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Personnel and Labor Issues arising from State of Emergency Declaration for COVID-19

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On April 7, 2020, Prime Minister Shinzo Abe declared a state of emergency ("Emergency Declaration") covering seven prefectures in Japan*, including Tokyo and Osaka, to curb the spread of COVID-19. In response to the Emergency Declaration, the governors of the seven designated prefectures have issued requests to people to refrain from going out and to suspend the use of certain facilities. As a result, the effects of the spread of COVID-19 on business activities is becoming increasingly unpredictable. In this article, we summarize the impact of the Emergency Declaration on business activities and explain several points to keep in mind regarding personnel and labor issues.

*On April 16, 2020, the Emergency Declaration was extended to cover all the other remaining prefectures as well.

1. Overview of the Emergency Declaration

This section provides an overview of the Emergency Declaration, focusing in particular on the measures that the Japanese national and local governments can take under the Emergency Declaration in relation to business activities, particularly personnel and labor issues.

（1） Overview of the emergency declaration

Pursuant to Article 32 of the Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response (unless otherwise stated, the term "Act" refers to this Act), a state of emergency may be declared when it is recognized that a situation has occurred in Japan that causes or is likely to cause a serious impact on the lives of the people and the national economy due to a nationwide outbreak or rapid spread of a novel strain of influenza etc. Although the Act uses the term "novel strains of influenza etc." it is also possible to declare a state of emergency to curb COVID-19 infections based on the Act (Article 1-2 of the Supplementary Provisions of the Act).

First of all, it is important to clarify that the Emergency Declaration by itself does not restrict business

activities or impose any specific obligations on businesses. The Emergency Declaration is issued by the Prime Minister, who is the head of the Government Emergency Response Headquarters, a task force set up by the Japanese government to deal with the current COVID-19 pandemic. However, there are no regulations accompanying the Emergency Declaration that impose restrictions or obligations on residents or companies in the regions covered by the Emergency Declaration.

Therefore, it is not necessary to immediately take measures such as closing a business office or suspending business activities just because a state of emergency has been declared.

（2） Measures for preventing the spread of COVID-19 implemented by the governors of the designated prefectures

When an Emergency Declaration is issued, business activities, particularly personnel and labor issues, may be affected when the governor of a prefecture covered by the Emergency Declaration ("Designated Prefectural Governor") makes requests or gives instructions based on the Emergency Declaration. A Designated Prefectural Governor may make or issue the following requests or instructions when he/she finds it necessary to do so in order to prevent the spread of COVID-19 etc., protect the lives and health of citizens, and avoid creating disruptions to the lives of citizens and the national economy (Articles 45(1) to 45(3) of the Act).

- Requests for cooperation to prevent the spread of COVID-19 etc., such as requesting that people refrain from leaving their residences or any equivalent place without due cause, except in cases where it is necessary for maintaining one's everyday life ("Stay Home Requests") (Article 45(1) of the Act).

- Requests to persons who manage schools, social welfare facilities, entertainment facilities, or any other facilities used by a large number of persons as specified by Cabinet Order, or persons who organize events using any of the aforesaid facilities, to restrict or suspend the use of the aforesaid facilities, to restrict or suspend the holding of events, or to take any other measures as specified by Cabinet Order ("Requests for Restrictions on Facility Use") (Article 45(2) of the Act).

- Instructions to implement the measures pertaining to the requests ("Instructions for Restrictions on Facility Use") if the Requests for Restrictions on Facility Use are not complied with without justifiable grounds (Article 45(3) of the Act).

In addition, if a Request or Instruction for Restrictions on Facility Use is made, such Request or Instruction will be publicly announced in order to widely notify the users of the relevant facility in advance (Article 45(4) of the Act).

However, Stay Home Requests and Requests for Restrictions on Facility Use are merely "requests" and do not impose any specific duties or obligations on individuals or companies. Regarding Instructions for Restrictions on Facility Use, a person who receives an Instruction has a legal obligation under public law to take the necessary measures stipulated under the Instruction. There are no regulations on

penalties for non-compliance with Instructions, but as mentioned above, Requests and Instructions are publicly announced. Therefore, if a company were to ignore a Request or Instruction, there is a risk that it may damage its reputation in the eyes of society.

In addition, a Stay Home Request is a request to refrain from going out when it is not necessary for the maintenance of one's everyday life. As to what is considered “necessary for the maintenance of one’s everyday life”, commuting to one’s workplace is included as one aspect (Annotation to the Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response edited by the Research Group on Special Measures for Pandemic Influenza and New Infectious Diseases (2013, Chuo houki Shuppan), p. 158). In this regard, a Stay Home Request issued pursuant to the Act does not require the immediate closure of offices or suspension of business activities, nor does it require employers to order their employees to standby at home.

（3） Measures taken by Designated Prefectural Governors (as of April 10, 2020)

As of April 10, the governors of the prefectures covered by the Emergency Declaration have issued Stay Home Requests (pursuant to Article 45(1) of the Act) to the residents of their respective prefectures, and requested businesses to suspend the use of facilities or cancel events (pursuant to Article 24(9) of the Act), although there are some differences in the specific details of the Requests issued by each prefecture (although the Requests issued by Fukuoka Prefecture do not make any reference to the applicable provisions under the Act, Fukuoka’s Requests are considered to be measures issued based on Article 45(1) and Article 24(9) of the Act like the Requests issued by the other prefectures).

With regard to the Designated Prefectural Governors’ requests to suspend the use of facilities or cancel events as mentioned above, such requests are not based on Article 45(2) of the Act, but are based on Article 24(9) of the Act, which recognizes the authority of a governor to take various measures if the prefecture he/she governs has established a Prefectural Novel Coronavirus Response Headquarters even without the declaration of a state of emergency by the government. ("Article 24(9) Request for Suspension of Facility Use"). The reason why the Requests were issued based on Article 24(9) of the Act rather than Article 45(2) of the Act, despite the fact that the government had issued an Emergency Declaration, seems to be because the government’s policy is to minimize restrictions on the freedom and rights of the people as much as possible. In accordance with the revision of the Basic Policies for Novel Coronavirus Disease Control (https://corona.go.jp/expert-meeting/pdf/kihon_h_0407.pdf (Japanese only)) by the government on April 7, Stay Home Requests based on Article 45(1) of the Act and Article 24(9) Requests for Suspension of Facility Use should be issued first. When a prefecture designated under the Emergency Declaration wishes to issue Requests or Instructions for Restrictions on Facility Use based on Articles 45(2) to 45(4) of the Act, it should do so only after consulting with the government and hearing the opinions of experts as necessary.

In the following part of this article, we will examine several matters that should be noted when considering the possibility of future measures being implemented pursuant to Article 45(2) to 45(4) of the Act.

2. Points to Note Regarding Business Activities under the Emergency Declaration and the Requests and Instruction Issued by Designated Prefectural Governors

We will begin by considering the possible personnel and labor issues caused by the Emergency Declaration and Requests and Instructions issued by Designated Prefectural Governors.

（1） Concerns about letting employees continue working at the workplace without closing the workplace

A. Whether to let employees continue working at the workplace

First of all, if the above Requests or Instruction are issued by Designated Prefectural Governors pursuant to the Emergency Declaration, is it possible to continue letting employees work at the workplace without closing the workplace in the first place? As mentioned above, Stay Home Requests and Requests for Restrictions on Facility Use are meant to encourage voluntary compliance, and therefore it is still possible to let employees continue working at the workplace even if a Request has been issued. On the other hand, Instructions for Restrictions on Facility Use impose legal obligations under public law on persons who receive such Instructions. Although it depends on the contents of such Instruction, we assume that the contents of the Instruction would not restrict employees from going to work at the facility in principle, and an Instruction does not restrict the facility management rights of a company. Therefore, even if a company lets its employees continue working at the workplace, such conduct will not be immediately deemed to be illegal.

B. Points to keep in mind when letting employees continue working at the workplace

However, when letting employees continue working at the workplace, it is necessary to take into account the company's obligation to consider the safety of its employees (Article 5 of the Labor Contracts Act) by considering whether it is possible for employees to shift to teleworking or other remote work systems, and taking measures such as avoiding the so-called “3 Cs” (Closed spaces, Crowded Places and Close contact settings) and thoroughly disinfecting the workplace, etc. For some examples on how companies can implement specific measures to prevent the spread of COVID-19, please refer to the "Checklist to prevent the spread COVID-19 in the workplace" (https://www.mhlw.go.jp/content/11303000/000616869.pdf (Japanese only)).

C. Whether or not workers' compensation insurance benefits should be paid in the event that an employee is infected

Should an employee be infected with COVID-19 at the workplace, if there is a reasonable causal relationship between his/her infection and his/her work or his/her commute to the workplace, he/she will be included in the coverage of workers’ compensation insurance.

(2) Dealing with Employees Who Refuse to Come to Work

It is conceivable that an employee may refuse an order to come to work on the grounds of a Stay Home Request by a Designated Prefectural governor, an Article 24(9) Request for Suspension of Facility Use, a Request for Restrictions on Facility Use, or an Instruction for Restrictions on Facility Use.

However, since these Requests and Instruction do not necessarily extinguish an employee's obligation to provide labor under his/her employment contract, the employee is obligated to provide labor even if Requests or Instructions are issued. Therefore, the company may essentially order the employee to come to the office by issuing an order to work ("business order"), and if the employee does not follow the business order, in addition to non-payment of salary in accordance with the principle of "no work no pay", disciplinary action for violating the business order may be imposed in principle.

As long as a business order is necessary and appropriate based on reasonable provisions of the company's rules of employment, an employee has an obligation to obey the business order. However, if the business order is not necessary or appropriate in the first place, the employee cannot be accused of violating the business order. In addition, there may be legitimate reasons for refusing business orders, for example, when an employee has an underlying disease and is at risk of dying if he or she comes to work. In such a case, there is a high possibility that any disciplinary action imposed for violating the business order will be invalid. However, even in this case, the employee is not providing any labor to the company, so there is no need for the company to pay him/her for the period when he/she does not come to work.

In addition, it is possible for an employee to refuse to come to work because he/she needs to take care of his/her children due to the temporary closure of nursery schools or elementary schools. Under normal circumstances, these reasons are treated as a matter of the worker's personal circumstances and do not justify an employee's refusal to come to work based on such a reason. However, depending on the specific circumstances associated with the spread of COVID-19, it may not be possible for a company to discipline an employee for refusing to come to work based on the aforesaid reason. We believe that companies should give consideration to their employees' needs and circumstances as much as possible, taking into account factors such as whether there is any operational necessity of the business, the possibility of temporarily reassigning employees to other work duties, and the possibility of allowing teleworking.

(3) When an employee wants to come to the workplace against the company's wishes

In contrast to the situation described in (2) above, there is a possibility that employees may want to continue working at the workplace despite the fact that the company has instructed them to take a leave of absence instead of coming to the workplace. In such cases, the company may take the following actions below. This section will focus on cases where a company does not close all or part of its business premises and continues operating as normal, even though a Request or Instruction has been issued by a Designated Prefectural Governor under an Emergency Declaration. In cases where all or part of the business premises have been closed, please refer to section 3. below.

A. If the employee has no health problems

Companies can refuse to allow employees to come to the workplace to work on the ground that they have the right to manage the business premises, and since the employee's obligation to provide labor to the company is an obligation and not a right, the company can refuse to allow the employee to continue working at the workplace. However, in cases where an employee is unable to work due to reasons attributable to the company, such as where the company refuses to allow the employee to continue working at the workplace, in principle, the company is obliged to pay the employee 100% of his/her wages under Article 536(2) of the Civil Code of Japan.

B. If the employee is suspected to be infected with COVID-19

It depends on the status of the suspected infection, but basically, the company should take the same measures as in A. above. However, if the employee is later confirmed to have COVID-19, the company should take the same measures as in C. below from that point on.

C. If the employee is infected with COVID-19

If an employee is infected with COVID-19, the company should follow the provisions under its rules of employment stipulating how to handle cases of infection, if any such provisions exist. If there are no such provisions, the company can refuse to allow employees to come to the workplace based on its right to manage the business premises. Employees infected with COVID-19 will not be able to provide labor as per normal, so the company will not need to pay wages and monetary leave allowances during this period as the reason for the leave is not attributable to the company. However, if there is a separate provision in the rules of employment, the company is required to follow it.

In addition, if any of the above employees who are infected with COVID-19 or who are suspected to be infected with COVID-19 infects other employees by coming to work, the company may impose disciplinary action on the employee, depending on the company's rules of employment. Companies may wish to preemptively include additional provisions relating to COVID-19 under its rules of employment that will allow it to impose restrictions on employees coming to work and to impose obligations on employees to notify the company of certain matters, so that it will be able to prevent COVID-19 infections in other employees more effectively. Although it is possible that other employees who have been infected may be able to hold the company responsible for damages, etc. on the ground that the company had failed in its duty to consider the safety of its employees, the key issue is whether the company had taken the appropriate measures it was reasonably expected to take, or if it had established appropriate internal rules and taken measures based on such rules. The "Checklist to prevent the spread of COVID-19 in the workplace" mentioned above will serve as a useful reference for determining what actions a company can take. (https://www.mhlw.go.jp/content/11303000/000616869.pdf (Japanese only))

(4) Points to keep in mind when teleworking

A. Overview of teleworking

In light of the Emergency Declaration, an increasing number of companies are trying to establish teleworking systems on an urgent basis. 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 "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 for teleworking, 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 the Ministry of Health, Labour and Welfare), and problems should be sorted out and solved by conducting tests in preparation for emergencies (See the Ministry of Health, Labor and Welfare's "Guidelines for appropriate labor management in telework" and "Q&A on Labor Management for Introduction of Telework").

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.

B. If an employee is found doing non-work-related things while teleworking

Such employees may be subject to disciplinary action in accordance with the company's rules of employment or his/her employment contract.

(5) Dealing with employees who do not comply with Stay Home Requests, such as by participating in overseas trips, drinking parties, etc.

Since participating in overseas trips and drinking parties are part of the employees' private lives, a company cannot force them to stop engaging in such activities. As such, in principle, it would not be possible to impose disciplinary action in most cases. However, it is still possible for a company to point out to its employees that they should not be engaging in such activities considering the current situation, which includes asking them to refrain from taking part in overseas trips or drinking parties. In this regard, making clear internal rules stating that employees should stop engaging in such activities will increase the effectiveness of Stay Home Requests and make it easier for the company to take measures in the event of violations. If it is discovered that an employee has taken part in an overseas trip or drinking party, the employee can be summoned and given strict warnings in lieu of disciplinary action. If the employee is suspected to be infected, the employee can be ordered to stay at home in accordance with the company's rules. In such a case, however, the company may decide to impose a leave of absence on the employee of its own accord and pay the employee his/her wages and a monetary leave allowance (this is elaborated on below).

3. Leave of Absence (休業, Kyugyo) and Payment of wages

In light of the Emergency Declaration, it is expected that more companies will consider suspending operations and placing their employees on leaves of absence. The following is an overview of a company's obligation to pay wages when employees are placed on leaves of absence, and some points to keep in mind regarding the employment adjustment subsidy system, which is a Government-sponsored subsidy program that companies can tap on if they have to place their employees on leaves of absence.

(1) Obligation to Pay Wages in the Case of Leaves of Absence

As a precondition, the obligation to pay wages in the event of a leave of absence is categorized as follows depending on the cause of the leave of absence.

Cause of leave of absence	**Payment obligations under the Civil Code** **= obligation to pay 100% of the employees' wages** **(Article 536 of the Civil Code)**	**Obligation to pay allowances for leave of absence** **= obligation to pay 60% of the employees' average wages** **(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, or any cause that could be deemed to be equivalent to the same by virtue of principle good faith principle of good faith and trust Article 536, paragraph 1 of the Civil Code	○ (Yes)

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

A. Leave of absence due to force majeure

If the employee is instructed to be leave of absence due to a force majeure event, the company is not obligated to pay any wages to the employees (Article 536(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 10, 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: (i) the cause of the event is an accident that has made business operations difficult and has occurred outside the business; and (ii) that event is an accident that cannot be avoided even with the utmost care taken by the employer as an ordinary manager. Therefore, in making a decision, it is necessary for a company 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. For example, if the use of a facility is required to be suspended as an emergency measure in accordance with the law, and if the said facility is closed and employees of a company that has been operating solely out of that facility cannot physically perform their duties, this may be deemed to be a situation where the company can impose leaves of absence on its employees due to an event of force majeure. In addition, in the event that the company's supply of raw materials is cut off and plant operations stop, it will be deemed to be a case of force majeure if the requirements in (i) and (ii) above are met based on a comprehensive judgment of the possibility of other alternative means of obtaining supplies described above and the company's efforts to avoid suspending operations.

The above Q&A also states, "For example, in cases where it is possible to have workers 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 an Emergency Declaration, a Request or an Instruction based on the Act do not necessarily exempt them from the obligation to pay allowances for leaves of absence under the Labor Standards Act.

B. Leave of absence is 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(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 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.

C. 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 company's rules of employment (Article 536(2) of the Civil Code). Although it will depend on each specific situation, one example would be in the case of a company which is not subject to the Requests for Restrictions on Facility Use and Instructions for Restrictions on Facility Use, and which does not have any operational or administrative difficulties. Such a company would be deemed to fall under the case where a company voluntarily issues an order to stay at home to all its employees or only to employees within a certain range of departments because the Emergency Declaration has been issued.

This provision on risk bearing under Article 536(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(2) of the Civil Code is excluded by the company's 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 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 (excluding the application of Article 536(2) of the Civil Code. 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(2) of the Civil Code).

(2) Eligibility for Force Majeure Due to Emergency Declaration

If a company decides to impose leaves of absence based on an Emergency Declaration and its accompanying emergency measures such as a Stay Home Request and so on, will the company no longer be obligated to pay wages or monetary leave allowances due to force majeure? We will consider the following cases separately.

A. Cases based solely on an Emergency Declaration

Again, the Emergency Declaration itself does not directly impose restrictions or obligations on business activities.

However, according to the “Q&A on Coronavirus Disease 2019 (COVID-19) (Information for the Companies)” issued by the Ministry of Health, Labor and Welfare as of April 10, 2020, there is a possibility that leaves of absence caused solely by the issuance of an Emergency Declaration could be regarded as being caused by an event of force majeure. In other words, among the two requirements for force majeure set out in 3.(1)A above, with regard to the requirement that the cause of the event must be an accident that occurred outside the company’s business operations, the Q&A states "... For example, factors that occur outside the company’s business operations, such as an Emergency Declaration or Requests issued pursuant to the Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response, can be cited as reasons which make it difficult for business operations to continue." As can be seen from the aforesaid, an Emergency Declaration is cited as an example of a factor that meets the requirements of 3.(1)A(i) above.

However, as mentioned above, the Emergency Declaration does not directly impose restrictions or obligations on business activities, and it is merely a statement by the Prime Minister, who is the head of the Government Response Headquarters, that a state of emergency such as the COVID-19 pandemic has occurred. Our view is that it is up to a company to decide whether or not to impose leaves of absence due to an Emergency Declaration, and there is no legal obligation to do so. As such, we are of the view that if a company chooses to impose leaves of absence on its employees solely due to an Emergency Declaration, this will not be deemed to fall under a situation where all such leaves of absence are caused by an event of force majeure.

In this regard, we will ultimately have to wait for the Japanese courts to make a judgment regarding this issue. However, we believe that this will be limited to cases where there is at least a reasonable causal relationship between the leave of absence and the Emergency Declaration, such as when the Emergency Declaration causes a loss in customers, and as a result the company has to cease operations and place its employees on leaves of absence.

B. Cases where a Stay Home Request has been made

A Stay Home Request (issued under Article 45(1) of the Act) is made to the general public, and is said to be a request from the Government asking the people to refrain from going out on a so-called unnecessary or non-urgent basis, other than for matters necessary for the maintenance of everyday life, such as visiting a medical institution, buying food, and going to work (Annotation to the Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response, p. 158, p. 159). In other words, it is assumed that "working at the workplace" is not subject to the Stay Home Requests, and as long as a "Request" is intended for the general public, it cannot be said to be enforceable against companies, and the legal position is that a company’s decision to impose leaves of absence is made on a voluntary basis.

However, as mentioned in 3.(1)A above, the above Q&A cites "Requests ... based on the Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response" as specific examples that meet the force majeure requirement that the cause of the event must be an accident that occurred outside the company's business operations.

However, similar to cases where a company imposes leaves of absence due to an Emergency Declaration, imposing leaves of absence due to a Stay Home Request is also based on the voluntary judgment of the company. As such, cases which meet the requirement in 3.(1)A(i) above are likely to be limited to cases where there is a reasonable causal relationship between the leave of absence and the Request, such as where the company suffers a large loss in customers due to a Stay Home Request, and is unable to continue operating and thus has to impose leaves of absence on its employees.

C. Cases where an Article 24(9) Request for Suspension of Facility Use is made

As described in 1(3) above, Designated Prefectural Governors may make requests for the suspension of the use of certain facilities based on Article 24(9) of the Act.

The Article 24(9) Request for Suspension of Facility Use is also one of the "Requests ... based on the Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response" as referred to in the Q&A above. Therefore, the question is whether the suspension of the use of facilities in accordance with the Request satisfies the force majeure requirement in 3.(1)A(i) above. However, as in 3.(2)A and 3.(2)B above, the Article 24(9) Request for Suspension of Facility Use is merely a "request" and does not impose any legal obligation under public law on the person who is the target of the Request. Thus, this is also likely to be limited to cases where there is a reasonable causal relationship between the leave of absence and the Request, such as objective situations where the company is unable to continue its business operations due to a loss of customers.

D. Cases where Requests for Restrictions on Facility Use and Instructions for Restrictions on Facility Use are made

In general, if a company is required to impose leaves of absence in order to comply with laws and regulations, there will be no cause attributable to the company, and imposition of the leaves of absence will be deemed to fall under force majeure. An Instruction for Restrictions on Facility Use (issued under Article 45(3) of the Act) imposes a legal obligation under public law on a person who is a target of the Instruction for Restrictions on Facility Use, and a target company that has suspended operations in accordance with the Instruction is considered to satisfy the above-mentioned force majeure requirement in principle. However, even in such a case, as described in 3.(1)A above, it is necessary for a company to carefully consider the possibility of shifting to telework and whether there is a possibility of reassigning employees to other work duties. If the company is found not to have given sufficient consideration to the aforesaid, it may be determined that there is cause attributable to the company. According to a news article (https://www.tokyo-np.co.jp/s/article/2020040701001894.html (Japanese only)), the Minister of Health, Labor and Welfare, Katsunobu Kato, has also made a statement to the same effect, and careful consideration is necessary on this point. Furthermore, if teleworking is possible or if employees can be

reassigned to other work duties, it is possible for companies to avoid imposing leaves of absence on its employees, and so such a situation will not be deemed to fall under force majeure.

Next, the question is whether or not a Request for Restrictions on Facility Use, which is a stage prior to the issuance of an Instruction for Restrictions on Facility Use, falls under force majeure. Unlike the Declarations and Requests in 3.(2)A to C above, it is reasonable to consider that a Request for Restriction on Facility Use falls under force majeure in principle. In the Declarations and Requests in 3.2(A) to (C) above, the fact that "Declarations" and "Requests" are not enforceable is the reason why they do not immediately fall under force majeure. Requests for Restrictions on Facility Use are still "requests" and, like Stay Home Requests, may not immediately fall under force majeure. However, Article 45(3) of the Act provides that a Designated Prefectural Governor may issue an Instruction for Restrictions on Facility Use if the person who received the Request for Restriction on Facility Use did not comply with the Request "without justifiable reason" and the Designated Prefectural Governor determines that "there is a particular need" to issue the Instruction. An example of a "justifiable reason" is the holding of important research groups on measures against new strains of influenza etc. (see page 161 of Annotation to the Act on Special Measures for Pandemic Influenza and New Infectious Diseases Preparedness and Response). It is clear from the aforementioned example that a "justifiable reason" can be recognized only in extremely limited cases. Therefore, if a Request is not complied with, it can be said that a Designated Prefectural Governor should issue an Instruction, and although a Request for Restrictions on Facility Use is not legally enforceable in itself, it can be considered to be integrated with or equivalent to an Instruction for Restrictions on Facility Use. If that is the case, it is reasonable to consider that, in principle, if a company subject to a Request for Restrictions on Facility Use suspends operations, such a situation may also fall under force majeure when it is closed. It should be noted, however, that even in the case of Requests for Restrictions on Facility Use, as in the case of Instructions for Restrictions on Facility Use, a company should give sufficient consideration to the possibility of teleworking or reassigning work duties.

E. Examination of specific examples

Based on the above, we will consider the specific example of a restaurant operating in a shopping center. It is assumed that eating establishments such as restaurants are not included in the scope of Requests for Restrictions on Facility Use (however, it is possible for them to be included in Article 24(9) Requests for Suspension of Facility Use). However, if a restaurant is operating in a large-scale commercial facility such as a shopping center or department store, it is assumed that such restaurant will not be able to continue operating in the event that a Request for Restrictions on Facility Use is issued to the commercial facility.

In the event that the designated shopping center is closed due to a Request or Instruction for Restrictions on Facility Use issued by a Designated Prefectural Governor, the restaurant will not be obligated to pay wages and monetary leave allowances to its employees due to force majeure. However, in such a case, it is necessary for the restaurant’s management to consider whether there is a possibility that those who are engaged in “on the ground” services such as serving food may be able to work in other workplaces.

In addition, employees who are engaged in accounting and management work and who are able to work at home will not be deemed to be subject to force majeure if they are placed on leaves of absences, and the company must pay such employees their wages or monetary leave allowances.

On the other hand, in the event that a restaurant's business is forced to be suspended solely because an Emergency Declaration has been issued, or a Stay Home Request or an Article 24(9) Request for Suspension of Facility Use has been issued by a Designated Prefectural Governor, and the number of customers of a shopping center has decreased, leading to a similar decrease in the number of customers of a restaurant, the suspension of the restaurant's business would be deemed to have been caused by the Emergency Declaration or the aforementioned Request. Depending on whether there is a reasonable causal relationship between the suspension of the restaurant's business due to this and the Emergency Declaration or any previously issued Requests, it may be necessary for the restaurant to pay wages or allowances for placing employees on leaves of absence if doing so is deemed to be a voluntary decision of the restaurant, or it may be unnecessary to do so if the leaves of absence are deemed to have been caused by force majeure.

A shopping center may voluntarily close due to a Stay Home Request or an Article 24(9) Request for Suspension of Facility Use issued by a Designated Prefectural Governor. In such a case, for a restaurant that operates in the aforesaid shopping center but which is operated separately from the shopping center, this is a situation that cannot be avoided even if the restaurant takes the utmost care as an ordinary manager, so it is considered to fall under force majeure.

The following is a summary of the above.

	Emergency Declaration	Stay Home Request (Article 45 (1) of the Act)	Request for Suspension of Facility Use (Article 24(9) of the Act)	Requests for Restrictions on Facility Use (Article 45(2) of the Act)		Instructions for Restrictions on Facility Use (Article 45(3) of the Act)	
				Targeted company	Non-targeted company	Targeted company	Non-targeted Company
Not able to telework or be reassigned to other work duties	△	△	△	○ Force majeure	△	○ Force majeure	△
Able to telework or be reassigned to other work duties	×	×	×	×	×	×	×

*The parts marked with an X indicate that the company is obliged to pay its employees their wages and allowance for leaves of absence in accordance with Article 536 of the Civil Code or Article 26 of the Labor Standards Act depending on the cause of the leaves of absence. For the parts marked △, it will depend on the specifics of each case, but for cases where a leave of absence is caused by an Emergency Declaration, Request or Instruction, such leave of absence may be deemed to be caused by force majeure if there is a reasonable causal relationship between the leave of absence and the Emergency Declaration or the Request or Instruction.

(3) Employment adjustment subsidy

In the event that employers are forced to reduce their business activities due to COVID-19 and have to make temporary adjustments to their employees' employment conditions ("employment adjustments") while continuing to employ them (e.g. leaves of absence, education and training, and temporary transfers), such employers can apply under the employment adjustment subsidy system for partial subsidies for their employees' wages and allowances for leaves of absence etc.

As of April 10, the period from April 1 to June 30, 2020 has been designated as the period for emergency COVID-19 measures ("emergency period"). The subsidy rates are 4/5 for small and medium-sized enterprises ("SMEs"), 2/3 for large enterprises. In addition, when the following requirements are met and no dismissals are made, the subsidy rates are increased to 9/10 for SMEs and 3/4 for large enterprises.

(a) No dismissals etc. of workplace employees during the period from January 24 until the last day of the wage calculation period (base period for determining wages) (including the non-renewal of a fixed-term contract worker who has a reasonable expectation of renewing his/her contract such that the termination is deemed to amount to a dismissal, and the cancellation of the contract of a dispatch employee by the company he/she has been dispatched to).

(b) The number of workplace employees on the last day of the wage calculation period (base period for determining wages) is 4/5 or more of the monthly average number of workplace employees during the comparison period (from January 24 to the last day of the base period for determining wages).

In addition, the amount of additional funds for education and training has been significantly increased, and the requirements for subsidies have been relaxed. For more information, see "Expanding Special Provisions for Employment Adjustment Subsidies Based on the Impact of COVID-19" (https://www.mhlw.go.jp/content/11603000/000620642.pdf (Japanese only)). However, with regard to the specific details of the special measures concerning the emergency period, it is fully expected that the details of the implementation method will be provided or changed in the future, so it is necessary to pay close attention to future trends.

In order to receive subsidies, one of the requirements is that the employer and employee must agree in advance on the implementation of the employment adjustment and implement the employment adjustment in accordance with the decision. This labor-management agreement must be made in writing

with a labor union consisting of a majority of the employees (if any), or with a representative of a majority of the employees (if no such labor union exists). Previously, when concluding an agreement with a person representing a majority of the employees, individual powers of attorney from the majority of the employees indicating that they have appointed that person to represent them must be obtained and attached to the agreement. The submission of such powers of attorney has often proven to be an obstacle to subsidy applications by companies with a significant number of employees. In fact, in cases where our firm acted as the representative for such subsidy applications, we had requested the authorities to make improvements to the application procedure because this problem impeded the application. In this regard, as a result of the recent relaxation of grant requirements, the necessary application documents have been greatly simplified; for example, there is no longer a need to obtain a power of attorney from each individual employee. For information on the latest application procedures, please contact the relevant Prefectural Labor Bureau or Hello Work which has jurisdiction over your company's workplace.

緊急事態宣言と人事労務の留意点

弁護士　角山　一俊 / 今泉　大樹

2020 年 4 月 7 日、安倍晋三首相が、東京、大阪など 7 都府県を実施区域*として、新型インフルエンザ等緊急事態宣言（以下、「緊急事態宣言」といいます）をおこないました。同宣言を受け、実施区域として指定された都府県の各知事が、外出自粛の要請や施設の使用停止等の要請内容を明らかにしました。これにより、新型コロナウイルス感染症の拡大に伴う企業活動への影響がますます予断を許さない状況となっています。本稿では、そもそも緊急事態宣言によって企業活動にどのような影響が生じるのかを整理するとともに、同宣言下における人事労務の留意点についてご説明いたします。

*4 月 16 日に全都道府県を実施区域とする区域変更がなされました。

1. 緊急事態宣言の概要

ここでは、緊急事態宣言の概要について、緊急事態宣言によって国や地方公共団体が講じることができる措置のうち、企業活動、とりわけ人事労務との関係で問題となる部分に焦点をあててご説明します。

(1) 緊急事態宣言の概要

緊急事態宣言は、新型インフルエンザ等対策特別措置法 32 条（以下、特記ない限り「法」とは同法を指します）に基づいて、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に宣言することができるとされています。なお、法律の名称は「新型インフルエンザ等」と記載されておりますが、新型コロナウイルス感染症についても同法に基づいて緊急事態宣言を行うことが可能です（法附則 1 条の 2）。

まず、ここで明確にしておきたいのは、緊急事態宣言そのものが企業活動を制限したり、企業に何らかの具体的な義務を負わせたりするものではないということです。緊急事態宣言は、政府対策本部長たる内閣総理大臣から出されますが、宣言に付随して対象区域の住民や企業に制限や義務を課した規定はありません。

したがって、緊急事態宣言が出たからといって、直ちに事業所の閉鎖や営業活動の停止といった措置を講じる必要はありません。

(2) 特定都道府県知事のまん延の防止に関する措置

緊急事態宣言が出たことによって、企業活動、とりわけ人事労務との関係で影響が生じるのは、緊急事態宣言に基づいて実施区域として指定された都道府県の知事（以下「**特定都道府県知事**」といいます）が要請や指示を行う場合です。特定都道府県知事は、新型インフルエンザ等のまん延を防止し、国民の生命及び健康を保護し、並びに国民生活及び国民経済の混乱を回避するため必要があると認めるときは、以下の要請又は指示を行うことができます（法 45 条 1 項から 3 項）。

- 生活の維持に必要な場合を除きみだりに当該者の居宅又はこれに相当する場所から外出しないことその他の新型インフルエンザ等の感染の防止に必要な協力の要請（以下「**外出自粛等の要請**」といいます）（1 項）

- 学校、社会福祉施設、興行場その他の政令で定める多数の者が利用する施設を管理する者又は当該施設を使用して催物を開催する者に対し、当該施設の使用の制限若しくは停止又は催物の開催の制限若しくは停止その他政令で定める措置を講ずることの要請（以下「**施設の使用制限等の要請等**」といいます）（2 項）

- 正当な理由がないのに施設の使用制限等の要請等に応じないときは、当該要請に係る措置を講ずべきことの指示（以下「**施設の使用制限等の指示**」といいます）（3 項）

また、施設の使用制限等の要請等及び施設の使用制限等の指示をした場合には、施設の利用者のため事前に広く周知を行う観点から、当該要請又は指示は公表されます（同法 45 条 4 項）。

もっとも、外出自粛等の要請や施設の使用制限等の要請等は、あくまで「要請」であり、個人や企業に対し具体的な義務を課すものではありません。施設の使用制限等の指示については、指示を受けた者は、措置を講ずる公法上の法的義務を負うことになります。指示に従わなかった場合の罰則等の規定はありませんが、前述のとおり要請や指示は公表されていますので、それらを無視した場合には、企業の社会的評価を低下させるといったリスクがあることは否定できません。

なお、外出自粛等の要請は、生活の維持のために必要なもの以外の、いわゆる不要不急の外出を自粛することを要請するものです。生活の維持のために必要なものには、職場への出勤が含まれると考えられているとおり（新型インフルエンザ等対策研究会編『逐条解説　新型インフルエンザ等対策特別措置法』（2013 年、中央法規出版、158 頁））、法律上は、外出自粛等の要請自体によって、直ちに事業所の閉鎖や営業活動の停止が必要になることや従業員に対する自宅待機命令が必要となることまでは要求していません。

（3） 特定都府県知事による措置（4 月 10 日時点）

4 月 10 日現在、緊急事態宣言の実施区域と指定された都府県知事は、各都府県の住民に対し、外出自粛等の要請（法 45 条 1 項）を行うとともに、事業者等に対し、各都府県で要請の具体的な内容に若干の違いがあるものの、施設の使用停止やイベントの開催停止の要請（法 24 条 9 項）をしております（福岡県のものについては、適用条文の言及がないものの他府県と同様、法 45 条 1 項及び法 24 条 9 項に基づく措置であると考えられます）。

今回の特定都府県知事による措置において、施設の使用停止やイベントの開催停止の要請は、前述の法 45 条 2 項に基づく要請ではなく、緊急事態宣言下でなくとも、新型インフルエンザ等の都道府県対策本部が設置された場合に当該都道府県知事の権限として認められている法 24 条 9 項に基づくものです（以下「**法 24 条 9 項に基づく施設の使用停止等の要請**」といいます）。このように緊急事態宣言下でありながら、法 45 条 2 項に基づく要請ではなく、法 24 条 9 項に基づく要請が出されたのは、4 月 7 日の政府の新型コロナウイルス感染症対策の基本的対処方針の改正（https://corona.go.jp/expert-meeting/pdf/kihon_h_0407.pdf）によって、国民の自由と権利への制限を必要最小限とする観点から、まずは法 45 条 1 項に基づく外出自粛等の要請及び法 24 条 9 項に基づく施設の使用停止等の要請を行い、都道府県による法 45 条 2 項から 4 項までに基づく施設の使用制限の要請、指示等を行うにあたっては、特定都道府県は、国に協議の上、必要に応じ専門家の意見も聞きつつ、外出の自粛等の協力の要請の効果を見極めた上で行うものとするとの政府方針が示されたことによると思われます。

以下では、今後法 45 条 2 項から 4 項の適用可能性があることも踏まえ、留意すべき事項について検討いたします。

2. 緊急事態宣言・特定都道府県知事による要請・指示下での企業活動の留意点

緊急事態宣言・特定都道府県知事による要請・指示下で考えられる人事労務上の問題点を検討します。

(1) 事業を閉鎖せずに従業員を出社させた場合の懸念事項

ア 従業員を出社させることの可否

まず、緊急事態宣言下で、特定都道府県知事の上記要請や指示が出ている場合に、そもそも事業場を閉鎖せずに、従業員を出社させることは可能でしょうか。前述のとおり、外出自粛の要請や施設の使用制限等の要請等は、自発的な対応を促すものであり、要請があった場合でも従業員を出社させることは可能です。また、施設の使用制限等の指示は、指示を受けた者に対して、その指示に従う公法上の法的義務を課すものではあります。しかし、その指示の内容によりますが、原則として、当該施設で働く従業員が出社すること自体を制限する内容となることはないと思われ、施設の管理そのものを否定するものではありません。したがって、従業員を出社させたとしても直ちに違法と判断されるわけではありません。

イ 出社させる場合の留意点

もっとも、従業員を出社させる場合には、企業の従業員に対する安全配慮義務(労働契約法第 5 条)との関係から、テレワークへの移行可能性等を検討したうえで、いわゆる三密(密集・密着・密閉)を避ける、消毒等の徹底といった対応を取る必要があります。企業内での具体的な対応方法について参考になるものとしては、たとえば「職場における新型コロナウイルス感染症の拡大を防止するためのチェックリスト」があります。(https://www.mhlw.go.jp/content/11303000/000616869.pdf)

ウ 従業員が罹患した場合の労災保険給付の可否

万一職場で罹患者が出た場合、罹患したことと業務又は通勤との間に相当因果関係が認められる場合には、労災保険の給付対象に含まれます。

(2) 出社を拒否した従業員への対応

特定都道府県知事の外出自粛等の要請、法 24 条 9 項に基づく施設の使用停止等の要請、施設の使用制限等の要請等、及び施設の使用制限等の指示を理由として、従業員が出社命令を拒否することが考えられます。

しかしながら、これらの要請や指示は、雇用契約に基づく従業員の労務提供義務を当然に消滅させるものではありませんので、要請や指示があった場合であっても従業員には労務提供義務があります。したがって、使用者は、基本的には業務命令に基づいて、出社を命じることができ、従業員がこれに従わない場合には、ノーワーク・ノーペイの原則による給与不支給の他、業務命令違反として原則として懲戒処分を科すことができます。

もっとも、業務命令は、就業規則の合理的な規定に基づく必要かつ相当な命令である限り、労働者はその命令に従う義務を有すると考えられていますので、そもそも業務上の必要性や相当性を欠く場合には業務命令違反を問うことはできません。加えて、対象従業員に基礎疾患があり出社した場合に命にかかわるリスクがある場合などは、業務命令を拒む正当な理由があると考えられるときもあります。そのときは、業務命令違反を理由とした懲戒処分は、無効となる可能性が高くなります。もっとも、この場合でも、従業員は労務の提供をしないことになりますので、出社しない期間について賃金を支払う必要はありません。

なお、保育園の休園や小学校等の臨時休業に伴い、子供の面倒をみることを理由に出社を拒否する場合も考えられます。通常の場合であれば、このような理由は労働者側の事情として取り扱われ、従業員側の出社拒否の正当な理由とはなりません。しかし、新型コロナウイルス感染症拡大に伴う個別具体的な事情によっては、処分を科すことができない場合も考えられます。業務上の必要性や代替性の可否、テレワークでの対応などを検討したうえで、従業員に可能な限り配慮した対応が必要になるものと考えます。

(3) 企業側の意に反して従業員が出社を希望する場合

前述の(2)とは反対に、企業が出社せず休職するよう指示しているにもかかわらず、これに反して従業員が出社するケースも想定されます。このような場合、企業としては以下のような対応をとることが考えられます。ただし、

ここでは、緊急事態宣言下で特定都道府県知事の上記要請や指示が出ているにもかかわらず、企業としては事業所閉鎖等による事業所全体又は一部の休業を行わず、平常の業務を行っている場合を取り上げます。事業所全体又は一部の休業が行われている場合は、下記3. で述べます。

ア 当該従業員が健康上何ら問題ない場合

企業は、施設管理権を理由に出社を拒むことができ、また、労務提供義務は、義務であって権利でない以上、当該従業員の就労そのものを拒絶することができます。もっとも、この場合は、当該従業員が出社することが可能であるのに出社させないという、企業の責めに帰すべき理由により、従業員が就労できない状況ですので、民法 536 条 2 項による 100%の賃金の支払義務が原則としてあります。

イ 当該従業員が新型コロナウイルス感染症への罹患が疑われる場合

罹患が疑われる状況によりますが、基本的に上記アと同様の対応となります。もっとも、事後的に罹患が明らかとなった場合には、その時点から下記ウと同様の対応となります。

ウ 当該従業員が新型コロナウイルス感染症に罹患している場合

従業員が新型コロナウイルス感染症に罹患している場合、就業規則上感染症に罹患した場合の取扱いについて定めがあればその定めに従います。就業規則上規定がない場合には企業の施設管理権に基づき出社を拒むことができます。なお、新型コロナウイルス感染症に罹患した従業員は、完全な労働の提供が不可能となりますので、使用者の責に帰すべき事由によらない休業として、この間賃金・休業手当を支払う必要はありません。ただし、就業規則上別途定めがある場合にはそれに従う必要があります。

また、上記従業員のうち、新型コロナウイルス感染症に罹患している従業員又は罹患が疑われる従業員が、出社したことによって他の従業員を感染させた場合、当該企業は、就業規則の規定次第では、当該従業員に対し、懲戒処分を科すことが可能です。もっとも、企業において、新型コロナウイルス感染症に関する、就業制限や会社への通知義務等の社内ルールがあらかじめ定められていることで、他の従業員への感染予防の実効性を高めることができます。他方で、感染させられた他の従業員は、企業に対して安全配慮義務違反を理由に損害賠償等の責任を追及してくることも考えられますが、その際には企業として取りうるべき対応を取っていたか、社内ルールが制定されていた場合には同ルールに基づく対応をとれていたかがポイントとなります。企業として取りうるべき対応については、前述の「職場における新型コロナウイルス感染症の拡大を防止するためのチェックリスト」が参考となるでしょう。（https://www.mhlw.go.jp/content/11303000/000616869.pdf）

（4）テレワークの際の留意点

ア テレワークの概要

緊急事態宣言によって、さらにテレワーク体制の構築が急務となった企業も増えてきたと考えられます。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。

イ　テレワークでの勤務中に業務外のことを行っていたことが判明した場合

就業規則又は雇用契約に基づき、懲戒処分の対象とすることが可能です。

(5)海外旅行や飲み会等に参加するなど、外出自粛等の要請に従っていない従業員への対応

海外旅行や飲み会等への参加は従業員の私生活上の出来事であることから、強制的に参加をやめさせることはできません。更に、原則として懲戒処分もできない場合が多いと考えられます。もっとも、指摘自体は可能ですので、現在の状況に鑑み、海外旅行や飲み会等への参加は自粛するよう求めることは可能です。この点も、これらの行動を止めるようとの社内ルールを明確にしておくことで、外出自粛等の要請の実効性を上げ、違反の場合の対応がとりやすくなります。仮に従業員が海外旅行や飲み会等へ参加したことが発覚した場合には、本人を呼び出し、懲戒処分外の厳重な注意を行い、感染が疑われる場合には、社内ルールに従い自宅待機を命じることが可能です。もっとも、その場合企業の自主的判断により休業させることになり、当該従業員に対し賃金・休業手当を支払う必要が出てくる場合があります。

3. 休業と賃金支払義務

緊急事態宣言を受けて、今後さらに休業を検討する企業が増えることが想定されます。ここでは、緊急事態宣言の影響により、企業が休業した場合の賃金支払義務はどうなるのかと、休業する際の助成制度である雇用調整助成金の概要と留意点を以下に述べます。

(1) 休業を実施する場合の賃金の支払義務

前提として、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ています。

休業の原因	民法上の支払義務 ＝100%の賃金支払義務 （民法 536 条）	休業手当支払義務 ＝平均賃金の 60%の支払義務 （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）
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）

ア　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 10 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。したがって、その判断にあたっては、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。例えば、法に基づく、緊急措置として施設の使用の停止が求められ、ある施設が閉鎖された場合に、その施設のみで業務を行っていた企業の従業員が物理的に業務を行えなくなった場合は、この不可抗力での休業であると考えられます。また、原材料の供給がなくなり工場の操業が止まった場合は、前述の代替手段の可能性、企業の休業回避の努力等の総合判断により、上記①及び②が満たされれば、不可抗力となります。

なお、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。

イ 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。たとえば、親会社の経営難のための資金・資材の入手困難等による休業が、使用者側の領域において生じた事由に該当し、休業手当の支給義務が発生するといわれています。

ウ 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い限り、企業側の責めに帰すべき事由により、従業員の就労ができなくなったとして、企業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)。具体的な状況にもよりますが、例えば、施設の使用制限等の要請等や施設の使用制限等の指示に基づく使用制限等の対象になっておらず、経営・管理上の障害も生じていない企業において、緊急事態宣言が出たことのみを理由に、自主的に全社的又は一定の範囲の部門において自宅待機命令を出す場合が、これに当たると思われます。

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 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。)。

(2) 緊急事態宣言による不可抗力該当性

それでは、緊急事態宣言とそれに伴う緊急事態措置によって休業を決定した場合、企業は不可抗力を理由に賃金支払義務や休業手当の支払義務を負わなくなるのでしょうか。以下、場合を分けて検討します。

ア 緊急事態宣言のみに基づく場合

繰り返しになりますが、緊急事態宣言自体が、企業活動に直接制限や義務を課すものではありません。

もっとも、前記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 10 日時点版によれば、緊急事態宣言が出たことのみを理由とした休業の場合も不可抗力に基づく休業と捉えられる可能性があることを示しています。すなわち、上記（1）アの不可抗力の要件のうち、①その原因が事業の外部から発生した事故であることについて、「…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ます。」として、緊急事態宣言が①の要件を満たす具体例として挙げられています。

しかしながら、前述のとおり、緊急事態宣言それ自体は企業活動に直接制限や義務を課すものではなく、政府対策本部長たる内国総理大臣が、新型インフルエンザ等緊急事態が発生したことを表明したものにすぎません。このような法的義務がない宣言を理由とした休業は、基本的には企業の自主的な判断に基づくものであり、緊急事態宣言が出たことを理由とした休業が全て不可抗力に該当すると評価することはできないと考えます。

この点につきましては、最終的には裁判所による判断を待つことにはなりますが、緊急事態宣言が出たことによって、集客できず、結果として営業継続を断念せざるを得なくなり休業するような場合など、少なくとも休業と緊急事態宣言との間に相当因果関係が認められる場合に限られるものと考えます。

イ 外出自粛等の要請の場合

外出自粛等の要請（法 45 条 1 項）は、住民一般に対してなされるものであり、医療機関への通院、食料の買い出し、職場への出勤など生活の維持のために必要なもの以外の、いわゆる不要不急の外出の自粛等を要請するものであるとされています（前掲・逐条解説　新型インフルエンザ等対策特別措置法 158 頁、159 頁）。すなわち、「職場への出勤」は、外出自粛等の要請があった場合でも、その要請の対象外であることが想定されているものであり、また、当該「要請」は、住民一般に対し向けられたものである以上、企業に対する強制力は観念できず、あくまで企業の自主的な判断に基づいて休業の判断がなされるというのが法の建前であると考えられます。

もっとも、前記 Q&A によれば、「新型インフルエンザ等対策特別措置法に基づく…要請」の場合も不可抗力の要件のうち、①その原因が事業の外部から発生した事故であることの具体例として挙げられていることは上記のとおりです。

しかしながら、外出自粛等の要請に基づく休業も、緊急事態宣言と同様、あくまで自主的な判断に基づいてなされるものである以上、①の要件を満たすためには、外出自粛等の要請が出たことによって、集客できず、営業継続を断念せざるを得なくったために休業する場合など、休業と当該要請との間に相当因果関係が認められる場合に限られるものと考えられます。

ウ 法 24 条 9 項に基づく施設の使用停止等の要請の場合

上記1（3）のとおり、特定都道府県知事による施設の使用停止等の要請は、法 24 条 9 項に基づくものです。

法 24 条 9 項に基づく施設の使用停止等の要請も前記 Q&A にいう「新型インフルエンザ等対策特別措置法に基づく…要請」ですので、当該要請に基づく休業が、不可抗力の①の要件を満たすのかが問題となります。

しかしながら、上記ア及びイと同様、あくまで「要請」に過ぎず、使用制限の要請を受けた者に対し公法上の法的義務を課すものではありませんので、こちらも当該要請が出たことによって、営業継続を断念せざるを得ないような客観的な状況がある場合など、休業と要請との間に相当因果関係が認められる場合に限られるものと考えます。

エ 施設の使用制限等の要請等と施設の使用制限等の指示の場合

一般的に、法令を遵守するための休業については、使用者に帰責事由はなく、不可抗力に該当すると考えられています。施設の使用制限等の指示（法 45 条 3 項）は、使用制限の指示を受けた者に対し公法上の法的義務を負わせるものであり、当該指示に従って休業した対象企業は、原則として不可抗力の要件を満たすものと考えられます。もっとも、その場合であっても上記（1）アで述べたとおり、在宅勤務の可能性や他に就か

せる業務があるかを検討する必要があり、検討が不十分な場合には使用者の帰責事由があると判断される場合があります。報道(https://www.tokyo-np.co.jp/s/article/2020040701001894.html)によれば、加藤厚生労働大臣も同様の趣旨の発言をしており、この点は慎重な検討が必要です、なお、在宅勤務が可能であったり、他に就かせる業務がある場合には、企業は従業員の休業を避けることが可能ですので、不可抗力には該当しないと考えられます。

次に、施設の使用制限等の指示の前段階である施設の使用制限等の要請等の段階で不可抗力に該当するかが問題となりますが、前記アからウの宣言や要請の場合とは異なり、施設の使用制限等の要請等は、原則として不可抗力に該当するものと考えるのが合理的です。前記アからウの宣言や要請では、「宣言」や「要請」に強制力がないことが直ちに不可抗力に該当しない理由でした。施設の使用制限等の要請等も「要請」であることに変わりはなく、外出自粛等の要請と同様に直ちに不可抗力に該当しないのではないかとも考えられます。しかしながら、法 45 条 3 項は、特定都道府県知事は、施設の使用制限等の要請等に対し「正当な理由がないのに」応じず「特に必要がある」と認める場合には、施設の使用制限等の指示をすることができると規定しています。この「正当な理由」の例として、例えば新型インフルエンザ等対策に関する重要な研究会等を実施する場合が挙げられていますが(前掲・逐条解説　新型インフルエンザ等対策特別措置法 161 頁)、この例からも明らかなように、「正当な理由」があると認められるのは、極めて限定された場合に限られると考えられます。したがって、事実上、当該要請に従わない場合には、特定都道府県知事による指示が想定されているといえ、施設の使用制限等の要請等は、それ自体に法的な強制力はないものの、施設の使用制限等の指示と一体的又は指示に準じたものと考えることができます。そうだとすると、使用制限等の要請等の対象となった企業が休業する場合も原則として不可抗力に該当するものと考えるのが合理的です。もっとも、施設の使用制限等の要請等の場合でも、施設の使用制限等の指示と同じように、在宅勤務や他の就業の可能性について十分な検討が求められていることには留意が必要です。

オ　具体例の検討

以上の点を踏まえ、ショッピングセンターで営業するレストランの例を取り上げて具体的に検討します。

レストランのような飲食店は、使用制限等の要請等の対象には含まれないと想定されます(なお、法 24 条 9 項に基づく施設の使用停止等の要請では要請の対象に含めることが可能です)が、ショッピングセンターや百貨店といった大型商業施設において営業している場合には、このような商業施設に対する使用制限等の要請等によって、営業が行えなくなることが想定されます。

特定都道府県知事の施設の使用制限等の要請等や使用制限等の指示によって、対象となったショッピングセンターが施設を閉めることになったために、レストランの営業が行えなくなった場合には、基本的に不可抗力によるものとしてレストランは従業員に対する賃金・休業手当の支払義務はなくなるものと考えられます。もっとも、この場合、レストラン側としては、配膳担当等の現場業務に従事している者が他の就業場所で業務に従事できる可能性がないかを検討する必要があります。加えて、会計や管理業務に携わり在宅等での勤務が可能な従業員については、不可抗力の対象とはならず賃金又は休業手当を支払う必要があります。

他方で、緊急事態宣言が出たことのみを理由として、又は特定都道府県知事の外出自粛等の要請や法 24 条 9 項に基づく施設の使用停止等の要請により、ショッピングセンターの来客数が減少し、それに伴いレストランの来客数も減少したために、レストランの営業を停止せざるを得なくなった場合、営業停止の理由が緊急事態宣言又は前記の要請によって、営業継続を断念せざるを得ないような場合であり、これによる休業と緊急事態宣言又は前期の要請との間に相当因果関係が認められるかによって、あくまでレストランの自主的な判断に基づく営業停止として賃金又は休業手当を支払うことが必要となるのか、不可抗力として賃金又は休業手当を支払う必要が無くなるのかが別れることになると思われます。

なお、本事例の場合、ショッピングセンターが特定都道府県知事の外出自粛等の要請や法 24 条 9 項に基づく施設の使用停止等の要請に基づいて、自主的に施設を閉める場合も考えられます。この場合、ショッピングセンターで営業し、運営主体をショッピングセンターとは別とするレストランにとっては、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情と言えますので、不可抗力に該当するものと考えられます。

以上の整理をまとめると以下のようになります。

	緊急事態宣言	外出自粛等の要請（法 45 条1項）	施設の使用停止等の要請（法 24 条 9 項）	施設の使用制限等の要請等（法 45 条 2 項）		施設の使用制限等の指示（法 45 条 3 項）	
				対象企業	非対象企業	対象企業	非対象企業
在宅勤務や他に就かせる業務がない	△	△	△	○ 不可抗力	△	○ 不可抗力	△
在宅勤務や他に就かせる業務がある	×	×	×	×	×	×	×

※×印の部分は、企業の休業の原因によって、民法 536 条又は労働基準法 26 条に基づき賃金・休業手当の支払義務を負うことになります。△印の部分は、具体例によりますが、休業が緊急事態宣言や要請・指示を理由とするものであり、休業と緊急事態宣言又は要請・指示との間に相当因果関係が認められる場合は、不可抗力となり得ることを表しています。

(3) 雇用調整助成金

雇用調整助成金は、新型コロナウイルス感染症によって、事業活動の縮小を余儀なくされ、雇用調整（休業・教育訓練・出向）を行わざるを得ない事業主が、労働者に対して一時的に雇用調整を行い、雇用関係を維持した場合には、休業手当、賃金等の一部を助成する制度です。

4 月 10 日現在、令和 2 年 4 月 1 日から 6 月 30 日までの期間を緊急対応期間として、助成率を中小企業の場合は 5 分の 4、大企業の場合は 3 分の 2、さらに以下の要件を満たし、解雇等をしなかった場合には、中小企業にあっては 10 分の 9、大企業にあっても 4 分の 3 まで助成率の上乗せがなされています。

ア 1 月 24 日から賃金締切期間（判定基礎期間）の末日までの間に事業所労働者の解雇等（解雇とみなされる有期契約労働者の雇止め、派遣労働者の事業主都合による中途契約解除等を含む。）をしていないこと

イ 賃金締切期間（判定基礎期間）の末日における事業所労働者数が、比較期間（1 月 24 日から判定基礎期間の末日まで）の月平均事業所労働者数と比して 5 分の 4 以上であること

そのほかにも、教育訓練を実施した場合の加算額の引き上げ等も大幅に拡充されるとともに、助成要件の緩和がなされています。詳しくは、「新型コロナウイルス感染症の影響を踏まえ雇用調整助成金の特例を拡充します」（https://www.mhlw.go.jp/content/11603000/000620642.pdf）をご参照ください。もっとも、緊急対応期間にかかる特例措置の具体的な内容については、今後も、実施方法の細部が整えられ、あるいは変更されていくことが十分予測されますので、今後の動向を注視する必要があります。

なお、助成金の交付を受けるためには、雇用調整の実施について労使間で事前に協定し、その決定に沿って

雇用調整を実施することが支給要件の 1 つとなっています。この労使協定は、労働者の過半数で組織する労働組合がある場合にはその労働組合、そのような労働組合がない場合には、労働者の過半数を代表する者との間で書面により行う必要があるとされています。このうち、労働者の過半数を代表する者との間で協定を締結する場合には、労働者の過半数を代表していることを示すものとして労働者の過半数からの委任状の添付が従前必要とされておりました。このような委任状の提出は、相当数の従業員がいる企業において、申請の際の障害になっておりました。実際、当事務所が申請を代理した事案においてもこの点が障害となったため、当局に対し改善を申しいれておりました。今回の助成要件の緩和に伴い、このような労働者個人ごとの委任状は不要となるなど、申請書類等についても大幅な簡素化が図られています。最新の取扱いについては、事業所の所在地を管轄する都道府県労働局又はハローワークにお問い合わせください。

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