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REMOTE WORKING 2022

Global interview panel led by Lindsay F Ditlow of McDermott Will & Emery LLP

Lexology GTDT Market Intelligence provides a unique perspective on evolving legal and regulatory landscapes.

Led by Lindsay F Ditlow of McDermott Will & Emery LLP, this Remote Working volume features discussion and analysis of emerging trends and hot topics within key jurisdictions worldwide.

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About the editor



Lindsay F Ditlow

McDermott Will & Emery LLP

Lindsay F Ditlow is an employment adviser on a variety of domestic employment law matters. She is one of the leaders of McDermott's COVID-19 Employment Task Force and advises employers on a wide range of covid-19 measures, including federal, state and local leave obligations, furloughs and layoffs, cost-cutting measures, accommodations, health and safety obligations, return-to-work procedures and policy review and implementation.

Lindsay provides trusted counsel to US and multinational companies on all aspects of the employment relationship. She regularly advises on employment structures, onboarding requirements, employment agreements, non-competes, international assignments, handbooks and policies, employee leave, workplace accommodations, furloughs and individual and collective dismissals. She assists employers with these matters in the US and when they are expanding abroad. She partners with clients in a wide range of industries, including healthcare, life sciences, technology, energy, manufacturing and communications.

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Japan

Yukiko Imazu, a partner, focuses her practice in the area of labour and employment and acts on behalf of both Japanese and non-Japanese companies in advising on labour and employment issues. She is also an experienced labour and employment litigator, having successfully defended many cases. She also gives seminars and training sessions regarding labour and employment matters tailored to clients' needs, both in Japanese and English. In particular, she gives a lot of harassment prevention seminars to non-Japanese companies, Japanese companies, Japanese governmental bodies and universities. She has been ranked in *Chambers Asia-Pacific*, *Best Lawyers* and *The Legal 500 Asia Pacific*.

Tomohiko Hamazaki, an associate, has provided advice to both Japanese and non-Japanese companies focused on employment and labour-related law, such as human resources and labour management, labour litigation, labour tribunal and other employment/labour disputes. He has written articles on recent labour issues such as covid-19, remote work and social media. He has also engaged in practices related to mergers and acquisitions, general corporate, and litigation and dispute resolutions.



1 What are the most consequential issues that an employer should consider when determining its post-covid-19 remote work policies?

The most consequential issue is whether a particular type of role is suitable for remote work. According to a survey carried out by various government agencies, the most common reason for abandoning remote work is the lack of jobs suitable for remote work. This is because there is a tendency in Japan to place importance on face-to-face communication, and thus the push to go paperless is not progressing quickly due to an emphasis in many sectors on physical stamps and original paper documents. Hence, even employers that have introduced remote work because of the covid-19 pandemic, such as those that require face-to-face communication to build customer relationships and those that have departments that handle original paper documents, will be phasing out remote working after the covid-19 pandemic is over. In fact, according to surveys conducted by several organisations, the number of companies that have introduced remote work increased in the first half of 2020, but the number gradually decreased between the second half of 2020 and 2021. According to that survey, the current percentage of companies in Japan that offer remote work options is around 20 per cent. However, the implementation rate has remained flat since then without any further decrease (as of 2022), indicating that remote work has taken root to some extent in Japan. In fact, one of Japan's largest companies made headlines when it announced a new policy that enables all its employees to work remotely.

The practical issues with remote work in Japan would be protecting sensitive information and managing employee performance. For these matters, please see our responses to questions 6 and 8.



Yukiko Imazu

Tomohiko Hamazaki

2 Pragmatically speaking, is there a threshold to determine when working remotely (from home or otherwise) requires local rules to apply?

In Japan, there is no such threshold and this determination is made by each individual employer based on its own needs and definitions.

3 If employees voluntarily move away from their main work location, can employers unilaterally impose locally appropriate compensation packages?

Under Japanese Labour Law, essentially, employers cannot unilaterally reduce wages without an employee's consent. Therefore,



“As remote work advances further, we expect that employers will be able to recruit workers from all over the country.”

even if an employee voluntarily moves away from their main work location, employers may not unilaterally impose lower locally appropriate compensation packages on them (for example, the employer may not unilaterally impose a lower base salary that is commensurate with the employee’s experience in the local market) without the employee’s consent. If the employer wants to do so without the employee’s consent, the employer will need to introduce a new compensation system that includes payment of a special allowance called a regional allowance, which is tied to the place of residence, in addition to the employee’s base salary. As the employer may establish the terms of the regional allowance at its discretion, the employer may set different amounts of regional allowances depending on the place of residence. Therefore, the employer may change the amount according to the relevant internal regulations when an employee relocates to an area where the cost of living is low (and conversely, if an employee relocates to a region where the cost of living is high, the employer will need to pay the higher regional allowance). What matters is that the amount of the regional allowance for each area and the terms of the regional allowance, including the

possibility of changing the amount as mentioned above, must be stipulated in the employer’s salary regulations. According to a survey carried out by government agencies, about 10 per cent or more of companies, and about 30 per cent or more of companies with 1,000 or more employees, pay regional allowances. The average amount of such allowances is about ¥20,000 per month.

In addition, the Japanese government sets the minimum wage, which varies from region to region, and reviews it annually. Therefore, employers are always obliged to check whether employees’ wages meet the minimum wage applicable to the area where the employee is relocated.

Furthermore, many Japanese companies provide a commuting allowance to compensate employees for the transportation expenses incurred by them when they commute to an office. Hence, an employer may decline to pay a commuting allowance if an employee has stopped commuting due to remote work. As a side note, instead of paying a commuting allowance, some companies provide special allowances to compensate employees for the costs incurred by them due to the use of utilities and internet facilities for remote work.

4 Do you anticipate a rising trend of employers hiring remote workers as opposed to managing office-based employees who subsequently go remote? What practical issues should employers bear in mind when considering remote hiring?

We anticipate that the hiring of remote workers will increase. Remote workers can be recruited from anywhere in the country and remote work also reduces office space requirements. In addition, in Japan, transfers that require relocation are common, especially in the case of career-track employees. Such transfers that require relocation have a significant impact on employees’ work-life balance and are one of the factors that hinder women’s advancement in society. However, with



remote work, employees are able to undergo transfers without having to physically relocate. Because of these advantages, some companies have declared full remote work for all employees in Japan. In fact, one of Japan's largest companies made headlines when it announced a new policy that enables all its employees to work remotely.

The key practical issue to bear in mind when using remote employment is whether the work can be effectively done remotely, while complying with Japanese labour-related laws (including the Labour Standards Act). As we discussed in question 1, Japanese business culture and practices have traditionally emphasised face-to-face communication, and the transition to paperless work environments is not progressing quickly. Therefore, if an employer wants to hire remote workers, it may have to confront these practical issues at some point.

5 Do local laws provide remote employees with more generous leave entitlements, such as sick leave? Can employees avail themselves of leave entitlements in both the primary work location and the remote work location?

For the former, no such leave is specifically given. For the latter, employees are able to use leave at both types of work locations.

As a side note, under Japanese Labour Law, an employer is not required to grant employees sick leave for personal reasons. However, this leave system is generally established voluntarily by each employer. It is therefore possible for employers to grant remote workers special leave rights.



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6 What are some best practices for protecting confidential and proprietary information in a remote work environment?

It would be prudent to refer to the Telework Security Guidelines (https://www.soumu.go.jp/main_sosiki/cybersecurity/telework/) published by the Ministry of Internal Affairs and Communications and take measures in accordance with the characteristics and circumstances of each employer. The main contents of these guidelines are as follows:

- formulate and review security policies in light of environmental changes occurring in the implementation of remote work, and after that review, notify remote workers of the contents of the policies and share the policies with them;
- establish organisations and human resources necessary for implementing security measures and secure budgets as necessary;



“The widespread adoption of remote work requires a change in perceptions not only among employers but also among the general public.”

- select services with sufficient operating results and security functions when selecting services necessary for remote work;
- organise how such information will be used in remote work in accordance with the level of importance of such information. For example, prohibiting the removal of physical information from offices;
- develop an incident response plan to enable prompt response in the event of a security incident; and
- implement security training involving remote workers to improve the understanding and awareness of security throughout the organisation.

Of the above, practical measures to be taken at an early stage are those in the first point, third and fourth point from the list above.

7 How does a remote employee affect the employer’s tax obligations? Do the employee’s activities render the employer to be ‘doing business’ in the remote location? Will these activities create a taxable presence for the foreign employer in the local jurisdiction?

Practically, a remote employee is not expected to affect the tax obligations of the employer. Under the Corporate Tax Act, corporate enterprise tax and corporate inhabitant tax are levied by the municipality in which a corporation’s office or place of business (‘Office’) is located. The authorities have explained that each municipality that wishes to tax an employer determines whether that remote worker’s home is their employer’s Office or not. Furthermore, this determination must comprehensively consider the definition of an Office (the three key requirements are the existence of human presence, physical equipment, and business continuity), though they did not provide any specific criteria. Therefore, in theory, if a municipality determines that an employee’s home is also their office under the Corporate Tax Act, the employee will be subject to



corporate enterprise tax and corporate inhabitant tax, even at the employee's home. However, since there is no physical equipment (such as a company signboard) in their home, it is not likely that an employee's home will fall under the category of an Office just because the employee is working remotely.

8 What are some best practices for tracking remote work arrangements?

Regarding the management of working hours, it is necessary to take measures such as ex post facto checks to see if there are any mistakes or errors in the working hours declared by employees, in accordance with the Guidelines for the Promotion of Appropriate Introduction and Implementation of Telework (www.mhlw.go.jp/content/000759469.pdf) prepared by the Ministry of Health, Labour and Welfare. Under Japanese Labour Law, employers are obliged to keep track of their employees' working hours. However, in the case of remote work, it is generally impossible to objectively assess working hours by using time cards, and workers typically report their daily starting and end times by themselves through email (or other appropriate systems). Unfortunately, some employees may understate or overstate their working hours through the above-mentioned self-reporting system. Therefore, the above guidelines stipulate that the following points should be considered:

- Employees should be provided with sufficient explanation regarding the importance of appropriate declarations, and those who handle the management of working hours should be provided with sufficient explanations regarding the operation of the self-reporting system.
- If there is a significant discrepancy between the hours reported by an employee and objective facts relating to the actual hours worked, such as evidence that emails were sent outside reported

hours, or that the relevant work computer was active for a lengthy period of time outside of reported hours, then the employer should investigate the facts and, if necessary, make adjustments to the working hours based on those actual facts.

- The system should not be operated in such a way that impedes the proper reporting of working hours, such as by setting an upper limit on the number of hours of self-reportable overtime.

In addition, there is a risk of improper use of work-issued laptops because individual work situations cannot be accurately ascertained in the case of remote work. Therefore, to prevent improper use, it is useful to establish internal rules for monitoring information devices and servers. However, because employers need to be sensitive to employees' personal privacy, they cannot perform unnecessary monitoring, for example, by checking an employee's work status with a laptop camera or constantly monitoring the contents of emails.

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The Inside Track

What do you think are the most exciting and promising opportunities of remote working? How do you think it will affect the future of work?

The biggest benefit of remote work is that it saves employees commuting time because employees do not have to commute every day. In the future, workers will not have to consider commuting time, so more people will live farther away from the city centre where their office is located. As remote work advances further, we expect that employers will be able to recruit workers from all over the country. In Japan, transfers that require relocation are common, especially in the case of career-track employees. However, employers that promote remote work are now moving to abolish these types of transfers. In Japan, it is not uncommon for employees to move away from their families in order to avoid frequent changes of residence and school for their children, but the advance of remote work may lead to a review of the existing transfer system.

In your view, what are the most difficult challenges raised by the rise of remote working? How do you think employers should tackle these challenges and adapt accordingly?

The problem in Japan is that there are many jobs where remote work cannot be introduced. The widespread adoption of remote work requires a change in perceptions not only among employers but also among the general public. In this regard, remote work is becoming more prevalent in Japanese society than we had imagined prior to the covid-19 pandemic. Several

large companies have announced their intention to make remote work a principle and to abolish transfers.

What do you enjoy most about practising and advising in this area?

What is interesting about this practice is that it provides insight into the state of remote work in different regions and industries. Until last year, we believed that the adoption of remote work was still not progressing quickly in Japan. However, the situation is changing by the minute, and we have come to realise that remote work is gradually gaining a foothold in Japan.