

## Labor & Employment Law Newsletter

### Terminating Employees in Japan – An Overview, Common Pitfalls and How to Avoid Costly Mistakes (Part III of III)

**Editor's Note:** Part I of this article covered ordinary dismissals and Part II addressed dismissals for the purposes of downsizing. With this issue's coverage of punitive dismissals, we conclude our overview of terminating employees in Japan.

#### Punitive Dismissals

Punitive dismissals are essentially a form of discipline. Like the other types of dismissals, a punitive dismissal should be based on valid grounds. A company should proceed with greater-than-normal caution when dismissing an employee punitively, as a punitive dismissal can result in harsh impacts on the employee, such as immediate termination without any sort of severance pay or retirement allowance, as well as difficulty in obtaining future employment. To minimize the chances of a future dispute with a target employee, a company should, where appropriate, consider other options (including persuading the employee to leave voluntarily) prior to resorting to a punitive dismissal.

This is not to say of course that a company should always hesitate to exercise its right to engage in punitive dismissals. Indeed, punitive dismissals are sometimes the only realistic option to maintain workplace discipline. Below is an overview of the requirements an employer must comply with in order to val-

idly perform a punitive dismissal.

#### I. Basic Requirements

##### (1) Work rules

First and foremost, a company's work rules must expressly state that the employer can carry out punitive dismissals as a form of disciplinary action and must describe the conduct that can lead to them. An employer is not allowed to discipline an employee twice for the same violation.

Because Japanese law does not specify the grounds for punitive dismissals, employers have the discretion to determine the grounds for themselves. Examples of misconduct that can form a basis for a punitive dismissal include a fraudulent application for employment, neglect of an employee's primary duties, a violation of workplace discipline (including sexual harassment and power harassment) and certain criminal acts. The work rules do not need to specify what misconduct may result in a punitive dismissal. Instead, they may simply include a list of actions that are subject to disciplinary measures and what measures the company may take in response (e.g., a reprimand, suspension, pay cut, dismissal, etc.). This allows the company to determine which form of discipline is most appropriate in light of the totality of the circumstances.



Nebuta Festival in Aomori

#### Contents

Terminating Employees in Japan – An Overview, Common Pitfalls and How to Avoid Costly Mistakes (Part III of III)

Punitive Dismissals (Introduction).....	1
Basic Requirements .....	1
Notice and Payment for Punitive Dismissals.....	3
Steps to Carry Out a Valid Punitive Dismissal.....	3

#### Message from the Labor and Employment Practice Group

*Kojima Law Offices have provided legal services in the area of labor and employment law since its founding in 1984. Our Labor and Employment 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 and Employment Practice Group publishes this newsletter 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 the newsletter both interesting and informative and welcome any feedback you wish to share with us.*

Labor Practice Group  
Kojima Law Offices

URL: <http://www.kojimalaw.jp/en/index.html>  
Contact: (E-mail) [webmaster@kojimalaw.jp](mailto:webmaster@kojimalaw.jp)  
(Telephone) 81-3-3222-1401

## (2) Employee misconduct and other actions

Work rules often describe the grounds for disciplinary action (including dismissals) using broad, abstract phrases such as “a violation of the work rules or other company rules or policies” or “an act that disrupts workplace order.” This lack of clarity often results in litigation over whether the act the employee is accused of committing was in fact covered by the disciplinary or dismissal procedures under the work rules. Japanese courts often narrowly interpret these provisions based on the necessity and reasonableness of the dismissal. As a result, only when an employee’s actions are egregious enough to substantially disrupt order in the workplace may an employer validly respond with disciplinary action.

To get an idea of how the courts apply this requirement in practice, we cite cases where employers claimed a breach of the work rules based on an employee’s appearance. In this connection, it is not uncommon for some employers to have detailed rules on grooming and appearance. Some companies even go so far as dismissing employees who refuse to shave off their mustaches or those with unapproved hairstyles (including nonstandard hair color). In these cases, courts found the dismissal invalid. An employee may be disciplined for his or her appearance only if customers would find it objectionable. However, the appearance of the employees in most dismissal cases does not meet this standard, even though the employees have violated the letter of the company’s rules. Another recent case involved the dismissal of a male employee with a gender identity disorder who began dressing as a female at the office. The court found the dismissal of the employee invalid because the employee’s appearance, though unusual, did not rise to the level of disturbing workplace order, which was conduct punishable under the company’s rules.

Disputes often arise over whether misbehavior committed outside the workplace and on the employee’s own time can be subject to disciplinary action. An employer generally cannot regulate its employees’ off-the-job conduct. However, an employee’s actions that may cause harm to the employer’s reputation may be subject to disciplinary action to the extent necessary to maintain workplace order. Japanese courts have held that whether or not an employee’s actions harm the employer’s reputation is determined by taking various factors into consideration, including the nature and severity of the action, as well as the employer’s line of business, size, and position in the market.

## (3) Appropriateness of punitive dismissals

As described above, a company’s work rules typically give it the leeway to determine on a case-by-case basis if it will terminate an employee for misconduct or whether it opts for

a less severe form of disciplinary action. However, any dismissal based on disciplinary grounds must still be deemed appropriate in light of generally accepted societal norms. This means that the employee’s conduct must be egregious enough to justify a punitive dismissal under prevailing social standards. In addition, a punitive dismissal must roughly correspond to how the employer handled other cases of similar misconduct within the company. Otherwise, a punitive dismissal will be invalidated based on the employer abusing its right to dismiss its employees.

### (i) Egregiousness

An employee’s actions must be egregious enough before an employer may carry out a valid punitive dismissal. In one case, the court invalidated a punitive dismissal because many of the 14 grounds cited by the employer were simply too minor to warrant the dismissal. These grounds included arriving at work 10 to 15 minutes late a few times a month, refusing to serve tea to clients, and responding defiantly to the supervisor’s instructions.

The results of a 2012 survey provide an indication of what is considered “egregious” in large companies. The target companies were presented with examples of misconduct and asked to choose what type of disciplinary action they would likely take in response. The table shows the percentage of companies that would punitively dismiss employees for engaging in various types of misconduct.

Misconduct	Punitive dismissal
Embezzlement of company funds (over 1 million JPY)	77.9%
Absence from work for more than two weeks without notice	69.1%
Intentional disclosure of important company trade secrets	66.4%
Drunk driving outside of work hours resulting in property damage and arrest (not involving bodily injury or death)	45.0%
Accepting monies personally from customers, suppliers, etc.	40.9%

(Source: The Institute of Labor Administration, September 5, 2012)

It is interesting to note the high ratio of companies that consider punitive dismissal an appropriate response to drunk driving, which likely represents the public’s increasing disapproval of that act. However, in a number of recent cases Japanese courts invalidated punitive dismissals for drunk driving as an abuse of the employer’s rights to

dismiss its employees, even when the dismissal was conducted pursuant to the work rules. The courts were persuaded by the fact that the drunk driving incident did not interfere with the employer's business operations, the employee was not a chronic offender, the employee was not in a key position in the company, and no accident occurred. Therefore, each case should be carefully scrutinized to determine if a punitive dismissal is really the most appropriate response, or whether the company should instead take less drastic measures.

(ii) Equal treatment of employees

An employer is required to discipline its employees in a fair and equal manner. A court will invalidate a punitive dismissal if it is a disproportionately harsh response compared to prior disciplinary actions that the employer meted out to other offenders. Employers should therefore document past disciplinary incidents in detail, clarifying what kind of conduct led to a given disciplinary action. Employers should note that they can take into consideration various factors when deciding what form of discipline to take. These factors include the employee's position in the company, the impact on the workplace, the response of the victim (if any), and changes in public attitudes.

**(4) Due process**

In any incident involving discipline, the company must provide an employee with the opportunity to explain and possibly justify his or her actions. If a company's work rules (or a collective bargaining agreement) set forth a certain disciplinary procedure (such as setting up an investigative committee to determine culpability), the company is required to follow that procedure.

**II. Notice and Payment for Punitive Dismissals**

**(1) Prior notice**

Just because a company may be justified in conducting a punitive dismissal does not necessarily mean that the employee can be terminated immediately. Indeed, an employer is generally required to provide at least 30 days' advance notice for punitive dismissals, which is the same notice requirement for ordinary dismissals. In the alternative, the employer may choose to pay 30 days' worth of wages in advance if it wants to immediately dismiss an employee without any notice. The company may also provide fewer than 30 days' notice and compensate the employee by paying wages for each day that the notice period falls short of 30 days.

An employer may avoid the requirement of prior notice (or

payment in lieu of prior notice) and dismiss an employee immediately only by obtaining prior approval from the appropriate labor standards office. The labor standards office will give its approval after holding a hearing and determining that the dismissal is justified because of one or more reasons attributable to the employee. This process ordinarily takes around a few weeks. Therefore, depending on the nature of the misconduct and the timing, obtaining prior approval from the labor standards office may take too much time to be a practical option.

**(2) Additional payment**

A punitive dismissal requires no severance pay. However, retirement allowance provided under the work rules is another story. Retirement pay is in many cases regarded as a deferred payment of wages earned during the period of employment. This means that the employee's right to receive a retirement allowance is not automatically forfeited by a punitive dismissal. Therefore, to avoid having to pay a retirement allowance, the work rules and/or labor agreement must expressly state that employees terminated on disciplinary grounds are not entitled to a retirement allowance. However, even companies that take this step may be ordered to provide a retirement allowance if a court finds that denying it to the employee would be too harsh a punishment in light of the employee's misconduct. A case that addressed this issue involved a railroad company employee who was handed a suspended prison sentence for repeatedly groping passengers on the train while he was off duty. In spite of his conduct, the court held that the employee should receive 30% of his retirement allowance. The court reasoned that a portion of the employee's retirement allowance amounted to a deferred payment of his wages. The court also found a lack of any significant impact on the company's business operations. Lastly, the court noted that the company was more lenient with other employees who committed similarly egregious offenses (though not involving groping).

**III. Steps to Carry Out a Valid Punitive Dismissal**

When carrying out a punitive dismissal, a company typically: (i) conducts an investigation into the alleged violation (including providing the target employee with one or more hearings); (ii) determines that the results of the investigation warrant a punitive dismissal; (iii) informs the employee that he or she is being disciplinarily dismissed; and (iv) follows the required administrative steps for termination, including making any necessary payments and providing proper documentation covering the specific grounds for the dismissal.

In the course of performing the steps listed above, a

company should do the following.

**(1) Order the employee to remain at home during the investigation**

Employers should order the target employee to remain at home if it appears the employee committed additional violations or if there is a risk that the employee will destroy and/or conceal relevant evidence or otherwise disturb the employer's daily operations. Please note that the employer must generally pay the employee full wages during this period because being ordered to remain at home is not considered an unexcused absence.

**(2) Conduct as thorough an investigation as possible**

It is important that the employer conduct a thorough investigation to substantiate its allegations against the target employee. Only after the employer has ascertained valid grounds for a punitive dismissal should the dismissal be carried out. The employer cannot justify a punitive dismissal based on grounds that it discovers after the dismissal. A typical example of how this might play out in a wrongful termination suit is as follows:

- (i) The employer carries out a punitive dismissal without waiting for the results of the investigation, and later discovers new facts to support its decision.
- (ii) The dismissed employee brings a wrongful termination suit challenging the validity of the punitive dismissal.
- (iii) At trial, the court prohibits the employer from relying on any grounds that it disclosed to the employee after the termination.

Given the importance of discovering the relevant facts prior to the dismissal, employers should be especially careful not to rely only on limited sources of information. Instead, employers should elicit information from those in as many positions as possible, including the target employee.

**(3) Provide the employee with sufficient information and the opportunity to mount a defense**

It is important to carefully take note of any justifications made by employees for their alleged misconduct. Although it may be tempting to dismiss them as frivolous, the company should take such explanations seriously, look into them, and verify if they are true. Failing to take this step may make it difficult for the company to make an impartial decision, and may come back to bite the company later on if the dismissed employee raises the justifications at trial and they turn out to be true.

**(4) Consider less severe action**

If the results of the investigation do not obviously warrant a punitive dismissal, an employer may still have sufficient grounds to conduct an ordinary termination. Without sufficient grounds, the employer may proceed with an ordinary termination, or persuade the employee to voluntarily leave the company. In the alternative, the employer might nonetheless decide to go ahead with a punitive dismissal in order to send a clear message to potential wrongdoers within the company that any misconduct will be dealt with harshly.

---

The contents of this publication, current at the date of publication, are for reference purposes only. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

**Labor and Employment Practice Group**

**Partner**

**Hiromasa Ogawa**



**Counsel/Associates**

**Izumi Okada**

**Hitomi Sakai**

**Tatsuro Terada**

**Ayako Shinmura**

**Darcy H. Kishida\***

**Norio Mitsuuchi**

**Seizaburo Taira**

\* Mr. Kishida is licensed to practice law in Hawaii, New York and Washington, D.C. and is admitted in Japan as a Registered Foreign Lawyer (*gaikokuho jimu bengoshi*). He provided editorial assistance for this newsletter.