Japanese Employment Law Update

March 31, 2021

In Japan, companies have traditionally required employees to devote their full time to their principal employment and prohibited them from engaging in any other work without prior approval. The government is urging employers to adopt an entirely new approach. As a part of its wide-reaching Work Style Reform policy, the government has been promoting the expansion of employees being able to have second or other jobs ("side jobs") in addition to their principal employment. The Ministry of Health, Labour and Welfare has recently announced "Guidelines for the Promotion of Side Jobs" (the "Guidelines"), and has amended its Model Rules of Employment to reflect the position in the Guidelines.

In light of this development, we describe in this newsletter the main points in the Guidelines that employers should take into consideration when permitting their employees to seek side jobs. We also provide an update on recent law amendments that are or will be effective in the Spring of this year.

Side Jobs

1. Changes to Rules of Employment

While companies have restricted side jobs, the courts have repeatedly declared that workers generally have the right to decide how to use their time outside of working hours. According to court precedent, restrictions on side jobs are limited to situations where: (i) the side job interferes with the employee's services to the main employer; (ii) the main employer's confidential information may be disclosed; (iii) the side job competes with the main employer; and (iv) the side job results in such conduct that damages the reputation of the main employer or harms the relationship of trust between the main employer and the employee.

In accordance with such court precedent, the Guidelines urge employers to review and amend their Rules of Employment from the following perspectives.

- Side jobs should be permitted as a general matter.

- If necessary, exceptions where side jobs may be restricted may be provided in the Rules of Employment based on the criteria indicated in judicial precedents.
- Employers should require notices from employees in order to learn if their employees have a side job and related information.

2. Management of Working Hours

(1) Basic Method of Working Hours Management

If an employee's side job is to work for another employer, the Labor Standards Act applies to the side job. In such a case, the hours worked for the side job constitute a part of "working hours" regulated by the Labor Standards Act.

The employee's "working hours" is calculated by adding up the working hours for the main employer and that of the side job (Article 38 of the Labor Standards Act). If the total working hours exceed the statutory limit (basically 8 hours per day and 40 hours per week), the employer must conclude a labor-management agreement concerning overtime work and work on days off (so-called "Article 36 Agreement"), submit it to the Labor Standards Inspection Office, and pay extra wages for the overtime work. The employer who has this obligation is the employer who concluded the employment contract with prescribed working hours that exceed the statutory working hours in the aggregate, i.e., generally the second employer. However, if an employer requires an employee to work outside of the prescribed working hours while knowing that the total prescribed working hours have already reached the statutory limit, that employer, even if it is the first employer, will have the obligation to pay the extra wages.

(2) Alternative Method of Working Hours Management (Management Model)

The Guidelines propose the following simpler method of working hours management (so-called "Management Model"), as an alternative to the basic method of working hours management described in (1) above.

I. Prior to the commencement of a side job, each employer shall set a maximum number of working hours within the range where the total number of hours described in A) and B) below shall be less than 100 hours per month and within 80 hours per month on average for multiple months (six months at maximum) – these two thresholds are the upper limit of overtime work in special circumstances under the Labor Standards Act.
   - A) Cap on working hours outside of statutory working hours at the first employer
   - B) Cap on the total working hours (prescribed working hours and working hours outside of prescribed working hours) at the second employer

II. After the commencement of the side job, each employer shall ensure that the employee work within the upper limit described in I above as well as within the limits stipulated in the Article 36 Agreement of each employer, and shall pay extra wages as required.

In case an employee works for multiple employers, the employers need to be mindful of the challenges in managing the working hours, and should consider ways of doing so properly, including the introduction of the Management Model.

3. Obligations with respect to Safety, Confidentiality and Non-Competition

Employers owe a duty to ensure the health and safety of their employees in connection with an employment contract (Article 5 of the Labor Contracts Act).

On the other hand, employees generally have an obligation to maintain the confidentiality of their employer's confidential information, not to engage in any business that competes with the employer during employment, and to act in good faith.

To assist in fulfilling the employer's safety obligation and ensuring that its employees perform their respective obligations, the Guidelines recommend employers to consider the following in addition to the measures mentioned above.

- Upon receiving notice from an employee regarding the employee's side job, confirm the potential impact on their work and agree with the employee on an on-going reporting of status regarding the side job
- Alert the employees to their obligations

4. Conclusion

In addition to the matters addressed in the Guidelines mentioned above, there is a wide range of other matters that should be taken into consideration when permitting and overseeing employees working in a side job, such as the handling and payment of social and labor insurance premiums. As employees' awareness and expectations regarding the acceptance of side jobs arise, a larger number of employers are considering implementing this new approach to varying degrees. When doing so, it is important to consider the impact and take a balanced approach that is suitable to the business while meeting employee expectations.

Law Amendments in Spring 2021

Some statutory amendments have come into force or are scheduled to come into force

this Spring.

- Since March 1, 2021, the employment rate of persons with disabilities (the ratio of persons with disabilities whom employers are require to hire) has been raised from 2.2% to 2.3%. As a result, employers hiring 43.5 employees or more (with part-timers counted as 0.5) would be required to hire at least one disabled employee in principle.
- From April 1, 2021, employers must endeavor to take measures to secure employment of persons between the ages of 65 and 70 (such as (i) raising the mandatory retirement age, (ii) eliminating the mandatory retirement age, (iii) introducing a re-hiring arrangement, and/or (iv) introducing an outsourcing contract arrangement). It is noteworthy that, for employees who are between 65 and 70 years old, if certain requirements are met (such as obtaining the consent of an employee representing the majority of employees), it is possible to have measures that are not based on employment contracts, such as concluding an outsourcing contract. This is currently only an obligation to "make efforts" and is not mandatory, but it is generally expected that this will become a mandatory obligation in the not so distant future.
- From April 1, 2021, the Part-Time and Fixed-Term Employment Labor Act which prohibits unreasonable discrimination between permanent employees and part-time/fixed-term employees becomes applicable to small and medium-sized businesses.

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