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Newsflash Japan (06/20) Balancing Home Office with Office Work – New Legal Challenges at the Workplace

Although the state of emergency has been lifted for the entire territory of Japan on 25 May 2020, the health risks related to COVID-19 persist, and many companies have chosen to continue teleworking (or working from home, "home office") in one way or another. In this Newsflash we discuss some legal questions resulting from these changes at the workplace and the consequences for employer and employees.

1: Home Office

Q 1.1: Is an employer granting commutation allowance to its employees entitled to stop the payment thereof, if employees are working from home, or to reduce the amount of the allowance? Has the employer a right to request a refund of already paid commutation allowance to home office employees?

- The payment of a commutation allowance is not mandatory under the Labor Standards Act and a respective payment obligation arises only when such obligation is explicitly stipulated in the employment rules or in the employment agreement(s) of the employee(s) concerned.

Often, employment rules stipulate that a commutation allowance is paid to cover the actual costs incurred for commutation to the workplace, subject to submission of respective evidence (e.g. a copy of the commuting pass, etc.). In such case, it is principally feasible to stop payment for periods during which employees are ordered to work entirely from home, because actual commuting expenses do not incur.

On the other hand, if employees work only partially from home, and commute to the company on certain days, the employer needs to continue paying the monthly commuting allowance with respect to already purchased commuting passes (since such passes usually are not refunded by the transportation companies in case of usage during several days of a month only). However, if the employer instructs the employees not to purchase commuting passes in the future, but only to use one-time tickets, it is feasible to reduce the monthly commutation allowance to the actual commutation expenses incurred for the days on which the employee actually commutes to the work place.

- A refund obligation of employees to return their already paid commutation allowance to the company will most likely not be legally enforceable if contested by the employees, unless a refund obligation has been explicitly stipulated in the employment rules or employment contract in the event certain conditions for receiving such allowance (e.g. submission of evidence) are not met.

Q 1.2: Is the employer required to reimburse employees for their expenses incurred while working at the home office?

- Expenses incurred by the employees due to working at home could include telecommunication expenses, whether for contracts with providers or hard- and software equipment, utility expenses due to increased use of own facilities, stationary material, etc.. If it can be demonstrated by the

employee that these expenses have incurred due to and for the establishment of a workplace at home, they need, in principle, to be borne by the employer, unless explicitly stipulated otherwise in the employment agreement or in the employment rules.

- Since it is usually difficult for the employee to specify the expenses incurred in relation to the home office workplace, already due to the need of separation from private expenses, employers may consider stipulating a lump-sum home office allowance in their employment rules for an easier handling. Such additional costs could be off-set with a reduction or abolishment of the commutation allowance for the employees working from home, provided this is clearly stipulated in the applicable employment regulations. As the actual situation may prevail and again occur in the future, it is recommendable to expressly confirm the conditions of home office work and the handling of workplace related expenses and commutation allowance etc. in the rules of employment.

2: Commutation and Working Hours Arrangements

Q 2.1: Are employees entitled to request a change of their working hours so that they can commute outside peak hours to avoid increased infection risks in crowded trains?

- The start and end time of work needs to comply with the conditions stipulated in the employment agreement and the rules of employment, if any, so that even in view of COVID-19, employees in principle need to attend the office according to these regulations.
- However, under the Labor Contract Act and the Industrial Safety and Health Act, employers have the obligation to secure the safety and health of the employees in relation to their work, which, depending on the individual situation of the employee, may also require employers to offer the employees the possibility to change the start and end times of work and to adjust commuting times outside peak hours for safety and health reasons. Otherwise, if employees get infected with COVID-19 for reason of commutation requested during peak hours, this may qualify as a violation of the employer's obligations under the Labor Contract Act and the Industrial Safety and Health Act and thus may result in damage compensation claims of the employees concerned.

For employees commuting with their own car, bicycle or by foot, particular arrangements related to the commutation hours will in principle not be required, as the employer does not need to take account of rush hours in public means of transportation in such case. To avoid that employers need to deal with commuting issues on an individual case-by-case basis, it is generally recommendable to implement a company wide working hour arrangement allowing the employees a certain degree of flexibility to avoid health risks during commutation (for details, please refer to the next topic in Q 2.2).

Q 2.2: What working hours arrangements should an employer consider when resuming office work after the lifting of the state of emergency?

- To avoid commutation of employees during rush hours by introducing a working hour arrangement in the company, the method usually applied in this respect is the flexible working hours system. This allows the employees to individually determine within a pre-determined framework the start and end time of their workday as long as the agreed average weekly working hours during the defined settlement period are reached. This settlement period of a flexible working hours system can be up to three consecutive months. While flexible working hours models may stipulate a so-called "core time" where employees have to work despite the flexible start and ending of their working time, some companies have lately switched to a "superflex"-model without core time and with flexible break times. This model has been proven helpful for employees with the need to align their work and private tasks in a remote work environment.

Another option to limit the number of employees in the office is the implementation of shifts between employees working at home and those working in the office, e.g. by determining groups of employees who will be in the office on specific days/weeks. A reduced number of employees will allow for better physical distancing, and may also raise questions whether an office setting with fixed seating for every employee is still required when remote work becomes the "new normal" and the number of employees in the company office is e.g. limited to half of the workforce. For many companies, the rules of employment may need to be reviewed and adjusted in this regard.

3: Changes of the Working Environment

Q 3.1: What changes of the working environment should employers contemplate when employees resume work at the office after the lifting of the state of emergency?

On 14 May 2020, the Ministry of Health, Labor and Welfare (MHLW) circulated a notice to national employer associations recommending certain organizational changes of the workplace also for the time after the state of emergency has been abolished¹, and published a checklist with items to be taken into consideration in this respect².

Based thereon, many local public authorities³ and also private organizations, such as the Japanese Business Federation Keidanren⁴, have published guidelines and recommendations regarding countermeasures against a spread of COVID-19 at the workplace.

Whereas currently no binding obligations in this respect have been implemented in Japan, a failure by an employer to implement appropriate countermeasures may qualify as violation of the employer's obligations to secure the safety and health of the employees at the work place, and in the worst case, e.g. in case of actual infections at the workplace, result in damage compensation claims of the employees in addition to the occurrence of a labor accident.

A core part of the measures recommended by the MHLW is to secure sufficient fresh air circulation at the workplace (which may also require adjustments of the air conditioning if windows cannot be opened, as is often the case within modern buildings), the avoidance of gatherings (e.g. no meetings with several participants), and the observation of distance rules (ideally minimum two meters) between individuals. If a respective adjustment of the office environment is difficult, the implementation or continuation of home office, flexible working hours, and extensive use of telephone/video conferences, etc. will be indispensable as long as the actual situation continues.

With respect to hygiene, the guidelines recommend the provision of masks and disinfection liquids, as well as the regular disinfection of jointly used areas. Further, the sufficient instruction of employees and their supervisors regarding health risks and available countermeasures, as well as the implementation of reporting obligations of employees regarding irregularities of their health situation, if related to COVID-19, are important according to the guidelines. Because all these measures constitute fundamental changes at the workplace, they do require a thorough review and update of existing employment rules and workplace regulations.

¹(<https://www.mhlw.go.jp/content/11302000/000630690.pdf>)

²(<https://www.mhlw.go.jp/content/11303000/000616869.pdf>)

³(https://jsite.mhlw.go.jp/gunma-roudoukyoku/content/contents/20200331_COVID19_syokuba_taiou_yousei.pdf)

⁴(https://www.keidanren.or.jp/policy/2020/040_guideline1.html)

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