As the COVID-19 virus spread all over the world, it is also spreading in Japan. This report provides basic viewpoint regarding labour management issues under the current pandemic circumstances.

1. Relationship with the obligation to consider safety

(i) It is necessary to understand that an employer is obligated to give consideration to their employees' safety (Labor Contract Law, Article 5) and must take preventative measures against infections in the workplace.

An employer may be liable for damages if the employer fails to adequately address the treatment of employees who are suspected of being infected or fails to implement appropriate measures that should be taken by the employer to prevent such infections. However, since the obligation to consider safety does not impose absolute liability on the employer, the employer will not be legally liable even if an employee gets infected as long as appropriate measures and considerations were taken. Although it is necessary to give the utmost consideration to the employees' health, it is also necessary for each employer to consider the extent to which such measure are necessary and reasonable for the continuation of business without causing an undue deterioration in the business circumstances.

Concrete items for such consideration, such as staggered hours, telecommuting, and leaves of absence, etc., are described afterwards.

(ii) Regarding the payment of remuneration, which is an issue in considering the stay at home or furlough, an employer needs to conduct a legal review to determine whether (i) the full amount of remuneration must be paid (Civil Code, Article 536); (ii) whether the absence allowance of 60% is sufficient (Labor Standards Act, Article 26); or (iii) whether payment may not be required (force majeure).

At present, in order to establish a system in which employees can take leave, it is advisable, at the request of the government, that each company pay over 60% (e.g. 100%) of base salary in accordance with the employment regulations. Listed companies, among other employers, also need to consider various remedies to fulfill their social responsibilities (protecting employment etc.).

Nevertheless, it is important to first thoroughly examine and analyze the scope of legal liabilities, then clarify what "needs to be done" and what "should be done", as well as consider the former ("needs to be done") and the additional and flexible responses to the latter ("should be done") based on its financing situations and the physical strength of each employer and future prospects.

At this time, if the requirements for payment are met, the employees will be eligible for employment adjustment subsidy payments. Therefore, collecting such information will be an important task and it is important to have access to the Ministry of Health, Labour and Welfare's Q&A and other information from government and other public offices.

2 Personnel labor management

(i) Basic concept

In response to the COVID-19 pandemic, many employers have already introduced staggered work hours and telecommuting.

First, it is an urgent task to take preventive measures against infections based on the circumstances of the employer. It is also necessary to reduce the risk of contact with infected persons to the greatest extent possible, and, in particular, to sufficiently reduce certain environmental concerns: (i) poorly ventilated enclosed space, (ii) crowded areas, and (iii) places where conversations and other oral activities are made at short distances at the same time, each of which has been shown by the Governmental Expert Committee to increase the risk of the spread of the infectious novel coronavirus.

The first step in accomplishing these measures is to check the working environment of the workplaces, factories, stores, etc. in which employees work, and then identify and analyze the risk of the spread of infections in light of the three conditions mentioned in the preceding paragraph. In addition, taking into consideration the risk of the spread of infections in the event of commuting or business trips, measures such as staggered hours, telecommuting, prohibiting or reducing business trips, and closing workplaces will be considered and implemented. However, it should be kept in mind that in the event that there is any sign of overshoot in areas where employees (or their families living with them) are infected or where workplaces are located after the review and implementation of the measures, it is necessary to immediately reconsider the measures. It is also necessary to continue to take appropriate measures in response to the constantly changing circumstances.

It is important to thoroughly implement self-management so that employees and their families can understand whether they have any suspicious disease or not, and in the event of any suspicious disease, it is also important to encourage employees to take leave promptly or to decide a response policy within the company so that they can order them to stay at home. In addition, it is also important to consider and implement the introduction of staggered hours and telecommuting so as to prevent the spread of

disease as much as possible.

(ii) Promotion of staggered hours and telecommuting

a. Staggered hours

This should be addressed as a first step as a means of preventing the spread of infection among employees.

Many employers seem to have the following provisions for staggered work hours under the working regulations of the employers.

Article ● (Working Hours)
The starting time and ending time and rest periods shall be as follows:
Provided, however, that they may be mover to an earlier or later time due to business circumstances or other unavoidable circumstances.
(Omitted hereinafter)

In this case, an employer may order employees to work at staggered hours in accordance with the above provision (provided, however, that an order to work early in the morning or to work late at night, which would make it difficult to strike a balance with daily life, and which is not generally implemented in light of socially accepted norms, should be avoided because it is highly likely that such an order will become invalid as an abuse of rights).

When ordering staggered work hours, it is common to indicate several patterns of the starting time and ending time, ask the wishes of employees, and consider which pattern each employee is to be assigned, while taking into account the perspective of continuing the business. There may be cases where employers are forced to order employees to work staggered hours in a pattern that does not comply with the wishes of a particular employee, but consideration should be given to appropriately arranging such staggered hours by taking into consideration the family circumstances of the employee as much as possible.

In the event that an employer does not have the basic provision above in its rules of employment, staggered working hours must be introduced with the consent of the individual employees.

b. Telecommuting

From the viewpoint of preventing COVID-19 infections, working at home will be an option to an employer (work at a satellite office is also considered one kind of telecommuting, and there is room for consideration of other options). Nevertheless, even

telecommuting is naturally subject to the Labor Standards Law and the Industrial Safety and Health Law, etc., so it is necessary to pay attention to the relationship with these labor standards-related laws and regulations when considering the system.

The primary obstacles to introducing telecommuting, including telecommuting, are the identification of working hours and information management.

In the event that the working hour system and other working conditions are the same for the introduction of telecommuting, it is possible to work telecommuting under the existing rules of employment without changing the rules of employment. However, in certain cases, such as requiring employees to bear communication costs, but only for telecommuting, would require changes to the rules of employment.

In ordinary times, it is normal for an employer to start on a small-scale trial basis with reference to the "Telework Model Employment Regulations-Guidelines for Preparation" and the "Q&A Report on Labor Management, etc. for Introduction of Telework" (the “Q&A”) published by the Ministry of Health, Labour and Welfare. It is also normal for an employer to proceed with the full-scale introduction of the system while solving problems, and both an employer and employees would discuss the establishment of internal rules and the establishment of an information system.

In the case of an employer where telework has been in place but has not yet been used, it would be sufficient to promote its use with this pandemic as an opportunity.

The problem is that an employer that has not yet looked into or introduced telework may be forced to consider and introduce telework on an urgent and temporary basis in order to take preventive measures against infections. Even in such cases, it may be an option to change the rules of employment and formulate and develop rules in the same way as done in ordinary times. However, as a temporary or provisional measure, there are situations where, for example, employees are allowed to work at home on a monthly basis with a view to extending the time for a limited period of 1 or 2 months in order to respond to an emergency. In such cases, it may be preferable to introduce telecommuting with the individual consent of the employees without changing the rules of employment, on the condition that the system is operated in such a way that the cost of communication and working hours are not disadvantageous to the employees.

From the aspect of labor management, it is desirable that a certain level of flexibility can be provided, but attention should also be paid to information management. It is necessary to take into account the risk of information leakage when working at home while the information system is underdeveloped and the risk of irreparable situations arising from the continuation of business and to impose minimum restrictions on access. If information management cannot be ensured, working from home may be given priority on the basis

that the work requiring access to the information is not allocated to the employee concerned. In the absence of any work assignment, it is inevitable to take into consideration the stay-at-home order and leave described below.

In addition, if there is an infectious person in a company, there is a possibility that the staff members who had been carrying out the work in the same area may become infected at the same time or the area may be blocked for a certain period due to disinfecting or other reasons, making it impossible to carry out the work. In order to avoid this risk, an employer may dived its employees in the same department/section into two or more teams to perform the work and to avoid simultaneous infections. In reality, however, at many companies experience difficulty in introducing a split operation if they do not have sufficient personnel. However, from the perspective of continuing their business, there may be a room for consideration.

(iii) Special leave and leave orders

a. Special Leave

At present, an employer is required to provide an environment that makes it easier for employees to take time off when they have illness, such as a fever.

Regarding the establishment of a paid special leave system, special measures have been established for the Subsidy for Improvement of Overtime Work (Work Awareness Improvement Course). In addition to the annual paid leave under the Labor Standards Law, subsidies have been established (up to a maximum of 8,330 yen per day) for employers that made their employees take a paid leave, regardless of whether they are regular employees or non-regular employees, as support for the taking of leaves by employees due to their children's temporary absences from elementary schools because of COVID-19, etc.

There is no objection to the desirability of providing an environment in which employees can take leaves at ease while utilizing the above-mentioned subsidies.

However, problems still remain, such as people who do not meet the subsidy conditions or where the maximum amount of the subsidy is exceeded. The establishment and granting of special leave is not legally obligated as an employer. Employers need to understand that special leave is preferable but is not mandated, and need to make a decision by taking into consideration the employer's strength and other factors.

b. Stay at Home (Suspension from Work) and Leave of Absence Order (Furlough)

In the event of an infectious disease, it is necessary to order not only the relevant employees but also other employees to stand by at home (suspension from work) since

they are people in close contact with the infected person.
In addition, even in situations where a definitive diagnosis has not been made at the stage of suspected infections, it is possible to clearly indicate to the employee or other employees that they are on a home standby in order to prevent the spread of the infections.
In such cases, the legal problem of how to deal with remunerations arises. In addition, there are cases where it is not practical to suspend the operation of factories due to the potential impact on business activities, but not the infectious disease itself. In this case, how to handle employees' remuneration is also a problem.
In conclusion, it is necessary to first understand that the necessity of paying wages, etc. needs to be comprehensively considered in each case, and that uniform laws cannot be applied.
Section 26 of the Labor Standards Law stipulates that "when an employer asks an employee to take a leave due to a reason attributable to the employer", the employer must pay at least 60% of the average employee's pay during the leave period.
Although there is a common view that force majeure events should be excluded from the scope of "reasons attributable to the employer" in Section 26 referred to in the preceding paragraph, it is understood that the "force majeure" event must satisfy the following two requirements:(i) the cause of the accident is on that occurred outside the business, and (ii) the accident could not have been avoided even if the employer had exercised the utmost care as a reasonable employer. In this case, it is necessary to examine and apply it to each individual case. "Reasons attributable to the employer" under Article 26 of the Labor Standards Law is are broader than "events attributable to creditors" as stipulated in the first paragraph of Article 536.2 of the Civil Code, and "reasons attributable to the employer" is interpreted to include management and administrative obstacles attributable to employers. In light of this, employers need to determine individually whether there is a "reason attributable to the employer" under Article 26 of the Labor Standards Law or "events attributable to creditors" as stipulated in the first paragraph of Article 536.2 of the Civil Code.
For example, if it is possible for an employee to engage in work by such means as working from home, and if it is recognized that the employer has not made the best efforts to avoid the leave, the case may fall under the category of leave due to "reason attributable to the employer" (The Q&A No.1).
Since a new coronavirus infectious disease has been designated as an infectious disease under the Infectious Diseases Act, prefectural governors are allowed to restrict the work of employees actually infected. It is thought that such measures will be taken at present, therefore, in such an event, the employee's leave does not fall under the category of leave

due to “reason attributable to the employer," and the employer does not need to pay a leave allowance, etc. They are treated the same as an ordinary sick leave. If the employee in question is covered by health insurance, the insured person will be entitled to sickness and injury benefits if the requirements are met.

One problem occurs where infection is suspected but not confirm. If the employer voluntarily decides to put an employee who is able to continue his/her duties on leave, this case would generally fall under leave due to “reason attributable to the employer" and a leave allowance would need to be paid (The Q&A No.3). Nevertheless, there is also the view that even if an employee who has been in contact with a person a reasonably suspected of infection is ordered to suspend work due to, for example, a persistent fever of 37.5 degrees or more for 4 days or a severe fatigue or difficulty breathing (dyspnea), the employee’s leave does not fall under the category of leave due to “reason attributable to the employer". In addition, the employer is obligated to pay the employee’s salary as well a leave allowance. In this case, there is no need to completely follow the administrative guidance (such as the Q&A). It is considered advisable to make judgments based on the individual circumstances.

In addition, the fact that the workload has decreased sharply due to COVID-19 does not necessarily mean a "force majeure" but rather a leave due to “reason attributable to the employer" applies, and leave allowances need to be paid. However, in cases where a business is suspended due to the suspension of business by an overseas business partner due to COVID-19 infectious disease, it may be deemed "a force majeure" event after comprehensively taking into consideration the degree of dependence on the business partner, the possibility of other alternative measures, the period from the suspension of business, concrete efforts to avoid the suspension of business as an employer, etc., and therefore, it is indispensable to consider the measures under each individual circumstance. If, after making the best efforts that should be made by reasonable employers to avoid leaves of absence, such as thoroughly considering having workers work from home, etc., and an order is issued to take leaves of absence, there may be sufficient cases where the order does not fall under the category of leave due to “reason attributable to the employer" and can be regarded as "Force Majeure."

(iv) Dismissal for the purpose of reorganization and termination of employment

In addition, some employers are facing serious problems, and some are already considering procedures for dismissal or termination of employment due to difficulty in business management, or so-called dismissal for the purpose of reorganization procedures. Nevertheless, even in the case of an unprecedented emergency, it is

imperative to examine the four requirements i) the necessity of personnel reduction, ii) the fulfillment of the obligation to avoid dismissal, iii) the rationality of the selection of employees, and iv) the appropriateness of the procedures.

In particular, ii) the fulfillment of the obligation to avoid dismissal is regarded as the most important requirement, and it is necessary to consider the absence from work (furlough) if there is an excess number of employees. However, it is a matter that naturally should be taken into account in the situation of the company's financial position, etc.

With regard to a temporary leave (temporary leave with return to job, it should inevitably be assumed that an employer has the obligation to pay a leave allowance because they constitute business and administrative disabilities attributable to the employers, and therefore fall under the category of "reason attributable to the employer" set forth in Article 26 of the Labor Standards Law. However, in a situation where tourism and eating and drinking businesses have been severely influenced by the recent COVID-19 infections and has is close to bankruptcy, a leave of absence in that case may be interpreted as not falling under the category of leave due to “reason attributable to the employer".

If measures such as the above measures to take leave and voluntary retirement applications are taken, dismissal for the purpose of reorganization can be valid. Some employers are now considering termination or dismissal of employment, but in this case, it is advisable to take into consideration the requirements for dismissal for the purpose of reorganization and decide how to deal with the situation they are facing.

(v) Employment offer revocation

In addition, there have been moves to revoke employment offers made to prospective employees who were expected to join the company.

However, there is a judicial precedent that rules that the grounds for revocation of employment offers should be based only on such facts that could not have been known at the time of employment offer was made and could not be foreseen. It also ruled that the revocation of employment offers on the grounds of such facts is limited to such facts that can be objectively and reasonably accepted in light of the purpose of the retention of the right to revoke employment offers and can be accepted as appropriate under socially accepted norms.

Normally, in light of the doctrine of judicial precedents mentioned above, the revocation of employment offers cannot be considered effective in terms of whether the employer has lost its business or its business prospects have deteriorated. Many

companies must recognize that the hurdle for unilateral revocation of employment offers remains high. However, in the tourism, accommodations, and eating and drinking industries, where the continued existence of the business was endangered due to COVID-19 infections, there may be cases where revocation of employment offers can be effective after conducting the same examination as the above-mentioned employment arrangement.

In cases where there are concerns that cannot be avoided effectively, it is necessary to consider obtaining the consent of individual prospective employees or reaching an agreement by presenting a certain amount of settlement. However, it is necessary to recognize that in practice objections from prospective employees are easily assumed and the hurdles are high.

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