ALLEN & OVERY

Employment Reorganisation Roadmap

Japan

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Contents

1. Employee representation

1.1. What are the main forms of employee representation involved in restructurings?

The main forms of employee representation involved in restructurings are:

– trade union representatives (where a union is organised by the majority of workers at the workplace), or

– the employee representative of the majority of the workers at the workplace (if there is no organised trade union representing the majority of workers at the workplace).

1.2. Is there a system of employee participation rights?

Employees have no right to management or board-level representation.

2. Process on business sales

2.1 Are employees automatically transferred to a buyer by operation of law on a business sale?

Employees are not automatically transferred to a buyer by operation of law on a business sale. If a seller wants to transfer its employees to a buyer as part of a business transfer (either by assignment of the employment contracts or by terminating the existing contracts and having the employees enter into a new contract with the buyer), it must obtain each individual employee's consent.

Under the Japanese Companies Act, however, there is a specific form of business reorganisation known as a "company split" (kaisha-bunkatsu) where a company (the transferor) carves out certain parts of its business and transfers them to another company (the transferee). If a company split takes place, employees who are included in the company split plan/agreement as transferring employees, are automatically transferred to the transferee by operation of law, provided, however, that employees who are not primarily engaged in the split business but are included in the split plan/agreement may refuse to be transferred. In addition, employees who are primarily engaged in the split business but who are not included in the company split plan/agreement may object to the non-transfer of their employment, in which case, they will be transferred to the transferee by operation of law.

2.2. If so, in broad terms, what is the legal test for identifying which employees transfer?

Employees are not automatically transferred to a buyer by operation of law on a business sale.

In the case of a company split, the legal test for identifying which employees are transferred is whether the employees are listed in the company split plan/agreement.

2.3. Can employees object to the automatic transfer of their employment and what are the consequences of an objection?

Employees are not automatically transferred to a buyer by operation of law on a business sale.

In the case of a company split, the employees who are primarily engaged in the split business cannot object to the transfer of their employment to the transferee. However, employees who are not primarily engaged in the split business may refuse the transfer, and employees who are primarily engaged in the split business may object to the non-transfer of their employment.

2.4. Do obligations to inform and consult employees or employee representatives arise on a business sale?

The buyer/seller must inform/consult employee representatives prior to a business transfer, only if such transfer will entail structural or technological changes within their business. There are no specific requirements in relation to process or timing. However, even if there is no obligation to inform/consult, it is good practice from an industrial relations perspective to inform/consult employee representatives about the proposed transfer.

2.5. What are the penalties for non-compliance with information and consultation obligations on a business sale?

Failure to inform/consult may result in a fine for the employer ranging from MAD 10,000 to MAD 20,000.

2.4. Do obligations to inform and consult employees or employee representatives arise on a business sale?

For a business transfer, there is no mandatory obligation to consult with the employee representative, unless otherwise agreed with the employees, eg in a collective agreement with the trade union. However, as there is no automatic transfer of employees and each individual employee's consent is required for the transfer of their employment, sufficient discussion with the employees is recommended. The Guidelines issued by the relevant Ministry (the Ministry of Health, Labour and Welfare) also recommend that employees and employee representatives are informed and consulted in relation to a proposed business sale sufficiently far in advance of it taking place.

In the case of a company split, there are mandatory employee consultation processes, which include the following obligations:

– to make efforts to seek the employees' understanding of, and their co-operation with, the company split by, for example, explaining to the trade union or employees' representative about the proposed company split and its implications

– to consult with employees who are primarily engaged in the transferred business and other employees who are listed in the company split plan/agreement as transferring employees, and

– to give those employees notice of the company split, allowing them at least two weeks to object (see answer to **2.3**).

2.5. What are the penalties for non-compliance with information and consultation obligations on a business sale?

If the seller or buyer does not obtain an employee's consent to the transfer to the buyer, the employee will not be transferred with the business from the seller to the buyer.

In the case of a company split, employees might be able to dispute their transfer of their employment pursuant to the company split or the effect of the company split itself, in the event that the seller fails to comply with the statutory consultation and notice processes (see answer to **2.4**).

3. Process on share sales

3.1. Do obligations to inform and consult employee representatives arise on a direct share sale (ie on the sale of the company itself)?

There is no obligation to inform/consult employee representatives in relation to a proposed direct share sale, unless a collective agreement provides otherwise.

3.2. Do obligations to inform and consult employee representatives arise on an indirect share sale (on the sale of a company's direct or indirect holding company)?

There is no obligation to inform/consult employee representatives in relation to a proposed indirect share sale, unless a collective agreement provides otherwise.

4. Process on outsourcings

4.1. Are employees transferred by operation of law in the following scenarios: (i) on an initial outsourcing of processes/services; (ii) on a change of supplier; or (iii) on an insourcing of processes/services?

Employees are not transferred by operation of law: (i) on an initial outsourcing of processes/services; (ii) on a change of supplier; or (iii) on an insourcing of processes/services.

4.2. Do obligations to inform and consult employees or employee representatives apply in any of these scenarios?

There is no obligation to inform/consult employee representatives in relation to any of the scenarios, unless a collective agreement provides otherwise.

5. Process on collective dismissals

5.1. Is a "collective dismissal" (or "mass layoff") defined by law?

There is no concept of collective dismissals, nor any specific regulations regarding collective dismissals. Rules on individual dismissals would, however, have to be observed. As to individual redundancy dismissals, please see **section 6 – Process on individual dismissals**.

5.2. Do obligations to inform and consult employee representatives arise on a collective dismissal?

There is no concept of collective dismissals, nor are there any specific regulations regarding collective dismissals. However, where an employer intends to dismiss employees as a means of reducing headcount, the courts tend to require the employer to follow certain procedures which would include information and consultation processes (see answer to **6.2**).

5.3. Do obligations to inform and consult the competent authorities arise on a collective dismissal?

Although there is no concept of collective dismissals, if it is expected that the employment of 30 or more employees is to be terminated at one business office during one month, filings with the head of the Public Employment Security Office are required. The filings need to be made at least one month prior to the termination of employment with the first employee.

5.4. When are these obligations triggered?

Not applicable, as no specific obligations arise in respect of collective dismissals.

5.5. What are the penalties for non-compliance with information and consultation obligations on a collective dismissal?

An employer could be subject to a fine of up to JPY300,000 for a failure to make a filing.

5.6. Do obligations to inform and consult employee representatives and/or competent authorities arise in the context of multiple dismissals, which do not qualify as a collective dismissal, as defined by law?

There are no specific obligations to inform and consult employee representatives and/or competent authorities in the context of multiple dismissals, unless otherwise agreed in a collective agreement or unless 30 or more dismissals are expected in which case filings may be required (see answer to **5.3**). However, where an employer intends to dismiss its employees for reducing headcount, the courts tend to require the employer to follow certain procedures which would include information and consultation processes (see answer to **6.2**).

5.7. Does an employer have options/alternatives when it has been unable to reach agreement with employee representatives during the negotiation period?

There are no specific requirements for an employer to consider options or alternatives in the case of collective or multiple dismissals. There is an expectation for an employer to consider alternatives to individual dismissals (see answer to **6.2**).

6. Process on individual dismissals

6.1. Are employees entitled to a minimum period of notice on dismissal on redundancy or economic grounds?

The minimum notice period for the dismissal of a permanent employee is 30 days, or a payment in lieu of notice must be made. If the continuation of the business has become impossible due to natural disaster or other unavoidable reasons, or the employee is dismissed for reasons that are attributable to them, the employer may dismiss the employee without the 30-day notice period and without a payment in lieu provided the approval of the authorities is obtained.

However, a dismissal is invalid (even with a 30-day notice period or payment in lieu) unless the dismissal is based on an objective reasonable ground and is appropriate in social terms. Practically, a 30-day notice period is not regarded as an appropriate notice period in most cases, and a longer notice period is required for a valid dismissal.

6.2. Does any special procedure apply when proposing to implement an individual dismissal on redundancy or economic grounds?

A court will scrutinise the validity of dismissals in the case of a reduction in headcount on redundancy or economic grounds. The court will examine the reasons for a redundancy dismissal, and the processes followed, closely and strictly, generally focusing on the four main factors below:

– the employer's reasons for reducing headcount (typically financial difficulties)

– the measures that the employer has taken to avoid the dismissal, eg other cost-cutting measures, the suspension of pay rises and recruitment, voluntary resignation schemes and/or the re-assignment of personnel to other positions

– whether there has been an objective and fair selection of the employees to be made redundant, and

– whether there has been a fair process, which would include whether an information and consultation process has been conducted with the trade union or employee representative.

In addition, the dismissal must be implemented in accordance with procedures set out in any collective agreements.

In practice, as the court will take a strict view on the validity of redundancy dismissals, employers often solicit a voluntary (consensual) resignation of the employees by offering a separation package, rather than proceeding with the unilateral dismissal for redundancy.

6.3. Does special dismissal protection apply where dismissals are to be implemented following or in connection with a business transfer?

There is no special dismissal protection for dismissals implemented following or in connection with a business transfer.

6.4. Are employees entitled to a minimum severance payment on dismissal for redundancy or economic grounds?

There is no mandatory severance payment under Japanese law.

In practice, however, employers often solicit a voluntary (consensual) resignation of the employees by offering a separation package, although there is no statutory rule as to what separation package should be provided on a dismissal for redundancy.

6.5. What are the penalties for non-compliance with individual dismissal procedure?

If a dismissal is made in breach of the requirement for a minimum 30-day notice period, or without a payment in lieu, the person responsible could be subject to a period of imprisonment of up to six months or to a fine of up to JPY300,000, and the company could also be subject to a fine of up to JPY300,000.

6.6. Is there any special legal protection or does any special treatment apply for particular groups of workers?

Subject to certain exceptions, employers cannot dismiss an employee during a period of absence from work for medical treatment, or within the following 30-day period, if the employee suffers injuries or illnesses in the course of employment. In addition, subject to certain exceptions, employers cannot dismiss any female employee during the period of absence from work before and after childbirth in accordance with the Labour Standards Act, or within the 30-day period following that absence.

7. Process when implementing alternatives to redundancy

7.1. Can changes to employment terms be made with or without express employee consent?

Changes to employment terms under individual agreements need to be made with the relevant employee's consent.

Changes to employment terms under the company's rules of employment can be made without each individual employee's consent, although the changes will need to be discussed with the trade union or employee representative. Changes to employment terms made by amendments to the rules of employment without obtaining the employee's consent are valid only if: (i) the employer informs the employees of the changes; and (ii) the changes are reasonable in light of the extent of the disadvantage that the employees will suffer, the business need for the changes, the appropriateness of the changes, the status of negotiations with the trade union or employee representative, and any other circumstances pertaining to the changes.

7.2. Must an employer consult individually or collectively with affected employees or their representatives (if any) before making changes to employment terms?

There is no obligation to consult the trade union or employee representative regarding proposed changes to employment terms under individual agreements.

However, there is an obligation to discuss proposed changes to employment terms effected through amendments to the rules of employment with the trade union or employee representative.

7.3. Do additional restrictions apply if changes are proposed in connection with or following a business transfer?

There are no additional statutory restrictions for changes to the employment terms in connection with or following a business transfer.

7.4. What are the penalties for non-compliance with these procedures?

If the processes above are not complied with, the amendments to the employment terms are considered invalid. If an employer imposes the invalid amended terms on the employee, the employer could be subject to penalties depending on which provision of the law the employer breaches. For example, if the employer unilaterally changes the amount of salary and does not pay the full salary in accordance with the employment agreement, it can be subject to the penalty for breaching its obligation to pay the full salary.

7.5. Do national laws promote or permit any alternatives to redundancy (eg layoff or short-time working)?

Suspension from work with certain statutory payments is possible under Japanese law.

In addition, measures that are taken by employers to avoid dismissal (such as other cost-cutting measures, the suspension of pay rises and recruitment, voluntary resignation schemes and/or the re-assignment of personnel to other positions), are viewed positively by the courts when judging the validity of redundancy dismissals. The government also promotes efforts to avoid dismissals more generally.

8. Process on insolvency

8.1. Do obligations to inform and consult employee representatives arise on the sale of an insolvent business (whether share sale or business sale)?

If a company is under any procedure regulated by the Bankruptcy Act, the Civil Rehabilitation Act or the Corporate Reorganisation Act, in order to sell the whole or a part of its business, consent from the court is needed and the court must seek the opinion of a trade union organised by a majority of the employees of the insolvent company, where such a union exists, or with a person representing a majority of the employees, where no such union exists. Therefore, although the company does not have any statutory obligations to inform and consult employee representatives on the sale of its business, it is advisable that the company informs and consults its employees about the sale of the whole or a part of its business.

8.2. Does the buyer of an insolvent business inherit employees and/or employee liabilities by operation of law?

On the sale of an insolvent business, employees and employee liabilities are not automatically transferred by law, and each individual employee's consent is required in order for employees to be transferred with the business in the case of a business sale. (Please see **section 2 – Process on business sales** for further information.) If employees do consent to transfer with the business, the provisions of the business transfer agreement can potentially affect the buyer's employee liabilities following the business sale, eg employee entitlements such as retirement allowances can be agreed to be calculated based on an employee's length of continuous employment at the seller.

8.3. Do obligations to inform and consult employee representatives arise where collective dismissals are to be implemented in an insolvent business?

There is no concept of collective dismissals, nor are there any specific regulations regarding collective dismissals. Rules on individual dismissals would, however, need to be observed in an insolvency situation (see **section 6 – Process on individual dismissals** for further information).

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