

## Japan: Amendments to the Workers Dispatch Act

Amendments to the "Act for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers" (Law No. 88 of 5 July 1985 as amended, the "Act") (the "Amendment") were approved at the plenary session of the House of Councillors on 28 March 2012.

Although the Act has been amended several times since its enactment, the Amendment was adopted following a thorough review of the workers dispatch legal framework prompted by the adverse effects of past deregulation and in particular the excessive use of worker dispatch by the day, fictitious service-providing contracts and the emergence of the social issue described as "*Haken-Giri*" (termination at will of the contracts of dispatched workers) after the global financial crisis in 2008.

The Amendment puts the emphasis on protection of dispatched workers as the main purpose of the Act and its name will be changed to the "Act for Securing the Proper Operation of Worker Dispatching Undertakings and Ensuring the Protection, etc. of Dispatched Workers". This briefing discusses key points and their practical implications.

### What is "Worker Dispatch"?

The term "worker dispatch" ("*roudousha haken*") under the Act means causing workers employed by one person to be engaged in work for another person under instruction of the latter, while maintaining their employment relationship with the former, but excluding cases where the former agrees with the latter that such workers shall be employed by the latter. Although worker dispatch is similar to a service-providing contract (contract for services or "*ukeoi*") in terms of making the worker of one person work for another, it is different from a contract for services because in worker dispatch, one person does not give instructions to its worker but orders its worker to follow the instructions of another person. Also, worker dispatch includes the provision of workers to another party but is excluded from the definition of "worker supply" which is prohibited under the Employment Security Act. Authorised worker dispatch agencies are licensed by, or must notify, the Ministry of Health Labour and Welfare (MHLW) depending on their activities (general type or specified type).

#### Key issues

- Main Changes
- Practical Implications of the Amendment

## Main Changes

The main changes brought about by the Amendment are as follows:

### Tightening of Business Regulations

#### Prohibition of Worker Dispatch by the Day

Under the Act before the Amendment, worker dispatch could not be deemed illegal solely because the period of dispatch is one day as long as the worker dispatch agency authorised by the MHLW to conduct the general type of worker dispatch satisfies the mandatory requirements (execution of a worker dispatch contract with its client, execution of a labour contract with the dispatched worker and notification of working terms and conditions, etc.). However, the Amendment, in principle, prohibits worker dispatch by the day (i.e., worker dispatch for a term between one and thirty days). The underlying rationale for the prohibition is that due to the short duration of the dispatch by the day, not only is the employment situation precarious and unstable but it also prevents the dispatched workers from developing skills and expertise. In addition, worker dispatch agencies and their clients often fail to strictly comply with the Act. Exceptions to the ban, however, include worker dispatch by the day (i) for work designated by the Cabinet Order that is deemed not to impede the proper HR management of workers by the day (the so-called "administratively selected 17.5 types of jobs" provided under the Cabinet Order out of the so-called "administratively selected 26 types of jobs") and (ii) in cases where it is particularly difficult to secure job opportunities (e.g., in the case of elderly people or daytime students).

#### Cap on the Percentage of Dispatched Workers within a Group

Large groups of companies have been able to use dispatch work arrangements to minimise employment risks by setting up their own internal agencies that supply workers solely to group companies. Under the Amendment, a worker dispatch agency is required to limit the percentage of dispatched worker working hours "sold" by them to companies belonging to the same group as the agency ("related clients") to 80%. The term "related clients" means "parties who have a relationship with a dispatch work agency which enables them to effectively control the administration of such agency or other parties who have a special relationship with the dispatch work agency as provided under the Ordinance of the Ministry of Health, Labour and Welfare" and such parties are mainly assumed to be the parent company and consolidated subsidiaries of the dispatch work agency. The reason behind the Amendment is that dispatch by a worker dispatch agency exclusively to its clients who are in the group is not necessarily appropriate as worker dispatch undertakings are supposed to adjust supply and demand of the workforce and doing so could force workers who should be directly employed, to work as dispatched workers leading to worsening of their working conditions. This requirement to limit the percentage of dispatched worker working hours applies as from financial years starting on and after 1 October 2012. Therefore, worker dispatch agencies who provide dispatch workers exclusively to their corporate group are required to reconsider their client basis before this provision becomes effective and those clients should be ready to receive dispatched workers from dispatch agencies outside their group.

#### Prohibition on Accepting an ex-Employee as a Dispatch Worker within One Year after Termination

The Amendment in principle prohibits employers from engaging any ex-employee as a dispatch worker for a period of one year after termination of employment with the employer. The purpose of the Amendment is to avoid a situation where companies use worker dispatch as part of restructuring measures, for example by firing employees and then receiving them from a worker dispatch agency belonging to their company group in order to downgrade the employees working conditions without changing their work.

### Amendments for the Prevention of Illegal Dispatch

#### Deemed Employment Offer

Even before the Amendment, clients were required to execute an employment contract with their dispatched workers under certain circumstances under the Act (where the dispatched workers wanted to be hired by the clients in the case where the clients continued to use the dispatched workers despite their worker dispatch agency's notice that their dispatch would be

discontinued after the permitted dispatching period, etc.), but employment contracts could not be made against the will of clients if they refused to enter into a contract. Under the Amendment, if any act of a client falls under one of the following types of illegal dispatch, the client is deemed to have offered an employment contract subject to the same working conditions as those contained in their dispatch contracts to their dispatched workers.

1. Clients make their dispatched workers engage in work prohibited under the Act (each item of Article 4, Paragraph 1 of the Act);
2. Clients receive worker dispatch services from worker dispatch agencies who do not have a permit or have not made the proper notification regarding their business;
3. Clients receive worker dispatch services exceeding the permitted dispatch period; or
4. Clients receive services through what is called a fictitious contract for services (i.e., worker dispatch disguised as a contract for services).

Concerning the case where "clients receive worker dispatch services exceeding the permitted dispatch period" in paragraph 3 above, many cases of illegal worker dispatch had been disguised as one of the 26 administratively selected types of jobs (requiring certain skills) which do not have a limitation on the permitted dispatch period. After the Amendment, however, if clients receive a supply of services exceeding the permitted dispatch period despite the fact that such services do not fall under the 26 specific types of jobs, such clients are deemed to have offered their dispatched workers an employment contract. Clients need to be careful because they cannot always identify which work falls under the 26 specific types of jobs. As the same goes for fictitious contracts, despite the fact that in many cases it is difficult to identify worker dispatch and fictitious contracts, if worker dispatch services are considered to be a sham, such clients are deemed to have offered employment to the dispatched workers. However, this deemed employment offer system will not apply if clients do not know about the illegal dispatch without negligence.

The deemed employment offer rule referred to above will come into effect by October 2015.

## Outstanding Issues

The Amendment does not prohibit general (list-registration) type dispatch which had been criticised as a source of unstable employment status on the ground that the employment contract is only effective during the term of their services to a client and dispatch to the manufacturing industry for manufacturing jobs which became a social issue. As these issues are scheduled to be discussed by the Labour Policy Council one year after enforcement of the Amendment, there may be further developments in this connection.

*Where Japanese legal concepts have been expressed in the English language, the concepts concerned may not be identical to the concepts described by the equivalent English terminology as they may be interpreted under the laws of other jurisdictions.*

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