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Japan's Shift to the Job-Description Model and Its Impact on Employment-Termination Rights

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Unlike most jurisdictions in the United States, Japan does not follow the rule of at-will employment. Instead, to terminate an employee, the employer must prove cause to terminate based on reasonable grounds. As a practical matter, it is very difficult for employers to meet that standard.

Recently, many employers in Japan are moving away from the traditional Membership Model to a Job-Description Model. The change may—but may not—have an import effect on the right to terminate employment.

Membership Model vs. Job-Description Model

Japan's traditional employment model is characterized as the hiring of employees as generalists and developing them to become managers with company-wide perspective through cross-departmental trainings and regular transfers (to different assignments/locations). This is referred to as the "Membership Model." Employees hired under the Membership Model have no job descriptions, and the employer may transfer them to other assignments on a few days' notice. Evaluation of an employee is often based on the reputation of the manager, and the human resources department has significant power within the company to manage the evaluation process.

When employees are hired based on a clear and finite job description, the arrangement is referred to as the "Job-Description Model." Foreign companies operating in Japan usually hire based on the Job-Description Model, while Japanese corporations have not developed job descriptions because that would stand in the way of training future managers in cross-departmental assignments and transfers every few years.

However, Japan's multinational corporations now have a different challenge: Japan's employees must work together and mix with the company's global colleagues who have clear job descriptions. It often is not possible to have two silos operating with similar functions under different employment rules, because that prevents the company from developing the same career path for employees simply because of where they were hired.

Moreover, in the modern economy, there is an acute need to train specialists (e.g., in-house legal staff) who are trained in one substantive area without having to be transferred to different sections of the company. This trend has been accelerated by COVID-19, which both imposed a new work style based on telecommuting and highlighted the need for employees who can excel in specific areas, rather than generalists who patiently wait to advance in the corporate decision-making process.

As a consequence, more Japanese companies are moving to the Job-Description Model. As they do, the question presented is what effect—if any—will it have on the right to terminate employment.

Impact on the Right of Termination

Historically, the core challenge in Japan for the employer in managing workforce has been the difficulty in terminating poor-performing employees. The long-standing abuse-of-termination-right doctrine stands in the way of terminating employees easily, even if, in management's view, they are not up to the job.¹ Indeed, under the Membership Model, defining competence often has been next to impossible; even if all managers agree that an employee is incompetent, he/she may be competent in other assignments. This is why case law rigorously requires the employer to transfer the employee to other responsibilities, sometimes multiple times, and to consider termination only if nothing works.²

Adoption of the Job-Description Model may effectively expand the employer's power to terminate. From the perspective of defining competence, the Job-Description Model is easier to manage. This is because employees within the same job description can be compared against others, on an apples-to-apples basis. And given there is a job description, there is no requirement to transfer the employee to another assignment, unlike the obligation to do so under the Membership Model.

That is not to say that the Job-Description Model is free from problems in this regard. If an employee works within a finite job description for many years without issues, it may be very difficult to prove that he/she suddenly has a performance issue. In addition, the reason for termination may need to be tied to specific metrics of performance, measured against the job description. By contrast, under the Membership Model, the employer can rely on "impressionistic incompetence," which means the employer's subjective judgment of the employee's performance (e.g., hard to work with, not harmonious, lacking in overall judgment).

Conclusion

The restrictive case law on termination may be adjusted as more Japanese employers gravitate from the Membership Model to the Job-Description Model. But I would not hold my breath for a dramatic change. Indeed, in some situations, if "impressionistic incompetence" is not available to the employer, termination actually may become even more difficult.

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If you have any questions concerning these developing issues, please do not hesitate to contact the following Paul Hastings Tokyo lawyer:



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¹ See, e.g., Saikō Saibansho [Sup. Ct.] Apr. 25, 1975, SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 29-4-456

² See, e.g., Tokyo Chihō Saibansho [Tokyo Dist. Ct.] Mar. 28, 2016, RŌDŌ HANREI [RŌHAN] 1142-40

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