious Diseases (hereinafter referred to as the "Infectious Diseases Act") as of February 1, 2020.

In each prefecture, the prefectural governor is responsible to take measures to prevent the spread of COVID-19 under the Infectious Diseases Act. If an employee within the prefecture were to be infected, they would likely take some preventative measures, which may include work restrictions, hospitalization recommendations, etc. in accordance with the Infectious Diseases Act.

If an employee in the prefecture is diagnosed, the governor of the prefecture is likely to impose certain restrictions on working conditions, so it is possible an employer may be required to suspend operations.

Even if the prefectural governor does not restrict work, employers have an obligation to prevent infections in the workplace as discussed above. Therefore, it is possible to order employees to remain away from the workplace to ensure the safety of other employees.

In the event that an employee is found to be or is suspected of being infected with COVID-19, the employer should consult with the employee and healthcare officials to decide on a specific response.

If an employer orders an employee to take a leave of absence, whether any leave allowance is required will depend on a determination of whether the leave is for "reasons attributable to the employer" in accordance with Article 26 of the Labor Standards Law.

According to the MHLW, for example, if an employer forces its employees to take leave at the employer's discretion, such as ordering a uniform leave of absence from work solely because of a fever or other illness, it will be deemed "a leave for reasons attributable to the employer" in accordance with Article 26 of the Labour Standards Law and the employer will be required to pay the employee for such leave. This is typically 60% of the employee's average wage.

However, in the event of a leave of absence due to a force majeure event, the employer may not be obliged to pay employees during such leave. If employers were to make such a claim, they should comprehensively consider such factors as the availability of other available alternatives, the period of business suspension, and specific efforts that could be taken to avoid suspension of operations.

6. WHAT IS AN EMPLOYER´S OBLIGATION IN CASE EMPLOYEES DECIDE NOT TO COME TO WORK AS A MEASURE OF PRECAUTION WITHOUT ANY DIRECTIONS OF THE COMPANY AND WITHOUT MEDICAL DIRECTIONS OR SYMPTOMS?

According to the MHLW, "If workers are to take leave in connection with the new COVID-19, there should be frequent discussions between labor and management regarding the handling of wages during any absence from work, and there should be cooperation between labor and management to establish a system that enables

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workers to take leave with peace of mind." As this is an unprecedented situation, it is important for employers and employees to cooperate.

Employees who at their own initiative take a leave of absence due to fever or other reasons are, in principle, treated as absent from work due to illness and do not need to be paid a leave allowance.

Employees should be allowed to apply to use annual paid leave, which employers may treat as usual annual paid leave. Employers should be aware that a company cannot unilaterally force employees to take annual paid leave.

In view of the unprecedented COVID-19 situation, some companies have set up special leave allowance systems.

7. WHAT ARE THE BENEFITS AN EMPLOYER CAN APPLY FOR IN RELATION TO SIGNIFICANT COVID-19 IMPACTS (E.G., SIGNIFICANT VIRUS-RELATED REDUCTION IN BUSINESS, AUTHORITY-ORDERED AND VIRUS-RELATED CLOSURE OF THE OFFICE, OR SIMILAR)?

The Japanese government made the decision to close all elementary and junior high schools until the end of March, subject to reassessment of the situation at that time. Therefore, MHLW has decided to compensate companies who allow parents to take additional paid annual leave to care for their children while schools are closed. The amount to be compensated will be equivalent to the employee's salary during this additional paid leave period at a rate up to JPY 8,330 per day.

Further, when an employer, who has been forced to reduce operations due to economic reasons, temporarily suspends operations, provides education and training, or temporarily transfers a worker in order to maintain the employment of the worker, the Japanese government may subsidize part of the leave allowance and wages under the Employment Adjustment Subsidy system.

8. WHAT PRIVACY CONCERNS SHOULD EMPLOYERS BE AWARE OF IN THE HANDLING OF EMPLOYEE HEALTH AND MEDICAL INFORMATION?

In general, employers who have collected employee personal data and plan to use such information for any purpose should provide notice of such data collection to the employee as soon after the collection as possible, and when obtaining an employees' personal data in written form, the employer must clearly explain the purpose prior to acquiring such personal data.

Of particular importance in relation to COVID-19, employers who collect “special care-required personal information,” which includes information pertaining to a person's race, religion, and medical history, must obtain employees' consent prior to collecting such information.

When providing or receiving personal information to or from a third party, employers must maintain records of personal data transferred or received, including the name and address of the receiving or transferring third party.

Employers also must obtain the prior consent of their employees when they seek to transfer personal information

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to a third party outside of Japan unless the third party is located in a country where regulations on personal information protection are deemed to be equivalent to those of Japan or when the third party maintains an internal personal information protection system consistent with standards set forth by the Japanese government.

9. WHAT SPECIAL STEPS CAN/SHOULD EMPLOYERS TAKE WITH RESPECT TO HOLDING SHAREHOLDERS MEETINGS?

In general in Japan, shareholders of larger companies or listed companies may execute their voting rights in writing or via the internet prior to the date of the shareholders meeting rather than actually attending such meeting. Therefore, some companies recommend that their shareholders execute their voting right in such manner in order to avoid infection and prevent the spread of COVID-19.

10. HOW CAN K&L GATES BE OF ASSISTANCE?

We can assist with advising on the details of the employers' obligations discussed above, as well as provide guidance on advisories issued by the various government agencies, and best practices during this period. For HR teams who are based outside of Japan, we will also be able to advise on the situation on the ground, as well as common practices across companies here in Japan.

If you would like to take this opportunity to review your COVID-19 practices globally, K&L Gates has lawyers across 45 offices globally who would be happy to assist you with your specific requirements, and with the convenience of a single point of contact.

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