

Navigating employment issues in Japan amid the COVID-19 pandemic

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This note addresses some of the questions employers are asking about their obligations to employees in dealing with the COVID-19 pandemic.

The measures that businesses can take to manage their employees depends on several factors, such as the employee's form of employment (e.g. permanent employee or not) and employment agreement and the Company's work rules and other rules. The following general comments should therefore be considered carefully against your company's particular circumstances.

Government guidance relating to employees in Japan can be found on the Ministry of Health, Labour and Welfare's website [here](#) (in Japanese only).

Can we ask or require employees to work from home (telecommute) to prevent the spread of COVID-19?

In general, any employee whose job can be performed remotely and who is willing to work at home (i.e., telecommute) may do so. You could consult with teams or individuals as needed, and if they consent then you should set clear terms for, e.g., working times (including overtime work) and duties.

Requiring employees to work at home may be possible if their employment agreements or the company's Work Rules expressly provide for a system of work from home. In that case, the company may be able to change their form of work to work from home by way of a work order.

Given the extreme nature of the current climate—including recent government guidance in several prefectures to stay indoors and work from home—clear communication should be considered an essential part of any strategy. The fact that large numbers of employees at companies across Japan are already telecommuting suggests that employees may generally be willing to telecommute.

Government guidance is also changing rapidly, and if a lockdown is implemented then telecommuting could be mandatory for many businesses. So even if you do not think it is necessary now, it may be prudent to start considering and planning for agile work possibilities.

If employees do work from home, you will still need to appropriately monitor working hours to ensure compliance with overtime regulations. Also be sure to think through issues that may arise when working from home, e.g.:

- Have you tested the stability of your IT infrastructure, and do IT personnel need additional support?
- Have employees who are new to telecommuting been given basic training on important 'Dos and Don'ts'?
- What is your policy for employees' handling, printing, exchanging, and disposing of hard copies of confidential information?

Can we require or ask employees to do different work if they have little or no regular work because of COVID-19?

To the extent you are asking a permanent employee to engage in work that is not part of the job description in their employment agreement, you will need their consent before assigning them the work. However, if the work you wish to assign is incidental to their regular work, it may be a reasonable request that the employee cannot refuse without good reason.

For other employees (e.g., part-time workers, contract workers, and dispatch workers), it will depend on their individual contracts. The attractive flexibility inherent in such contracts is often balanced with the ability of either party to terminate with notice in certain circumstances. Employees with such contracts may therefore be willing to agree to engage in different work in order to maintain their position now and in the future.

Another option is to provide educational or training opportunities to employees. For example, if the volume or value of your monthly sales has decreased by more than 10% compared to the same month in the previous year and as a result you need to reduce your business activity, then providing educational or training opportunities to employees may make you eligible to apply for an employment adjustment subsidy. The amount of the subsidy is calculated based on the base monthly salary of the subject employees and depends on, e.g., the size of your company, but the maximum amount (as of 1 March 2020) is JPY 8,330 per person per day, up to a maximum of 100 days per year per person. An additional subsidy may also be available in the amount of JPY 1,200 per person per day. (Please note that there are several other conditions to be satisfied before this subsidy can be applied for.)

Can we reduce employees' hours while business is slow because of COVID-19?

While you may reduce the hours of permanent employees, in principle you cannot reduce their salary. The same may apply to other employees, depending on their individual contracts.

However, there are a couple of options that may be worth considering for reducing working hours and possibly reducing personnel costs.

- (a) The first option is referred to as an employment adjustment. In certain circumstances you may be able to put certain employees on administrative leave, which entitles them to take paid leave for a reduced wage. This applies in particular to:
 - (i) businesses the government has requested to voluntarily shutdown in order to prevent the spread of COVID-19;
 - (ii) businesses who have lost trade because of the government's requesting people to stay indoors in order to prevent the spread of COVID-19;
 - (iii) businesses who have suffered as a result of drops in tourism due to the COVID-19 pandemic; and

- (iv) businesses that have had to shut down due to employees being infected with COVID-19.
- (b) The second option is the implementation of a "One-Year Variable Working System". This system is intended to permit companies to increase or decrease staff working hours for a specific period (between a month and a year) according to ordinary ebbs and flows of business pursuant to a written agreement either with a labor union organized by a majority of the employees or with a person representing a majority of the employees. It enables the company to reduce or cut working hours at certain times within the period, and increase them in other times during the period, on the condition (among others) that each staff member's average weekly working hours for the period do not exceed 40. However, given the extraordinary nature of the COVID-19 situation and the difficulty in predicting how it will unfold, it is unclear how effective implementing this system may be.

Can we terminate employees if we have no work for them to do because of the effects of COVID-19?

If your company is suffering a serious and sustained reduction in the volume of its business which has led to there being no work for certain employees despite your efforts to find them alternative suitable work, then it is possible you may be able to terminate them or, more specifically, make them redundant. Pursuant to Japanese case law, there are certain requirements you will need to satisfy to do this. More specifically, in order not to be deemed invalid by a court if challenged, any redundancy would need to satisfy the following four requirements:

- (c) the necessity for the termination of employment;
- (d) having sought other options available to avoid the termination (eg. restricting overtime, reallocating employees, offering voluntary retirement, etc.);
- (e) objective and reasonable basis for the selection of the affected employee; and
- (f) whether a full discussion of the need, basis and timeframe for the termination of employment took place with the employee.

Failing to meet one of those requirements could expose you to significant liability. And as you can appreciate, proving that there has been a serious and sustained reduction in business is a matter of degree which is therefore subject to differing opinions. So whether redundancy may be a feasible approach will depend on how the COVID-19 situation develops as well as a case-by-case analysis of your business and the validity of any redundancy against the above four requirements.

For employees other than permanent employees, the validity of their termination will depend on the terms of their contracts. However, just because their contract may contain a force majeure clause, for example, does not necessarily mean that you are entitled to terminate them without consequence. Whether the situation caused by the COVID-19 pandemic rises to the level of triggering any such clause deserves careful consideration.

Lastly, [government guidance](#) is also asking businesses to be considerate of certain individuals they do business with (namely, sole proprietors and freelancers) in the spirit of Japan's Anti-trust Act and other laws. For example, businesses are asked to consult with them in advance before changing the terms of any agreed work, and to clearly set out the changes in writing. While the guidance is not binding, it is a relevant factor to be considered.

Is the Japanese government providing any subsidies to businesses or employees affected by COVID-19?

Yes, there are a range of subsidies being made available. Whether or not you are eligible for a particular subsidy will of course be subject to certain conditions, but some of the subsidies available are as follows (information in the links is only available in Japanese):

Telecommuting subsidy:	up to JPY 1,000,000 / company against applicable expenses
Employment adjustment subsidy:	up to JPY 8,330 per person per day
Subsidy for giving special paid leave to staff whose children go to elementary school or are younger than elementary school age	up to JPY 8,330 per person per day
Babysitter coupons:	One coupon for JPY 2,200 per employee per day per child

These are extraordinary times, and businesses and employees alike are facing unprecedented challenges and concerns. Before taking action, please ensure you are well informed so you can carefully consider the potential consequences of any decision.

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