

Equal pay for equal work: recent trends

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In recent years, the government-established Council for the Realisation of Work Style Reform has frequently discussed how to realise the international trend of equal pay for equal work in Japan. Further, the Japanese courts have rendered some noteworthy judgments regarding the equal pay for equal work principle. This update provides an overview of how the principle is being effected in Japan, including the future legislative amendments in this regard.

Equal pay for equal work principle

The definition of 'equal pay for equal work' varies from country to country. In Europe, this principle is generally considered to mean that equal wages must be paid to employees whose duties are considered equal or equivalent. This is because both regular and non-regular employees are generally subject to a wage system under which wages are determined based on the salary grade for each type of duty agreed to by the employers and trade unions in each industry. Conversely, Japanese wage systems have historically been characterised as 'age-based wage systems' or 'wage systems based on occupational ability'. When determining wages under such systems, Japanese employers generally consider not only an employee's duties, but also his or her:

- age;
- years of service;
- academic history;
- occupational ability; and
- performance.

Japanese law includes no principle under which employees whose duties are equal or equivalent must receive equal pay. In addition, the Japanese courts have adopted no such rules on the equal pay for equal work principle. Rather, the principle is considered to mean that employees must receive equal pay when the value of their work is equal, taking into account various circumstances, including each employee's duties and potential contributions to his or her employer.

As such, it is generally acceptable under Japanese employment law for there to be reasonable differences between the wages of regular and non-regular employees, even if the duties assigned to them are the same.

Recent legislative trends

Existing laws

At present, the relevant Japanese employment laws (eg, the Labour Contract Act and the Part-Time Employment Act) include provisions that aim to realise the principle of equal pay for equal work by avoiding the possibility of unreasonable differences in the employment conditions (including wages) of 'regular' employees (ie, permanent, full-time employees) and 'non-regular' employees (ie, fixed-term or part-time employees).

Further, the Part-Time Employment Act prohibits employers from discriminating against part-time

AUTHORS

**Koki
Yanagisawa**



Yuki Sawada



employees when determining their employment conditions if their duties and the extent of any changes to their duties and workplace are the same as those of full-time employees.

Recent government policies

The government recently announced a policy to realise the equal pay for equal work principle, which is aimed at improving the employment conditions of non-regular employees, as part of its Plan for Promoting the Dynamic Engagement of All Citizens developed at the June 2016 Cabinet meeting. Pursuant to such policy:

- in December 2016 the Council for the Realisation of Work Style Reform announced the Draft Guidelines for Equal Pay for Equal Work; and
- in March 2017 the Ministry of Health, Labour and Welfare Expert Committee issued the Committee Report for the Realisation of Equal Pay for Equal Work.

In light of the above, on June 16 2017 the Labour Policy Council submitted a recommendation to the Minister of Health, Labour and Welfare on the legal reform regarding equal pay for equal work. The government is shortly expected to submit a draft amendment to the relevant laws in line with this recommendation to the National Diet, which is expected to take effect in April 2019.

Proposed amendments to existing laws

As is the case with existing law, the equal pay for equal work amendment proposed in the Labour Policy Council's recommendation is expected to address the difference in employment conditions between:

- fixed-term and permanent employees;
- full-time and part-time employees; and
- temporary employees dispatched from worker dispatching business operators and other employees working in the same workplace.

Accordingly, the amendment will not cover the difference in employment conditions between regular employees who are engaged in the same duties.

A summary of the major amendments proposed in the recommendation with respect to the difference in employment conditions between fixed-term and permanent employees and full-time and part-time employees is set out below.

Criteria as to whether difference is unreasonable

As described above, under existing law, the difference between the employment conditions (including wages) of regular and non-regular employees may be unlawful if the difference is considered 'unreasonable'. More specifically, Article 20 of the Labour Contract Act stipulates that differences between the employment conditions of fixed-term employees and those of non-fixed-term employees will be evaluated for unreasonableness by considering:

- the employees' duties and the extent of responsibility accompanying said duties;
- the extent of any changes to the employees' duties and workplaces; and
- other circumstances.

Article 8 of the Part-Time Employment Act provides the same rule for evaluating differences in the employment conditions of part-time and other employees.

In determining whether a difference in the employment conditions of regular and non-regular employees is unreasonable, some Japanese courts have considered whether the difference in the specific employment condition at issue is considered unreasonable, while others have rendered decisions that broadly consider the difference in all or multiple employment conditions of the relevant employees. In light of this issue, the Labour Policy Council has proposed that the relevant laws clarify that unreasonableness should be determined by considering the differences in the specific employment conditions at issue. Further, the Labour Policy Council's recommendation has proposed that 'other circumstances' – which is one of the three factors used to determine unreasonableness, as mentioned above – should be replaced with more specific factors to be taken into consideration, such as an employee's work achievements, occupational abilities and experience.

Prohibition on discriminating against fixed-term employees

While the Part-Time Employment Act prohibits employers from discriminating against part-time employees if their duties and the extent of any changes to their duties and workplaces are the same as those of full-time employees, Japanese law contains no provisions prohibiting discrimination against fixed-term employees. As such, part-time employees on a fixed-term contract are better protected than full-time employees on a fixed-term contract. In order to eliminate this unfair situation, the Labour Policy Council has proposed that a provision be introduced prohibiting employers from discriminating against fixed-term employees, including full-time employees on fixed-term contracts, when determining their employment conditions if the duties and the extent of any changes to their duties and workplaces are the same as those of employees with no fixed-term contract.

In addition, in light of Japan's rapidly aging society, recent discussions have considered whether employers should be prohibited from providing less favourable employment benefits to fixed-term employees who have been re-employed after reaching retirement age than those provided to regular employees below the retirement age. In a similar dispute, while the Tokyo District Court rendered a judgment nullifying such unfavourable employment conditions, the Tokyo High Court reversed the judgment and the case is now pending before the Supreme Court. The Labour Policy Council's recommendation noted that this issue should be further discussed and that it would be appropriate to clarify the rules in this regard in due course.

Employers' obligation to explain difference in employment conditions

Under existing law, employers are not obliged to provide their employees with explanations regarding differences in the employment conditions of regular and non-regular employees. However, the draft amendment is expected to introduce a provision obliging employers to provide their employees with explanations of any difference in employment conditions and the reasons for such difference on request.

Comment

It is important that a country's rules regarding the equal pay for equal work principle align with its employment practice and social system. The Japanese government is in the process of introducing the aforementioned amendments to the rules on equal pay for equal work, which will significantly affect Japanese employment practice. As such, Japanese employers should closely monitor the progress of these amendments.

For further information on this topic please contact [Koki Yanagisawa](mailto:koki_yanagisawa@noandt.com) or [Yuki Sawada](mailto:yuki_sawada@noandt.com) at Nagashima Ohno & Tsunematsu by telephone (+81 3 6889 7000) or by email (koki_yanagisawa@noandt.com or yuki_sawada@noandt.com). The Nagashima Ohno & Tsunematsu website can be accessed at www.noandt.com.

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