M&A Update

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Due Diligence Investigations and the Whistleblower Protection Act

Companies usually conduct due diligence investigations before they attempt to purchase another company ('target company'). Some factors deemed extremely important from a labor/employment viewpoint in these investigations are:

i) No employee is working so much at a target company that he or she is mentally stressed; and

ii) All the eligible employees have been paid by the target company for overtime work allowances, holiday work allowances, and late-night work allowances ('additional compensations').

After Japan's economic bubble burst in the early 1990's, ailing companies tried to reduce the impact of decreased profits by lowering their overhead expenses. Employers at first tended to reduce their workforces. The effect of these cutbacks in manpower has, however, been an increase in the work volume for the remaining employees, which has translated into longer working hours. Now there are many employees throughout Japan who suffer from emotional illness, commit suicide, or die due to overwork. The Government has noticed that this situation has even affected the average life expectancy of male Japanese. The Employment Standards Inspection Office (*Roudou-Kijun-Kantokusyo*, 'Office') might, therefore, start to investigate any company after a merger, if an employee who worked for a target company became sick due to work, in accordance with the *Workers Accident Compensation Act (Roudousya-Saigai-Hosyou-Hou)* and/or the *Employment Safety & Sanitation Act (Roudou-Anzen-Eisei-Hou)*.

Some employers have, since the bubble burst, continued to fail to pay additional compensations to their employees, despite benefiting from the overtime/holiday/late-night work that their employees do. In response to this situation, the government has declared that the non-payment of additional compensations is unacceptable, and has begun a crackdown. Many companies have actually been investigated and ordered by the Office to make a payment of unpaid additional compensations (corresponding retroactively to the last 24-month period, in some cases). Thus, the Office can, in accordance with the *Employment Standards Act (Roudou-Kijun-Hou)*, investigate any company after a merger if an employee who worked with the target company did not receive proper additional compensation.

As of April 1, 2006, companies should begin to be even more cautious about the above-mentioned points. This is largely because the *Whistleblower Protection Act* (*Kouekituuhousya-Hogo-Hou* – 'the WPA'), which is expected to be effective in encouraging private companies to abide by regulations, will come into effect on this date.

The WPA disallows employers from engaging in retaliation (e.g., unilateral termination of the employee, demotion of the employee, and reduction of the employee's salary) against workers who, without any illicit purposes (e.g. trying to obtain unjustifiable benefits or to damage other persons), inform (x) their employer or other people (e.g., lawyers) whom the employer designates beforehand: (y) the competent national administrative authorities or their public officers, or the competent municipal administrative authorities; or (z) a third party (e.g., actual or probable victims, consumer organizations, or mass media), of illegal acts or misconduct (known as "reportable conduct") which may have been committed, or is about to be committed, by their employer or by their employer's officers, employees, agents, and so forth.

The WPA defines 'reportable conduct' as an infringement of one of 413 statutes. The government has very recently announced what 406 of the 413 statutes are, and Acts such as the *Employment Standards Act*, the *Workers Accident Compensation Act*, and *the Employment Safety & Sanitation Act*, all of which we mentioned above, are included.

Please be informed that a whistleblower will be protected by the WPA when he/she blows the whistle about an incident of reportable conduct which occurred before April 1, 2006, as long as the act of whistleblowing itself is done on or after April 1, 2006.