

## Amendment of the Act on Stabilization of Employment of Elderly Persons

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The amended “Act on Stabilization of Employment of Elderly Persons” (the “**Act**,” and the Act after amendment is referred to as the “**Amended Act**”) will become effective on April 1, 2021. The Amended Act requires employers **to make best efforts** to take Measure to Secure Working Opportunity for their employees up to the age of 70, in addition to the current obligation to secure employment of their employees up to the age of 65.

### 1. Purpose of the Amendment

Japan is experiencing rapid changes, including an aging society, declining birthrate, and decreasing population. Under these circumstances, and in order to maintain an active social economy, Japan must facilitate an environment in which elderly persons who desire to work can fully realize their potential. Accordingly, given the diverse characteristics and needs of individual employees, the Act was amended to provide various options for securing employment opportunities for individuals up to the age of 70.

### 2. Addition of Best Efforts Obligation to Implement Measures to Secure Working Opportunity for employees up to the age of 70

Under the Amended Act, a business operator (i.e., employer) will be required to make best efforts to implement “Measures to Secure Working Opportunity” for its employees up to the age of 70. We will first review the contents of the Act before amendment and then explain the Measures to Secure Working Opportunity for employees up to the age of 70.

#### (1) Overview of the Act before amendment

The Act states that if a business operator stipulated a mandatory retirement age, that mandatory retirement

age must be 60 or above (Article 8 of the Act). Further, prior to the amendment, as measures to secure employment of individuals up to the age of 65, the Act required a business operator to either: (i) raise the mandatory retirement age; (ii) introduce a continuous employment system (e.g., re-employment system, extended employment system, etc.); or (iii) abolish the mandatory retirement age (Article 9, Paragraph 1 of the Act). In practice, the majority of business operators adopted a continuous employment system ((ii) above) under which an employee who reached the mandatory retirement age would be re-employed pursuant to successive renewals of fixed-term employment contracts until the employee reached the age of 65.

## **(2) Overview of the Measure to Secure Working Opportunity for employees up to the age of 70 under the Amended Act**

Under the Amended Act, business operators will be required to make best efforts to take at least one of the measures in the following table as a Measure to Secure Working Opportunity for employees from ages 65 to 70 (Article 10-2 of the Amended Act). The obligation to make best efforts applies to business operators that set a mandatory retirement age from 65 to below 70, or those that introduce a continuous employment system up to the age of 65 (excluding business operators that adopt a continuous employment system to an age above 70) (Article 10-2, Paragraph 1 of the Amended Act).

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| <ul style="list-style-type: none"> <li>i) Raise the mandatory retirement age to 70;</li> <li>ii) Abolish the retirement age;</li> <li>iii) Introduce a continuous employment system for employees up to the age of 70 (including employment at business operators other than specially-related business operators*);</li> <li>iv) Introduce a system to execute outsourcing contracts for employees continuously up to the age of 70;<br/>or</li> <li>v) Introduce a system to allow former employees to be continuously involved in the following undertakings: <ul style="list-style-type: none"> <li>(a) Social contribution activities carried out by the business operator itself; or</li> <li>(b) Social contribution activities undertaken by an organization commissioned or funded by the business operator.</li> </ul> </li> </ul> |
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\*Specially-related business operator means a subsidiary, parent company, sibling company affiliated company, or an affiliated company of a parent company.

Measures iv) and v) (i.e., non-employment measures) are referred to as “Measures to Support Business Startup.” The introduction of these measures requires consent from a labor union representing a majority of the employees, or if there is no such labor union, then an individual who represents a majority of the employees (These representatives are collectively referred to as “**Majority Union, etc.**”) (Article 10-2, Paragraph 1 of the Amended Act, and Article 4-5, Paragraph 1 of the Ordinance for Enforcement of the

Amended Act).

### **(3) Basic points in stipulating Measures to Secure Working Opportunity**

The Act imposes a duty on business operators to make best efforts to implement Measures to Secure Working Opportunity for the elderly. Based on this, the “Guidelines on the Implementation and Operation of Measures to Secure Working Opportunity for Elderly” (Ministry of Health, Labor and Welfare Notice No. 351 of 2020) (the “**Guidelines**”) indicate that, when implementing those measures, business operators are able to stipulate standards to limit the scope of eligible individuals. In principle, the details of those standards would be subject to labor-management negotiations, and the Guidelines provide that it is desirable to hold sufficient consultations between the business operator and the Majority Union etc. and to obtain consent from the Majority Union, etc. Also, business operators are prohibited from implementing any standards that contradict the purposes of the Act, other employment laws and regulations, and social norms, such as standards that permit a business operator to arbitrarily exclude a certain type of employees (e.g., male or female, or union members, etc.).

The Guidelines provide that a business operator should conduct sufficient labor-management negotiations prior to implementing any of the Measures to Secure Working Opportunity, and that such measures should take into account the needs of elderly employees. However, a business operator is not legally obligated to implement any of these measures, but is instead expected to make best efforts. A business operator’s failure to take the measures would probably not immediately constitute a breach of the Act, assuming that the business operator is making best efforts, such as reviewing and negotiating with a view towards introducing some kind of appropriate measure. If a business operator is not making any steps toward introduction of an appropriate measure, then it may receive guidance or advice from the regulators (Article 10-3 of the Amended Act).

### **(4) Continuous employment system up to the age of 70**

Under the Act before amendment, continuous employment measures for employees up to the age of 65 at the same business operator or at a specially-related business operator was the only category of continuous employment measures permitted under the Act. (Article 9, Paragraph 2 of the Act).

However, the Amended Act also includes a continuous employment measure that permits continuous employment of an employee who is age 65 or older not only at the same business operator or a specially-related business operator, but also at business operators other than specially-related business operators (Article 10-2, Paragraph 3 of the Amended Act). Thus, under the Amended Act, an employee who is age 65 or older may have qualifying continuous employment at business operators with which the original business operator has no capital relationship.

If employment will be continued at a business operator other than a specially-related business operator,

that employment will not be subject to the exception in the indefinite employment contract conversion rule (Article 18, Paragraph 1 of the Labor Contracts Act) that is stipulated in Article 8, Paragraph 2 of the Act on Special Measures Concerning Fixed-term Employed Workers with Expert Knowledge, etc. Even if the exception (i.e., the exemption of the indefinite employment conversion rule mentioned above) would be available, it is necessary to comply with the prescribed legal procedures, such as formulating plans, obtaining approval from the competent authority, etc.). Thus, if a business operator repeatedly renews a fixed-term employment contract with an employee, and the period of employment exceeds five (5) years, the employee has the right to request to convert his/her fixed-term employment contract to a permanent employment contract.

## **(5) Concerning Measures to Support Business Startup**

### **A. Overview of the Measures to Support Business Startup**

The “social contribution activities” in the Measures to Support Business Startup means any undertaking that helps to advance the interests of an unspecified and large number of people (Article 10-2, Paragraph 2, item 2 of the Amended Act). The question of whether an undertaking constitutes a “social contribution activity” is determined on a case-by-case basis by taking into account the nature and contents of the undertaking. Thus, activities to support certain political parties or candidates will only advance the interests of certain, or a small number of, people, and therefore, do not constitute social contribution activities in this definition.

Also, in order to confirm that the social contribution activities are funded by the business operator, the business operator must provide necessary support to conduct the activities, such as making contributions, including donations to operate the undertaking, or providing office space to the organization. Further, the type of organization that satisfies the Measures to Support Business Startup with regard to social contribution activities is not limited to “Public Interest Incorporated Associations”, but includes all kinds of organizations.

### **B. Necessary procedures**

#### **(A) Draft a plan**

A business operator that will take Measures to Support Business Startup must prepare a plan stating: (1) the reasons for choosing to take Measures to Support Business Startup from among the possible Measures to Secure Working Opportunity; (2) the contents of the undertaking; and (3) certain other matters (Article 4-5, Paragraph 1 and Paragraph 2 of the Ordinance for Enforcement of the Amended Act).

#### **(B) Obtain consent from the Majority Union, etc.**

The business operator must obtain consent to the draft plan from the Majority Union, etc. (Article 4-5, Paragraph 1 of the Ordinance for Enforcement of the Amended Act).

As a note, working under the Measures to Support Business Startup is not subject to application of the Labor Standards Act, the Industrial Accident Compensation Insurance Act, or other employment-related laws and regulations to protect workers. Thus, the Guidelines indicate that a business operator must provide sufficient explanation to the Majority Union, etc., at the time of obtaining consent on the following points; (a) the business operator is preparing a plan because a form of non-employment is not subject to application of labor-related laws and regulations; and (b) the reason why the business operator chooses the Measures to Support Business Startup.

### **(C) Publicize the plan to employees**

The business operator must make the plan known to the employees by posting it at all times at a place easily viewable inside the workplace or by allowing the plan to be accessible through computers (Article 4-5, Paragraph 3 of the Ordinance Enforcement of the Amended Act).

## **3. Effective Date**

The effective date of the Amended Act is April 1, 2021.

## **4. Practical Impact**

As stated above, the Amended Act encourages business operators to implement Measures to Secure Working Opportunity for employees up to the age of 70, but only requires business operators to make best efforts to do so, and does not immediately obligate business operators to secure employment for employees up to the age of 70. However, if a business operator fails to make any efforts with a view towards introducing some kind of appropriate measure, then it may receive guidance and advice from the regulators.

After measures were initially introduced to secure employment up to the age of 65, an amendment to that law in 1990 obligated business operators to make best efforts to secure that employment, and that obligation was thereafter legally mandated by amendment in 2004, which was enforced in 2006. Therefore, the requirement to make best efforts to implement Measures to Secure Working Opportunity for employees up to the age of 70 is anticipated to become a legal obligation at some point. Accordingly, business operators would be advised to review the utilization of their elderly human resources.

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# 高年齢者雇用安定法の改正

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2021年4月1日から、改正された「高年齢者等の雇用の安定等に関する法律」(以下「**高年法**」といい、改正後の同法を「**改正高年法**」といいます。)が施行されます。改正高年法は、使用者に対し、従来からの65歳までの雇用確保義務に加えて、**努力義務として**、70歳までの就業確保措置を求めています。

## 1. 改正の趣旨

日本では、少子高齢化が急速に進展し、人口が急速に減少しています。このような状況下において、経済社会の活力を維持するため、働く意欲がある高年齢者がその能力を十分に発揮できるよう、高年齢者が活動できる環境整備を図ることが必要です。そこで、個々の労働者の多様な特性やニーズを踏まえ、70歳までの就業機会の確保について、多様な選択肢を付与するという趣旨の下、高年法が改正されました。

## 2. 70歳までの就業確保措置の努力義務の追加

改正高年法の下では、事業主(使用者)に対し、努力義務として、70歳まで就業確保措置を実施することが求められます。以下では、改正前の高年法の内容を確認した上で、70歳までの就業確保措置について解説します。

### (1) 改正前の高年法の概要

改正前の高年法は、事業主に、定年を定める場合には、60歳以上とすることを義務付けた上(高年法8条)、65歳以上までの高年齢者雇用確保措置として、①定年の引上げ、②継続雇用制度(再雇用制度、勤務延長制度等)の導入、③定年制廃止のいずれかの措置を取ることを義務付けています(同法9条1項)。実務上は、②の継続雇用措置として、定年で退職した労働者を、有期雇用契約を更新していく形で、65歳までの間、再雇用することが一般的です。

### (2) 改正高年法が求める70歳までの就業確保措置の概要

改正高年法では、従前からの65歳までの雇用確保義務に加えて、新たに、65歳から70歳までの就業機会を確保するため、就業確保措置として、下表のうちいずれかの措置を講ずる努力義務が課されます(改正高年法10条の2。なお、事業主が任意に複数の措置を取ることも可能です。)。なお、これらの努力義務を負うのは、定年を65歳以上70歳未満に定めている事業主、又は、65歳までの継続雇用制度(ただし、70歳以上まで引き続き雇用する制度を除きます。)を導入している事業主です(同条1項)。

- ① 70 歳までの定年引上げ
- ② 定年制の廃止
- ③ 70 歳までの継続雇用制度の導入(特殊関係事業主(※)に加えて、他の事業主によるものも含まれます。)
- ④ 70 歳まで継続的に業務委託契約を締結する制度の導入
- ⑤ 70 歳まで継続的に以下の事業に従事できる制度の導入
  - (i) 事業主が自ら実施する社会貢献事業
  - (ii) 事業主が委託、出資(資金提供)等する団体が行う社会貢献事業

※特殊関係事業主とは、子法人等、親法人等、親法人等の子法人等、関連法人等、親法人等の関連法人等を指します。

④、⑤の措置(雇用によらない措置)を「創業支援等措置」といい、その導入のためには、労働者の過半数を代表する労働組合(これがない場合には労働者の過半数を代表する者。これらを総称して、以下「過半数労組等」といいます。)の同意が必要です(改正高年法 10 条の 2 第 1 項、同法施行規則 4 条の 5 第 1 項)。

### (3) 就業確保措置を定める場合の全般的な留意点

高年齢者就業確保措置は努力義務にとどまることを踏まえ、高年齢者就業確保措置の実施及び運用に関する指針(令和 2 年厚生労働省告示第 351 号)において、これらの措置を講じるに当たっては、対象者を限定する基準を設けることが可能とされています。基準の内容は、原則として労使に委ねられますが、事業主と過半数労組等との間で十分に協議した上で、過半数労組等の同意を得ることが望ましいものとされています。また、事業主が恣意的に特定の者を排除しようとするなど、法の趣旨、他の労働関係法令や公序良俗に反するもの(対象者の性別を限定することや、組合員を対象から除外すること等)は認められません。

また、同指針では、就業確保措置のいずれを実施するかについては、労使間で十分に協議を行い、高年齢者のニーズに応じたものとするのが望ましいものとされています。もっとも、これらの措置のいずれかを実施することが法的に義務付けられているわけではなく、努力義務が課されているにとどまります。したがって、何らかの措置の導入に向けて検討や協議を続けるなどして努めている限りにおいては、直ちに高年法違反を問われることにはならないと考えられます。何らかの措置の導入に向けて検討や協議を続けるなどの努力を行っていない場合には、当局からの指導・助言の対象となる可能性があります(改正高年法 10 条の 3)。

### (4) 70 歳までの継続雇用制度について

改正前の高年法では 65 歳までの継続雇用措置について、自社に加え、特殊関係事業主における継続雇用のみ同法が認める継続雇用として認められます(高年法 9 条 2 項)。

他方で、改正高年法の下では、65 歳以上の労働者の雇用との関係では、自社及び特殊関係事業主に加え、特殊関係事業主以外の他社における継続雇用も、継続雇用措置として認められます(改正高年法 10 条の 2 第 3 項)。つまり、65 歳以上の労働者との関係では、資本関係がない企業における継続雇用も同法の定める継続雇用として認められることになります。

なお、特殊関係事業主以外の他社で雇用を継続する場合は、自社又は特殊関係事業主で再雇用する場合と異

なり、「専門的知識等を有する有期雇用労働者等に関する特別措置法」8 条 2 項が定める無期転換ルール(労働契約法 18 条 1 項)の特例の対象にはなりません(なお、特例を受け得る場合であっても計画の策定、所轄官庁の認定取得等、所定の手続を経ることが必要ですのでご注意ください。)。すなわち、労働者の有期労働契約が繰り返され、5 年を超えることになった場合には、当該労働者には、無期転換申込権が発生することに留意が必要です。

## (5) 創業支援等措置について

### ア 創業支援等措置の概要

創業支援等措置における、「社会貢献事業」とは、不特定かつ多数の者に利益に資することを目的とした事業を指します(改正高年法 10 条の 2 第 2 項 2 号)。特定の事業が「社会貢献事業」に該当するかどうかは、事業の性質や内容等を勘案して個別に判断されます。もともと、特定の政党や候補者等の支援活動は、特定又は少数の者の利益のためのものであるため、ここにいう社会貢献事業には該当しません。

また、(ii)の「出資(資金提供)等」といえるためには、自社から団体に対し、事業の運営に対する寄付等の出資や事務スペースの提供等、社会貢献活動の実施に必要な援助を行っている必要があります。また(ii)の「団体」は、公益社団法人に限られず、いかなる団体も含まれます。

### イ 必要な手続

#### (ア)計画の作成

創業支援等措置を実施する場合には、就業確保措置のうち、創業支援等措置を講ずる理由や、業務内容等、一定の事項を記載した計画を作成する必要があります(改正高年法施行規則 4 条の 5 第 1 項、第 2 項)。

#### (イ)過半数労組等の同意

事業主は、作成した計画について、労働者の過半数労組等の同意を得る必要があります(改正高年法施行規則 4 条の 5 第 1 項)。

なお、創業等支援措置による就業には、原則として、労働基準法や労働者災害補償保険法等、労働者保護のための労働関係法令が適用されません。このことから、指針において、同意取得の際には、過半数労組等に対し、労働関係法令が適用されない働き方であることから計画を定めることや、創業支援等措置を選択する理由を十分に説明する必要があるとされています。

#### (ウ)計画の周知

事業主は、同意を得た計画を、事業所の見やすい場所に常時掲載する、コンピューター上で確認できるようにする等の方法により、労働者に周知する必要があります(改正高年法施行規則 4 条の 5 第 3 項)。

## 3. 施行日

改正高年法の施行日は、2021 年 4 月 1 日です。



## 4. 実務への影響

上記のとおり、改正高年法は、事業主に 70 歳までの就業確保措置の実施を求めるものではあるものの、あくまで努力義務にとどまり、直ちに労働者を 70 歳まで雇用することを義務付けるものではありません。ただし、何らかの措置の導入に向けて検討や協議を続けるなどの努力を行っていない場合には、当局からの指導・助言の対象となる可能性があります。

65 歳までの雇用確保措置が導入された際には、最初は、1990 年改正により努力義務が新設され、その後、2004 年改正(2006 年施行)により、それが法的義務に格上げされたという経緯がありました。70 歳までの就業確保措置についても、いずれは、努力義務から法的義務へと格上げされる方向で検討が進められていくことが想定されます。そのような背景のもと、高年齢者の人材活用をどのように図っていくべきか、各社において検討を進めていくことが求められています。

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