

June 28, 2021

In this issue, we provide an overview of recent amendments to the government's guidelines on telework, briefly discuss telework from overseas, and touch upon vaccination against COVID-19 as it relates to employers.

Amendment to the Telework Guidelines

On February 22, 2018, as a part of the government's initiative to improve working styles, the Ministry of Health, Labour and Welfare announced guidelines to promote telework (the "Guidelines"). The Ministry amended these Guidelines on March 25, 2021 since new issues have been raised as telework became increasingly common because of the COVID-19 epidemic. Summarized below are the points added to or amended in the Guidelines which are of significant practical importance.

1. Points to Note When Using Telework

(1) Scope of Eligible Employees

When employers determine the scope of employees eligible for telework, employers should not exclude employees solely because of differences in the form of employment, such as whether the employee is a permanent / full-time employee or a fixed-term / part-time employee. This derives from the prohibition of unreasonable differences in treatment between regular and non-regular employees.

(2) Desirable Initiatives

Elimination of unnecessary *hankos* (stamps) and signatures, introduction of paperless workflows, computerization of decisions, and use of online conferencing would help facilitate telework. In addition, it is desirable to make efforts to promote appropriate communication among employees when they are working remotely.

2. Establishment of Rules

Laws and regulations relating to labor standards, such as working hours, apply to telework as well. Further, as there are many differences between telework and working in the office, it is desirable to establish telework rules that provide details for telework in addition to existing work rules. An increasing number of companies are adopting such telework rules.

Last spring, many companies quickly introduced telework in accordance with the government's request under the state of emergency because of the COVID-19 pandemic, and there were many cases where employment agreements and work rules were not updated properly to cover telework. In principle, if telework is being utilized, the workplace in the employment agreement or work rules should be defined to cover work outside of office, such as "a place or location permitted by the Company." Companies that continue to rely on telework going forward should amend their employment agreements or work rules if the existing documents do not provide for this concept.

3. Utilization of Various Working Hours Systems

Employers may utilize all working hours systems permitted under the Labor Standards Act for telework. Below are some notes to consider when doing so.

- **Change of the Start Time and the End Time by Employees**
When implementing telework, there are cases where it is not essential to have employees work at the same time as other employees. In such cases, employers may enable each employee working remotely to change their start time and end time of working hours by including such ability to make changes in the work rules in advance, while maintaining the regular working hours of the prescribed working hours per day.
- **Flexible Working Hours System**
The flexible working hours system allows employees to determine their start time and end time of work on each workday. It allows flexible adjustment of the start time and end time during telework, depending on the life style of each employee, or changing the work hours so that the employee may work for a shorter time while working at the office and work longer hours on telework days.

4. Monitoring Working Hours

Employers are required to monitor their employees' working hours in order to control overtime work and to protect employee health. This requirement applies when employees perform telework as well. Employers may take the following methods to monitor working hours of telework.

- **Objective recording**

In principle, employers should monitor working hours by objective data, such as via records of the time employees use their computers for teleworking or with respect to the entry and exit time at satellite offices.

- **Report by Employees**

When relying on self-reporting by employees, employers should ensure that employees are properly reporting working hours by taking such measures as providing appropriate guidance to employees and their managers, and checking the self-reported time against objective data.

Telework from Overseas

The Guidelines seem to be based on the assumption that all work will be performed in Japan. However, as the pandemic has hindered the global movement of personnel, it has given rise to such issues as whether it is possible for Japanese companies to employ foreign residents, and what rules should apply to telework performed by employees residing outside of Japan. These issues need to be analyzed on a case-by-case basis as they will be affected not only by Japanese law but also by the laws and regulations of the countries/regions in which the teleworking employees reside. A summary outline of these issues follows.

When an employee residing outside of Japan carries out telework for an employer located in Japan, a detailed analysis may be required as to whether the applicable law is Japanese law, the law of the employee's residence, or both.

- If the employment contract provides that Japanese law is the governing law, Japanese law that applies to employment contracts, such as the Civil Code and the Labor Contract Act, would apply with regard to the interpretation and effect of such employment contract.

- Employment-related public law or regulatory laws that provide for criminal sanctions and/or are enforced by administrative bodies, such as the Labor Standards Act, the Industrial Safety and Health Act, and the Industrial Accident Compensation Insurance Act, are in principle applicable only to businesses in Japan. However, if an employee works overseas temporarily under the direction of an employer in Japan, these laws may apply. If these laws do apply, it is particularly important to manage the working hours of the teleworking employee in accordance with the requirements of the Labor Standards Act for appropriate payment of wages.

In addition to the application of Japanese law in the foregoing situations, the law of the country where the employee is located may also apply, depending on the laws of the country/region where the employee is located and the working style of each teleworking employee. Finally, while it is beyond the scope of our newsletter, cross-border taxation issues may also arise when employees telework overseas, and employers should consult their tax advisors in these situations as well.

Vaccination for COVID-19

Vaccinations for COVID-19 have begun in Japan, and Prime Minister Suga has set a target to complete vaccination for all residents wishing to be vaccinated by October or November, 2021.

Vaccination is voluntary, i.e., each individual may decide whether or not to be vaccinated, although there is a general obligation under the Immunization Act to make efforts to receive vaccination. The Japanese government bears the full cost of the vaccination. While vaccination has a positive effect on preventing infection in the workplace and maintaining employees' health, it is inappropriate for companies to subject non-vaccinated employees to unfavorable treatment in an unreasonable manner.

In order to promote vaccination, some companies have announced that they will (i) treat the time taken for vaccination as working hours, (ii) allow employees to take paid vaccination leave in addition to regular annual paid leave, if they suffer from side reactions after vaccination and find it difficult to work, or (iii) pay a certain allowance when employees are vaccinated. The Minister in charge of promoting coronavirus vaccination has also requested business organizations to implement vaccination at the workplace

and introduce a vaccination leave system.

Please note that employee information regarding COVID-19 virus infection, results of PCR testing, and vaccination status would fall under the category of “special care-required personal information” (Article 2, paragraph 3 of the Act on the Protection of Personal Information) and needs to be treated carefully in accordance with the regulations of this Act.

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