

Labor & Employment Law Newsletter

Expanding Employment of the Elderly

Options for companies to deal with retiring employees under the amended Act on Stabilization of Employment of Elderly Persons

Outline of the Amendment

Act on Stabilization of Employment of Elderly Persons (the "Act") was amended in 2004 and 2012. These amendments require companies to take measures to secure stable employment of workers over the age of 60 to ensure that people can keep working until the age of 65.

Background

In response to the rapid increase in Japan's elderly population, the Japanese government had no choice but to reform the public pension system. Prior to the 2000 reforms, employees could receive both a fixed pension payment and an earnings-related pension payment ("Earnings-related Pension") when they turned 60. Following the reform, the eligibility age for the fixed pension payment was raised in stages from 60 to 65 between 2001 and 2013. Similarly, the eligibility age for the Earnings-related Pension will be raised in stages from 60 to 65 between 2013 and 2025 (see "Overview of Transitional Measures" on next page). Because many Japanese companies had set their mandatory retirement age at 60, certain employees between the ages of 60-65 that do not yet meet the new pension eligibility age would now be forced to live without any income until they became eligible. To deal with this issue, the Act was amended in 2004 and 2012, allowing employees to work until age 65.

The 2004 amendment requires companies to adopt one of the

following measures to secure stable employment for its employees until the age of 65, and to amend their work rules ("shugyo-kisoku") and/or the employment agreement accordingly:

- (1) Raising the mandatory retirement age to 65;
- (2) Adopting the "Continued-Employment System" under which employees may choose to continue working beyond the age of 60; or
- (3) Abolishing the mandatory retirement age entirely.

Measures (1) and (3) are fairly straightforward, and only minimal revisions to the work rules may suffice to comply with the 2004 amendment. However, because companies were allowed to exclude certain employees by establishing criteria in their labor-management agreements, many companies adopted measure (2) in order to be able to manage and minimize any increase in labor costs. In fact, leading companies such as Toyota and NTT have reportedly adopted the Continued-Employment System by selecting measure (2).

The Act was amended again in 2012 (effective April 1, 2013) to address certain issues left unresolved by the earlier amendment. For instance, even under the Continued-Employment System, those who meet the criteria established in their labor-management agreements but are not yet old enough to receive their pension might not earn any income until reaching their eligibility age. In addition, it can be prohibitively expensive for companies to keep all of



Contents

Expanding Employment of the Elderly ... 1

Amendments to the Employment Contracts Act..... 3

Message from the Labor Practice Group

Kojima Law Offices have provided legal services in the area of labor law since its founding in 1984. Our Labor Practice Group represents clients in labor disputes and assists them in structuring and implementing HR policies. We work with both foreign headquarters and local management to timely and appropriately resolve employment issues that overseas companies face operating in Japan.

As part of our continuing effort to reach out and share our expertise with others, the Labor Practice Group is proud to be launching the premier issue of our "Labor & Employment Law Newsletter". Our hope is to provide a better understanding of this complex area of law, thereby enabling the reader to make more appropriate employment and labor decisions. We hope you find our newsletters both interesting and informative and welcome any feedback you wish to share with us.

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their employees over 60 on payroll without the flexibility to transfer those employees to subsidiaries and other affiliated companies. In response to some of these problems, the main provisions of the 2012 amendment

provide as follows:

- (1) In principle, companies adopting the Continued-Employment System are required to abolish the existing criteria set forth in their labor-management agreements. However, as a transitional measure, companies can apply the criteria to those who become eligible for their Earnings-related Pension between 2013 and 2025 (see "Overview of Transitional Measures" below);
- (2) The scope of companies allowed to employ workers covered by the Continued-Employment System is expanded to include parent companies, subsidiaries and other affiliated companies; and
- (3) The government can make public the names of companies in breach of the Act.

one of the following two schemes:

(i) Continuing Employment

The term of employment will be extended and the current employment contract will continue to be in force until the employee reaches 65 (with or without changes in employment conditions); and

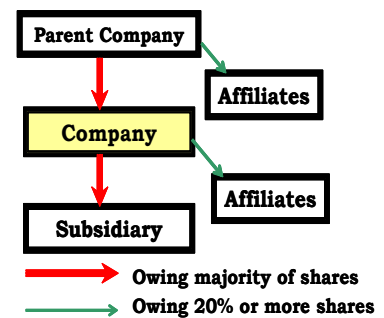
(ii) Re-Employment

The current employment contract will be terminated and the company will offer a new employment contract (the conditions for the new contract usually differ from those of the previous contract).

A company should carefully consider which scheme is most appropriate for its unique set of circumstances. Because the Act does not require companies to maintain the same employment conditions as before, companies can alter those conditions (e.g., the type of job, remuneration and benefit plan) for the employees covered by the Continued-Employment System.

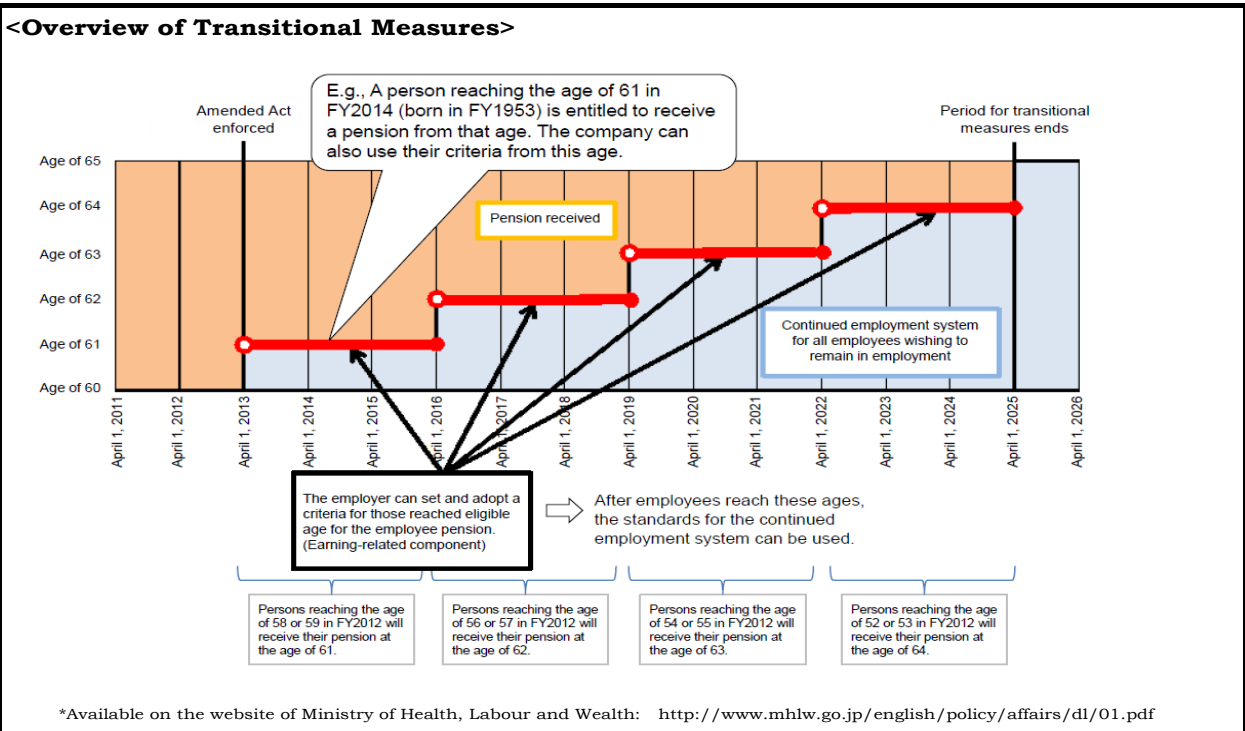
Some companies have already established criteria in their labor-management agreements to limit persons covered by the Continued-Employment System under the 2004 amendment. With the 2012 amendment, these companies can take up to 12 years to transition to the new system by applying the existing criteria to certain employees while concurrently applying the new standards to the rest of their employees (see "Overview of Transitional Measures"). Furthermore, the companies themselves are not required to employ the employees covered by the Continued-Employment System. Instead, they can transfer the employees to a group company, as shown in the chart below.

<Companies Employing the Elderly>



Summary of Continued-Employment System

To adopt the Continued-Employment System, companies should choose from



Amendments to the Employment Contract Act

When is a fixed-term contract not a fixed-term contract?

Outline of Amendments

The Employment Contract Act was amended to provide a measure of job security to non-regular employees. The amendments took effect on April 1, 2013 and require companies to grant open-ended employment status to employees who have worked for five years under fixed-term contracts.

Background

Japanese companies used to boast about offering their employees “lifetime employment”. With the prolonged downturn in the economy, however, fewer and fewer employees have been able to attain this coveted status. According to data published by Japan’s Ministry of Internal Affairs and Communications, the percentage of non-regular employees, including fixed-term, part-time, and dispatched employees, increased to 35.2 percent of the total workforce in 2012 (up from only about 20 percent in 1992). Some of the reasons behind this shift are likely the lack of at-will employment in Japan and the difficulty companies face in laying off workers. Many companies therefore came to view non-regular employment as an effective way to maintain flexibility in adjusting the size of their workforce. However, with more than a third of workers now classified as non-regular employees, the almost complete lack of job security that comes with non-regular employment has become a significant concern. The Act was amended to address this issue.

The amendment resulted in three major changes to the Act.

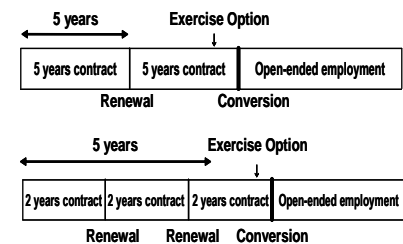
- (1) Companies must now grant open-ended employment status to employees who have worked for five years under fixed-term contracts.
- (2) The criteria for how a company can validly decline to renew a fixed-term employment contract are now codified in the Act.
- (3) The Act prohibits companies from providing non-regular employees with less favorable employment conditions than their regular employees.

Even prior to the amendment, companies were effectively required to comply with items (2) and (3), the underlying principles of which were already established by case law. Item (1), however, is new and represents a potentially significant burden on companies.

Granting open-ended employment to workers who have worked for five years under fixed-term contracts

A company must grant open-ended employment status to fixed-term employees who request regular employment and who meet the requirements listed below. If the employee exercises the option, the fixed-term employment will automatically be “converted” into open-ended employment status upon expiration of the fixed-term employment contract that was in effect at the time the employee exercised the option (see chart below).

- (a) The employer and employee have entered into two or more fixed-term employment contracts; and
- (b) Under those fixed-term employment contracts, the employee has worked for a total of at least five years.



After automatic conversion to open-ended employment status, it will be very difficult for the company to terminate converted employees. To do so, the company would need to comply with the stringent requirements for dismissal in Japan. Conversion does not automatically result in any changes to the employment conditions of employees who exercise their conversion options (apart from the term of employment, of course). The result is that employment conditions of the fixed-term employment contract such as wages, paid holidays, and benefits will remain unchanged under the new open-ended employment status.

Recommended Action

Companies should review their work rules and amend them, if necessary, to clarify whether the rules apply to “converted” regular employees. As noted above, except for the term of employment, the employment conditions remain unchanged when a fixed-term contract is converted to an open-ended contract. This effectively means that the employment conditions of the fixed-term contract will continue to apply. Employers may face problems, however, because the work rules often state simply that the rules will apply to all regular employees without clarifying whether the rules also encompass “converted” regular employees.

If there are any differences in employment conditions between the fixed-term contract and the work rules, the conditions set forth in the

fixed-term contract that are less favorable to the employee than those of the work rules can be negated and replaced by the work rules. The employer can establish different sets of work rules depending on the status of the employee. Therefore, companies should carefully review and, if necessary, amend their work rules and/or establish another set of work rules tailored for “converted” regular employees to avoid potential problems.

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