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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

The main sources of employment law which govern individual labour relationships are the Labour Contract Law ("LCL") and the rules established by court precedents, which serve as the basic rules which employment contracts must follow. The Labour Standards Act ("LSA") also regulates employment contracts by providing minimum standards for the conditions of employment.

On the other hand, the main source of the employment law which governs collective labour relationships is the Labour Union Act ("LUA").

1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

The workers protected by employment law are "employees" as defined under the LCL and the LSA. A worker is judged to fall under the category of "employee" on the basis of the actual conditions of his or her work, taking into account whether: (i) he or she is under the basic control (instruction and order) of the employer; and (ii) his or her wages are paid by the employer.

Employees are classified into the following categories:

i) indefinite-term contract employee;

ii) fixed-term contract employee, whose term of employment is three years (or five years in extraordinary cases stipulated under the LSA) at most; and

iii) part-time employee, whose prescribed working hours are shorter than those of regular employees.

Indefinite-term contract employees enjoy the overall protections of the employment law. Fixed-term contract employees and part-time employees also enjoy almost the same protection as indefinite-term contract employees. In addition, certain employment laws may not apply to part-time employees due to their shorter working hours than regular employees.

1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

No. An employment contract may come into effect either by an oral or a written agreement. However, upon entering into an employment contract, an employer is required to expressly specify certain employment terms and conditions. Among such terms and conditions, the employer is required under the LSA to provide the following to an employee in writing:

i) matters pertaining to the duration of an employment contract;

ii) matters pertaining to the workplace and work contents;

iii) matters pertaining to the start time and end time for working hours, break time, etc.;

iv) matters pertaining to wages; and

v) matters pertaining to termination of employment, retirement and dismissal (including grounds thereof).

1.4 Are any terms implied into contracts of employment?

Yes. If a certain term between an employer and employee is treated the same way repeatedly and continuously for a long period of time, that term may be implied into employment contracts as "common labour practice" or as an "implied agreement".

1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

Yes. Minimum working conditions are established under the LSA and ancillary laws:

i) The statutory working hours are 40 hours per week and 8 hours per day, in principle.

ii) Break times shall be given during working hours for at least 45 minutes or 1 hour, depending on the length of working hours.

iii) At least one day off must be given to employees per week.

iv) Minimum increased wage rates are stipulated for overtime work, work on days off and night work.

v) A stipulated minimum number of days of annual paid leave is to be granted in accordance with the length of service of an employee.

In addition, the minimum wage per hour for each district (or for certain industries) is determined in accordance with the Minimum Wage Act.

1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

Parties are free to agree on any terms and conditions of employment at a collective bargaining session, so long as the employer (a party to the collective bargaining session) has the authority to agree on the

subject terms and conditions. Generally, the terms and conditions that are agreed at a collective bargaining session relate to major employment conditions.

Collective bargaining sessions usually take place at the company or business place level, although they also exist at the industry level.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

In order to qualify as a "labour union" under the LUA, a labour union has to submit evidence to the Labour Relations Commission and demonstrate that all the requirements as described below have been satisfied.

The requirements regarding the substance of a labour union are:

i) it is mainly composed of workers;

ii) it is formed and operated independently of management control;

iii) there is no member who represents the interests of management;

iv) it receives no financial support from the employer for defraying or operation;

v) its main purpose is to maintain or improve the conditions of employment or the financial situation of workers; and

vi) it is the association of two or more members who have a constitution and an organisation necessary for operating such association (or a federation of such associations).

A labour union, which is not qualified as a "labour union" under the LUA as it lacks the above-mentioned requirements, would still enjoy the rights granted under the Constitution of Japan ("Constitution") (see question 2.2). An exception to this is where a labour union lacks requirement ii) above, in which case it does not enjoy the rights under the Constitution.

2.2 What rights do trade unions have?

Workers enjoy the constitutional guarantee of the right to organise, based on which they organise labour unions.

A labour union can request an employer to hold a collective bargaining session on any issue, provided that such issue relates to the labour union itself or the economic status of a worker who is a union member. The employer is required to accept such request and faithfully negotiate with the labour union. In relation to certain matters, such as the establishment of, or a change to, the employment rules, an employer is required to hear the opinion of the labour union organised by a majority of the workplace concerned.

Further, a labour union is guaranteed the right to act collectively, which is centred around labour dispute actions such as strikes. A worker will not bear any civil or criminal liability with respect to his or her justifiable labour dispute action.

2.3 Are there any rules governing a trade union's right to take industrial action?

Yes. Industrial actions should be taken after collective bargaining session(s) are held, since industrial actions that are taken without holding any collective bargaining session in advance may be determined to be illegitimate. No notification to the employer is statutorily required prior to the commencement of industrial actions. However, procedures stipulated in the union charter must be followed.

2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

There is no system of works councils in Japan.

2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

See question 2.4.

2.6 How do the rights of trade unions and works councils interact?

See question 2.4.

2.7 Are employees entitled to representation at board level?

No. Employees are not statutorily entitled to representation at board level.

3 Discrimination

3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Yes. The Constitution sets down the principle of equality with respect to the relationship between the state and its citizens. In accordance with this principle of equality, the LSA establishes a similar principle for certain limited terms and in respect of the relationship between employers and employees. The terms listed under the LSA as those based on which an employer is prohibited from engaging in discriminatory treatment of employees are nationality (which includes race), creed, social status and sex.

3.2 What types of discrimination are unlawful and in what circumstances?

Under the LSA, discriminatory treatment based on nationality, creed or social status of an employee which is related to his or her employment conditions is considered unlawful, if conducted against him or her after hiring him or her. Discriminatory treatment pertaining to the conditions of dismissal of an employee is also prohibited. In addition to the above-mentioned prohibition of discriminatory treatment, the LSA sets forth the principle of equal wages for men and women ("Principle of Equal Wages").

Under the Employment Security Law, it is forbidden to discriminate against a person in employment placement, vocational guidance or the like by reason of any previous profession or membership in a labour union, as well as by reason of race, nationality, creed, sex, social status and family origin.

Further, the Act on Securing, etc. of Equal Opportunity and Treatment between Men and Women in Employment ("Equal Opportunity Treatment Act") prohibits discriminatory treatment

based on sex in relation to the following matters:

i) discrimination at the recruitment and hiring stage;

ii) assignment, promotion, demotion and training of employees;

iii) loans for housing and certain other similar fringe benefits;

iv) change in job type and employment status of employees; and

v) encouragement of retirement, mandatory retirement age, dismissal, and renewal of the employment contract.

It is also explicitly prohibited to treat female employees disadvantageously by reason of marriage, pregnancy and childbirth. Moreover, an employer is also prohibited from taking certain measures on the basis of conditions other than sex, if such measures are effectively discriminatory by reason of a person's sex, taking into consideration the proportion of men and women who satisfy the criterion and other matters (such as including certain physical size conditions in applications for recruiting and hiring).

3.3 Are there any defences to a discrimination claim?

Yes. If an employer can substantiate that the alleged discriminatory treatment is based on a justifiable reason, it may be considered non-discriminatory. With respect to some measures taken by employers, guidelines have been issued which exemplify the measures that will and will not be considered as reasonable differentiation. In such cases, employers may have a strong case, if they can substantiate that they have followed those guidelines.

In addition, an employer may not be liable for discriminatory conduct of one of its employees against another employee if the employer can substantiate that it has taken all possible measures to prevent such discriminatory conduct from occurring.

3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

Methods available to employees to enforce their civil rights are case-dependent. For example, in a case of a discriminatory dismissal, an employee may bring an action to claim that the dismissal is null and void, requesting the employer to reinstate him or her to his or her original position, as well as to provide him or her with back pay and compensate him or her for the damage which he or she suffered due to the dismissal.

Employers can settle claims at any time before or after they are initiated.

3.5 What remedies are available to employees in successful discrimination claims?

Remedies available to employees in discrimination cases vary depending on the case. For example, a discriminatory dismissal, assignment or disciplinary action against an employee by an employer will become null and void. As a result, the subject employee will be reinstated to his or her original position or state. An employee may also be entitled to receive compensation for the damage which he or she has suffered. (See also question 3.4.)

3.6 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

Yes. Under the LCL, employment conditions of fixed-term contract employees shall not be unreasonably different from those of indefinite-term contract employees by reason that the employment term of such employees is fixed.

Further, the Act on Improvement, etc. of Employment Management for Part-Time Workers prohibits discrimination against part-time workers *vis-à-vis* full-time employees. Specifically, an employer is prohibited from engaging in discrimination against a part-time worker with respect to wages, implementation of education and training, utilisation of welfare facilities and any other treatment of workers by reason of being a part-time worker, if both of the following items are equivalent with respect to the part-time worker and full-time workers:

i) job descriptions and levels of responsibility; and

ii) possibility of a change in job description and assignment, and if such change is possible, the range of change.

Also, the Law Concerning Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers ("Worker Dispatching Law") prohibits a receiver of worker dispatching services from cancelling a worker dispatch contract on the basis of a dispatched worker's nationality, creed, sex or social status or his/her engagement in legitimate labour union activities, etc. A receiver of worker dispatching services is further prohibited under the Whistleblower Protection Act from cancelling a worker dispatch contract on the basis of a dispatched worker's whistleblowing. ("Worker dispatching" in this context means to cause a worker that one employs to work for another person under the instructions of the latter, while maintaining an employment relationship with the former, but excludes cases where the former agrees with the latter for such worker to be employed by the latter.)

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

If a female employee who is to give birth within six weeks makes a request not to work, her employer may not require her to work. In addition, an employer is prohibited from allowing a female employee to return to work within eight weeks after giving birth, even if she wishes to do so (Maternity Leave, "ML").

An employee who is raising a child is entitled to apply for full-time leave to look after his or her child until the child turns one year old. Eligible employees may apply for extension of full-time leave to look after the child until the child turns 14 months old or 18 months old (Childcare Leave, "CCL").

4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

An employer is not required to pay an employee's salary during the ML or CCL, unless otherwise stipulated in the employment contract or the employment rules. However, a female employee is entitled to receive the following amount of money:

i) under the Health Insurance Act, a certain amount of maternity allowance which corresponds to the amount of her standard remuneration for a certain period; and

ii) under the Employment Insurance Act, a certain amount of childcare leave benefit after the lapse of eight weeks from the birth date of a child until the day before the child's first birthday.

4.3 What rights does a woman have upon her return to work from maternity leave?

It is prohibited to treat female employees detrimentally for taking ML or CCL. Therefore, it is generally required to enable female employees to return to their original work after their ML or CCL. Treatment such as the assignment of female employees to a different position or reduction of their wages due to their taking ML or CCL is also considered unlawful, if there is no justifiable reason.

4.4 Do fathers have the right to take paternity leave?

CCL may be taken by male employees as well as female employees. Principally, CCL may only be taken once. However, an employee is entitled to take a second CCL, if the first CCL of such employee ended within eight weeks from the birth date of the employee's child. This entitlement is established for the purpose of encouraging male employees to take the CCL.

4.5 Are there any other parental leave rights that employers have to observe?

An employee who raises a child under elementary school age is entitled to take unpaid Nursing Care Leave ("NCL") of up to five days per year, in order to take care of his or her sick or injured child or accompany their child for medical checkups or vaccinations. If he or she raises two or more children under elementary school age, he or she is entitled to take NCL of up to 10 days per year.

4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependants?

When a male or female employee: i) who does not take CCL and who lives with and raises a child less than three years old; and ii) whose normal working hours per day are more than six hours, so requests, the employer must principally shorten his or her normal working hour to six hours per day.

5 Business Sales

5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

In an asset transfer, which amounts to the transfer of business (hereinafter the same in this legal guide), employees do not automatically transfer to the assignee entity. In principle, if either the assignee entity or an employee refuses to give consent to the transfer of employment, then the employment between the assignor entity and the relevant employee will not be succeeded to the assignee entity.

In a share sale, the identity of the employer remains the same before and after the sale.

5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

1. In an asset transfer, there are two ways by which an employment will be transferred to the buyer, namely:
   i) transfer of position as an employer ("Case 1"); or
   ii) resignation of employees from the seller followed by a new employment of the same employees by the buyer ("Case 2").

   In Case 1, the employment conditions of employees, which the seller has applied, will be transferred to the buyer as is, unless otherwise agreed between the buyer and the employees. In Case 2, the employment conditions of the buyer will apply, unless otherwise agreed. Collective labour agreements will not be transferred, unless otherwise agreed in the business transfer agreement.
2. In a share sale, there is no change in the conditions of employment of the employees.

5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

Employees do not have any specific information and consultation rights on a business sale. However, in order to obtain the employees' consent for the transfer of employment (in the case of business transfer), the employer would normally be required to provide sufficient information and faithfully consult with the employees. The time required for the process varies depending on each case.

5.4 Can employees be dismissed in connection with a business sale?

A business sale in itself will not justify the dismissal of employees. Therefore, normal protections apply to the employees with respect to dismissals upon a business sale. (See question 6.3 for the employees' protection against dismissals.)

5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

1. In Case 1 of a business transfer or a share sale

   A business transfer or a share sale in itself would not justify an employer to freely change the employment conditions of employees. Therefore, if the employer desires to change them to the disadvantage of the employees, justifiable reasons are required, unless individual consent is obtained from the employees.
2. In Case 2 of a business transfer

   Due to the reason that the employees will be subject to the employment conditions of the buyer, employees may be subject to employment conditions that are different from those of the seller. The seller employer should fully familiarise its employees with the new employment conditions and obtain their consent.

6 Termination of Employment

6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

Yes. Employers are required to give at least 30 days' advance notice, or pay the average wages for a period of not less than 30 days *in lieu* of notice. The advance notice period of 30 days may be reduced, if the employers pay the average wage for each day by which the period is reduced ("Payment *in lieu* of Notice").

The exceptions to the above rule are as follows:

i) in the event that the continuance of the business of the employer has been made impossible due to a natural disaster or other unavoidable reasons;

ii) in the event that the employee is dismissed for reasons attributable to him or her; or

iii) in the event that the employee is dismissed during his or her probationary period and within 14 days from the employment date.

In order for the exception i) or ii) to apply, the approval of the head of the relevant Labour Standards Inspection Office is required.

6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

Yes. An employer can require its employees to serve "garden leave", provided that wages are paid to the subject employee during such period.

6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

An employee may only be dismissed when there is an objectively justifiable reason and it is appropriate in general social terms. Objectively justifiable reasons are as follows:

i) incapacity (due to health or performance-related reasons) and lack of qualification;

ii) misconduct;

iii) operational necessity; and

iv) request from a labour union based on a union-shop agreement.

Generally, a court would only consider a dismissal to be "appropriate in general social terms" if the degree of the cause of dismissal is significant, while there is no other way to avoid the dismissal and there is almost no circumstance on the side of the employee which could be taken into consideration in favour of the employee. Employees may bring an action to dispute the validity of the dismissal, and the court strictly examines the validity thereof, based on the above-mentioned criteria.

If an employee does not dispute the validity of the dismissal, the state of dismissal of the employee will effectively become fixed. On the contrary, if an employee disputes the validity of the dismissal, he or she would ultimately be considered to have been duly dismissed if it is judged by the court that the above-mentioned criteria have been met.

If a collective labour agreement has a provision which obligates an employer to obtain consent from a labour union upon dismissal of employees, a dismissal without such consent will be considered null and void.

6.4 Are there any categories of employees who enjoy special protection against dismissal?

Yes. An employer may not dismiss certain categories of workers, such as:

i) a worker during a period of absence from work for medical treatment with respect to injuries or illnesses suffered in the course of employment or within 30 days after his/her recovery;

ii) a female worker during a period of absence from work before and after childbirth which is taken in accordance the LSA or within 30 days after her recovery;

iii) a worker due to the reason of nationality, creed or social status of the worker;

iv) a worker due to the reason that he or she is a labour union member or has performed justifiable acts of a labour union and the like;

v) a worker for reasons of sex, and of a female worker's marriage, pregnancy, childbirth or having taken absence from work before and after childbirth;

vi) a worker due to the reason of his or her having exercised rights granted with respect to childcare or family care under the Act on the Welfare of Workers who Take Care of Children or Other Family Members Including Child Care and Family Care Leave;

vii) a part-time worker who is considered to be equivalent to ordinary workers, only due to the reason that he or she is a part-time worker;

viii) a worker due to the reason that he or she has reported the employer's breaches of certain employment protection laws to the relevant government agencies;

ix) a worker due to the reason that he or she has sought the advice of, or filed an application for, mediation by the head of the Prefectural Labour Offices; and

x) a worker due to the reason that he or she has reported a violation in accordance with the Whistleblower Protection Act.

6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

See questions 6.3 and 6.9.

Employees are not entitled to compensation on dismissal. However, an employer is principally required to make Payment *in lieu* of Notice (see question 6.1). In addition, since the validity of dismissal is strictly examined by the courts if disputed, employers often provide a severance payment to employees in order to facilitate their voluntary resignation. The amount of severance pay varies significantly depending on each company; however, in many cases, it is calculated based on the employees' length of service.

6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

Advance notice of termination (see question 6.1) is required in principle. In addition, any termination procedures stipulated under the employment rules or collective labour agreement must be followed.

In addition, it is desirable to notify the subject employee of the reasons of dismissal and provide the opportunity for self-vindication.

Further, an employer is required to provide an employee with a certificate without delay, if requested by the employee, which certifies the period of employment, the type of work of the employee, the employee's position, the wages, or the cause of retirement (if the cause for retirement is dismissal, the reason of the dismissal must also be provided), as requested by the employee.

6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

An employee can bring a claim against his or her employer for declaratory judgment or a decision to confirm his or her position as an employee by filing a labour trial, preliminary disposition or litigation.

When the decision is made by the court (in the case of preliminary disposition or litigation) or the Employment Tribunal Court (in the case of a labour trial) that a dismissal is null and void, the employer must reinstate the employee and pay the employee's wages or salary since the date of dismissal with applicable interest. In principle, if the dismissal is determined to be invalid, the employee cannot claim damages. However, a claim for damages may be admitted, if any communication or action by the employer against the employee in relation to the dismissal is considered to be a tortious act.

6.8 Can employers settle claims before or after they are initiated?

Claims can be settled at any time before or after they are initiated.

6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

Yes. In the event that 30 or more employees (or five or more employees who are aged 45 years or older) are dismissed or cease to be employed within one month, notification regarding such dismissal or cessation should be made to the head of the competent public employment security office.

In addition, as described in question 6.3, the dismissal of an employee must be based on objectively justifiable reasons and be appropriate in general social terms. The court strictly examines the validity of a dismissal due to redundancy of employees based on the following four criteria:

i) whether the redundancy is necessary and the reasons therefor;

ii) whether every reasonable effort to avoid the redundancy was made;

iii) whether the selection of the workers for dismissal is fair and reasonable; and

iv) whether the employer observed "due process" (i.e., proper explanation and appropriate discussions).

Although additional obligations are not imposed on an employer (except as described in the first paragraph), an employer is effectively required to take measures in line with the four criteria, in order for the dismissal to be judged valid.

6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

Employees can dispute the validity of the dismissal at an ordinary court or the Employment Trial Committee. If the four criteria (see question 6.9) are not satisfied, the dismissal will be considered null and void, in which case the employer will be required to reinstate the dismissed employee and provide back pay.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

Restrictive covenants typically include a covenant not to compete with, not to solicit the employees of, and not to disclose confidential information of a former employer.

7.2 When are restrictive covenants enforceable and for what period?

A non-competition obligation imposed on an employee after his or her retirement directly restricts the constitutional right of workers to choose their occupation. Therefore, there must be an express agreement with an employee or a provision in the employment rules to allow an employer to make such a restriction. The validity of this agreement or provision will be judged taking into consideration various factors such as the position of the employee (seniority), the purpose of the non-competition obligation, the degree of restriction on the occupation, the period and area, payment of compensation in exchange for the restriction and the like. The period of restriction normally may last for up to two years at most.

With respect to a non-solicitation obligation, in principle, employees would not be restricted to solicit their former employer's employees, since their duty of loyalty would basically cease to exist after their retirement. However, a former employee's solicitation of his or her former employer's existing employees may constitute an action in tort, if, for example, the employer's business is seriously affected due to such solicitation.

A confidentiality obligation will be considered valid if there is an agreement with an employee or a provision in the employment rules, which is not against public order and morality in respect of the necessity and reasonableness thereof. The period of restriction would normally last for up to two or three years at the most. In addition, under the Unfair Competition Prevention Act ("UCPA"), an employer may file an injunction against an employee during, and after, the period of his or her employment with respect to his or her unlawful use or disclosure of a trade secret acquired from or disclosed by the employer.

7.3 Do employees have to be provided with financial compensation in return for covenants?

Financial compensation is not statutorily required. However, the provision of financial compensation is one of the important factors to be taken into account, upon judgment of the validity of the covenants.

7.4 How are restrictive covenants enforced?

Covenants are enforced through a provisional injunction against the subject employee. With respect to a covenant of confidentiality, under the UCPA, employers may also enforce the covenant by seeking destruction of the articles that constituted the infringement, removal of the equipment used for the act of infringement, as well as seeking restoration of the business reputation.

An employer may also claim for damages arising from the former employee's conduct. As a means of securing compensation for damages, an employer may reduce or request the return of the retirement allowance of the former employee, provided that it is expressly stipulated in the employment rules or rules concerning the retirement allowance of the employer that such reduction or return can be enforced.

Seeking punishment through a criminal complaint against the former employee may also be effective in certain cases. Crimes such as breach of trust or embezzlement under the Penal Code and the penal provisions under the UCPA may apply.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship?

Privacy laws in Japan impose various regulations on employers, in relation to their handling of personal information about their employees. This may affect the whole of the business, but are especially important in HR and personnel management. The main privacy act in Japan is the Act on the Protection of Personal Information ("PIPA"), which is supplemented by various guidelines.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Article 25 of the PIPA requires an employer to disclose retained personal data it holds about an employee at the request of that employee, unless there is a particular reason for not disclosing the retained personal data which falls within one of the exceptions to disclosure specified in the said Article. It is generally understood that an employer may refuse to disclose, for example, the details of personnel evaluation as the disclosure thereof would prevent the employer from properly conducting its business, under Article 25, paragraph 1, item 2 of the PIPA.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

It is generally understood that an employer may not conduct a criminal record check, based on the Ancillary Guidelines to the Employment Security Law. These guidelines restrict the acquisition of sensitive personal information about job applicants, including information regarding race, ethnicity, and criminal history. Under these guidelines, an employer cannot obtain the sensitive information about job applicants from a third party provider.

Employees and job applicants may consent to an employer obtaining their personal information. Employers should obtain prior written consent from applicants, before obtaining any such information. In addition, under Article 18, Paragraph 1 of the PIPA, an employer must notify or make public the purpose for which it intends to use any personal information it has acquired, and this obligation applies in respect of personal information acquired in the course of a background check.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

When an entity handling personal information has an employee handle personal information, it must exercise necessary and appropriate supervision over the employee to ensure control of the security of the personal data (PIPA, Article 21). This supervision may include things such as monitoring the employee's actions online, or video monitoring employees. The Guidelines Targeting Economic and Industrial Sectors Pertaining to the PIPA, recommends employers consult with labour unions or other employee representatives prior to instigating a monitoring policy. Once the monitoring policy is decided, this should be communicated to the employees who will be monitored.

The Guidelines Concerning Measures to be Taken by Entities to Ensure the Proper Handling of Personal Information Relating to Employment Management further provides considerations for employers when monitoring employees. The purpose of the monitoring and the policy around implementation of monitoring should be communicated to employees in advance. The manager responsible for managing the monitoring should be clearly identified. Finally, the monitoring programme should be audited, to ensure it is being implemented appropriately.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

An employer can control an employee's personal use of social media in the workplace as employees are obliged by their employment contract to be devoted to performing their work while at the workplace. An employer may not control an employee's personal use of social media outside the workplace, except in limited circumstances, for example, where an employee intends to leak business secrets or defame the company.

9 Court Practice and Procedure

9.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

i) Ordinary courts composed of one to three qualified judges, or ii) Employment Trial Committees composed of one qualified judge and two layperson committee members, who have specialised experience with respect to labour relations, have jurisdiction to hear employment-related complaints.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

At an ordinary court, once an action is brought, it will go through oral proceedings and examination of evidence. Conciliation is not mandatory before a complaint can proceed.

The Employment Trial Committee will hold up to three hearings to hear allegations of both parties and examine evidence. Conciliation is mandatory before a decision is rendered, if there is a possibility for the case to be resolved by settlement.

An employee has to pay a fee to the court to submit a claim, normally by attaching revenue stamps to the written complaint. The amount of such fee will be determined based on the amount requested by the employee in his/her claim.

9.3 How long do employment-related complaints typically take to be decided?

An employment-related complaint brought into an ordinary court would undergo an average deliberation of approximately 12 months at the court of first instance before being resolved. If a complaint is brought into the Employment Trial Committee, the average number of days for deliberation is approximately 75 days.

9.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

Yes. Both decisions by an ordinary court of first instance and the Employment Trial Committee can be appealed. If a case which was pending at the Employment Trial Committee is appealed, it will automatically move to the ordinary court. The average deliberation period at the appellate court is approximately six months.

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