iel International Employment Lawyer

Guide to Restructuring a Cross-Border Workforce

Japan

Contributor:

IWATA GODO
Established 1902

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A.Reduction in Workforce

1. Is there a concept of redundancy - based on a shortage of work or other economic reasons - as a justified reason to dismiss employees in your jurisdiction? If so, how is it defined?

Employees in Japan generally have a high degree of legal protection and the standards for redundancy are stringent. Employers can only make employees redundant for compelling reasons (for example, where the employer faces significant economic difficulties and streamlining the workforce becomes unavoidable). The Tokyo High Court has established specific conditions that need to be met. The employer must: be in a poor financial situation, making the need to act imperative; first attempt to cut costs and expenses and reassign employees to other positions within the organization; establish appropriate, objective and rational selection criteria; and follow due process, in particular by providing explanations to employees. Where a company is liquidated, there is more flexibility, regardless of the employer's financial circumstances.

2. In brief, what is the required process for making someone redundant?

Where the Tokyo High Court conditions are met, employers must provide the affected employees with a minimum of 30 days' notice or payment in lieu. Although no specific statutory provision makes severance pay mandatory, this is customary to smooth the process and minimise legal risks.

When these conditions are not met, employers can try alternative approaches such as obtaining the employee's resignation at the employer's request together with a financial package. For redundancies affecting a large number of employees, early retirement plans allow employers to offer financial packages to employees to encourage them to leave. In one type of plan, employees are offered a financial package to encourage them to resign within a short period (for example, a couple of weeks). The key to success is to determine a proper package, target employees without discrimination and get the timing right. This can be a costly process. Packages vary depending on the industry, and the employees' rank, age and length of service. Individual resignations at the employer's request with a financial package are simpler where the number of redundancies is limited.

3. Does this process change where there is a "collective redundancy"? If so, what is the employee number threshold that triggers a collective redundancy?

The process does not change. However, if 30 employees or more are to be made redundant at a given workplace within one month, a re-employment assistance plan must be prepared, listing the employees and detailing the measures taken or to be taken by the employer to facilitate job searches. The employer must notify the competent Employment Service Center (known as Hello Work) of the proposed redundancies and submit the plan for approval before implementation.

4. Do employers need to consult with unions or employee representatives at any stage of the redundancy process? If there is a requirement to consult, does agreement need to be reached with the union/employee representatives at the end of the consultation?

Certain obligations to consult may arise for consultation and the provision of information to appropriate representatives under a collective agreement (if any applies). These obligations can include consultation with appropriate representatives in a collective redundancy context and the provision of information to appropriate representatives on a business closure or transfer.

A labour union can require an employer to hold a collective bargaining session on any issue, provided that the issue relates to the union itself or the economic status of the workers who are union members. The employer cannot refuse to bargain without a proper reason and must negotiate in good faith with the union. When the employer continuously acts in good faith, refusal to compromise or a failure to reach an agreement are not breaches of the duty to bargain in good faith.

5. If agreement is not reached, can the restructure be delayed or prevented? If so, by whom?

See question 4. For a consultation, no agreement has to be reached in principle, but compromising is often necessary and negotiations with labour unions can still be protracted and the restructuring delayed.

6. What does any required consultation process involve (ie, when should it commence, how long should it last, what needs to be covered)? If an employer fails to comply with its consultation obligations, what remedies are available?

The labour union would typically send a request for collective bargaining to the employer, setting the place, date, time and agenda (demands or the subject of bargaining) with specific hours for bargaining. Once these points have been agreed upon, the employer and union representatives meet to negotiate. The employer must listen to the union and respond with good-faith counter proposals. For labour disputes, there are dispute resolution procedures either established by unions and employers in collective agreements or prescribed by law. Typical procedures involve conciliation, mediation, fact-finding and recommendations, and arbitration. However, refusal to bargain collectively without a proper reason (including the refusal to bargain in good faith) is an unfair labour practice under the Labour Union Act. In such cases, specific remedial procedures are handled by administrative bodies called local Labour Relations Commissions and an administrative review of their decisions can be petitioned to the Central Labour Relations Commission. In turn, an appeal may be filed with the courts under the Administrative Litigation Act to cancel orders issued by the Commissions.

7. Do employers need to present an economic business rationale as part of the consultation with unions/employee representatives? If so, can this be challenged and how would such a challenge normally be made?

Employers must indicate the basis of their arguments and submit the necessary supporting data. In a redundancy context, that would mean showing the efforts made to avoid redundancies (through transfers, farming out, solicitation of voluntary retirement, non-renewal of fixed-term contracts and temp staff, etc), submitting financial statements and providing some economic analysis, etc. Counterarguments can be put forward by the labour unions (who can engage accountants or other experts) to which the employer can respond, and so forth.

8. Is there a requirement or is it best practice to consult employees individually (whether or not the employer is also legally required to collectively consult employees)?

Yes, this is best practice and part of the due process condition, although collective (town hall) meetings can take place depending on numbers.

9. Are there rules on the selection of individual employees for redundancy?

As part of the Tokyo High Court conditions, the selection must be proper and the employer must establish objectively reasonable standards that should be applied fairly. Criteria can include job performance, discipline, history of absences and tardiness, and a lower economic impact on younger employees.

10. Are there any specific categories of employees who an employer is prohibited from making redundant?

An employee cannot be dismissed while unable to work because they are receiving treatment for a work-related injury or illness and cannot be dismissed within 30 days of the date that treatment ceases. Special protection applies to dismissals connected with pregnancy and maternity, parental and family care leave, labour union membership or activities, and whistleblowing.

11. Are there categories of employees with enhanced protection (eg, union officials, employees on sick leave or maternity/parental leave, etc)?

See question 10.

12. What payments are employees entitled to when made redundant? Do these payments need to be made within a specified period? Are there any other requirements, such as giving contractual notice, payments into a central fund, etc.

If the Tokyo High Court conditions are met, there is no legal obligation to pay severance pay, but a voluntary payment according to a separation agreement is customary. Employers must provide the affected employees with a minimum of 30 days' notice (or payment in lieu).

13. If employees are entitled to redundancy/severance payments, are there eligibility criteria and how is the payment calculated? If this is formula based, please set out the formula.

Not applicable.

14. Do employers need to notify local/regional/national government and/or regulators before making redundancies? If so, by when and what information needs to be provided?

See question 3.

15. Is there any obligation on employers to consider alternatives to redundancy, including suitable alternative employment?

Yes, reassignment within the employer's organisation, farming out, or transferring to related companies to avoid redundancies are measures to be considered to meet the Tokyo High Court conditions.

16. Do employers need to notify local/regional/national government and/or regulators after making redundancies, eg, immigration department, labour department, pension authority, inland revenue, social security department? If so, by when and what information needs to be provided?

Employers must report to Hello Work (the Employment Service Center), whenever a foreign employee ceases to be employed. Regarding foreign employees covered by the Employment Insurance System, notification must be made within 10 days of the departure date.

For employees enrolled with the following schemes, withdrawal must be notified within the prescribed number of days following the employee's departure: within five days to the Japan Pension Service Office for Health Insurance, Employees' Pension Insurance and Nursing Care Insurance; and within 10 days to Hello Work for Workers' Accident Compensation Insurance and Employment Insurance.

17. If an employee is not satisfied with the decision to make them redundant, do they have any potential claims against the employer? If so, what are they and in what forum should they be brought, eg, tribunal, arbitration, court? Could a union or employee representative bring a claim on behalf of an employee/employees and if so, what claim/s and where should they be brought?

The employee will generally seek to invalidate the dismissal and claim compensation or reinstatement. Judicial procedures including initiating proceedings before the courts or a labour tribunal are last resort options in cases involving wrongful termination. Some form of negotiation would typically be attempted before legal proceedings are commenced. Employees can consult an attorney or a labour and social security specialist to seek legal advice, and they can alternatively contact and join a labour union independent of the employer's organisation (if the employer does not have a labour union). The union can then force the employer to hold discussions through collective bargaining on the subject of the dispute.

18. Is it common to use settlement agreements when making employees redundant?

Yes, this is often recommended to minimise legal risks and it is best practice. See question 2.

19. In your experience, how long does it normally take to complete an individual or collective redundancy process?

Where the conditions are met, the individual redundancy process can be completed quickly, in a matter of days or weeks. The employer may often try to convince the employee to resign (at the employer's request) first. In the case of collective redundancies, the process can be protracted, especially if the employer offers a pre-retirement plan as a first stage.

20. Are there any limitations on operating a business for a period following a redundancy, like a prohibition on hiring or priority for re-hire being given to previous employees?

There is no express prohibition or priority, but if the employer starts re-hiring, paying dividends or increasing wages immediately or quickly after the redundancies, the economic rationale behind the redundancies would be undermined. Even if a settlement agreement were signed, the employee could argue that they have been deceived and seek to invalidate the agreement and be reinstated.

Restructuring/Re-organisation of the business

21. Is employee consultation or consent required for major transactions (such as business transfer, mergers, acquisitions, disposals or joint ventures)?

Consultation on a share deal is unusual. If there is a business transfer where there is no collective agreement providing for information or consultation with employee representatives, the employer has no obligation to inform the employees of the proposed transfer (except to the extent that employee transfers – where individual consent must be secured – or redundancies are contemplated). Even if an employer has consultation obligations under a collective agreement, there is generally no obligation to reach an agreement. Ministry of Health, Labour and Welfare guidelines provide guidance on sharing information on working conditions and economic prospects to employees.

In the case of a corporate division (kaisha bunkatsu) (ie, the carve-out of a business or part of a business), the employer must consult with the employees engaged (primarily or not) in the spun-off business individually, and with the labour union that represents the majority of employees, or a representative of the majority of employees (Law on the Succession of Employment Contracts in a Corporate Division and related guidelines). The company to be split must try to secure the understanding and cooperation of its employees.

22. What are the remedies that are available if an employer fails to comply with its consultation duties? Can employees take action to prevent any proposals going ahead?

If there is a labour union and an employer does not hold collective bargaining negotiations in good faith with the union, the union can complain to the competent Labour Relations Commission about the employer's breach of its duty to negotiate and the Commission can direct the employer to resume negotiations. The labour union can also apply for a provisional injunction or start formal litigation before the courts. Likewise, the court can order the employer to negotiate.

If the employer fails to consult with the employees before a corporate division, the employees can claim that the transfer of their employment contract is invalid.

23. Is there any statutory protection of employees on a business transfer? Are employees automatically transferred with the business? Are employees protected against dismissal (before or after the transfer of employment)?

There is no TUPE-style statutory protection of employees in a business transfer and they are not automatically transferred with the business, except – at least for the primarily engaged workers – in the case of a corporate division (see questions 21 and 24).

24. What is the procedure for a transfer of employment (upon a business transfer or within group companies)?

For an ordinary business transfer, the employees resign and are newly hired by the transferee of the business (who can do some cherry-picking). By contrast, in the case of a corporate division, the dedicated employees (those primarily engaged in the business to be spun off) are automatically transferred while some analysis and negotiation may be needed for non-primarily engaged workers.

25. Are there any statutory rules on harmonising the transferring employees' terms of employment with the existing employees' terms of employment?

Only in a corporate division context; in an ordinary business transfer, new terms can be offered. Since the successor company assumes the employment contracts of the split company under the Companies Act based on universal succession, the working conditions should be maintained as they are. Any change requires a labour-management agreement under the Labour Union Act and the Employment Contract Act. Any change to working conditions before or after the effective date of the corporate division requires a labour-management agreement (an agreement under the Labour Union Act (collective agreement), unless such change results from a reasonable change to the work rules (see question 26), which satisfies certain statutory requirements.

Changing Terms and Conditions

26. Can an employer reduce the hours, pay and/or benefits of an employee?

Contracts can be supported by work rules, which are specific rules for the workplace. They set out working conditions, including wages, working hours, holidays and the rules with which employees must comply. Employers with 10 or more employees at a given workplace must adopt work rules. The main points to consider if an employer wants to unilaterally change the terms and conditions of employment depend on the nature of the changes and the structure of the employment terms (for example, whether they are contained in a contract or the work rules). Employers and employees can agree to make changes. An agreement between a labour union and an employer can affect individual agreements without the employee's consent, but this is rather unusual. In principle, salaries (and benefits other than variable or discretionary ones) cannot be reduced unilaterally.

If an employer has established work rules, individual employment contracts do not need to include all the employee's working conditions (ie, wages, working hours and breaks, holidays and disciplinary procedures). However, altering the rules is not a simple process. Unless agreed with the employee, an employer cannot make detrimental changes to the working conditions set out in the employment contract by changing the work rules. Changes can be made to an employee's working conditions if certain conditions, including reasonableness, are satisfied. This does not apply to individual contracts, and provisions that the employer and employee have agreed on cannot be amended by revising the rules. In cases of demotion or a disciplinary sanction, a reduction in salary or benefits can be considered under the work rules, but that should be carefully implemented by the employer and ideally with the employee's consent.

Under certain circumstances (eg, the covid-19 pandemic), an employer can place its employees on furlough. The employer is required to pay a furloughed employee compensation of at least 60% of their wage during the leave of absence, if the employer reduces its business activities due to reasons attributable to the employer.

27. Can an employer rely on an express contractual provision to vary an employment term?

Not always, it depends on the term to be amended. Some clauses are nice to have in a contract or work rules, although not always enforceable (for instance a clause authorising the employer to unilaterally reduce an employee's salary in case of reassignment).

28. Can an employment term be varied by implied conduct?

Where an employee is treated in the same manner repeatedly and continuously for a long period, that treatment can be regarded as an implied term of employment.

29. If agreement is required to vary an employment term, what are the company's options if employees refuse to agree to the proposed change?

The employer has the right to establish and maintain enterprise order concerning staff, organisation and facilities. Employers generally have a right to make changes to job descriptions and positions and reassign employees. If an employee does not agree where an agreement is required, the employee could be reassigned to a different position or the employer could ultimately ask the employee to resign at the employer's request in exchange for a package.

30. What are the potential legal consequences if an employer varies an employment term unilaterally?

If the employer needs the employee's consent, proceedings can be initiated before the courts or a labour tribunal but this is usually a last resort.

The employee can contact the Counselling Corner set up in Labour Bureaux or Labour Standards Inspection Offices. Public officials provide consultation services regarding issues arising from employment relations, and employees can present their grievances. If an employee using these services wants to pursue a legal claim, the Labour Bureaux or Labour Standards Inspection Office can request the employer to appear before it to discuss how to resolve the dispute. If the dispute is not resolved and if one of the parties so requests, the case can be subject to conciliation by a three-member panel set up in the bureau, usually composed of practising lawyers or law professors. If requested by either party to the dispute, the panel (or a member of the panel) mediates the dispute, ascertains the facts of the case and the allegations of the parties, confirms their main arguments, co-ordinates and prompts them to consult each other to resolve the dispute and proposes a settlement. Neither the employer nor the employee is bound to accept an amicable settlement offer suggested by the panel under the Individual Employment Disputes Resolution Promotion Law, and the employee can decide to initiate legal proceedings before the labour tribunal or the district court.

Employees can consult an attorney or a labour and social security specialist to seek legal advice, and they can alternatively contact and join a labour union independent (or not) from the employer's organisation. The union can then force the employer to hold discussions through collective bargaining on the subject matter of the dispute (terms and conditions of work and so on).

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