# Individual Employee Termination (Japan)

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A Practice Note addressing legal and practical considerations in Japan regarding termination of individual employees. It reviews the reasons supporting a lawful individual employee termination as well as what constitutes an unlawful termination. It also addresses the procedures for individual employee terminations and best practices to minimize the risk of legal challenges.

There are several important legal issues to consider when an employer or employee is seeking to terminate employment in Japan. These include the reason for termination, any process that must be followed, the termination payments which may be owed to the employee, and when a termination is unlawful.

This Note sets out the key details on these topics and explains which laws underpin them.

## Terminations in Japan

The parties can terminate their employment contract by:

- Mutual agreement.
- Unilateral termination by the employer (dismissal). In such cases, there can be two types of dismissal, which are:
    - ordinary dismissal; or
    - disciplinary dismissal.
- Unilateral termination by the employee (resignation).

Although multiple employees can be simultaneously dismissed due to the employer's business or economic necessity, there is no concept of collective termination (dismissal) or mass termination (dismissal) under Japanese law.

## Dismissal

Ordinary dismissal arises if the employer terminates the employee for a reason described in:

- The work rules of the company These are contained in an internal company policy describing employment conditions and other employment related matters.
- The individual employment contract but not necessarily due to a wrongful action or inappropriate behavior of the employee. For example, an employee's inability to perform their work due to illness.

 

Disciplinary dismissal occurs where the employer terminates the employee due to the employee's wrongful action or inappropriate behavior.

Dismissal of employees (including both ordinary dismissal and disciplinary dismissal) on a non-fixed term contract is restricted (Article 16, *Labor Contract Act (Act No. 128 of 2007)*). Dismissal which is without *objectively reasonable grounds*, or which is *inappropriate in general societal terms* is deemed invalid as abuse of rights. In other words, the law requires that any dismissal must be with just cause and the dismissal cannot be too harsh on the employee. This rule applies to all employees regardless of categories of employees and may not be exempted in any contract (that is, a contract cannot create an at-will employment).

The Labor Contract Act further requires *unavoidable circumstances* to dismiss fixed-term employees during their employment term (Article 17 (1), Labor Contract Act), which is stricter than the objectively reasonable grounds and appropriate in general societal terms criteria.

These required grounds of the dismissal are mandatory, and the parties cannot contract out of the application of these requirements under the law.

The grounds for dismissal must be described in the individual employment contract or the work rules of the company. To demonstrate the objective reasonable grounds, the employer cannot dismiss an employee with a reason not listed in the individual employment contract or the work rules as grounds for dismissal. The following are the most common grounds for dismissal:

- The inability of the employee to perform their work, or lack of eligibility (for example, inability to perform their work due to injury or disease, significantly inferior work performance, and falsification of the employee's resume).
- Business or economic necessity.
- Violation of discipline at the workplace or disturbance of company order.

Even with the objectively reasonable grounds, the dismissal is invalid if deemed inappropriate in general societal terms. The courts strictly review what qualifies as inappropriate and often look into:

- Whether the grounds for dismissal reached a significant level.
- The employer took all available measures to avoid the dismissal.
- Whether there is any circumstance that the employer should forgive the employee.

(Supreme Court, 268-17, 31 January 1977.)

Japanese courts consider other factors for dismissal due to business or economic necessity (see *Business or Economic Necessity*).

## Poor Performance

Japanese courts have stated that it is not sufficient for the employer to dismiss the employee by only showing the employee's inferior performance. The employer must also demonstrate that, based on the employee's long-term employment, such inferior performance has become an obstruction to the business operations and has reached such a level that the company should terminate the employee from the company (Tokyo District Court, 820-74, 10 August 2001).

The employer must successfully show, based on the objective records of a periodical performance review that the employee's poor performance continued for a certain period (the length of which needs to be considered on a case-by-case basis as there is

 

no set period required by law) despite the employer's effort to improve the performance of the employee (for example, through performance improvement plans).

The employer must also show that the employee is obstructing the business operations of the company (for example, showing offensive or defiant attitude against their supervisor).

It is generally difficult to convince a Japanese court that the employer has sufficient grounds to dismiss the employee due to poor performance. Therefore, the employer, instead of dismissing the employee often requests them to voluntarily resign from the company in exchange for the severance package.

## Incapability

The employer cannot dismiss the employee during their leave of absence due to injury or diseases related to work and 30 days after return to work (Article 19, *Labor Standard Act (Act No. 49 of 1947)*). To dismiss an employee incapable of performing their work due to personal injury or disease, the employer must first adjust the work or allow the employee to take a leave of absence to provide an opportunity to recover from such injury or disease. The employer may dismiss the employee due to their incapability if the employee cannot recover from the injury or disease after being provided such an opportunity.

## Business or Economic Necessity

Japanese courts consider the following four factors to determine the validity of dismissal based on the employer's business or economic needs:

- The necessity to reduce the workforce. In such cases, the employer must show strong necessity based on its financial difficulties (for instance, state of insolvency, or cumulative deficit).
- Efforts made to avoid dismissal. For example, the employer must try other measures that are less severe than dismissal, such as job rotation or voluntary resignation.
- Whether the method of selecting employees to be dismissed is reasonable. Here, the employer must select the employees to be dismissed based on objective and reasonable criteria.
- Whether the employer followed proper procedures. The employer must sufficiently explain and discuss with the labor union (if any) before dismissal.

(Tokyo High Court Vol. 30, 5-1002, 29 October 1979.)

Dismissing employees to streamline business operations or strengthen the company's competitiveness without any financial difficulties is unlikely to be a valid ground for dismissal. The employer must meet all four factors above for the dismissal to be valid. The objective and reasonable criteria when selecting the employee to be dismissed should also be applied in a fair manner.

If the collective agreement requires the employer to consult with the labor union before dismissing an employee based on the employer's business or economic needs, the employer must discuss with the labor union as required under the collective agreement. Even if there is no such requirement, the employer must, in good faith, explain to the labor union or employees, the details of the planned dismissal.

## Misconduct

 

Misconduct of employees is typically listed as grounds for disciplinary actions in the work rules of the company. The typical grounds of disciplinary actions described in the work rules are:

- Falsifying past records.
- Neglect of duty (for example, absence without notice, continuously being late for work, and poor performance).
- Disobedience to work order (for example, disobeying an order from their supervisor or refusing to relocate).
- Obstruction of business operation (for example, inappropriate labor dispute actions taken by a labor union or escalating of disagreements between the employees).
- Violation of discipline at workplace (for example, embezzling company's assets, leaking confidential information, and sexual harassment).

Disciplinary action must be:

- Made with objectively reasonable grounds.
- Deemed appropriate in general societal terms considering the characteristics and situation of the misconduct.

(Article 15, Labor Contract Act.)

Whether the disciplinary action is appropriate is also determined by either considering:

- The procedure the employer followed (for example, whether the employer has formed a disciplinary committee to decide on the disciplinary action, if required under the work rules).
- Whether the employer has granted the employee the opportunity to explain the misconduct.

Disciplinary dismissal is the most severe disciplinary step the employer takes with no notice to the employee. The employer usually provides in its work rules that retirement allowance is either not paid or reduced if the employment contract is terminated by disciplinary dismissal. Due to its severity,

Japanese courts strictly review whether the disciplinary dismissal is appropriate. Therefore, even if the employer believes that the misconduct by the employee is sufficient to justify the disciplinary action, the employer may still choose to go with an ordinary dismissal.

## Process for Dismissal

In the case of disciplinary actions, including a disciplinary dismissal, the employer must follow the procedure described under the work rules (for example, forming of the internal disciplinary committee). Even if such a procedure is not stipulated under the work rules, the employer must give the employee opportunity to explain the misconduct.

There is no legal requirement or established practice related to the investigation of misconduct of employees in Japan. The employer is also not required to give any formal warnings to the employee before dismissal.

There is no specific statutory requirement for consultation, or approval in connection with terminating an employment contract. The employer is not required notify any local authority. However, if a collective agreement is entered with the labor union

 

and the agreement stipulates that the employer must consult with the labor union before dismissing any union members, the employer must follow such process.

### Notice

In case of dismissal, the effective date of termination is described in the dismissal notice.

Under the Labor Standards Act, an employer must provide 30 days' prior notice, or payment of 30 days' average wage in lieu of such notice before dismissing an employee. Average wage includes all wages paid to the employees (for example, base pay, commission payment, allowances such as commuting allowance, and housing allowance). However, wages paid on a quarterly basis or for example, a bonus to be paid on a semi-annual basis or wages paid temporarily are not included when calculating the average wage.

However, prior notice to terminate employment is not required if:

- There is unavoidable circumstance such as a natural disaster.
- The dismissal of an employee was for reasons attributable to the employee. This applies only if the employee committed material violation of discipline or acted disloyally to the extent that prior notification is no longer appropriate.

The employer must obtain an acknowledgment from the local Labor Standards Inspection Office to exercise these exceptions.

The employer also does not have to give prior notice to the following employees:

- An employee hired on a day-to-day basis (excluding a person who has been employed consecutively for a period of more than one month).
- An employee employed for a fixed period of no longer than two months (excluding a person who has been employed consecutively for a length of time exceeding such period).
- An employee employed in seasonal work for a fixed period not longer than four months (excluding a person who has been employed consecutively for a length of time exceeding such period).
- A person who is in a probationary period (excluding a person who has been employed consecutively for a period of more than 14 days).

For more information regarding the detailed steps and procedures around notice, see *Practice Note, Notice of Termination (Japan)*.

## Resignation

The employment contract can be terminated if the employee resigns. The employee must give notice to the employer of their intention to terminate the employment contract. The employee must give two weeks' notice before the termination date (Article 627 (1), *Civil Code (Act No. 89 of 1896)*). The employer may also accept a shortened notice period.

There is no statutory requirement for the form of such notice and the employee can notify the employer verbally. However, the employer should request the employee to submit a written notice. In case of voluntary resignation by the employee, the employer is not required to follow any procedure to effectuate the termination.

 

## Mutual Termination

Since the requirements to be able to dismiss the employee under Japanese law are strict, employers frequently resort to mutual termination instead of dismissing the employee. To request the employee to voluntarily resign through a mutual termination agreement, the employer often provides a severance package in exchange for such resignation although this is not legally required.

Although there is no statutory requirement for entering into a separation agreement with the employee, it is recommended that parties do so for evidence purposes.

The terms of the separation agreement vary among companies but often include clauses on:

- The termination of employment.
- Severance pay.
- Return of property belonging to the company.
- Confidentiality.
- Discharge of duties.
- Settlement (that is confirmation that no rights and obligations remain between the parties other than agreed in the separation agreement).

## Unlawful Terminations

The employer cannot dismiss the employee during the following periods:

- When the employee is taking leave of absence for medical treatment due to an injury sustained or illness suffered in the course of employment, and 30 days thereafter.
- During the leave of absence before and after childbirth, and 30 days thereafter.

(Article 19, Labor Standards Act.)

An employer who violates this provision can be punished by either:

- Imprisonment of not more than six months.
- A fine of not more than JPY 300,000.

(Article 119 (Item 1), Labor Standards Act.)

## Probationary Period

The courts describe the nature of the employment contract during the probationary period as an employment contract where the employer reserves its termination rights. While there are no clear rules on the minimum or maximum length of the probationary period, a three-to-six-month period is often put in place.

 

However, termination of the employment contract during or upon expiration of the probationary period by the employer is regarded as dismissal, and the employer must show objectively reasonable grounds and appropriateness in general societal terms (see *Dismissal*).

Compared to ordinary dismissal after the probationary period, the courts allow a broader exercise of termination right in case the employee is found to be incapable or not eligible during the probationary period.

## Termination Payments

The employer is not required by law to make any payment when it dismisses an employee (except for the payment of the 30-day average wage in lieu of 30 days prior notice if applicable).

Employers should note that they cannot justify dismissing an employee by making any payment to the employee. However, there are discussions in the government and legislature to introduce such law, but it has not been produced yet.

When requesting a voluntary resignation, the employer often offers a severance package to the employee but there is no specific formula to calculate the amount of severance pay (special retirement allowance) and the amount depends on several factors including:

- Negotiation with the employee.
- Length of service.
- Whether there is sufficient grounds to dismiss the employee.

Retirement allowance and severance pay claims lapse by prescription if they are not made within five years from the date the severance pay and retirement allowance were supposed to be made (Article 115, Labor Standards Act).

## Post-termination Obligations

Although it is not required by law, the employer often requests the employee to submit a written pledge covering the confidentiality and non-compete obligations after the termination of the employment contract.

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