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Kojima Law Offices

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Labor & Employment Law Newsletter

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

Introduction

In the not-too-distant past, the concept of "lifetime employment" was still a defining characteristic of corporate Japan. However, companies began abandoning the lifetime employment system following the bursting of the asset price bubble in the early 1990s and in response to an increasingly competitive business climate that continues to this day. In fact, it has been difficult even for large firms such as Panasonic and Sony to maintain the lifetime employment system in its previous form. Instead, many companies have accelerated their efforts to streamline their organizations through layoffs or by selling off parts of their business. As evidence of this shift, over 50,000 people sought assistance from governmental administrative agencies in 2012 for dismissal-related matters according to the Ministry of Health, Labour and Welfare (this is up from only about 32,000 just 10 years earlier).

However, it would be wrong to conclude that terminating employees in Japan is now a simple matter. It is a painful lesson that some foreign companies have learned the hard way. To avoid a public relations backlash and a possible hit to the bottom line, foreign companies need to understand the legal requirements in Japan for validly dismissing employees. To ignore them risks ruining a company's carefully cultivated corporate image, which may have taken many years to build up. More practically, any money that a company might save through downsizing its workforce can be eaten up by the millions of yen in legal expenses necessary to oppose lawsuits that will likely be filed against the company.

Three Types of Dismissals

There are three main types of dismissals in Japan: punitive dismissals, dismissals for purposes of downsizing, and ordinary dismissals.

Punitive dismissals are considered part of a company's disciplinary procedures and are based on an employee's illegal action or a violation of the company's work rules. An employee found guilty of robbery, for instance, would be subject to punitive dismissal.

As the name suggests, dismissals for purposes of downsizing are conducted with the aim of reducing the size of a company's workforce to cope with financial difficulties faced by the company. Unlike the other two types, this dismissal can be carried out without cause, as long as the employer satisfies certain requirements established and refined under years of case law precedent.

Ordinary dismissals can be thought of as a catchall category. They are dismissals other than punitive dismissals and dismissals for purposes of downsizing. Examples of ordinary dismissals include terminating an employee due to work performance issues or a long-term absence without providing adequate notice or without having a valid reason for the absence.

Part I of this article will focus on ordinary dismissals. Part II will be published in the next issue and will discuss dismissals for the purposes of downsizing. Punitive dismissals will be covered in Part III, which will appear in Volume 5 of this newsletter.

A snow-covered town in Niigata prefecture

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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.

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Requirements for "ordinary dismissals"

A variety of labor-related statutes and case law interpreting those statutes provide the requirements for ordinary dismissals. At the most fundamental level, the Labor Contract Act provides that an employer abuses its right to terminate an employee when it carries out a dismissal without objectively reasonable grounds, or when that dismissal offends generally accepted societal norms.

Although difficult to define precisely, "objectively reasonable grounds" are typically exemplified by the following:

(i) an employee is unable to achieve the expected job performance due to an injury or illness unrelated to his or her work;
(ii) an employee lacks the requisite abilities, skills or qualifications for the position in question and improvement does not appear likely in spite of the employer's attempts to help the employee improve; and
(iii) an employee demonstrates a consistent inability to get along with co-workers, or engages in such acts as the commission of a serious crime (the disciplinary aspects of this third ground may in some cases overlap with those of punitive dismissals).

The Labor Standards Act requires that the basis for termination be set forth in the company's work rules (or an employment agreement if there are no work rules). It is crucial that the relevant provisions of the work rules (or an employment agreement) be as comprehensive and specific as possible. Failing to meet this requirement can be perilous, as a dismissal not based on the work rules or an employment agreement will almost certainly be found to be unreasonable and therefore legally invalid.

Even if there are objectively reasonable grounds for dismissal, a court may still find the dismissal invalid if it is deemed too harsh on the employee as determined by prevailing societal norms. Rather than outright dismissal, for instance, a court may require an employer to take less draconian measures such as demoting the employee to a more manageable position or cutting the employee's pay. The court may also consider how employees in comparable positions and industries are treated to determine what is acceptable under prevailing societal norms.

Given that poor performance is one factor that may justify dismissal, one could be forgiven for concluding that it is easier to terminate mid-career employees in managerial positions or highly specialized individuals for poor performance. This is especially true compared to regular employees hired fresh out of college. After all, an employer rightly has higher expectations for mid-career employees, especially ones who are highly compensated. While the bar is indeed set lower for employers wishing to terminate such employees for poor performance, it would be a mistake to assume that termination is an easy or simple process. At a minimum, in fact, an employer must conclusively prove that it had clear expectations for the employee, that those expectations were properly communicated to the employee, and that the employee failed to meet those standards. Accordingly, during the hiring process, employers should provide something in writing to mid-career employees explaining precisely the level of performance the company expects from them. Moreover, it is comparatively easier to dismiss employees on probation, though even here the termination must be based on objectively reasonable grounds and cannot violate prevailing societal norms.

Restrictions on Dismissals

A number of labor-related acts set forth various restrictions on terminating employees and prohibit dismissals based on the following:

- Such factors as an employee's nationality, religion and social status (e.g., being born out of wedlock).
- Union membership or taking part in lawful union activities.
- Marriage, pregnancy, childbirth, taking childcare or family leave.
- The reporting of labor law violations such as violations of the Labor Standards Act, or justifiably blowing the whistle on an employer's unlawful activities, etc.

In addition, dismissing an employee during the following periods is also prohibited:

- During maternity leave and for 30 days thereafter.
- While an employee is on medical leave to receive treatment for injuries or illnesses suffered in the course of employment and for 30 days thereafter.

Essential Steps

Assuming the substantive requirements for dismissal described above are met, an employer should still take one of the following steps to ensure that the termination is legal: (i) provide the target employee with at least 30 days' written notice; (ii) in lieu of 30 days' written notice, provide the target employee with at least 30 days' worth of pay; or (iii) a combination of notice and pay (e.g., 20 days' written notice and 10 days' pay). In addition, companies are required to issue to dismissed employees a certificate of cessation of employment and/or a certificate showing the grounds of dismissal if the employee so requests.

Final Pointers

Possibly the harshest result for an employer is when a court finds that an employee was invalidly dismissed and orders the employer to rehire the employee and pay the employee full back wages despite the fact that the employee has performed no work while the case was being litigated.

Because courts determine the validity of dismissals on a case-by-case basis, an employer must be extra vigilant in order to maximize the chances that a termination will be found valid. In addition to meeting the requirements described above, an employer should also:

- Provide the target employee with as many warnings as possible to lessen the chance that the employee will be able to claim surprise.
- Provide the target employee with clear and specific instructions on

how to improve his or her work performance.
- Keep ample records to validate the dismissal, such as e-mail messages, warnings and other evidence to show violations of the company's work rules.

Validly dismissing an employee requires extensive preparation and an appropriate strategy. The same is true for a company attempting to convince an employee to resign voluntarily instead of being dismissed outright. No two situations are alike, of course, and an employer therefore needs to tailor its approach depending on the specific circumstances of each case. To avoid costly missteps, contact a labor law specialist as early in the dismissal process as possible.

Illustrative Cases

To understand how Japanese labor law applies to dismissals and how difficult it can be to validly dismiss employees, it is useful to review in detail how Japanese courts handle actual disputes involving dismissed employees. Below are summaries of selected cases illustrating this complex area of Japanese law.

1. February 18, 2005 Judgment of the Tokyo District Court

Plaintiff-employee began suffering from manic depression to such an extent that he could no longer adequately perform his duties at work. His employer Kando Co., Ltd. tried to help him first by allowing him to take an extended period of leave, and then by transferring him to other departments within the company. However, Kando claimed that the employee continued to use abusive language and engage in odd behavior, making it difficult to maintain order in the workplace. Moreover, the employee's job performance remained subpar. As a result, Kando terminated his employment, and the employee brought suit challenging the dismissal and seeking back wages.

After a trial on the merits, the court found that the employee, in an attempt to recover from his manic depression, took a seven-month leave of absence from work. Prior to that leave, the employee often missed work due to his manic depression, disrupting the work of other employees in the process. Moreover, after returning from his seven-month leave, the employee continued to miss work frequently, was still unable to consistently perform his work properly, exhibited unprofessional behavior towards individuals outside the company, and continued to interfere with the work of others in the company.

On the other hand, the court found the following facts in the employee's favor:

(1) The employee's doctor indicated that, at the very least, the employee was able to perform clerical work for Kando;
(2) the employee's odd behavior was not constant, occurring only about once a day;
(3) Kando did not incur any damages from the employee's strange behavior;
(4) the employee did not appear to exhibit any symptoms of manic depression when he testified in court;
(5) under Kando's leave policy, the employee was entitled to take additional time off to recover from his manic depression, and Kando should have made him take that leave before terminating him; and
(6) because Kando continued to employ other employees who exhibited symptoms similar in severity to the employee's, it was inequitable to dismiss only him.

Based on these findings, the court concluded that Kando had improperly terminated the employee's employment and held the dismissal invalid.

Practical Pointers

Companies are expected to make considerable efforts to help ailing employees return to work, even if it is a burden for a company to keep sick employees on the job who are unable to fully perform their duties, or who have trouble communicating with others. These efforts include allowing the employee to take a recuperative leave of absence, consulting with doctors to confirm and monitor the employee's condition, reducing an employee's workload, or transferring employees to other departments.

Companies dismissing sick employees without taking these kinds of measures face likely defeat in court. A court will generally be persuaded by a doctor's expert medical opinion. Therefore, prior to terminating a sick employee, companies should obtain an opinion from a doctor clearly stating that an employee is no longer able to continue working due to illness.

2. October 5, 2012 Judgment of the Tokyo District Court

Plaintiff-employee was a journalist employed by Bloomberg L.P. Bloomberg was unhappy with the employee's work and tried to have him improve by implementing a performance enhancement plan. However, the employee's job performance continued to disappoint, leading Bloomberg to dismiss the employee on the ground that he lacked the requisite journalistic skills. The employee brought suit challenging the dismissal and seeking back wages.

At trial, Bloomberg alleged that the employee often left the workplace unannounced and continued to do so even after Bloomberg had warned him to stop. In terms of his job performance, Bloomberg claimed that the employee did as he pleased without collaborating closely with editors and other reporters and exhibited poor communication skills. Bloomberg further contended that the employee's news

articles were not well written, and that the slow pace of his writing resulted in fewer articles than Bloomberg had expected.

In its decision, the court stated that the employee's employment agreement did not require performance higher than that of an average mid-career employee. Therefore, even if Bloomberg's claims of poor performance were true, the dismissal would still be invalid unless Bloomberg could establish that the employee's job performance was so abysmal as to make it extremely difficult for Bloomberg to continue employing him.

As far as Bloomberg's specific allegations of poor work performance, the court held that:

(1) The employee's unannounced absences were not nearly as serious as Bloomberg made them out to be, i.e., the absences did not make it particularly difficult for Bloomberg to continue to employ him, and Bloomberg's instructions on the matter were neither clear nor specific enough for the employee to follow;
(2) the employee sufficiently collaborated with editors and other reporters;
(3) Bloomberg failed to establish that the employee exhibited poor communication skills;
(4) Bloomberg's rules did not specify a minimum writing speed, the employee's slow pace of writing articles manifested itself only a few times over a five-year period, and Bloomberg failed to implement any meaningful measures to improve the employee's writing skills;
(5) Bloomberg's rules failed to specify the required number of articles that the employee needed to write, and the employee's output was not markedly lower than other reporters; and
(6) even if the employee's articles weren't up to the quality standards that Bloomberg had expected, the employment agreement did not contain any requirements regarding the quality of articles, and the employee's articles were nevertheless of sufficient quality to justify his continued employment with Bloomberg.

For these reasons, the court concluded that, looking at the matter objectively, the employee's dismissal was unreasonable and therefore invalid.

Practical Pointers

Companies typically hire mid-career employees with the expectation that they already possess the necessary skills and knowledge to perform adequately in their new job. However, it is not a simple matter to terminate mid-career employees, even those who lack the expected skills and/or knowledge. Once a company hires an employee, the company is required to do its utmost to keep that individual employed. Here, Bloomberg apparently made an attempt to improve the employee's job performance. However, Bloomberg failed to provide the employee with sufficiently specific guidance. Moreover, Bloomberg set goals that were too difficult for the employee to achieve. Therefore, the court likely concluded that Bloomberg's efforts fell short of what is required of an employer. In light of the above, one may reasonably conclude that courts do not easily allow the dismissal of mid-career employees due solely to issues of job performance.

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