Newsflash Japan (04/20) COVID-19 Labor Relations (2)

In the current situation, many companies are considering HR-related measures to cope with the economic challenges they are facing. Such measures may range from requesting employees to take part of their annual paid leave to outright salary cuts or redundancy. This newsflash addresses some legal issues to be considered by the employer from a labor law perspective.

Q1: Can employees be requested to use up their accrued annual paid leave in periods with little workload?

In principle, no. Whether or when to take annual paid leave is generally at the discretion of the employee. Employers are therefore generally obliged to grant annual paid vacation to the employees in accordance with their vacation requests, unless such vacation interferes with the company’s "normal operation". The term "interference with normal operation" is interpreted very narrowly, and the employer is only in limited cases entitled to deny the requested vacation. However, the employer can in principle not unilaterally designate the timing of paid vacation without a specific vacation request.

An exception to this principle is the so-called “planned paid vacation system”. Under such system, it is feasible to designate the dates on which the annual paid vacation of the employees shall be taken, provided that at least five (5) days per year must remain at the free disposition of each employee. The vacation days designated in the planned paid vacation schedule will be automatically deducted from the annual paid vacation of the employee. As long as the five days limit is respected, the vacation plan may also include paid vacation days carried over from the last year. The scope of the vacation plan may (i) pertain to the entire business, (ii) establish a shift system in which certain groups or sections take vacation on a rotation basis, or (iii) designate vacation days for individual employees. For the implementation of the planned paid vacation system, the conclusion of a labor-management agreement between the company and the employee representative (or union representative, if applicable) is required.

Encouraging employees to take their annual paid leave during specific time on a voluntary basis is legally feasible. It should be noted though that in case of a later dispute an employee may challenge the voluntariness of his consent. To this end, due implementation and communication are important.

Q2: Can employees be requested to use up their accrued overtime?

Under Japanese labor law, overtime needs in principle to be compensated in cash in the month following the month in which the overtime was rendered. An exception applies under the so-called flexible working hour system, which requires the prior establishment in a labor-management agreement between the company and the employee representative. Under the flexible working hour system, the regular working hours can be balanced over a specified reference period. The maximum reference period is three months. While an employer may encourage employees to schedule their working time in accordance with the actual workload, the allocation of working hours within a flexible working hour system is generally at the discretion of the employee. To this end, also with a flexible working hour system, the employer may not oblige employees to use up accrued overtime, but may only encourage them to allocate their working time in alignment with the business situation.
Q3: Is continued payment of salary mandatory, if employees do not engage in work due to COVID-19 and, if yes, how much?

It depends on the reason why the employee does not engage in work. Please see the below chart for further information:

<table>
<thead>
<tr>
<th>Reason</th>
<th>Obligation for Continuous Salary Payment</th>
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<tbody>
<tr>
<td>Refusal by employee to work due to fear of COVID-19</td>
<td>In principle, no unless fear is based on reasonable ground (e.g. COVID-19 infected person was in organization)</td>
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<tr>
<td>Absence due to illness</td>
<td>In principle, no unless employee applies for paid sick leave (if available under the company’s employment rules or individual agreement) or annual paid leave</td>
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<tr>
<td>Absence due to quarantine requested by authority</td>
<td>No</td>
</tr>
<tr>
<td>Absence due to quarantine ordered by employer</td>
<td>In principle, yes but only 60% mandatory in case of reasonable suspicion of COVID-19 infection of employee concerned</td>
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<tr>
<td>Medical test / doctor visit</td>
<td>In principle, no (but de-facto not uncommon to pay at least for check-ups induced by company during the working hours)</td>
</tr>
<tr>
<td>Temporary closure of business</td>
<td>Yes, but only 60% mandatory if closure by employer was due to “unavoidable reason”</td>
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</table>

Regardless of the above described, it should be confirmed whether the company’s employment rules or the individual agreement(s) stipulates otherwise.

If an employer instructs its employees to temporarily suspend work due to a “reason attributable to the employer”, the employer needs to continue payment of at least 60% of the salary. The term “reason attributable to the employer” is generally applied and interpreted broadly. However, if an employer instructs its employees to suspend work although this would have been avoidable, the employer’s decision may be deemed negligent to make the necessary effort to avoid such suspension with the consequence of the company being obliged to pay up to 100% (but at least 60%) of the employee’s average salary. The following examples may constitute a “reason attributable to the employer” in which the leave allowance of 60% will generally apply unless there is an obligation for the company to pay more than 60% of the salary laid down in the rules of employment or the employment agreement:

- Reasonable concern that the employee is infected with COVID-19 but the employee is willing to render work at the office;
- The raw material or production equipment etc. which is necessary for the manufacturing has not been delivered due to the COVID-19 crisis;
- In case certain employees get infected with COVID-19 and it is difficult to operate the business with the remaining employees;
- In case there is very few work the employees can engage in due to the cancellation of orders or a steep decrease in overall business due to the COVID-19 crisis.

Governmental subsidies for the leave allowance to be paid to the employees may be available for companies falling under the definition of small and medium enterprises stipulated in the guideline of the Ministry of Health, Labor and Welfare of Japan.

An employer does not have to pay any salary at all if a so-called event of “force majeure” applies. The employee’s infection with COVID-19 and a quarantine request of the competent authority would generally constitute such force majeure event. In such case, the reason for suspending the employee from work would not be considered as a reason attributable to the employer with the effect that no salary payment to the employees would be required. The closure or suspension of a business facility by government-mandated order does not automatically constitute a force majeure if there are other work opportunities for the employees to engage in, e.g. via remote work or in a different location of the employer which has not been closed. Each case should therefore be duly evaluated on its own.
Q4: Is a general reduction of salaries during the COVID-19 crisis permitted?

A reduction of the salary of an employee generally requires the individual employee’s consent. Where scope and conditions providing for an amendment of the salary and related proceedings for such amendment are laid down in the rules of employment in a way that employees can predict such changes, e.g. in a salary matrix (i.e. a uniform system defining various salary levels applicable to all employees depending on their position etc.), such salary amendment may be in principle feasible, provided that related proceedings are observed and the change is “reasonable”. Whether a change is reasonable depends on various factors, such as the extent of the disadvantage to be incurred by the employees, the business needs justifying an amendment of the salary matrix, the social appropriateness of the new employment/salary conditions, and the status of prior negotiations held with the employees. These criteria are generally evaluated strictly and mere economic losses due to the COVID-19 crisis are generally not sufficient to implement a one-sided change.

Companies may implement the proposed changes by advance agreement with the individual or group of employees concerned on a voluntary basis. In such case, clear and due communication and process should be observed to avoid later claims that the consent was not given voluntarily. Instead of obtaining the consent of each of the employees concerned, companies may also conclude a labor agreement with the labor union that applies to at least three-quarters (3/4) of all employees regularly working at the respective workplace. In such case, the labor agreement will be binding on all employees belonging to the employee categories (e.g. factory workers, sales staff, etc.) failing under the scope of application of the labor agreement. A salary reduction shall generally be kept at minimum and be limited to a fixed period.

Different from the base salary, a bonus payment is often at the employer’s discretion when deciding on the amount and timing. Whether a bonus payment can be reduced in the light of the COVID-19 crisis largely depends on the wording of the related bonus provision in the employment contract or the employment regulations.

Q5: Does COVID-19 and its economic consequences for a company provide a legitimate reason for downsizing?

The COVID-19 crisis itself and its impact on the financial situation of a company does not automatically constitute a justifiable reason to make employees redundant. Because a unilateral termination by the employer is generally considered a method of last resort (ultima ratio) in Japan, it needs to be evaluated under consideration of all circumstances at issue whether the requirements for a unilateral termination are given. To this end, it is first necessary to confirm if other less drastic measures are available to mitigate the effects of the COVID-19 crisis on the financial situation of the company. This would typically include the measures discussed above. Only if all other measures are exhausted, a company may consider a unilateral termination of employees. Such termination requires a so-called “justifiable reason”, which, in case of a termination based on economic reasons, must comply with the following criteria:

- **Economic necessity**
  Redundancies have to be unavoidable and necessary in the light of the economic situation of the particular company.

- **Previous efforts to avoid dismissal**
  The employer has to conduct serious efforts to avoid a unilateral termination, e.g. by suspension of hiring new employees, suspension of salary increases, reduction of management compensation, sale of unnecessary assets, promotion or resignations.

- **Reasonable selection**
  The method of selecting the employees to be made redundant needs to be fair and based on objective, non-discriminatory criteria.

- **Reasonable process**
  The employer has to sufficiently consult with employees and labor unions (if any) before the unilateral termination.

Due to the strict application of the above criteria by the courts and the high threshold for a legally justifiable and valid termination under Japanese law on the one hand and the absence of a preclusion period for a termination protection claim by the employee on the other hand, a unilateral termination is typically avoided in Japan. Thus, even in case the business is severely affected by the consequences of the COVID-19 crisis, it is generally recommendable to propose a voluntary resignation of the employees concerned in consideration of a severance payment and/or other benefits (for further information, please refer to our newsletter #10/19 “Restructuring HR” to be found on our homepage www.arquis.jp). It should also be noted that some of the governmental subsidies and support measures offered to companies as a countermeasure against the effects of COVID-19 require the company to refrain from dismissing employees during a defined period.