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**Market Intelligence**

# LABOUR & EMPLOYMENT 2022

Lexology GTDT Market Intelligence provides a unique perspective on evolving legal and regulatory landscapes.

This *Labour & Employment* volume features discussion and analysis of emerging trends and hot topics within key jurisdictions worldwide.

**Regulatory trends**
**Sector focus**
**#MeToo movement**
**Restrictive covenants**

START READING

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# Contents



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# Japan

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QUESTIONS

## 1 What are the most important new developments in your jurisdiction over the past year in employment law?

Japan's working-age population is declining because of a falling birthrate, an increasing number of elderly people, and a diversification of workers' needs. In light of this, increasing labour productivity through investment and innovation and creating an environment in which employees can expand their employment opportunities and fully demonstrate their motivation and capabilities are important. In an effort to address these issues, 'work style reform' has been promoted with the aim of realising a society in which diverse work styles are available depending on workers' individual circumstances.

### Strengthening of working hours regulations

In June 2018, a work style reform bill was passed in the National Diet. The bill amends the Labour Standards Act, the Industrial Safety and Health Act and related laws. The most significant changes were amendments to the overtime work regulations. Specifically, the amended Labour Standards Act provides that the upper limit for overtime is, in principle, 45 hours a month and 360 hours a year. Also, even if a labour-management agreement on special circumstances is concluded, the upper limit is less than 100 hours' overtime and holiday work per month, 720 hours' overtime per year, and an average of 80 hours' overtime and holiday work for any two to six-month period.

The amended Labor Standards Act has been taking effect in phases since April 2019. Beginning in April 2023, an increased rate (ie, 50 per cent) of the overtime premium rate will apply for overtime work hours in excess of 60 hours per month, even in small and medium-sized businesses. And, beginning in April 2024, the upper limit of 960 hours per year will be applied to the vehicle driving and construction businesses for which the upper limit regulation was exempted until


March 2024. This is a pressing issue in the logistics and construction industries, where labour supply remains a serious issue.

### Equal/balanced treatment between non-regular employees and regular employees

On 1 April 2020, amendments to the Act on the Improvement of Personnel Management and the Conversion of Employment Status for Part-Time Workers and Fixed-Term Workers went into effect. The amended Act prohibits creating differences in base salary, bonuses and other benefits between part-time and fixed-term employees (ie, 'non-regular employees') and non-fixed-term employees (ie, 'regular employees') based on their duties and level of responsibility and the extent of changes in their job descriptions and assignments. The amendments are intended to achieve equal or

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> "'Work style reform' has been promoted with the aim of realising a society in which diverse work styles are available depending on workers' individual circumstances."

balanced pay for equal work and to improve the working conditions of non-regular employees.

In light of the body of court precedents (including Supreme Court judgments), the Japanese courts tend to view differences in benefits between regular and non-regular employees as unreasonable, if there are no legitimate reasons to treat them differently in light of the purpose of the benefits. In contrast, the courts tend not to interfere with employers' discretion regarding differences in base salary, bonuses and retirement allowances. In Japan, lifetime employment is common and many Japanese companies provide various allowances to employees with families, such as family or spouse allowances or housing allowances. In light of the amended Act and the Supreme Court judgments, some companies have revised their pay structures, eliminating various allowances and simplifying their pay structure.

**2 What upcoming legislation or regulation do you anticipate will have a significant impact on employment law in your jurisdiction?**

Gender discrimination is prohibited under the Labour Standards Act and the Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment (the Equal Opportunity Act). Article 4 of the Labour Standards Act provides that employers must not treat employees differently in terms of pay simply because they are women. In addition, articles 5 and 6 of the Equal Opportunity Act require equal treatment of all employees, regardless of gender, and prohibit gender discrimination.

Although discrimination is prohibited under law, there is still a gender pay gap in Japan. According to the World Economic Forum's Gender Gap Index published in July 2022, Japan ranks 116th out of 146 countries. In particular, the percentage of women holding management-level positions or directorships is remarkably low. To address this situation, the Act on Promotion of Female Participation and Career Advancement in the Workplace was introduced; it came into full force and effect in 2016. Further, on 8 July 2022, the amended ministerial ordinance concerning this Act came into force. This amendment requires large companies with 301 or more employees to disclose information on the gender pay gap. Companies are required to disclose the results of the first fiscal year after the amendment came into force within approximately three months of the start of the next fiscal year. If the fiscal year ends at the end of December 2022, the company will need to disclose the results of the fiscal year 2022 before the end of March 2023.

Such disclosure requirement incentivises companies to review their pay structures to close the gender pay gap.

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**3 How has the #MeToo movement impacted on the investigation or settlement of harassment or discrimination claims in your jurisdiction?**

Thanks to the #MeToo movement, the number of people who are reporting sexual harassment is increasing, but it is not as widespread as in other countries. We believe that one of the reasons for this is that sexual harassment tends to occur in circumstances where there are no witnesses, making it difficult to build a criminal case. In Japan, a highly publicised case of the #MeToo movement involved a female journalist accusing a male journalist of sexual assault. The woman reported the incident to the police, but the case was not pursued as a criminal case. She then filed a civil suit for damages against the male journalist, and in January 2022, the Tokyo High Court found that he had committed acts of sexual violence and ordered him to compensate her ¥3.32 million in damages. In July 2022, this High Court judgment became final with the Supreme Court's rejection of his petition for acceptance of a final appeal.

We believe that one of the reasons the #MeToo movement is not widespread in Japan is the particularly high burden of proof in criminal cases, as prosecutors are often reluctant to prosecute in order to avoid the risk of losing the case. Furthermore, the amount of compensation for pain and suffering awarded by the court is relatively small for victims who win their civil suits, which could demotivate victims from seeking redress in court.

Although female employees have tended to be reluctant to bring sexual harassment cases to court, as a result of the #MeToo movement, reports to companies regarding sexual harassment issues have increased. More recently, a former female Ground Self Defence Forces member reported that she had been sexually harassed in the course of her duties. Following investigation by the Ministry of Defense, it was found that there had been multiple instances

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of sexual harassment and an apology was made to the relevant personnel. Essentially, the investigation confirmed that remarks of a sexual nature and physical contact occurred almost daily in the unit. According to press reports, several female members were victims of sexual harassment.

Under Japanese law, prior to the #MeToo movement, article 11 of the Equal Opportunity Act has required employers to take necessary measures for employment management, such as establishing a system to address worker inquiries appropriately to ensure that they are not disadvantaged in their working conditions and that their working environment is not affected by remarks of a sexual nature and conduct. Under the Minister of Health, Labour and Welfare's guidelines, employers are required to take the following measures:

- clearly set out their anti-sexual harassment policy, inform employees of the policy and ensure that they understand it;
- put systems in place to receive and respond appropriately to employee requests for consultation (including complaints);

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"Legislation for the protection of freelance workers has been debated in the government. The draft bill has not been published yet, but, according to the outline of the new law, it will define the companies' obligations to clarify the terms and conditions of the outsourced business and to make timely payments."

- respond promptly and appropriately to reports of sexual harassment (eg, to investigate the relevant facts, and if the allegations are verified, to give due consideration to the victim and take the necessary action against the perpetrator); and
- take any other necessary actions in connection with the above measures (eg, give due consideration to the employee's privacy and ensure that the employee who reported the sexual harassment or cooperated with an investigation is not disadvantaged).

Sexual harassment is increasingly being reported to companies, and companies that have had consultations or received reports are conducting investigations to verify the facts. However, where there are conflicting statements from the parties involved and there are no witnesses, there are limitations on the extent to which companies with no coercive investigation power can investigate, and it is often difficult to determine whether sexual harassment has occurred. Investigators should carefully review circumstantial evidence such as the transcripts of chats, and other correspondence between the parties and the alleged victim's conduct after the incident. For example, the fact that the victim sought help from the police or another person immediately after the incident and provided specific details about the sexual harassment may support the victim's allegations.

When sexual harassment occurs in the workplace (or when a workplace superior physically sexually harasses subordinates outside the office), not only is the employee culpable as the perpetrator but also the company is liable for damages suffered by the victim as an employer of the perpetrator. Moreover, given that a company owes a duty of care for its employees' safety, it is essential that it takes measures such as raising employee awareness and creating a working environment free of sexual harassment.

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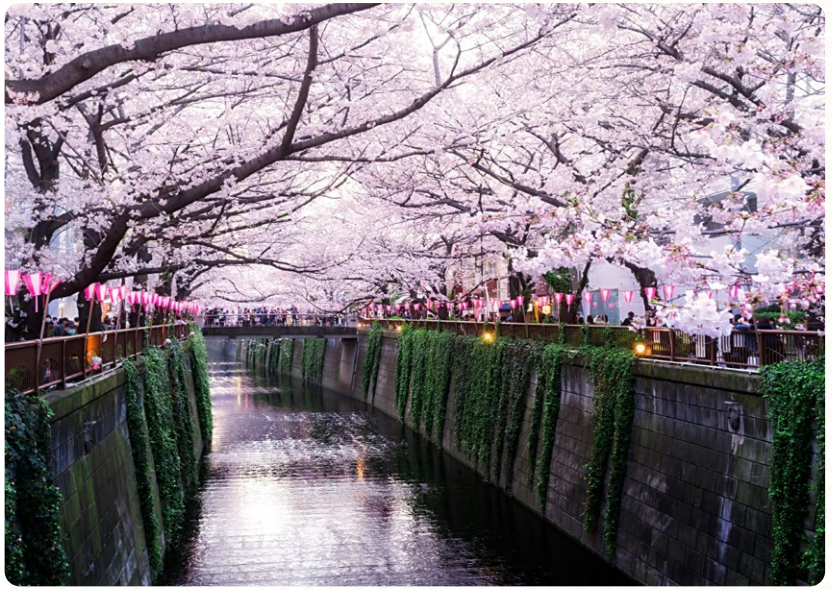
## 4 What are the key factors for companies to consider regarding the enforcement of restrictive covenants against departing employees?

When executives or key employees leave a company and move to a competitor, their former employer is often concerned that they may use or disclose confidential information, know-how or customer information, or solicit customers. Therefore, companies often enter into a post-employment non-compete or non-solicitation agreement or include these obligations in their employment contract.

The validity or enforceability of non-compete obligations, if challenged, is closely scrutinised by Japanese courts, as such post-employment obligations, by their nature, restrict departing employees' freedom of choice of occupation, which is guaranteed under the Constitution of Japan. According to settled court precedents, Japanese courts determine the validity or enforceability of post-employment non-compete obligations comprehensively, taking into account factors such as (1) the purpose of restriction or employer's interest (ie, whether an employer has a legitimate interest to protect by entering into the non-compete agreement); (2) duties and skills of the departing employee during the employment (ie, whether the departing employee held a position that gave access to confidential information); (3) the scope of the restriction (in terms of geographical area of the restriction, the duration of restriction, and the scope of prohibited actions); and (4) the compensation paid to the departing employee for the non-compete obligations.

Under factor (1), based on the court precedents, grounds such as protecting business information and trade secrets (eg, technology, know-how and customer information) of the employer or ensuring non-solicitation of customers by the departing employee may be regarded as reasonable.



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Concerning factor (2), generally, post-employment restrictions on executives such as directors, senior-level employees or engineers who had access to trade secret technical information or know-how during employment tend to be regarded as reasonable.

Regarding factor (3), according to the court precedents, the scopes of the restrictions, such as the geographical area of the restriction, the duration of the restriction, and the scope of prohibited actions, are also important factors. If the geographical area of the restriction area is limited, such limit will generally be considered favourably in determining the validity of the restriction. However, this is not a decisive factor. There is no clear-cut line on what length of the period of post-employment restriction is considered enforceable, as courts determine the validity of the post-employment restriction by taking into account various factors. Generally, if the non-compete period is one year or less, courts usually consider the restriction valid, as long as the other restrictions are reasonable.

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Turning to factor (4), it appears that, in deciding whether a post-employment restraint is valid, courts do not necessarily require separate compensation in consideration for non-competition obligations; courts are more likely to consider factor (4) satisfied if the amount of salary, compensation or remuneration during employment is sufficiently high to justify the post-employment restraint. In sum, to increase the likelihood that post-employment covenants will be enforced, companies should check whether the employee will have access to confidential information, clearly set out the scope of the prohibited actions, and set the duration of the period restriction as one year or less.

**5 In which industry sectors has employment law been a hot topic recently? Why?**

The logistics industry is drawing attention from the perspectives: (1) the upper limit of overtime that will apply soon and (2) the question of whether a freelance driver can be regarded as a 'worker' under labour laws of Japan.

In recent years, due to the increased volume of packages resulting from the expansion of e-commerce, the logistics industry has been faced with a shortage of drivers, which has caused the overwork of drivers. Currently, for vehicle drivers, the upper limit of overtime work hours has been exempted as an interim measure, but the upper limit of 960 hours per year will apply to vehicle drivers from 1 April 2024. This issue is referred to as the 2024 Problem. In response, some companies have started to secure staff by creating a good working environment and have asked customers to increase shipping fees, to offset the potential increase in labour costs.

In addition, to secure staff, companies are turning to freelance drivers. These freelance drivers sometimes work under the direct or detailed instructions of the transportation company. If it is found that freelance drivers are working under the direction or supervision of the transportation company and are effectively considered 'workers' under the Labour Standards Act, the employment regulations may be applicable. In addition, legislation on the protection of freelance workers has been debated in the government. The draft bill has not been published yet, but according to the outline of the new law, it will define the companies' obligations to clarify the terms and conditions of the outsourced business and to make timely payments.

In summary, companies will need to be prepared to secure sufficient staff to reduce working hours of drivers and ensure that they comply with the freelance-related regulations.

> "From a labour or employment law perspective, the shift to a job-based salary system is notable. For some time, many Japanese companies have maintained a seniority-based pay system."

**6 What are the key political debates about employment currently playing out in your jurisdiction? What effects are they having?**

The Kishida Cabinet announced the Grand Design and Action Plan for a New Form of Capitalism in June 2022. The plan focuses on

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growth and distribution strategies. In terms of distribution strategies, strengthening investment in and distribution to people is listed as one of the goals, which will be achieved through facilitating labour mobility via reskilling and promoting wage increases. By June 2023, the Cabinet will prepare guidelines to facilitate labour mobility between companies and industries, such as the introduction of a re-skilling system, which is a learning support measure to move labour to growth areas, and the shift from seniority-based salary to a job-based pay, adapted to Japan.

From a labour or employment law perspective, the shift to a job-based salary system is notable. For some time, many Japanese companies have maintained a seniority-based pay system. In contrast, companies have broad discretion over assignments. Companies may assign employees to a business or department that completely differs from their original assignment and order transfers that involve relocations. This system worked well during the period of strong economic growth period after World War II, when many women did not have full-time employment. Recently, given that many women are working full-time and women's active participation in the work force has been encouraged, the Japanese-style personnel transfer system is not in line with the changing work styles. Following the covid-19 pandemic, remote work has become increasingly widespread and some companies have eliminated personnel transfers requiring relocations or have allowed employees to work from home when their spouses have been relocated for work or for other valid reasons.

The shift to a job-based pay system is likely to affect this Japanese-style personnel transfer and the lifetime employment system. The introduction of a job-based pay system could be construed as restricting the scope of employers' discretion over personnel transfers. As discussed above, under the Action Plan, companies seek to facilitate employment mobility. However, under current Japanese employment legislation, an employer's right to dismiss employees is severely restricted based on the doctrine of abuse of the right to dismiss. If a dismissal is found invalid by a court, the employer is required to reinstate the applicable employees and is not legally allowed to dismiss them by making a payment of fair compensation. In this regard, the monetary redress system for invalid dismissal was discussed in the study group reviewing the monetary redress for invalid dismissals. However, currently, it is highly unlikely that legislation will be put in place for such monetary redress system.

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QUESTIONS

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# The Inside Track

**What are the particular skills that clients are looking for in an effective labour and employment lawyer?**

As Japanese labour regulations, such as working hours regulations, are strict and complicated, and, in practice, it is challenging to manage HR issues in full compliance with applicable laws and regulations, clients seek practical advice to minimise risk. We aim to provide the most practical advice possible based on our clients' needs and the obstacles they face.

**What are the key considerations for clients and their lawyers when handling employment disputes?**

Many employment disputes are negotiated out of court before legal action is taken. At the negotiation stage, it is important for companies and their lawyers to work closely together and respond quickly to any developments. In addition, lawyers should carefully review the relevant facts and evidence and assess the likelihood of whether clients will prevail if the case is litigated in court. We should also consider the pros and cons of settlement, as an early and easy settlement may encourage other employees to also seek a settlement.

**What are the most interesting and challenging cases you have dealt with in the past year?**

We regularly handled cases of wrongful termination. These cases are always challenging, since Japanese employment laws are highly favourable to employees, and the threshold for employers to prevail is considerably high. We provided our clients with detailed, step-by-step advice on how best to proceed and gathered evidence in cooperation with clients, which ultimately and often led to a favourable outcome for them.

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