

Japan's New Government Intending to Amend Worker Dispatch Law

Introduction

While the normal focus of our regulatory newsletters usually relates to issues specific to the financial services sector, in this month's newsletter we will focus on an issue that not only applies to financial services companies but to all companies in Japan: temporary dispatched workers. Dispatched workers have come to make up nearly one-third of Japan's labour force. The laws in Japan surrounding dispatched workers have evolved over time, and it seems that they are about to change once again.

Although the dispatch system was created in order to strengthen employee rights, according to Japan's new government this system has evolved into a means of allowing companies to minimise employee protections. It is for this reason that the government has made it a priority to amend the Worker Dispatch Law, limiting the type of workers that companies will be allowed to employ on a temporary basis. These amendments to the law will affect the relationships many companies have with a substantial part of their work forces as well as the employment status of many workers. While many companies with or seeking to establish offices in Japan will be surprised to learn of such amendments, it is nonetheless important for these companies to stay informed about these reforms in order to remain compliant with the changing law.

Japan's Employee Classification

There are three main categories of temporary workers in Japan:

- dispatched workers;
- service workers; and
- independent contractors.

For this newsletter, the two categories of importance are dispatched workers and service workers.

For dispatch work, the worker receives direction from the company to which the worker is dispatched; however, the worker maintains an employment relationship with the dispatching agency as opposed to the company. Therefore, the worker has a contract with the dispatching agency, not the company. There is also a worker dispatch contract between the company and dispatching agency. The key is that in this scenario the dispatched worker receives day-to-day instructions from the company, not the dispatching agency.

For service work, the worker will work at the company, but does so to carry out services that the service agency has agreed to provide to the company pursuant to a contract between the company and the service agency. The worker is directed and supervised by the service agency and no employment relationship exists between the worker and the company.

Current Worker Dispatch Law

Under Japanese law employers are expected to look after their employees until the employees retire. With regards to terminating an employee's contract, this cannot be done without a justifiable reason. In practice, it is very difficult for a company to justify the termination of an employee's contract.

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It is for this reason, employers wanting increased flexibility in hiring and firing workers, that many employers hire temporary dispatched workers. This is because these workers are dispatched by temporary staffing agencies and hired by the employer for a fixed term. At the end of the fixed term contract employers have no obligation to renew the term of employment and are free to lay off the dispatched worker depending on the company's business needs.

While employers can hire employees on fixed term contracts without going through a temporary staffing agency, many employers prefer to indirectly hire employees through these agencies due to the legal implications. If an employer were to hire an employee directly, then the employer may run the risk that repeated renewals of the employee's fixed-term contract, or the employer's conduct or communications, may create a reasonable expectation of continuing employment for the employee. However, if the employer were to hire the same employee through a temporary staffing agency, much of this risk will generally not exist.

Changes to Japan's Worker Dispatch Law

In 2009 a political shift occurred in Japan when a new coalition government came into power. This government, through its manifesto, has vowed to comprehensively amend the current law with regards to dispatched workers. These changes can be divided into three categories.

Banning the dispatch of temporary registered, deregulated workers

Dispatch workers can be split into the following two categories:

- Specified dispatched workers – These workers have contracts with the dispatch agency which makes them continuous employees of the agency. Therefore, even if they are not being dispatched out to a company, they will still receive their salary and social and labour insurance through and from the dispatch agency.
- Registered dispatched workers – These workers are registered with and have contracts with the dispatch agency, but their salary, and the payment thereof, is dependent upon being dispatched out to a company. If the worker is not dispatched to a company, then that worker will not receive a salary.

Registered dispatched workers can be further split into the following two categories:

- Dispatched workers of a specified "26 types" – These workers fall into one of 26 specific types of work. These types of work are those that require expert knowledge, technical skill or experience in order to do the work or work that is considered to require special employment management with regards to the workers due to the peculiarity of the work or employment form.
- Deregulated workers – These workers are those that do not fall within the 26 types of workers discussed above.

Under the new government's amendments, temporary staffing agencies will no longer be able to dispatch workers who are registered and who do not fall within one of the 26 types (registered, deregulated workers).

Banning the dispatch of temporary workers to manufacturing jobs

Japan's government plans to ban the dispatch of all registered dispatched workers to manufacturing jobs.

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Other changes

Beyond the changes listed above the government also intends to implement many changes to the Worker Dispatch Law. Some of these changes include:

- Dispatched workers and regular workers will need to be treated the same in the workplace.
- A deemed direct employment system will be put into place whereby dispatched workers from temporary staffing agencies who continue to work beyond their term in their fixed term contracts will be able to notify their employers that they are now their employers, as opposed to the temporary staffing agency.
- A company which accepts workers from a temporary staffing agency will be responsible for making salary payments to the employee, as well as paying the employee's social and labour insurance premiums, if the temporary staffing agency fails to do so. This will be true even if the accepting company has already made a payment to the temporary staffing agency and the staffing agency fails to pay the worker.
- The accepting company will also be responsible for the medical check-ups of dispatched employees. These check-ups must occur at least once a year, or more, depending upon the number of hours worked by the employee.

The Future of Dispatched Workers

Companies that currently hire the type of dispatched workers which will be prohibited once the reforms come into place will need to find new ways to staff themselves. One way to do this will be to hire these dispatched workers as regular employees of the company. However, many employers will be hesitant to do so as this will grant these workers the full legal protections discussed above and will not allow companies to fluctuate their employment numbers depending on the business needs of the company.

A second option that companies may adopt is to hire more service workers in place of the banned dispatched workers. While these service workers will not legally be able to receive instructions from the company itself, they will not be afforded the legal protections that regular employees of a company will receive. This is the option that many companies, especially manufacturing companies, have already begun to implement. The concern with this option is that employers will hire service workers, but treat them as dispatched workers. To be clear, this would be a violation of the law, and while it may make the most commercial sense for a company, it is not clear how the government will respond to such violations. Theoretically, the heads of a company can be imprisoned for such a violation. However, in the past, if the government has chosen to take action against such a violation, the government has normally chosen to fine the company, suspend the business of the company or seek a business improvement order.

Conclusion

In the past, companies in Japan have made frequent use of dispatched workers, often in an attempt to allow themselves to hire and fire employees depending upon their business needs. However, the new Japanese government is looking to make amendments to the current Worker Dispatch Law in an attempt to improve job security for many Japanese workers.

It is important for companies who take on dispatched workers to be aware of the types of dispatch work which will soon be banned and to have a plan as to how to deal with this situation. While there are different options available, each company will need to evaluate these options in a commercial context and decide which one will work best for it.

The content of this article does not constitute legal advice and should not be relied on as such. Specific advice should be sought about your specific circumstances.

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