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Personnel and Labor Issues arising from Spread of the Novel Coronavirus Infection (COVID-19)

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The spread of the novel coronavirus infection is having a major impact on supply chains and all other aspects of companies' businesses whereby some companies are forced to put their employees on leave or close their offices. This article describes how the spread of the novel coronavirus infection is impacting businesses and points to bear in mind for personnel and labor issues that will arise due to the rampant spread of the virus globally.

1. Spread of Infections and Personnel Management

This section describes matters to be considered from the viewpoint of the Business Continuity Planning ("BCP") and Personnel Management in light of the possibility that the spread of the coronavirus infection is likely to continue for an uncertain period of time.

(1) Establishment of a system for confirming the safety of employees

The "Act on Special Measures concerning Countermeasures against Novel Influenza, etc." (the "Novel Flu Special Measures Act") was amended on March 13, 2020 and was enforced on the 14th of the same month. Pursuant to this amendment, the novel coronavirus infection has been included within the scope of a Novel Influenza, etc. as stipulated in the Novel Flu Special Measures Act. Article 32 of the Novel Flu Special Measures Act provides that a state of emergency may be declared when a situation is found to have occurred in Japan that has or is likely to have an enormous impact on the lives of the people and the national economy due to the nationwide outbreak and rapid spread of a Novel Influenza, etc. In the event of such a situation, companies are required to take appropriate measures after confirming the implementation area and other details of the declaration.

Therefore, it is essential to establish a system to promptly confirm the safety of employees in an emergency situation, including when a state of emergency is declared in accordance with the Novel Flu Special Measures Act. So, companies should acknowledge that the establishment of a communication system and a communication network and the introduction of a safety confirmation system should be promoted as a minimum requirement.

Depending on the type of work involved, companies should also consider establishing a communication system and a communication network to develop a safety confirmation system for, not

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only employees but also companies and individuals involved in the companies' business, such as affiliated companies, dispatched workers and partner companies.

(2) Suspension of periodic transfer and reorganization

In an emergency situation such as when the novel coronavirus infection continues to spread, it is necessary to establish a system that enables the continuation of critical business operations (i.e. core business). Since the resources necessary for maintaining critical business operations are to be invested, special consideration should be given to, for example, minimizing periodic personnel transfers and reorganization scheduled before the spread of infection so as not to cause confusion or stagnation, in order to establish an emergency response system for employees and ensure that it functions effectively.

An optimized personnel system is required for the maintenance of critical business operations. For example, if there is an urgent need to maintain critical business operations and there is a shortage of human resources in those operations, it is necessary to make a decision to suspend personal transfers from such critical operations while having proper personnel continue to engage in those operations, and to promptly dispatch support personnel to such critical operations at an early stage. On the other hand, if there is a situation where a personnel transfer to a certain critical business operation is a hindrance to the maintenance of other critical operations, suspension of such transfer should be considered.

(3) Change of working hours and working styles

Please refer to "3. Spread of Infectious Diseases and Change of Working Hours and Working Styles" below.

(4) Postponement of recruitment activities

As the outbreak of the novel coronavirus infection continues to spread rapidly, it is advisable to postpone recruitment presentations; extend the deadline for entry sheets; or take any other relevant measures. Or, from the perspective of investing the resources necessary to maintain critical business operations, one of the options could be to postpone recruitment activities and focus on maintaining critical business operations first.

(5) Information sharing

In an emergency situation, it is important for companies to share information with their suppliers, consumers, shareholders, citizens and local governments, not to mention last but not the least, its employees. In addition, depending on the situation in particular, it is necessary to promptly share information on the safety of employees' lives and health, and to establish a system that enables the top management to make decisions clearly and communicate such decisions promptly.

2. Spread of Infections and Leave of Absence

Because of the spread of the novel coronavirus infection, there may be some cases where employers order employees to stay at home by imposing a period of leave of absence (休業, *kyugyo*)[1]. We will

[1] The Japanese Law Translation website run by the Japanese Ministry of Justice uses the phrase

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consider whether employers are obligated to pay wages or allowances for instructing its employees to be absent from work in such a situation.

(1) Order to go home and stay at home

In the event that the novel coronavirus infection were to occur in a company or in a building in which a company is located, or in the event that a state of emergency is declared in accordance with the Novel Flu Special Measures Act, it may be necessary to issue an order for the employees to go home and stay at home as part of the safety consideration obligation from the viewpoint of preventing the spread of the infection. The safety consideration obligation (under Article 5 of the Labor Contract Act) is an obligation to give necessary consideration to enable workers to work while ensuring the safety of their lives and bodies.

A judicial precedent also states that it is “an obligation to give consideration so as to protect the lives and bodies of workers from danger in the course of using places, equipment or instruments, etc. installed by the workers for the purpose of providing labor or in the course of providing labor under the instruction of the employer” (Supreme Court, judgment of April 10, 1984 (Hanrei Jiho No.1116, P33)).

Therefore, in the event of an emergency, if a company collects necessary information and after a timely and appropriate evaluation, concludes that it is appropriate to promptly have its employees go home and order them to stay at home instead of coming to work, the company should immediately issue an order to its employees to go home and stay at home until further instructions are given.

Obligations to pay wages, etc. in the event of issuance of an order to go home or an order to stay at home will be determined according to the circumstances described in (2) to (5) below.

(2) Leave of absence and obligation to pay wages

Depending on the cause of the absence, an employer’s obligations to pay wages in the event of its employees being absent from work are classified as follows:

Cause of leave of absence	**Payment obligations under the Civil Code (Article 536 of the Civil Code)**	**Obligation to pay allowances for leave of absence (Article 26 of the Labor Standards Act)**
Due to *force majeure*	× (No) Article 536, Paragraph 1 of the Civil Code	× (No)
Due to operational or administrative difficulties	× (No) Except for cases where the leave of absence is due to an intentional act or negligence on the part of the employer	○ (Yes)

"absence from work" for the term "休業, *kyugyo*".

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	Article 536, Paragraph 1 of the Civil Code	
Due to intentional act or negligence on the part of the employer	○ (Yes) Article 536, Paragraph 2 of the Civil Code	○ (Yes)

(3) Leave of absence due to *force majeure*

If the employee is instructed to be absent from work due to a force majeure event, the company is not obligated to pay any wages to its employees (Article 536, Paragraph 1 of the Civil Code), nor is it obligated to pay any allowances during the leave of absence period (Article 26 of the Labor Standards Act). According to the "Q&A on Coronavirus Disease 2019 (COVID-19) (Information for the Companies)" (April 17, 2020 version) posted by the Ministry of Health, Labor and Welfare, in order for an event to qualify as an event of force majeure, the two following requirements must be satisfied: (1) the cause of that event is an accident that has made business operations difficult and has occurred outside the business; and (2) that event is an accident that cannot be avoided even with the utmost care taken by the employer as an ordinary manager.

In relation to the factor in (1) above, the Q&A above states that "accidents that have made business operations difficult and have occurred outside the business" include the declaration of a state of emergency or a request under the Novel Flu Special Measures Act.

In addition, in relation to the factor in (2) above, the Q&A states that the employer is required to have made the utmost effort to avoid imposing the leave of absence, taking into consideration individual and specific circumstances. For example, if an employer intends to implement the leave of absence based on the reason that overseas suppliers have suspended their business due to the spread of COVID-19, in making such a judgment call, it is necessary to comprehensively consider the degree of the company's dependence on such suppliers, the possibility of other alternative means of obtaining supplies, the period after the suspension of business, and specific efforts taken by the employer to avoid imposing leaves of absence on its employees.

The above Q&A also states, "For example, in cases where it is possible to have employees engage in work by pursuing alternative options such as working from home, and if it is determined that the employer has failed to make best efforts that should be made as an ordinary employer to avoid imposing leaves of absence on its employees by fully considering such alternative measures, the employees' leaves of absence may then fall under the category of "leave of absence for reasons attributable to the employer", and the employer must pay for such leaves of absence."

Therefore, employers must be aware that the declaration of a state of emergency, a request or an instruction based on the Novel Flu Special Measures Act do not necessarily exempt them from the obligation to pay allowances for leaves of absence under the Labor Standards Act.

(4) Leave of absence due to operational or administrative difficulties

If the employees are placed on leaves of absence due to a cause that can be said to have occurred due to the employer's incapacity (operational or administrative difficulties), the employer is not liable to pay 100% of the employees' wages (Article 536, Paragraph 1 of the Civil Code), unless there is an intentional act or negligence on the part of the employer or any cause that could be deemed to be

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equivalent to the same by virtue of principles of good faith and trust. However, the employer must pay allowances for leaves of absence amounting to at least 60% of the employees' average wages (Article 26 of the Labor Standards Act). For example, difficulties in obtaining funds and materials due to financial difficulties of the parent company is said to constitute a cause that can be said to have incapacitated the employer.

(5) Leave of absence due to an intentional act or negligence on the part of the employer

If the employees are placed on leaves of absence due to an intentional act or negligence on the part of the employer or any cause that could be deemed to be equivalent to the same by virtue of principles of good faith and trust, the employer is, in principle, liable to pay 100% of the employees' wages, unless otherwise provided in the rules of employment (Article 536, Paragraph 2 of the Civil Code).
This provision on risk bearing under Article 536, Paragraph 2 of the Civil Code is a voluntary provision, and its application may be excluded by a special provision. However, even if the application of Article 536, Paragraph 2 of the Civil Code is excluded by the rules of employment, payment of allowances for leaves of absence equivalent to 60% of the employees' average wages is required because Article 26 of the Labor Standards Act is a mandatory law which will override any rules of employment in force. In light of this, if the rules of employment stipulate that "the company shall pay only 60% of the employee's average wage in the case of a leave of absence due to a reason attributable to the company", then in principle the company shall only be obligated to pay wages equivalent to 60% of the employees' average wages (application of Article 536, Paragraph 2 of the Civil Code is excluded. However, in a Yokohama District Court judgment dated December 14, 2000 (Rodo Hanrei No.802, p27) (Ikegai case), it was stated that the court denied the reasonableness of the adverse modification of working conditions in the rules of employment, and ordered payment of 100% of the employees' wages pursuant to Article 536, Paragraph 2 of the Civil Code).

(6) Leave of absence and obligation to pay wages / adverse disposition

Even if the company does not implement a period of leave of absence for its employees, due to the effects of the novel coronavirus infection, the employees may not be able to come to work because they have to look after their children since they have no place to leave their children while they can be at work (i.e. at schools and after- school care centers). Since such absence is when labor is not provided based on the personal situation of the worker, the company is not liable to pay wages for such absence (Article 536, Paragraph 1 of the Civil Code), nor is it under any obligation to pay allowances for the leaves of absence (Article 26 of the Labor Standards Act). This is where the so-called no-work no-pay principle applies.
Furthermore, there is a system to subsidize employers that allow their employees (whether regular or non-regular) to take paid leave (in addition to statutory annual paid leave) during the period from February 27, 2020 to June 30, 2020 in order to look after their children who attend temporarily closed elementary schools, special support schools, kindergartens, day care centers and authorized day care centers for children with the amount equivalent to 100% of wages paid during such leave period (up to 8,330 yen per day).
https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/koyou_roudou/koyou/kyufukin/pageL07_00002.html
In addition, even if an employee is absent from work for any of the reasons mentioned above, it will

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not amount to a failure in performing his/her work duties due to reasons attributable to the employee, and therefore no disciplinary action or other disadvantageous dispositions can be implicated on such an employee.

3. Spread of Infections and Change of Working Hours and Working Styles

An increasing number of employers are introducing flexible working hours and work styles to prevent the spread of infection of the novel coronavirus. The following is a list of possible measures that can be implemented by companies to cope with the pandemic.

(1) Staggered commuting

Workers and employers may change the starting and finishing times of work in accordance with the rules of employment that stipulate moving up and delaying the starting and finishing times or by individual agreement. Depending on the degree of congestion caused by commuting, it is possible to introduce staggered commuting pursuant to sufficient discussions and trials between labor and management on the method of staggered commuting.

(2) Teleworking

As the novel coronavirus infection continues to spread, establishing a teleworking system is also an important issue to take into consideration. According to the "Guidelines for the appropriate introduction and implementation of off-site work using information and communications technology" issued by the Ministry of Health, Labor and Welfare, teleworking refers to the "off-site work carried out by workers using information and communications technology" and includes homeworking, satellite office working and mobile working. The use of information networks is a prerequisite, so it is essential that the infrastructure for information networks is fully established. Short-term telework can be handled by business orders, but considering medium- to long-term situations, rules including time management should be established as soon as possible to ensure a smooth transition to telework (See the "Guidelines concerning measures employers should take to adequately ascertain employees' working hours" (established on January 20, 2017) issued by MHLW), and problems should be sorted out and solved by conducting tests in preparation for emergencies (See the "Guidelines for appropriate labor management in telework" and the "Q & A on Labor Management for Introduction of Telework" both issued by MHLW)

In addition, as a measure against the novel coronavirus infection, the government has established a subsidy for improvement of overtime work (telework course) to support small and medium business owners who have newly introduced telework.

(3) Flextime

The flextime system is a system in which the starting and finishing times of work can be determined by workers. Under the flextime system, the settlement period and the total working hours during that settlement period are stipulated in a labor-management agreement, and workers can decide on the starting and finishing times so that working hours per week on average during the settling period do not exceed the legal working hours and, as a result, they can work efficiently while maintaining a

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balance between their personal lives and work. For example, companies can divide workers' daily working hours into hours that they must work (core time) and hours that they can come to office or go home at any time during those hours (flexible time), or companies can make all of the workers' working hours flexible. Or, in combination with telework, workers can work longer hours on office days while working shorter hours on telecommuting days to spend more time at home.

When introducing the flextime system, it is necessary to stipulate in the rules of employment or any similar rules that the starting and finishing times shall be determined by the workers themselves, and to stipulate in a labor-management agreement the scope of eligible workers, the settlement period, the total working hours during the settlement period, and the standard daily working hours, etc., in accordance with Article 32-3 of the Labor Standards Act.

4. Spread of Infections and Integration/Abolition of Offices / Wage Cuts

Considering the impact of the spread of the novel coronavirus infection on businesses, it is conceivable for companies to integrate or abolish their offices (selection and optimization of existing businesses) or to cut wages of employees in their management decisions. We will examine the problems related to the integration and abolition of offices and wage cuts etc.

(1) Integration/abolition of offices (i) --- Transfer order to employees

If an office is abolished, employees who worked at the office will be transferred to other appropriate offices. Generally, the rules of employment or other similar rules provide the basis for a transfer order and a transfer order may be issued in accordance with such rules. However, attention must be paid to the possibility that the transfer order may become an abuse of right and therefore invalid from the perspective of (1) existence of a business necessity, (2) existence of an unjust motive or purpose, or (3) existence of disadvantages which greatly exceed the level that an employee should normally suffer (Article 3, Paragraph 5 of the Labor Contract Act; Supreme Court judgment of July 14, 1986 (*Hanrei Jiho* No.1198, p149)).

(2) Integration/abolition of offices (ii) --- Handling of employees who refuse to comply with transfer orders

Employees who do not comply with transfer orders will eventually have to be considered for dismissal. In this case, dismissal may be disciplinary dismissal by reason of violation of transfer order or ordinary dismissal by reason of redundancy (*seiri kaiko*). Of these, disciplinary dismissal requires reasonableness based on the premise of the validity of the transfer order. The effectiveness of ordinary dismissal by reason of redundancy that are not based on reasons attributable to employees will be determined comprehensively by considering the following four factors: (1) reasonableness of management judgment for the abolition of the office (namely, the necessity to reduce surplus personnel), (2) efforts to avoid dismissal, (3) reasonableness of personnel selection, and (4) adequacy of procedures.

(3) Integration/abolition of offices (iii) --- Handling of employees whose work place is limited by contract

Meanwhile, some transfers are subject to restrictions under a labor contract, and it is not possible to order a change of work place of an employee whose work place is limited by his/her labor contract. In

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such a case, the company should first sufficiently explain the necessity to change his/her work place to the employee, hear his/her wishes and then inform him/her about the change of the work place. There is no problem if the employee agrees to the change of his/her work place, but if he/she does not agree and the office is abolished, the employer will have no choice but to consider dismissal in the same way as (2) above.

(4) Wage cuts

In a situation where a significant decline in business performance is expected to continue for the foreseeable future due to the impact of the novel coronavirus infection, it is conceivable that even if companies make every effort, they might fall into a severe situation in terms of financing and other aspects of business. In such a case, wage cuts may be considered as a measure to control the situation. However, wage cuts that are not based on leaves of absence due to closure of business or employees' personal reasons are not something that an employer is free to make unilaterally. Such wage cuts must be made with the sincere agreement of the employee (Article 8 of the Labor Contract Act), or in the absence of such an agreement, by following the procedures such as to make reasonable amendments to the rules of employment (wage regulations) (Article 10 of the Labor Contract Act).

5. Spread of Infections and Cancellation of Job Offers, Termination of Employment and Redundancy

This section describes personnel reductions and other actions to be taken in the event of a severe decline in business performance due to the effects of the novel coronavirus infection.

(1) Decline in business performance and cancellation of job offers

According to the Ministry of Health, Labor and Welfare, 58 students who were planning to be employed this spring had their job offers rescinded by 23 companies due to the spread of novel coronavirus infection as of April 19, 2020.

In this regard, once a job offer has been accepted by a candidate, a labor contract with a right of early termination reserved is considered to be in effect even before the date of commencement of employment. The"Q & A on Coronavirus Disease 2019 (COVID-19) (Information for the Companies)" (April 17, 2020 version) posted by the Ministry of Health, Labor and Welfare also explains that once a job offer has been accepted by a new school graduate, any cancellation of a job offer that lacks objectively reasonable grounds and is not considered appropriate in general societal terms is invalid. In particular, when the reason is the significant deterioration of management due to the spread of novel coronavirus infection, it is not the fault of the prospective employee, and therefore the legality of the cancellation of the job offer should be determined strictly and careful actions are required to be taken.

If a company intends to terminate a job offer or postpone the date of employment of a new school graduate, it is necessary to notify "Hello Work" and the school of the new graduate in advance using a prescribed form (Article 54 of the Employment Security Act; Article 35, Paragraph 2, Items 2 and 3 of the Ordinance for Enforcement of the Employment Security Act; and the Guidelines on the Employment of New School Graduates).

(2) Decline in business performance and termination of employment

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First, in order to secure employment, companies should make utmost management efforts and proactively utilize various subsidies. However, there may be a case where companies have no choice but to consider terminating the employment of fixed-term workers or undertake dismissal for redundancy of such workers in the middle of their employment term due to a significant deterioration in its business management.

Generally, the employment of fixed-term employees such as contract employees, part-timers and casual staff can be terminated at the expiration of their term.

However, (1) if such fixed-term labor contract has been renewed in the past repeatedly and can be regarded as being the same as a labor contract with no fixed term in general societal terms, or (2) if there is a reasonable reason for such workers to expect that the fixed-term labor contract will be renewed, employment cannot be terminated simply because the contract term has expired, and the validity of such termination will be determined based on strict criteria similar to the doctrine of abuse of right of dismissal (Article 19 of the Labor Contract Act; Supreme Court judgment of July 22, 1974 (*Hanrei Jiho* No.752, p27); Supreme Court judgment of December 4, 1986 (*Hanrei Jiho* No.1221, p134).

Dismissal of fixed-term workers not upon the expiration of the contract term but “in the middle of” the term is not permitted unless there are “unavoidable circumstances” (Article 17, Paragraph 1 of the Labor Contract Act). In this context, the term “unavoidable circumstances” refers to the occurrence of a situation that is so serious that continuing employment until the expiration of the term of employment is considered to be unjust or unfair, and it is construed more strictly than the dismissal requirements under the doctrine of abuse of right of dismissal (Article 16 of the Labor Contract Act) in labor contracts with no fixed term, and a careful handling of the matter is required.

(3) Decline in business performance and dismissal for redundancy

First, in order to secure employment, companies should make utmost management efforts and proactively utilize various subsidies. However, there may be a case where companies have no choice but to consider dismissing their employees due to a significant deterioration in management of its business. Since those dismissals for redundancy are not based on reasons attributable to employees, their effectiveness will be determined by comprehensively considering the following four factors: (1) necessity of personnel reduction, (2) efforts to avoid dismissal, (3) reasonableness of personnel selection, and (4) adequacy of procedures (see Article 16 of the Labor Contracts Act.).

(i) Necessity of personnel reduction	It is unavoidably necessary for the reasonable operation of the company (The need to reduce the number is recognized).
(ii) Efforts to avoid dismissal	To make sincere and reasonable management efforts to avoid dismissal in the individual and specific circumstances of each company.
(iii) Reasonableness of personnel selection	To select workers subject to dismissal for redundancy based on non-arbitrary, objective and reasonable criteria.
(iv) Adequacy of procedures	In undertaking dismissal for redundancy procedure, to give full explanations and consult with employees and labor unions about the company’s situation (necessity of personnel reduction), background (efforts to avoid dismissal), selecting criteria, etc.

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新型コロナウイルス感染症拡大と人事労務の留意点

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新型コロナウイルス感染症の拡大により、サプライチェーンへの影響を含め、企業の行う事業の各方面に多大な影響が出ている状況です。企業によっては、従業員の休業等を余儀なくされたり、事業所の閉鎖等を余儀なくされる事例が出てきています。本稿では、新型コロナウイルス感染症の拡大と人事労務の留意点について述べます。

1. 感染症拡大と人事マネジメント

新型コロナウイルス感染症の拡大が継続する可能性も視野に入れて、BCPや人事マネジメントの観点から、配慮すべき事項について記します。

(1)従業員等の安否確認体制の整備

「新型インフルエンザ等対策特別措置法」(「新型インフル特措法」)の改正法が令和2年3月13日に成立し、同月14日に施行されました。この改正は、新型コロナウイルス感染症を同法にいう新型インフルエンザ等とみなすものです。新型インフル特措法32条では、新型インフルエンザ等が国内で発生し、その全国的かつ急速なまん延により国民生活及び国民経済に甚大な影響を及ぼし、又はそのおそれがある事態が発生したと認めるときは、緊急事態宣言ができることになっており、企業としても、そのような事態になった場合には、実施区域を含めた宣言の内容を確認の上で、適切な対応をとる必要があります。

したがって、新型インフル特措法に基づく緊急事態宣言が発せられた場合を含めて、緊急時に迅速な安否確認をする体制の整備は必要不可欠です。連絡体制・連絡網の確立や、安否確認システムの導入は最低限進めるべきだと考えられます。

なお、業務によりますが、従業員だけでなく、関連会社、派遣社員、協力会社など、業務に携わる会社や業務従事者との連絡体制・連絡網の確立や安否確認の体制整備も検討課題です。

(2)定期異動、組織変更の停止

新型コロナウイルス感染症の拡大が継続する場合等の緊急時においては、重要業務(中核事業)の継続を可能とする体制整備が求められます。そして、重要業務の維持のために必要な資源を投入することとなりますので、従業員の緊急時の体制を発足させて有効に機能させるためにも、例えば定期の人事異動や感染拡大前に予定していた組織変更などは最小限にし、これに伴う混乱や業務停滞が生じないようにするなどの配慮も考えられるところです。

重要業務の維持のための最適化された人員体制が求められますので、例えば、重要業務の維持が急務であり、当該業務に人材が不足しているなどの事情があれば、当該重要業務からの異動は停止しつつ継続して重要業務に当たらせるとともに、当該重要業務への応援人材を早期に投入するなどの判断が必要となります。また、逆に、ある重要業務への異動が、その他の重要業務の維持の足かせになるような事情があれば、当該異動を停止することも考えられます。

(3)勤務時間や勤務形態の変更等

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「3 感染症拡大と勤務時間・勤務形態の変更」をご参照ください。

(4)採用活動の延期

新型コロナウイルス感染症の拡大が継続する状況ですので、採用説明会の延期、エントリーシートの締切延長等の措置を講ずることが考えられます。また、重要業務の維持のために必要な資源を投入するという観点からも、採用活動を延期して、まずは重要業務の維持に注力するということも考えられます。

(5)情報共有

緊急事態においては、従業員は当然のこと、取引先、消費者、株主、市民、自治体などと情報を共有することが重要です。また、特に状況に応じて、従業員の生命身体の安全に係る情報は迅速に共有するとともに、トップの意思決定は明確に行い、迅速に決定を伝達する体制を整備する必要があります。

2. 感染症拡大と休業

新型コロナウイルス感染症の拡大により、やむを得ず従業員に関して、自宅待機を命じたり、休業を実施したりするケースも考えられるところ、賃金の支払義務や休業手当の支払義務はあるのかを検討します。

(1)帰宅命令・自宅待機命令

企業内で新型コロナウイルスによる感染者が出た場合や、企業が入るビル内で感染者が出た場合、さらには新型インフル特措法に基づく緊急事態宣言がなされた場合などにおいて、感染症の拡大防止を図る観点から、安全配慮義務の一環として、帰宅命令や自宅待機命令を発しなければならない場合もあると考えられます。安全配慮義務(労働契約法5条)は、労働者がその生命、身体等の安全を確保しつつ労働することができるよう、必要な配慮をする義務です。判例でも、「労働者が労務提供のため設置する場所、設備もしくは器具等を使用し又は使用者の指示のもとに労務を提供する過程において、労働者の生命及び身体等を危険から保護するよう配慮すべき義務」(最判昭和 59・4・10 判時 1116 号 33 頁)があると述べられているところです。

したがって、企業としては、緊急時には、必要な情報を収集して、適時適切な判断の下、速やかに従業員を自宅に帰宅させ、あるいは出勤させずに自宅待機を命じることが相当だとの判断に至れば、速やかに帰宅命令や自宅待機命令を発することになります。

帰宅命令や自宅待機命令を発した場合の賃金等の支払い義務に関しては、状況に応じ、下記(2)から(5)に従い判断されることになります。

(2)休業と賃金支払義務

休業を実施する場合の賃金支払義務は、休業の原因により、以下のように分かれます。

休業の原因	民法上の支払義務 (民法 536 条)	休業手当支払義務 (労働基準法 26 条)
不可抗力に基づく場合	×(なし) 民法 536 条1項	×(なし)

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経営管理上の障害に基づく場合	×(なし) ただし、事業者の故意・過失または信義則上これと同視すべき事由がないことが前提 民法 536 条1項	○(あり)
事業者の故意過失に基づく場合	○(あり) 民法 536 条2項	○(あり)

(3)休業が不可抗力に基づく場合

休業が不可抗力に基づく場合、企業には従業員に対する賃金支払義務はなく(民法 536 条1項)、休業手当の支払義務(労働基準法 26 条)もありません。なお、厚生労働省の「新型コロナウイルスに関する Q&A(企業の方向け)」(令和2年 4 月 17 日時点版)によれば、不可抗力とは、①その原因が事業の外部から発生した事故であること、②事業主が通常の経営者として最大の注意を尽くしてもなお避けることのできない事故であること、という2つの要件が必要であるとされています。

上記 Q&A によれば、①に該当するものとしては、例えば、今回の新型インフルエンザ等対策特別措置法に基づく緊急事態宣言や要請などのように、事業の外部において発生した、事業運営を困難にする要因が挙げられるとされています。

また、②に関しては、個別具体的な事情を考慮して、使用者として休業を回避するための具体的努力を最大限尽くしていると言える必要があるとされています。例えば、海外の取引先が新型コロナウイルス感染症を受け事業を休止したことに伴う事業の休止である場合には、当該取引先への依存の程度、他の代替手段の可能性、事業休止からの期間、使用者としての休業回避のための具体的努力等を総合的に勘案し、判断する必要があると考えられます。

また、前記 Q&A によれば、「例えば、自宅勤務などの方法により労働者を業務に従事させることが可能な場合において、これを十分検討するなど休業の回避について通常使用者として行うべき最善の努力を尽くしていないと認められた場合には、「使用者の責に帰すべき事由による休業」に該当する場合があり、休業手当の支払が必要となることがあります。」とされています。

したがって、新型インフルエンザ等対策特別措置法に基づく緊急事態宣言や、要請や指示を受けて事業を休止し、労働者を休業させる場合であっても、一律に労働基準法に基づく休業手当の支払義務がなくなるものではないことに注意が必要です。

(4)休業が経営、管理上の障害に基づく場合

休業が、使用者側の領域において生じたといえる事由(経営、管理上の障害)に基づく場合、企業に故意・過失または信義則上これと同視すべき事由がない場合は 100%の賃金支払義務があるとはいえませんが(民法 536 条1項)、少なくとも平均賃金の 60%の休業手当(労働基準法 26 条)を支払う必要があります。親会社の経営難のための資金・資材の入手困難等が、使用者側の領域において生じた事由に該当するといわれています。

(5)休業が事業者の故意・過失に基づく場合

休業が事業者の故意・過失又はこれと信義則上同視すべき事由に基づく場合、就業規則に特段の規定がな

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い限り、会社は原則として従業員に対する100%の賃金支払義務を負います(民法536条2項)。

なお、この民法 536 条2項の危険負担の規定は、任意規定であり、特約によりその適用を排除することができます。ただし、就業規則により、民法536条2項の適用を排除する場合であっても、労働基準法26条の規定は強行法規ですので、平均賃金の 60%相当の休業手当の支払は必要です。これらを踏まえて、就業規則において、「会社都合による休業の場合は、平均賃金の 60%のみを支払う」旨の規定を定めておけば、原則として企業は平均賃金の 60%相当額の賃金支払義務しか負わないことになります(民法 536 条2項の適用排除。ただし、横浜地判平成 12.12.14 労働判例 802 号 27 頁(池貝事件)では、事後的な就業規則の変更に関して、労働条件の不利益変更についての合理性が否定され、民法 536 条 2 項により 100%の賃金の支払いが命じられています。)。

(6)欠勤と賃金支払義務、不利益処分

事業者による休業等が実施されていない場合であっても、新型コロナウイルス感染症の影響により、学校(学童保育)を含めた子供の預け先がなくなり、子供の世話を見るために従業員が出勤できない場合も想定されます。このような欠勤は、労務の提供が労働者の意思によってなされなかった場合であるため、当該欠勤日にかかる賃金支払義務はありませんし(民法536条1項)、休業手当の支払義務(労働基準法26条)もありません。いわゆるノーワーク・ノーペイの原則が妥当する場面です。

なお、臨時休業した小学校や特別支援学校、幼稚園、保育所、認定こども園などに通う子供を世話するために、令和2年2月27日から3月31日の間だけでなく、令和2年 4 月 1 日から 6 月 30 日の間に従業員(正規・非正規を問わず)に有給の休暇(法定の年次有給休暇を除く)を取得させた会社に対し、休暇中に支払った賃金100%相当額(1日 8,330 円が上限)を助成する制度があります。
https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/koyou_roudou/koyou/kyufukin/pageL07_00002.html

また、上記のような理由での欠勤があったとしても、従業員の責めに帰すべき事由による労働義務の不履行ではありませんので、これを理由とした懲戒その他の不利益処分はできません。

3. 感染症拡大と勤務時間や勤務形態の変更

新型コロナウイルス感染症への感染を防ぐため、勤務時間や勤務形態の柔軟化を実施する企業が増えています。どのような施策が考えられるのかを以下に述べます。

(1)時差通勤

労働者及び使用者は、始業、終業時刻の繰り下げ繰り上げを定める就業規則に基づき、または、個別合意により、始業、終業の時刻を変更することができます。通勤による混雑具合に応じて、時差通勤の内容について、労使で十分な協議や試行をするなどして時差通勤を導入することが考えられます。

(2)テレワーク

新型コロナウイルス感染症の拡大が継続する状況ですので、テレワーク体制の構築も重要課題です。厚生労働省の「情報通信技術を利用した事業場外勤務の適切な導入及び実施のためのガイドライン」によれば、テレワークとは、「労働者が情報通信技術を利用して行う事業場外勤務」をいい、在宅勤務、サテライトオフィス勤務、モバイル勤務などがあります。情報ネットワークの活用が前提ですので、その基盤が構築されていることが肝要です。また、短期間のテレワークであれば、業務命令により対応可能ですが、中長期にわたる場合も考慮して、あらかじめ、テレワークへの移行が円滑に行われるよう時間管理を含めたルールを早急に整備するとともに(厚生労

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働省「労働時間の適正な把握のために使用者が講ずべき措置に関するガイドライン」（平成 29 年1月 20 日策定）参照）、緊急時に備えた試験施行をして問題点を整理した上で解決しておくべきです（厚生労働省「テレワークにおける適切な労務管理のためのガイドライン」、厚生労働省「テレワーク導入ための労務管理等Ｑ＆Ａ集」参照）。

また、今般の新型コロナウイルス感染症対策として、新たにテレワークを導入した中小企業事業主を支援するため、時間外労働等改善助成金（テレワークコース）も設けられています。

（3）フレックスタイム

始業、終業の時刻を労働者の決定に委ねる制度として、フレックスタイム制があります。フレックスタイム制は、清算期間やその期間における総労働時間等を労使協定において定め、清算期間を平均し、1週当たりの労働時間が法定労働時間を超えない範囲内において、労働者が始業及び終業の時刻を決定し、生活と仕事との調和を図りながら効率的に働くことのできる制度です。例えば、1 日の労働時間帯を、必ず勤務すべき時間帯（コアタイム）と、その時間帯の中であればいつ出社または退社してもよい時間帯（フレキシブルタイム）とに分けることもできますし、全部をフレキシブルタイムとすることもできます。さらに、テレワークと組み合わせて、オフィス勤務の日は労働時間を長く、一方で在宅勤務の日の労働時間を短くして家庭生活に充てる時間を増やす、といった運用が可能です。

なお、フレックスタイム制の導入に当たっては、労働基準法 32 条の3に基づき、就業規則その他これに準ずるものにより、始業及び終業の時刻をその労働者の決定に委ねる旨定めるとともに、労使協定において、対象労働者の範囲、清算期間、清算期間における総労働時間、標準となる1日の労働時間等を定めることが必要です。

4. 感染症拡大と事業所の統廃合、賃金カット

新型コロナウイルス感染症拡大による事業への影響を勘案して、企業が、その経営判断において、事業所を統廃合したり（既存事業の選択と最適化）、賃金カットをすることは考えられるところです。これら事業所の統廃合や賃金カットにおける問題点を検討します。

（1）事業所の統廃合①～従業員に対する配転命令

事業所の廃止をするのであれば、当該事業所に勤務していた従業員は、他の然るべき事業所に配転させることになります。一般的には、就業規則等に配転命令の根拠規定がありますから、当該規定に基づき配転を命ずることができますが、①業務上の必要性の有無、②不当な動機・目的の有無、③労働者が通常甘受すべき程度を著しく越える不利益の有無といった観点から、配転命令が権利濫用となり、無効となる場合があるので留意が必要です（労働契約法3条5項、最判昭和 61・7・14 判時 1198 号 149 頁）。

（2）事業所の統廃合②～配転命令に従わない従業員の対応

配転命令に従わない従業員に対しては、最終的には解雇を検討せざるを得ません。この場合の解雇は、配転命令違反を理由とする懲戒解雇や、整理解雇が考えられます。このうち、懲戒解雇は配転命令の有効性を前提として、懲戒解雇処分の相当性が必要です。また、整理解雇も従業員の帰責事由に基づくものではないため、その有効性は、①事業所廃止の経営判断の合理性（＝余剰人員削減の必要性）、②解雇回避努力、③人選の合理性、④手続の相当性という4つの要素を総合考慮して判断されることになります。

（3）事業所の統廃合③～勤務地限定の従業員の対応

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他方、配転には労働契約による制限もあり、勤務地限定の従業員には勤務地の変更を命じることはできません。この場合には、まずは十分に業務上の必要性を説明し、本人の希望等を聴取した上で、勤務地の変更を打診することになります。その結果、勤務地の変更に同意すれば問題はありませんが、あくまで同意せず、事業所も廃止される事態となれば、使用者としては、最終的には上記(2)と同じく解雇を検討せざるを得ません。

(4)賃金カット

新型コロナウイルス感染症の影響により、業績の大幅な落ち込みが当面続くと想定される状況では、企業があらゆる努力を尽くしてもなお、資金繰りその他の面で厳しい状況に至ることが考えられ、その場合の一方策として、賃金カットをすることも考えられるところです。しかし、休業や欠勤等を理由としない賃金カットは、使用者が一方的に自由になし得るものではなく、従業員の真摯な合意がある場合(労働契約法8条)か、合意がない場合は就業規則(賃金規定)の合理的な変更手続(労働契約法 10 条)によることが必要です。

5. 感染症拡大と採用内定取消し、雇止め、整理解雇

新型コロナウイルス感染症の影響で業績の落ち込みが激しく、著しい経営の悪化に至った場合における人員整理等について述べます。

(1)業績の落ち込みと採用内定取消し

厚生労働省によれば、新型コロナウイルス感染症の拡大による今春就職予定の学生らへの採用内定取消しが 4 月 1 日時点で 23 社 58 人とのことです。

この点、いわゆる採用内定の段階に至れば、始期付き解約権留保付きの労働契約が成立することになります。厚生労働省「新型コロナウイルスに関する Q&A(企業の方向け)」(令和2年 4 月 17 日時点版)でも、新卒の採用内定者について労働契約が成立したと認められる場合には、客観的に合理的な理由を欠き、社会通念上相当であると認められない採用内定の取消しは無効となると解説しています。特に新型コロナウイルス感染症の拡大による著しい経営の悪化を理由とする場合は、採用予定者の帰責事由に基づくものではありませんから、採用内定取消しの適法性については、厳格に判断されると解され、慎重な対応が求められます。

なお、企業が、新規学校卒業者の採用内定取消しや、入職時期の繰下げを行おうとする場合は、所定の様式により、事前に、ハローワーク及び学校に通知することが必要となります(職業安定法54条、職業安定法施行規則 35 条 2 項 2 号 3 号、新規学校卒業者の採用に関する指針)。

(2)業績の落ち込みと雇止め

まずは、雇用確保のために、最大限の経営努力を行い、かつ各種助成措置を積極的に活用することになりますが、著しい経営の悪化等による期間雇用者の雇止めや期間途中の整理解雇を検討せざるを得ない場合も考えられます。

この点、本来、期間を定めた労働契約を締結している契約社員、パート、アルバイトなどの期間雇用に関しては、期間満了で雇止めができるのが原則です。

しかし、①当該有期労働契約が過去に反復して更新され、期間の定めのない労働契約と社会通念上同視できると認められる場合や、②当該労働者において当該有期労働契約が更新されるものと期待する合理的な理由があると認められる場合には、単に期間満了だから雇止めができるというわけではなく、解雇権濫用法理と同様の厳しい基準で雇止めの有効性が判断されることになります(労働契約法19条、最判昭和 49・7・22 判時 752 号 27 頁、最判 61・12・4、判時 1221 号 134 頁)。

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なお、期間満了に伴う雇止めではなく、期間「途中」での解雇は、「やむを得ない事由」がなければできないこととされています(労働契約法 17 条1項)。ここで「やむを得ない事由」とは、期間満了まで雇用を継続することが不当・不公平と認められるほどに重大な事由を生じたことをいい、期間の定めのない労働契約における解雇権濫用法理(労働契約法 16 条)の解雇要件より厳格に解されており、慎重な対応が求められます。

(3)業績の落ち込みと整理解雇

まずは、雇用確保のために、最大限の経営努力を行い、かつ各種助成措置を積極的に活用することになりますが、著しい経営の悪化等による従業員の解雇を検討せざるを得ない場合も考えられます。このような整理解雇は、従業員の帰責事由に基づくものではないため、その有効性は、①人員削減の必要性、②解雇回避努力、③人選の合理性、④手続の相当性という以下の4つの要素を総合考慮して判断されることになります(労働契約法 16 条参照)。

①人員削減の必要性	企業の合理的運営上やむを得ない必要があること(当該人数の削減の必要性が認められること)。
②解雇回避努力	企業の置かれた個別具体的状況の中で、解雇を回避するための真摯かつ合理的な経営上の努力を尽くすこと。
③人選の合理性	整理解雇の対象者を恣意的でない客観的・合理的基準で選定すること。
④手続の相当性	整理解雇をするにあたり、会社の状況(人員削減の必要性)、経緯(解雇回避努力)、人選基準等について従業員・労働組合に十分な説明をし、協議すること。

<ご参考/Sources of Information>

新型コロナウイルスに関するQ&A(企業の方向け)(令和2年4月 17 日時点版)
Q & A on Coronavirus Disease 2019 (COVID-19) (Information for the Companies)" (April 17, 2020 version)
https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/kenkou_iryou/dengue_fever_qa_00007.html

厚生労働省ウェブサイト "新型コロナウイルス感染症について"
Website of the Ministry of Health, Labor and Welfare "Novel Coronavirus Infection (COVID-19)"
https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/0000164708_00001.html

情報通信技術を利用した事業場外勤務の適切な導入及び実施のためのガイドライン
Guidelines for the appropriate introduction and implementation of off-site work using information and communications technology
https://www.mhlw.go.jp/content/000545678.pdf

労働時間の適正な把握のために使用者が講ずべき措置に関するガイドライン
Guidelines concerning measures employers should take to adequately ascertain employees' working hours
https://www.mhlw.go.jp/file/06-Seisakujouhou-11200000-Roudoukijunkyoku/0000149439.pdf

テレワークにおける適切な労務管理のためのガイドライン

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Guidelines for appropriate labor management in telework
https://www.mhlw.go.jp/content/000553510.pdf

テレワーク導入ための労務管理等Q＆A集
Q & A on Labor Management for Introduction of Telework
https://work-holiday.mhlw.go.jp/material/pdf/category7/02.pdf

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