NAGASHIMA OHNO & TSUNEMATSU
長島·大野·常松 法律事務所

NO&T Japan Legal Update

September, 2023 No. 41

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LABOR AND EMPLOYMENT

Broader Notification Obligations with respect to Terms and Conditions of Employment

I. Introduction

With the March, 30, 2023 amendment to the Ordinance for Enforcement of the Labor Standards Act coming into effect on April 1, 2024, employers will have added obligations to notify employees of the terms and conditions of their employment. Specifically, under the amended law, employers will be required to notify their employees of (i) the scope of changes of workplace location (including changing offices and any change from in-person to remote work, or vice versa) and duties and responsibilities, (ii) the existence and details of renewal limits on fixed-term employment contracts, and (iii) the opportunity for conversion from a fixed term employment contract to an indefinite term employment contract and the terms and conditions of employment following such conversion.

Below is a brief overview of the new notification obligations incumbent on employers with respect to employment terms and conditions.

II. Obligation to notify on hiring and/or renewal of employment contract (current obligation)

Under the current Labor Standards Act, employers are required to notify employees of certain important terms and conditions of employment at the time of hiring. Specifically, employers must notify employees of the following conditions in writing:

i. the term of the employment contract;

ii. in the case of fixed-term employment contracts, criteria for their renewal;

iii. workplace location and duties and responsibilities to be performed;

iv. work start and end time, whether there is overtime work, break time, holidays, and shift changes in cases where workers work in two or more shifts;

v. wage determination calculation and payment methods (excluding retirement allowances, wages paid in special circumstances, and bonuses, etc.), as well as the payroll cut-off date and payment

dates; and

vi. matters concerning termination (including grounds for dismissal).

In addition, under the Act on Improvement of Personnel Management and Conversion of Employment Status for Part-Time Workers and Fixed-Term Workers, when hiring part-time employees or fixed term employees, in addition to the conditions indicated above, employers are also required to notify such employees of the following conditions in writing:

(a) whether there will be salary increases;

(b) whether retirement allowances are paid;

(c) whether bonuses are paid; and

(d) contact person for handling consultation requests and complaints regarding the improvement of human resource management, etc. for part-time employees or fixed-term employees.

III. Strengthening of the obligation to notify the terms and conditions of employment (under the amended law)

(a) Scope of changes of workplace location and duties and responsibilities

Under the current Labor Standards Act, employers are required to notify employees of "workplace location and duties and responsibilities." This obligation is considered satisfied if employers notify employees of workplace location and duties and responsibilities immediately upon their hiring by the employer. However, against the background of an increasing number of companies adopting various employee systems, such as those limiting workplace locations, duties and responsibilities, and working hours, the amended law will require employers to notify employees in writing upon their hiring of the scope of changes of workplace location and duties and responsibilities (i.e., the range of workplace locations where the employee may work and the scope of duties and responsibilities employee may engage in upon any future transfer).

For example, if an employer hires employees on the condition that their duties and responsibilities will be limited to "sales" and their duties and responsibilities immediately after joining the company is indicated as "sales for corporate customers," the employer should state in the column of "details of duties and responsibilities" of the employment contract as follows: "details of duties: (immediately after joining the company) sales for corporate customers; the scope of change of duties and responsibilities: sales." Conversely, for employees without such limitations in relation to their duties and responsibilities, employers may state in the column "scope of change of duties and responsibilities" of the employment contract as follows: "duties and responsibilities as designated by the company."

Employers are required to notify employees of the scope of changes of workplace location and duties and responsibilities not only upon entering into employment contracts but also on renewal of fixed term employment contracts.

(b) Opportunity for conversion of a fixed-term employment contract to an indefinite term employment contract and the terms and conditions following such conversion

Under the Labor Contracts Act of Japan, if a fixed-term employment contract with the same employer exceeds five consecutive years, employees under such employment contracts have the option to convert such fixed-term employment contracts to an indefinite term contract upon request by the employee. This rule is the so-called "conversion to an indefinite-term employment contract" rule and was introduced by amendments to the Labor Contracts Act in 2012. However, it has been pointed out that, although 10 years have passed since such amendment, many employees are not aware of the

rule, and thus the option is underutilized. In light of this, the amended law requires employers to notify relevant employees at every contract renewal when the opportunity for conversion to an indefinite term employment contract arises (i.e., where a fixed term employment contract has been repeatedly renewed with the same employer and the total period of the employment contract exceeds five consecutive years) (i) that they can request conversion of their fixed-term employment contract to an indefinite employment contract and (ii) of the terms and conditions following such conversion. In relation to (i) above, for example, employers must provide in the renewal employment contract that "during the contract term of this fixed-term employment contract, if you make a request to the company to convert your fixed term employment contract to an indefinite-term employment contract, your employment contract will be converted accordingly from the date following the date of expiration of your fixed-term employment contract." As regards (ii) above, employers will need to notify relevant employees of the terms and conditions following such conversion by appropriate methods such as attaching an appendix of the terms and conditions following such conversion to the renewal contract.

In relation to the above notification obligation regarding (i) the opportunity for conversion of a fixed-term employment contract to an indefinite-term employment contract and (ii) the terms and conditions following such conversion, employers are subject to an ongoing obligation to notify employees of such matters upon every renewal of a fixed term employment contract once the right for conversion to an indefinite-term employment contract arises.

(c) The existence and details of renewal limits on fixed-term employment contracts

Fixed-term employment contracts generally end upon the expiration of their contract term. However, under the Labor Contracts Act of Japan, in the following cases employers may be prevented from not renewing such contracts by the so-called "doctrine of restriction of non-renewal on a fixed-term employment contract": (i) if the fixed-term employment contract has been renewed repeatedly and the non-renewal thereof can be reasonably deemed equivalent to the dismissal of an employee with a non-fixed term employment contract under normal social conventions, and (ii) if the employee with a fixed-term employment contract has a reasonable expectation of renewal upon the expiration of his/her fixed-term employment contract. In addition, as mentioned in (b) above, if the fixed-term employment contract with the same employer exceeds five consecutive years, such employment contract must be converted to an indefinite term employment contract upon request by the employee under the so-called "conversion to an indefinite term employment contract" rule. In light of this, in practice, employers often limit the frequency of renewals of fixed term employment contracts in the fixed-term employment contract itself and/or include a non-renewal clause, providing that the employer will not renew the fixed-term employment contract beyond a particular point.

In view of these circumstances, in order to avert issues arising between employers and employees due to misunderstandings with respect to the existence and details of renewal limits on fixed-term employment contracts, the amended law requires employers to notify the relevant employees of the existence and details of renewal limits on fixed-term employment contracts (i.e., any cap on the number of renewals of a fixed-term employment contract or the total period of the fixed-term employment contract) each time a fixed-term employment contract is entered into or renewed.

IV. Conclusion

Proper notification of the terms and conditions of employment on hiring and/or renewal of an employment contract is a statutory duty for employers, and is critical in preventing any issues from arising due to misunderstandings between employers and employees in relation to the terms and conditions of employment. Employers should review their employment contract templates and practices to ensure that they are in line with the amendments above.

[Author]

Misae Shimizu, Partner
+81-3-6889-7570 misae_shimizu@noandt.com

Misae Shimizu is a partner at Nagashima Ohno & Tsunematsu's Tokyo office. Her practice focuses on employment law and litigation. She regularly and extensively advises clients on employment and labor law matters and has represented a variety of Japanese and non-Japanese clients in litigation and labor tribunals in employment and labor-related disputes.
She earned her LL.B. in 2005 from Waseda University, her J.D. in 2007 from Keio University. She also earned her LL.M. in 2018 from the University of Washington School of Law.

M&A

Publication of the Guidelines for Corporate Takeovers

I. Introduction

In Japan, recent years have seen an increase in public M&A deals involving competing proposals. Such cases raise complex issues that the board of the target company must consider and deal with. In addition, a number of judicial decisions have been handed down in 2021 and 2022 on injunctions against countermeasures based on takeover response policies adopted by listed companies in the face of unsolicited acquirers. These facts form the background of the Fair Acquisition Study Group (the **"Study Group"**) launched by the Ministry of Economy, Trade and Industry (**"METI"**) in November 2022, with the aim of improving predictability and presenting best practices for parties involved in acquisitions, and affected capital market participants.

The Study Group examined parties' actions and reactions in unsolicited takeover proposals (both the perspective of the target company's board of directors and the acquirers) to determine best practices for anti-takeover measures. Based on the Study Group discussions and reflecting public comments, METI formulated and published the "Guidelines for Corporate Takeovers" (the **"Guidelines"**) on August 31, 2023.

II. Characteristics and Overview of the Guidelines

While the Guidelines do not have any statutory effect, they are expected to have a significant impact on Japanese M&A practice, as was the case with both the Fair M&A Guidelines published in 2019 and the "Guidelines Regarding Takeover Defense for the Purposes of Protection and Enhancement of Corporate Value and Shareholders' Common Interests" published in 2005 (the "**2005 Guidelines**"). In fact, close analysis of disclosure documents in relation to tender offers launched after the publication of the Fair M&A Guidelines clearly shows the alignment of actual practices with recommended best practices ("**Fairness Ensuring Measures**") for transactions involving a structural conflict of interests, including the formation of an independent special committee by the target which comprises outside directors and other independent members.

While the primary focus of the Fair M&A Guidelines is on management buyouts and acquisitions of a controlled company by a controlling shareholder (in each case where a structural conflict of interests exists), the scope of the Guidelines encompasses arms-length acquisition transactions between third parties. It is also noteworthy that Chapter 5 of the Guidelines presents an updated version of the 2005 Guidelines, which addressed takeover response policies and countermeasures, with substantial revisions taking into consideration, among other things, changes in practice following the 2005 Guidelines and above-mentioned court rulings on defense measures in 2021 and 2022.

The Guidelines are comprised of four main chapters: outline of the principles and basic perspectives (Chapter 2), code of conduct for directors and boards regarding takeover proposals (Chapter 3), information disclosures in acquisitions (Chapter 4), and takeover response policies and countermeasures (Chapter 5). Each of these chapters contains a variety of issues related to acquisitions which require careful reading. This article will focus on two such issues: (i) the concept of "corporate value"(discussed in Chapter 2) and (ii) "majority-of-minority" resolution (discussed in Chapter 5).

III. Concept of Corporate Value

The first principle presented by the Guidelines to be taken into consideration in acquisitions is that desirability of an acquisition should be determined on the basis of securing or enhancing corporate value and best interests of the shareholders. In this respect, the 2005 Guidelines stated that the corporate value of a company is enhanced by respecting its relationships with various stakeholders, including employees and business partners. The concept of "corporate value" used by the 2005 Guidelines might have helped several

target companies, in the face of unsolicited takeovers, emphasize employee motivation, relationships with business partners and other qualitative factors.

The Guidelines state that corporate value is a quantitative concept: the sum of the present values of discounted future cash flows generated by a company[1]. Further, the Guidelines state that the target company's management should not make the concept of corporate value unclear by emphasizing qualitative value, which is difficult to measure, nor should the concept of "corporate value" be used as a tool for the management to defend themselves.

Given the concept of corporate value presented by the Guidelines, takeover response policies which designate impairment of relationship with employees and other stakeholders as a countermeasure triggering event (on the ground that such impairment means impairment of corporate value) will likely be subject to counter-arguments supported by the Guidelines.

IV. "Majority of Minority" Resolution

One recent court ruling on takeover response policies and countermeasures is the Tokyo Kikai Seisakusho case. In this case, a resolution at a shareholders' meeting on the invocation of countermeasures was adopted, which resolution did not count the voting rights of the acquirer, the target company's directors and their related parties (so-called "majority-of-minority (MoM) resolution[2]"). The court held that the MoM resolution was permitted in that particular case, but it still remains unclear on what grounds and under what circumstances MoM resolutions may be permissible.

The Study Group initially made an attempt to establish certain best practices or guidelines on this issue, but after a series of discussions, the Guidelines settled on the position that there is no clear answer to the issue. Instead, the Guidelines refer to several different opinions raised in the Study Group. Nevertheless, the Guidelines make it clear that the invocation of countermeasures based on an MoM resolution must not be abused, and that any such invocation may be permitted only in very exceptional and limited cases, on the basis of special case-by-case circumstances. This general statement is not directly led by the court ruling on the Tokyo Kikai Seisakusho case, and therefore may have potential impact on relevant practice in the near future.

V. Conclusion

Since only a couple of weeks have passed after the publication of the Guideline, very few public deals have been announced thereafter. As discussed above, however, a variety of changes are expected in public M&A practice in light of the Guidelines. Investors, listed companies and other potential parties to public deals need to pay close attention to upcoming trends and developments in this arena.

[Author]

Takahiro Oishi, Partner
+81-3-6889-7691 takahiro_oishi@noandt.com
Takahiro Oishi's practice focuses on corporate transactions, including mergers and acquisitions, joint ventures, strategic alliances and venture capital investments. He has extensive experience in representing foreign and domestic clients in a variety of complex cross border transactions.

[1] The Guidelines make it clear that the value arising from quantifiable increases in future cash flows resulting from the contributions by employees, business partners and other stakeholders should be included in the quantitative concept of corporate value.
[2] The Guidelines do not use the term "majority-of-minority resolution" because shareholders with voting rights (other than interested shareholders) are usually not minorities.

NAGASHIMA OHNO & TSUNEMATSU

www.noandt.com

JP Tower, 2-7-2 Marunouchi, Chiyoda-ku, Tokyo 100-7036, Japan
Tel: +81-3-6889-7000 (general) Fax: +81-3-6889-8000 (general) Email: info@noandt.com

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