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This issue covers the following topics:

■ Employment Law

Amendment on Regulations regarding Working Hours and Annual Paid Leave

I. Introduction

Recently passed amendments to Japanese labor and employment laws will become effective on April 1, 2019. Below we set out in brief an overview of the important amendments regarding working hours and annual paid leave. It is important to note from the outset that certain elements of the amendments will enter into force at different times depending on the size of the relevant company or entity. In some cases, the new regulations will become effective in relation to small or medium sized companies from 2020. We have specified these cases in our overview below.

II. Regulations Entering Into Force on April 1, 2019 for All Companies

(i) Monitoring of employee working hours

From April 1, 2019, an employer will be required to monitor the hours during which an employee is capable of undertaking their intended work[1]. In principle, this monitoring should be based on an objective standard, such as records of timecards or log-in and log-out records of an employee's PC. These records must be retained for a period of three years. In practice, this regulation effectively only applies to employees in managerial and supervisory positions, or other positions where the employer was not previously required to monitor the employee's working hours using an objective standard[2].

If the number of recorded hours per month exceeds the statutory standard working hours of 40 hours per week (i.e. 160 hours per month for a 28 day month) by 80 hours or more, the employer should notify the employee of the recorded hours and, upon the employee's request, organize for the employee to consult with a doctor if the employee is suffering from chronic fatigue.

(ii) Mandatory exercise of annual paid leave

From April 1, 2019, if an employee is granted annual paid leave of ten or more days in one year, the employer will be required to designate five days of the employee's annual

1 This may differ from an employee's working hours in situations where, for example, an employee finished their work but did not log-out from his/her PC while having non-work related conversations with his/her co-workers.

2 For employees whose actual working hours are already required under a guideline issued by the Ministry of Health, Labor and Welfare to be monitored by the employer using, in principle, an objective standard, the employer is permitted to deem such actual working hours as being the hours during which an employee is capable of undertaking their intended work for the purpose of this regulation. Please note that the working hours should be recorded in a wage register (in Japanese, chingindaichou).

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paid leave to be used within the relevant year. However, if the employee voluntarily uses (or voluntarily designates the timing of the use of) five days or more of their annual paid leave before the employer's designation above, the employer is not required to, and not allowed to, designate the timing of the employee's annual paid leave to be used. Due to these amendments, employers will be required to amend their work rules to set forth how such designation can be made by the employer.

(iii) The "Highly Professional System"

From April 1, 2019, an employer will become able to adopt a so-called "highly professional system" regarding working hours and overtime regulations. Under the system, employees who (i) engage in work that is highly professional and not tied to the number of hours required for such work; and (ii) whose salary is above certain amount, will be exempted from working hours regulations, such as overtime regulations. The definition of high professional work and the salary threshold will be set forth in further regulations. In order to adopt this system, an employer is required to go through certain procedure including (a) creating a labor-management committee; (b) such labor-management committee resolving to designate certain work of the company, from among those defined in further regulations, as 'highly professional work'; (c) submitting such resolution to the relevant authority; and (d) obtaining consent from any employee who will be subject to the system.

(iv) Flexible working hours system settlement period

In addition to the foregoing, effective on April 1, 2019, the maximum settlement period under the flexible working hours system will be extended from one month to three months.

III. Regulations Entering Into Force on April 1, 2019 for Large-sized Companies and April 1, 2020 for Small and Medium-sized Companies

Currently, the maximum number of overtime working hours per month and per year, which should be set forth in a labor-management agreement regarding overtime working hours, is regulated only by a guideline and does not include any criminal sanctions. The guideline provides that, in principle, the maximum overtime working hours should be 45 hours per month and 360 hours per year; however, the guideline sets forth an exception under special circumstances where an employer is permitted, up to six times (i.e. months) per year, to extend the maximum number of hours up to an amount that is currently unregulated but which must be specified in the same labor-management agreement. In connection with this, from April 1, 2019 for large companies (April 1, 2020 for small and medium-sized companies), the maximum number of overtime working hours will be regulated by law and infringements could incur criminal sanctions. The maximum number of overtime working hours will remain unchanged at 45 hours per month and 360 hours per year; however, the law will begin to specifically regulate the above-mentioned exceptional overtime working hours which should be set forth in the labor-management agreement.

It is important to note that this amendment will only apply to a labor-management agreement that will commence in or after April 2019 (or April 2020 for small and medium-sized companies). Thus, for example, if an employer has entered into a labor-management agreement that is effective until late 2019, the employer is not required to amend that current labor-management agreement.

IV. Final Comments

With the labor regulations poised to take effect, prudent employers should take this time to confirm that their policies and practices are ready for the amendments above and to ensure an easy transition to the new labor and employment landscape in Japan.

Recent Publications

- ***The International Comparative Legal Guide to: Litigation & Dispute Resolution 2019 - Chapter 22 Japan***
  (Global Legal Group Limited, February, 2019)
  by Koki Yanagisawa
- ***Getting the Deal Through - Cartel Regulation 2019 Japan***
  (Law Business Research Ltd, January,2019)
  by Eriko Watanabe, Koki Yanagisawa (co-author)
- ***Chambers Global Practice Guides Corporate Tax 2019 Japan - Law & Practice***
  (Chambers & Partners Publishing, January 2019)
  by Yushi Hegawa
- ***Practice Area Focus: Tax - The future looks bright for Japan's tax practitioners***
  (The Legal 500 Website fivehundred, December 2018/January 2019, December 2018)
  by Yushi Hegawa
- ***Bond offerings under Japanese securities law***
  (International Law Office Online Newsletter "Capital Markets-Japan", December 2018)
  by Masaki Konishi
- ***The International Comparative Legal Guide to: Merger Control 2019 - Chapter 29 Japan***
  (Global Legal Group Limited, December 2018)
  by Ryohei Tanaka
- ***The Guide to M&A Arbitration - First Edition Part II (Survey of Substantive Laws) Chapter 15 Japan***
  (Law Business Research Limited, December 2018)
  by Hiroki Aoki
- ***Work Style Reform Act***
  (Euromoney Institutional Investor PLC, December 2018)
  by Yoshiro Tanimoto

■ Big Data / Personal Data

Recent Developments in Supporting the Utilization of Data

I. Introduction

At the World Economic Forum's 2019 Annual Meeting in Davos, Switzerland held in January 2019, Prime Minister Shinzo Abe stressed the importance of ensuring the free flow of useful data while protecting personal and other security-related information by saying that "the engine for growth is fueled no longer by gasoline, but more and more by digital data". The Japanese government has been very keen and active in facilitating the utilization of data, which is an essential element of Japan's Future Investment Strategy 2018 for promoting innovation and propelling the growth of Japan's economy and society. Below we will highlight some of the recent developments regarding the handling of data in Japan, particularly in the context of promoting the utilization and transfer of data.

II. Framework for the Mutual and Smooth Transfer of Personal Data between Japan and the EU

After repeated negotiations between the European Commission and the Personal Information Protection Commission of Japan (the "PPC"), the framework for the mutual and smooth transfer of personal data between Japan and the EU (the "Framework") was implemented on January 23, 2019.

Prior to January 23, 2019, certain measures were legally required to be taken if personal data was being transferred between Japan and the EU. As for the transfer of personal data from Japan to a recipient located outside of Japan (including the EU), except for very limited exceptional circumstances, such transfer was only permitted under the Act on the Protection of Personal Information of Japan (the "APPI") if either (i) the transferor of such personal data had obtained the consent of the person to whom such personal data relates (the "Data Subject") regarding the transfer; or (ii) the recipient of such personal data had established a system that conformed to standards prescribed by the PPC rules which ensure that the recipient is implementing measures that are equivalent to those that a personal information handling business operator in Japan is required to implement concerning the handling of personal data under the APPI. Similarly, under the EU General Data Protection Regulation (the "GDPR"), the transfer of personal data from within the EU to Japan generally requires either (a) the execution of an agreement between the transferor and the recipient that includes appropriate clauses regarding adequate measures for the protection of privacy and personal data (known as 'Standard Contractual Clauses'); or (b) the consent of the Data Subject.

These requirements were recognized as burdensome obstacles for business activities of Japanese or European companies that involve the transfer of personal data between Japan and the EU. However, as a result of the implementation of the Framework, personal data can be transferred between Japan and the EU without obtaining the consent of the Data Subject or implementing the other measures mentioned above. Thus, the implementation of the Framework will have a substantial impact on business activities conducted between Japan and the EU, and the PPC expects that "the world's largest area of safe and smooth data transfers will be created. For global business operators, it is expected that operational efficiency will improve, the cost will be reduced and new business models will be developed, which may also benefit consumers".

One caveat is that there are still some conditions that must be met in order to enjoy the benefits of the Framework. As for the transfer of personal data from Japan to a recipient in the EU, such recipient must be located within the 31 member countries of the EEA and must also comply with the regulations of the GDPR. For the transfer of personal data from the EU to Japan, all parties must comply with the "Supplementary Rule Regarding the Handling of Personal Data that has been Transferred from the EU Based on the Adequacy Decision of the Act on the Protection of Personal Information" published by the PPC, which sets forth requirements that are additional to the APPI.

III. New Protection for Big Data under the Unfair Competition Prevention Act

Due to revolutionary changes in the utilization of data, such as IoT and AI, as part of the Fourth Industrial Revolution, recognition of the increasing importance of data is growing, but the cases where data is subject to legal protection under Japanese law remain limited. For instance, data is an intangible asset and thus cannot be the subject of rights under the Civil Code, such as ownership or possession. Also, data can be protected as intellectual property such as copyrights, patent rights and trade secrets, but it is generally difficult for data that is mechanically generated by devices, such as sensors and cameras or the usage logs of smartphones, to fulfill the requirements of copyrights and patent rights, such as the creative element. Further, in order to be protected as a trade secret ("Trade Secret") under the Unfair Competition Prevention Act of Japan (the "Unfair Competition Act"), it must (i) be managed as a secret; (ii) have utility; and (iii) not be in the public domain. In practice it is difficult to satisfy item (i) or (iii) above if the data is planned to be distributed to, or shared with, a certain number of parties through a transaction.

Given the lack of adequate legal protection of data, data owners tend to be reluctant to share their data with others because they believe it is likely to lose its value once it is disclosed to third parties, notwithstanding that data is an essential source for developing the economy and society. In 2018, to enhance the legal protection of data in order to

encourage its utilization, the Ministry of Economy, Trade and Industry ("METI") amended the Unfair Competition Act to include the wrongful acquisition, disclosure, use and so forth of 'data for limited provision' ("Protected Data") under the scope of "unfair competition" acts. Similar to how Trade Secrets are protected under the Unfair Competition Act, injunctions can also be issued and monetary damages can be awarded by a court in respect of data infringements and provisions relating to the presumption of the amount of damage will also apply. However, unlike Trade Secrets, criminal sanctions will not apply with respect to Protected Data. This amendment is scheduled to come into force on July 1, 2019.

Protected Data is defined under the amended Unfair Competition Act as technical or business information that is accumulated in a reasonable amount by electronic or magnetic means (meaning an electronic form, magnetic form, or any other form that is impossible to perceive through human senses alone) and is managed by electronic or magnetic means as information provided to specific persons on a regular basis. To avoid the overlap of the application of the Unfair Competition Act between Trade Secrets and Protected Data, data that is managed as secret is excluded from the definition of Protected Data. Big data is generally expected to fall within the scope of the definition of Protected Data, but must still satisfy the three required elements to be protected under the Unfair Competition Act; namely (i) accumulated in a reasonable amount (significant accumulation); (ii) managed by electronic or magnetic means (electromagnetic management); and (iii) provided to specific persons on a regular basis (limited provision). The meaning of each element is explained in the "Guideline on Data for Limited Provision" which was published by METI in January 2019.

IV. Contract Guidelines on Utilization of AI and Data

In June 2018, METI published the "Contract Guidelines on Utilization of AI and Data", which consists of two sections: Data and AI (the "METI Guidelines"). The Data section provides guidance on matters that should be considered when preparing, negotiating, or entering into data contracts (i.e. contracts relating to the utilization, processing, transfer and other handling of data) from the perspective of promoting reasonable negotiations and the execution of data contracts, reducing transaction costs and advancing the use of data contracts. The AI section explains a fundamental approach to be taken in relation to contracts that concern the development and utilization of AI-based software from the perspective of promoting the development and utilization of software using AI technology. The METI Guidelines also provide sample provisions for data contracts and development contracts for AI-based software.

As explained above, data owners have general concerns regarding the insufficiency of the legal protection of data under Japanese law. Thus, from a practical perspective, it is very important to have contractual protection over data; however such contractual practices, though growing, are still not considered mainstream. In light of such circumstances, the Data section of the METI Guidelines aims to provide relevant information and illustrate major issues or considerations that are relevant to data contracts. It analyzes data contracts through the following three categories: (i) "Data Provision Contracts", which concern the provision of data from one party to another single party; (ii) "Data Generation Contracts", which concern the handling of data generated with the participation of multiple parties; and (iii) "Data Sharing Contracts", which concern data sharing platforms.

Although the METI Guidelines are not of a legally binding nature, they have a substantial impact on contractual practice generally in Japan. In fact, with reference to the METI Guidelines, industry-specific contract guidelines on the utilization of data have been published in a number of sectors, including agriculture and industrial safety. Thus, as an area that is quickly evolving, it is important to keep an eye on the developing contract practices in relation to data utilization in Japan.

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