

Newsletter

The background for the main title is a composite image. The left side shows a green, spiky virus particle against a dark background with white droplets. The right side shows a close-up of a person's hand in a blue nitrile glove holding a silver stethoscope. A dark horizontal band is overlaid across the middle of these images, containing the title text in white.

COVID 19 & EMPLOYMENT LAW IN JAPAN – SOME KEY QUESTIONS

The sudden onset of the Covid-19 emergency has caused significant disruption across swathes of the Japanese economy and raised novel and urgent questions for employers as they seek to handle the challenges they face, whilst balancing the protection of their business and their obligations to their workers. This memorandum briefly addresses a number of key employment law issues and questions.¹

COVID-19 State of Emergency

On 7th April 2020 the Japanese government declared a state of emergency² covering the greater Tokyo and Osaka areas, and a number of other urban areas, and which was extended nationwide on 16th April. The declaration authorizes the governors in the areas affected to request (not require) that residents stay home except for essential tasks, such as grocery shopping and seeking medical care; businesses can be requested that they “thoroughly implement infection control measures” but cannot be required to close. Tokyo’s governor has requested that its citizens isolate themselves until 6th May.³ The government has also strongly requested that employers should as far as possible reduce the number of employees coming to their place of work by 20 to 30%.⁴ There are no sanctions for failure to comply with the requests, and whilst they cannot currently be interpreted as orders there would be a strong expectation that companies will comply with them.

Given the rapidly changing situation surrounding Covid-19 and the possibility of additional measures to contain the outbreak and mitigate its effects, employers should ensure they have systems in place, such as arrangements with local counsel and other advisers, to monitor updates to relevant guidance, regulations, etc.

Q&A

Q1. What obligations does an employer have to protect its employees in their workplace?

An employer has a statutory duty to give appropriate consideration to ensure that its employees are physically safe at their place of work. Measures to satisfy this obligation in the Covid-19 situation might include collecting information on employees’ health and physical condition⁵, asking employees to work from home or a safe location (in particular given the government’s request for employers to reduce the number of workers coming to their place of work), installing temperature meters or other health risk detection methods for employees and visitors (subject to compliance with possible data protection requirements⁶), and implementing staggered commuting times; which measures to take would have to be determined on a case-by-case basis.

Q2. What steps should an employer take if an employee has, or is suspected to have Covid-19?

If an employee has Covid-19 but is still fit enough to work, the employer may still require them not to come to work and try to enable them to work from home or from a safe location,

¹ The information in this memorandum is based on data publicly available up to 18th April 2020.

² Article 32 paragraph 1 of the Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response (Act No. 31 of 2012) (the “Act”) and article 1-2 item 1 of the amended supplementary provisions of the Act.

For the full Japanese article, please see below:

https://elaws.e-gov.go.jp/search/elawsSearch/elaws_search/lsg0500/detail?lawId=424AC0000000031#223

<https://kanpou.npb.go.jp/old/20200313/20200313t00027/20200313t000270001f.html>

³ Article 45 paragraph 1 of the Act

⁴ Request has been made in order to achieve the purpose of the revised “Basic Plan on Infection Control of Covid-19” on 7th April 2020.

⁵ It should be noted that medical data is subject to strict data protection requirements; see Q 12.

⁶ See Q 12. below

or if remote working is not possible to take temporary leave⁷; in practice, the employee would be asked to take sick leave. If the employee is too sick to work, they can be required to take sick leave⁸ in accordance with their employment contract⁹.

If it is suspected that an employee is infected with Covid-19, the employer must evaluate the risk of infection to other employees based on factors such as the degree of certainty of the suspected infection, work environment, and medical opinion. If the company's works rules don't give the employer the right to require the employee to undergo a medical examination and provide the results to the employer, the employer's obligation to provide a safe workspace would give it the authority to do so.¹⁰

Q3. What must an employee do if they are, or suspect they are infected with Covid-19?

An employee who is or who suspects they are infected with Covid-19 must report that fact to their employer. An employee who cannot work (i.e. physically impaired so as not to be able to work, not just prevented from doing so) due to being infected with Covid-19 must take sick leave in accordance with their employment contract.

Q4. What if an employee refuses to attend their place of work as a result of genuine Covid-19 concerns?

At present, an employee may not refuse to attend to their place of work unless ordered to do so by the employer, regardless of any actual or perceived risk of infection. The employee could also take paid annual leave, but the employer must not coerce the employee to do so. The company's works rules¹¹ should set out the procedures for requesting and granting leave.

Q5. Can an employer unilaterally reduce an employee's working days or hours?

Yes; a unilateral reduction in working days (including a furlough) or working hours is permitted if based on reasonable grounds; a material reduction in business activity or requirement to furlough employees as a result of Covid-19 or a governmental order (but not a request) might constitute reasonable grounds, but each case would have to be examined based on its own facts.¹²

The employer should first check the employee's employment contract to see what, if any, rights it has to reduce the employee's working hours without the employee's consent.

⁷ See Q 6. below regarding obligations to pay workers on temporary leave

⁸ See Q 6. below regarding obligations to pay workers on sick leave

⁹ This would comprise the company's works rules (if any – see footnote 9) and any specific employment contract for the employee.

¹⁰ See Q 12. for data protection requirements.

¹¹ A company with more than 10 employees must have work rules, though companies with less than 10 employees may also do so if they wish. Local HR staff should be able to advise whether a company has adopted works rules.

¹² See Q 6. below regarding obligations to pay furloughed workers

Q6. Does an employer have to pay an employee's salary if the employee is furloughed or prevented from working in light of the Covid-19 outbreak in following situations?¹³

The basic question when determining whether there is an obligation to pay an employee who is absent from work is "Was the absence due to a "cause attributable to the employer"?"¹⁴ If it was, the employer will be subject to certain payment obligations as discussed below.

Case 1: The employee is not infected (and Case 6 does not apply)

If an employer reduces an employee's working days or hours, or the employee is absent from work for due to a cause attributable to the employer, even if there are reasonable grounds for such reduction or absence, the employer must pay the employee:

- (i) for a reduction in days worked, at least 60% of the employee's average wage¹⁵ for the days the employee does not work; and
- (ii) for a reduction in hours worked in a day, normal salary¹⁶ for the hours worked, but not less than 60% of the average wage for the day.

Neither obligation can be waived by the employee's employment contract¹⁷, but otherwise an employer and employee are free to voluntarily agree on payment terms for a reduction in working days or hours.

Case 2: The employee is infected or suspected of being infected

If an employee is too sick to work, they must take sick leave. In general, there is no statutory obligation to pay salary for sick leave. The employee's employment contract may provide for the payment of sick pay.

According to Q&A published by the Ministry of Health, Labour and Welfare if under the current circumstances an employee is "able to continue working" but the employer orders the employee to take a leave of absence based on its own judgment and in light of its obligations to provide a safe working environment, the order is considered to be due to a cause attributable to the employer and the payment obligations in Case 1. would apply for the furlough period.¹

However, if an employee has a fever of 37.5 degrees Celsius or higher over four or more days or suffers from severe tiredness or breathing difficulties they might be considered as unable to continue working (though there is ongoing debate over the point) and so any resultant absence would not be attributable to the employer and the employer would therefore not be required to pay the employee for the furlough period. In practice, the employee would be asked to take sick leave (see the first part of this Case).

¹³ It is assumed that the absence is not as result of misconduct or negligence of the employer, such as failure to take appropriate measures or care, with regard to the absence from work; if it is the employer must, in principle, pay 100% of the employee's average wage.

¹⁴ In practice, it is understood that any reason other than a force majeure is a reason "attributable to the employer". A force majeure might include a natural disaster, government order or substantial reduction in business, but each case would have to be examined based on its facts.

¹⁵ Average wage means the amount obtained by dividing the total amount of the employee's wages for the 3 months preceding the day for which the calculation is being made by the number of all days during the period, but disregarding any abnormal days or payments, such as periods of absence from work for medical treatment caused by injury or illness in the course of employment; the "total amount of wages" includes overtime and travel allowances.

¹⁶ Salary includes contractual monetary benefits, e.g. overtime payments and travel allowances.

¹⁷ Same applies below where a payment is due as the reason for absence is due to a cause attributable to the employer.

Covid-19 infections are a Designated Infectious Disease under the Act on the Prevention of Infectious Diseases and Medical Care for Patients with Infectious Diseases, which allows prefectural governors to impose restrictions on infected persons working¹⁸; an absence based on such an order would not be an absence due to a cause attributable to the employer. The employer would therefore not be required to pay the employee any salary for the period of absenceⁱⁱ, though it should consider paying at least 60% of the employee's average wages.

Case 3: The employee has had close contact with an infected person, but the employee is not yet reasonably suspected of being infected

Case 1. would apply as the employee is able to continue working and it cannot be said that such an absence is due to a force majeure; accordingly, furlough would be regarded as "due to causes attributable to the employer".

Case 4: The employer has voluntarily closed the employee's place of work for the purpose of preventing or restricting infection

See the second part of Case 2.

Case 5: The employer has not been ordered to close its business but there has been a material reduction in the business the employee is engaged in as a consequence of Covid-19

In most cases it is likely that a resultant furlough would be regarded as due to causes attributable to the employer and so Case 1. would apply; the situation would need to be evaluated on a case-by-case basis having regard to factors such as the degree of dependence on the relevant customers, the period of the reduction and the extent of the employer's efforts to avoid the furlough.ⁱⁱⁱ

Case 6: The furlough or absence results from an order of the government or other authority

If an order of a competent authority requires (not just a requests, no matter how persuasive) a business or part of it to be closed or imposes restrictions which prevent employees getting to their place of work (e.g. a ban on certain persons entering Japan¹⁹) and the employees cannot work from another location, the closure or absence would not be caused by a reason attributable to the employer (though the nature of the connection between the order and the closure or absence would need to be examined in each case); the employer would therefore not be required to pay the affected employees their salary for the period they can't work due to the closure or absence, though depending on the specific facts the employer should consider paying at least 60% of the employee's average wages in such a situation.

The Ministry of Health, Labour and Welfare updated its Q&A regarding the Covid-19 situation on 17th April 2020 stating that if an employee's absence from work:

¹⁸ Unlike the measures referred to under "COVID-19 State of Emergency" above, these restrictions must be complied with. No such orders have been made public.

¹⁹ The Japanese government has banned entry into Japan of foreigners (including those with work permits, and those with spousal visas or permanent residency who left Japan on or after 3rd April 2020) if within the 14 days before entry they have been in any of 73 countries and regions on a list issued by the Ministry of Justice; the countries include the US, the UK and most EU nations. These rules are subject to change. Further information is at http://www.moj.go.jp/EN/nyuukokukanri/kouhou/m_nyuukokukanri01_00003.html

- (i) resulted from an external cause (e.g. a request of a prefectural governor²⁰ issued under the state of emergency to close the relevant business, but less than an order); and
- (ii) was unavoidable (i.e. not just based on the employer's judgement) even after the employer had taken all reasonable care (e.g. by implementing remote working if possible),

then the absence would not be for a cause attributable to the employer. However, the employer is nonetheless required to discuss the situation with the employee and seek to avoid the employee suffering any disadvantage, and the employer may still be liable to pay the employee as described in Case 1., each case being determined based on its own facts.

Q7. Can an employer terminate an employee based on the Covid-19 situation?

The Covid-19 situation does not provide an employer with any additional rights to terminate an employee. Termination of employment must be objectively reasonable; terminating an employee because they are infected by the coronavirus is basically not allowed, even as a preventive measure against infection.

In the case of redundancy, termination must be based on a cause that would objectively be considered reasonable, and must generally satisfy 4 tests, being:

- (i) there must be a genuine and significant economic need for the termination;
- (ii) the employer must have taken all reasonable steps to avoid the termination, e.g. reassigning the employee(s) to other roles, reduction of payments other than salary and reduction in hiring;
- (iii) if only some employees from within a discrete group in the affected business are being terminated, the criteria for selection of those to be terminated must be fair and not discriminatory; and
- (iv) the employer must have consulted with the affected employee(s) and any labour union.

Terminating an employee as a result of a reduction in or reorganization of the employer's business resulting from Covid-19 is, depending on the situation, unlikely to be considered objectively reasonable and/or satisfy the four tests so the employer should seek to agree on a voluntary termination with the affected employee, including an appropriate severance payment.

Terminating employees in Japan is generally a difficult process and it is advisable to seek the advice of local counsel or a specialist employment law adviser before doing so.

Q8. An employee wants to take time off for childcare as schools have been closed due to Covid-19; what are the employer's obligations?

There are no specific rights or obligations arising out Covid-19 in this situation and there is no statutory right to paid or unpaid leave to look after school-age children, though there may be provisions for such leave in an employee's employment contract. The government is providing special benefits to employers that provide extra paid leave for parents who have children affected by school closures relating to the Covid-19 situation for the period from 27th February to 30th June 2020.

²⁰ In Japan a company would be expected to comply with request issued by regulators and government if reasonably possible.

Q9. How does an employer deal with an employee who has been dispatched/seconded to it?

Dispatch employees are employed by the dispatching company and are not employees of the client company to which they are dispatched.

However, as dispatch employees provide labour under instructions from the client company, it should be assumed that the client company owes them the duty of care referred to at Q 1.; the dispatching company and the client company should discuss how to handle Covid-19 issues relating to dispatch employees.

Q10. Are employment subsidies available in relation to the impact of a Covid-19 infection?^{iv}

Japan currently has an "Employment Adjustment Subsidy" system; this system has been revised by the Japanese government to help businesses suffering as a result of Covid-19. The system is designed to help employers avoid termination by covering part of their employees' salaries (up to a maximum of JPY8,330 per employee per day and a maximum of 100 days in any 12 months (but disregarding days in the period 1st April to 30th June 2020 if the subsidy was requested in that period)) during the period the employees are furloughed. In order to be eligible, the employer must have a labour agreement with an employee representative, or union if there is one, and its monthly business activities (evaluated by reference to factors such as sales volume and/or sales amounts) must have decreased due to Covid-19 when compared to the same period in the previous year by 10% if the request for the subsidies was submitted in the period 24th January 2020 to 31st March 2020, 5% if the request was submitted in the period 1st April to 30th June 2020 and 10% thereafter.

The subsidy is paid to the employer, the rate of the subsidy being between 50% and 90% of the payment the employer is required to make during the furlough (i.e. at least 60% of the employee's average wage), the actual amount being calculated based on whether the company is a small/medium sized company²¹ or a large company, the total number of the employer's employees, the dates covered by the payments and whether the company has terminated any employees.

Application for the subsidy is made to the competent Prefectural Labour Bureau or Employment Service Center.

Q11. What other financial support may be available?

The Japanese government has not introduced any general support packages for businesses suffering as a result of the Covid-19 situation and has indicated it believes such measures "unrealistic". Existing subsidies, such as for furlough and childcare as mentioned above, are available though the amounts are not significant.

²¹ What constitutes a small/medium sized company depends on the nature of the company's business. A company in the retail sector is small/medium sized if has a capital of not more than JPY50 million OR not more than 50 employees; the corresponding thresholds are JPY50 million and 100 for the service sector, JPY100 million and 100 for the wholesale sector, and JPY300 million and 300 otherwise; companies which exceed these thresholds are "large".

Q 12. What obligations does an employer have when handling employees' health data? ²²

The basic obligations²³ of a business handling personal data²⁴ include to:

- 1) only use it for the purpose specified to the data subject/employee and only to the extent necessary for that purpose;
- 2) delete the data when no longer needed for the purpose;
- 3) keep the data up-to-date and secure;
- 4) only transfer the data as permitted by law or with the data subject's specific consent or through an opt-out;
- 5) keep specified records of any transfer of the data, including the name and address of the transferor and transferee; and
- 6) cease using the data if requested by the data subject.

Medical records and other medical information (whether relating to an employee or any other person) would fall within the scope of "Personal information requiring special consideration" and as such:

- 1) the consent of the data subject must be obtained before acquiring such data²⁵; and
- 2) the data cannot be transferred to a third party²⁶ without the data subject's specific consent – consent though an opt-out is not permitted,

unless the acquisition or transfer is:

- a) specifically required or authorised by any Japanese laws or regulations;
- b) necessary for the protection of the life, health, or property of an individual and it is difficult to obtain the consent of the data subject; or
- c) essential for improving public health and sanitation or promoting the sound growth of children and it is difficult to obtain the consent of the data subject; or
- d) required by a state organ or a local government to perform their legal duties, or by an individual or a business operator entrusted by either of them for that purpose and obtaining the consent of the data subject is likely to impede the performance of those duties. ^v

Employers need to be particularly careful that they do not inadvertently disclose an employee's medical condition without the employee's consent, e.g. by having them work from home where it could be deduced by others that the employee is infected with Covid 19.

Transfers of personal data to a third party in a foreign country are subject to detailed rules relating to the scope of the data protection laws in the foreign country and the recipient's personal data protection arrangements; these must be checked before any such transfer.

Q 13. Are there any special Covid 19-related rules on handling employees' health data?

On 2nd April 2020, the Personal Information Protection Commission²⁷ announced²⁸ that a data holder (e.g. employer or medical professional in respect an employee's health data) can transfer medical, etc. data based on the exceptions listed in Q 12. b) to d) above on a case-

²² These are necessarily only very high-level summaries as the rules are complex; advice should be taken before acquiring, transferring or disseminating medical information.

²³ The protection of personal information is primarily governed by the Act on Protection of Personal Information ('APPI') and related guidelines.

²⁴ Information about an individual in Japan and from which the identity of the individual can be ascertained (including information which enables identification by easy reference to, or combination with other information).

²⁵ Data acquired through the use of temperature monitoring of employees and visitors to premises might constitute medical information and so its acquisition would require prior consent of the subject.

²⁶ A personal information/data processor and (subject to notification requirements) a company designated as a joint user of personal data with the data holder are not "third parties".

²⁷ The regulatory body established pursuant to the APPI responsible for overseeing compliance with the APPI.

²⁸ https://www.ppc.go.jp/files/pdf/information_20200402.pdf

by-case basis if for the purpose of preventing the spread of COVID-19; when considering whether to apply an exception, the data holder must consider matters such as the categories of personal data provided, the purpose it is to be used for and security control measures. Data holders can consult the PPC for guidance on how to apply the exceptions.

Employers need to exercise extreme care when collecting and using medical data as the law is both strict and complex; the advice of local counsel should be sought in all but the clearest of cases.

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We will from time-to-time update this memorandum on our website as material developments arise.

If you have any queries on the points covered above or on any legal issues relating to Covid19 please do contact one of our team named below or your usual contact at Atsumi & Sakai.

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Statutory references

- ⁱ "4. Measures in the event of placing employees on leave (allowance for leave of absence, special leave, etc.)" Q3 of "Q&A regarding the Novel Coronavirus (for businesses) (as of 14th April 2020)" (Ministry of Health, Labour and Welfare) https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/kenkou_iryuu/denque_fever_qa_00007.html#Q3-1
- ⁱⁱ "4. Measures in the event of placing employees on leave (allowance for leave of absence, special leave, etc.)" Q2 of "Q&A regarding the Novel Coronavirus (for businesses) (as of 4th April 2020)" (Ministry of Health, Labour and Welfare)
- ⁱⁱⁱ "4. Measures in the event of placing employees on leave (allowance for leave of absence, special leave, etc.)" Q5 of "Q&A regarding the Novel Coronavirus (for businesses) (as of 4th April 2020)" (Ministry of Health, Labour and Welfare)
- ^{iv} "Guidebook on Employment Adjustment Subsidies (for the request submitted in the period 1st April to 30th June 2020" (published on 15th April 2020) (Ministry of Health, Labour and Welfare) <https://www.mhlw.go.jp/content/000623230.pdf>
- ^v Article 16 (3)(ii) (iii) and (iv), Article 17 (2)(ii) (iii) and (iv), and Article 23 (1) (ii) (iii) and (iv) of the Act on the Protection of Personal Information (Act No. 57 of 2003)

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