

## NO&T Labor and Employment Law Update

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## Coronavirus Disease (COVID-19)

### Legal Issues Regarding COVID-19 Vaccinations and How Companies Should Handle Them

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#### ■ Introduction

Approximately two years have passed since the first State of Emergency was declared in Japan due to the Coronavirus Disease (COVID-19). As in other countries, the number of those vaccinated is increasing in Japan. According to The Nikkei (a leading Japanese newspaper), as of March 24, 2022, 79.4% of Japan's population has received two doses of a COVID-19 vaccine.<sup>1</sup> Although the number of infected people had been falling for some time, with the spread of the highly infectious Omicron variant since January 2022, that number has been rising sharply again. Against this backdrop, the Japanese government has started a third round of COVID-19 vaccinations (i.e., booster shots).

Companies are subject to a duty of care for their employees' health and safety (see Article 5 of the Labor Contract Act). In relation to the COVID-19 pandemic, companies must also take appropriate measures in the workplace to prevent the spreading of infectious diseases. If an employee who was likely infected in the workplace were to die due to the employer's insufficient infection control measures, theoretically, the company could be held liable for breaching its duty of care for its employees' health and safety.

Given that COVID-19 vaccines have shown some preventive effects, companies are expected to encourage their employees to receive a COVID-19 vaccine. However, some employees are reluctant to be vaccinated, because the side effects of a COVID-19 vaccine could be more severe than those of other vaccines such as the influenza vaccine, among others.

In this newsletter, we will explain the legal issues regarding COVID-19 vaccinations and how companies should handle them.

#### ■ Whether companies can mandate that employees obtain COVID-19 vaccines

In the U.S., the Biden administration has adopted measures to combat the spread of COVID-19. Under these measures, companies with 100 or more employees were required to have their employees vaccinated against COVID-19 in September, 2021. In compliance with these measures, many companies required their employees to be vaccinated against COVID-19. In some cases, the employment of employees who refused to be vaccinated against COVID-19 was terminated. However, on January 13, 2022, in its widely discussed ruling, the U.S. Supreme Court issued an injunction prohibiting the government from making COVID-19 vaccinations mandatory.

In Japan, the law applicable to vaccines in these circumstances is the Immunization Act. Under Article 9 of such act, Japanese residents aged 12 years or older are required to make efforts to be vaccinated. Therefore, companies cannot mandate that their employees be vaccinated against COVID-19. In addition, in a "Q&A for Vaccination of

<sup>1</sup> <https://vdata.nikkei.com/newsgraphics/coronavirus-japan-vaccine-status/>

COVID-19” posted on its website, the Ministry of Health, Labour and Welfare (“MHLW”) expressed the same position.<sup>2</sup>

As we mentioned above, companies are subject to a duty of care for their employees’ health and safety (Article 5 of the Labor Contract Act) and are required to take appropriate measures to prevent the spread of infectious diseases in the workplace. Accordingly, in particular for certain type of businesses that require face-to-face communications with clients or colleagues, due to the nature of the business, including businesses that require (i) face-to-face collaborative work among employees, (ii) the hospitality industry, (iii) over-the-counter services, it is understandable that companies may wish to strongly encourage their employees to be vaccinated against COVID-19. In addition, since some countries have relaxed the entry and exit restrictions for those vaccinated against COVID-19, it may be necessary for companies requiring employees to make overseas business trips to strongly encourage their employees to be vaccinated against COVID-19.

We will explain below the measures companies can take against employees who are unwilling to be vaccinated against COVID-19.

■ **Approaches that companies can take relating to employees who are unwilling to be vaccinated against COVID-19**

I. **Whether companies can reassign unvaccinated employees to duties that do not involve in-person communication**

In Japan, the work rules of companies and/or employment agreements with employees typically provide that “the company may order employees to be transferred to another department or to be reassigned to other duties due to business necessity.” If such provision exists, unless there is a special agreement between the employee and the employer that limits the employee’s type of work and/or location of work, the employer (i.e., the company) may order the employee to be transferred or to be reassigned without the employee’s individual consent.

However, the company’s right to order a transfer is subject to certain limitations under court precedents, if there exist special circumstances such as (i) the company has an improper motive or purpose, or (ii) the transfer causes a considerable disadvantage to the employee beyond the extent to which the employee would normally be subjected, as a result of weighing the extent of the business necessity and that of employee’s disadvantages, the transfer order would be held invalid.

In this regard, if employees who are unwilling to be vaccinated engage in work that involves in-person communication, such as providing hospitality services and/or that necessarily involves in-person collaboration with colleagues, among others, in the normal course of their duties, we believe that the business necessity for the employer to take measures to prevent the spread of COVID-19 will likely be found to exist.

We also believe that, in the context of the coronavirus pandemic, it is unlikely that temporarily reassigning employees who engage in work requiring frequent communication with an indeterminate number of people, such as hospitality services and over-the-counter services, among others, to other duties in which in-person communication with others is much less, would be considered to be based on an improper motive or purpose, unless other special circumstances exist.

Therefore, after considering factors such as (i) the nature of the employee’s duties, (ii) the extent to which measures are necessary to prevent the spread of COVID-19, (iii) whether the employer has taken any measures to prevent such spread other than transferring employees, (iv) the extent to which the employee may be disadvantaged, if there are justifiable reasons, it may be a viable option for the employer to order employees who are unwilling to be vaccinated against COVID-19 to be temporarily reassigned to other duties that do not require as much communication or in-person communication with others. However, given that some employees may be unable to be vaccinated due to pre-existing medical conditions or other health-related reasons, the employer should carefully consider such option to transfer, and obtain the employee’s understanding beforehand.

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<sup>2</sup> The Ministry of Health, Labour and Welfare “Q&A for Vaccination of COVID-19” “If I am not willing to get a vaccine of COVID-19, can I choose not to get it?”  
<https://www.cov19-vaccine.mhlw.go.jp/qa/0053.html>

The “Q&A for Vaccination of COVID-19 (for companies)” posted on the website of the MHLW indicates that ordering an employee who is unwilling to be vaccinated against COVID-19 to be transferred would not be uniformly prohibited.<sup>3</sup>

## II. Whether it is possible for companies to have only vaccinated employees go on business trips

Similar considerations to those mentioned in I. above should be given to business trips. Employers have the discretion to decide who to order or instruct to go on business trips, except in exceptional cases where doing so could be considered an abuse of rights. Since it is expected that business trips necessarily require the use of public transportation or other means of transportation that are also used by many others, generally, it will likely be acceptable for the company to consider an employee’s vaccination status as a factor in selecting employees who will be instructed to go on a business trip.

Therefore, for non-regular business trips, it is acceptable for companies to give preference to vaccinated employees from among multiple candidate employees for such business trips. In particular, in relation to overseas business trips, since many countries have different entry and exit restrictions, depending on the relevant person’s COVID-19 vaccination status in the context of the COVID-19 pandemic, it is unlikely that a court would find such selection by an employer in such circumstances to constitute an abuse of the employer’s right.

## III. Whether companies can order employees to work from home

Can companies require employees who are unwilling to be vaccinated to work from home and allow employees to come to the office on the condition that they are vaccinated?

In such case, if, in the context of the COVID-19 pandemic, it is highly necessary for companies to take measures to prevent the spread of COVID-19 in the workplace, we believe that companies are allowed to order employees unwilling to be vaccinated to work from home.

Employees may claim that such an order would constitute “power harassment” (i.e., “isolation in relationships at the workplace,” which is considered a type of harassment in the workplace). However, if the company has a work environment in place that employees can essentially work from home, we believe that, in the interest of preventing the spread of COVID-19, the company can order employees to work from home if there is a COVID 19 outbreak. Even if such cases, if there are duties that the employees cannot perform at home, it would be advisable for the company to allow employees come to the office for a short time to minimize contact with others and/or to encourage online communications internally to avoid alienation.

### ■ Can companies require new employees to be vaccinated against COVID-19 as a condition of employment?

Finally, can new employees, rather than existing employees, be required to be vaccinated against COVID-19?

Under Japanese law, it is considered that companies have the discretion to decide who they employ unless otherwise restricted by laws or regulations. Although the law prohibits companies from discriminating against qualified employees or applicants based on gender, age, disability, or other grounds, there are currently no laws or regulations prohibiting companies from making vaccination against COVID-19 a condition of employment for qualified employees or applicants. Accordingly, we believe that companies can make vaccination against COVID-19 a condition for employment for qualified employees or applicants.

However, as we mentioned above, considering that, in Japan, persons 12 years or older are only required to make efforts to be vaccinated, it would be advisable for companies to carefully consider whether there is a business necessity for a vaccination mandate. In addition, when asking applicants about their vaccination status during job interviews due to business necessity, it would be advisable for companies to take into account the applicant’s privacy, among other factors, by explaining to applicants in advance that their response to the question would be voluntary.

<sup>3</sup> The Ministry of Health, Labour and Welfare “Q&A for Vaccination of COVID-19 (for companies) “ 10-Q12” Can the company order employees who have not been vaccinated to be reassigned other duties that do not require much in-person communication with others?” [https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/kenkou\\_iryuu/dengue\\_fever\\_ga\\_00007.html#Q10-12](https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/kenkou_iryuu/dengue_fever_ga_00007.html#Q10-12)

In the “Q&A for Vaccination of COVID-19 (for companies)” posted on its website, the MHLW indicates that it would be advisable for companies to fully consider the reasonableness of requiring vaccination as a condition of employment for qualified employees or applicants, but also indicates that imposing such condition itself is not prohibited by laws or regulations.<sup>4</sup>

■ **Concluding Remarks**

The prolonged COVID-19 pandemic has prompted companies to take a different approach to managing employment-related matters than they normally would. We will provide information and/or updates on topics of interest in light of changing social conditions and recent employment law-related amendments.

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<sup>4</sup> The Ministry of Health, Labour and Welfare “Q&A for Vaccination of COVID-19 (for companies)” 10-Q13” With regard to new hiring, is it possible for companies to make it a condition that qualified employees or applicants be vaccinated to be employed?” [https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/kenkou\\_iryuu/dengue\\_fever\\_qa\\_00007.html#Q10-13](https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/kenkou_iryuu/dengue_fever_qa_00007.html#Q10-13)

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