

Labor & Employment Law Newsletter**APR 16,
2020****Japan: Salary Concerns During Employee Leave Due to COVID-19****Jiro Abe**

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As the world battles the COVID-19 pandemic, many companies are closing their offices, stores and other facilities. While salaries are payable if employees work from home, various questions arise concerning salaries for those employees who cannot work from home and are required to take leave.

I. Laws and legal principles concerning salaries during employees' absence

- Under general circumstances, if an employee is absent from work due to COVID-19 infection or for any other personal reason, an employer is not obliged to pay the employee's salary during that period. In labor law, this is known as the principle of "no work, no pay."
- Pursuant to Article 526-2 of the Civil Code, if an employee is not able to work due to the employer's intent, negligence, or any cause that can be understood as the employer's intent or negligence, the employee is entitled to claim 100% of his/her salary during that period.
- Under Article 26 of the Labor Standards Act ("LSA"), if an employee is absent from work due to reasons attributable to the employer, the employer is obliged to pay an allowance equal to at least 60% of the employee's salary during the period in which the employee is absent ("Leave Allowance").
- While the Civil Code and the LSA seem to conflict, Article 26 of the LSA covers a wider range of causes and reasons for an employee's absence that are attributable to the employer, and includes causes relating to the employer's business and management of the company.

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II. Questions and Answers

Question 1

Is the Leave Allowance payable if an employee has some symptoms of infection and the employee decides to take leave?

Answer

The government is currently advising people not to go to work if they have any cold-like symptoms. If an employee is absent due to having such symptoms, the employee's absence will not be seen as attributable to the company, and the company is thus not obliged to pay the Leave Allowance.

The employee may, however, receive personal illness/injury allowances from his/her health insurance from the fourth day of his/her absence (60% of their salary).

Question 2

Is the Leave Allowance payable if an employer orders its employees with certain symptoms to take leave?

Answer

While the Leave Allowance is not payable where the decision to take leave is made by the employee, if an employer requires employees with certain symptoms (without confirming a COVID-19 infection) to take leave, then such absence will be seen as an absence due to reasons attributable to the employer, and the Leave Allowance is payable.

Question 3

If an employee (without any specific symptoms) is quarantined due to the government's order/advice and has to take leave, is the employer required to pay their salary or the Leave Allowance during such period?

Answer

Currently, if an employee is not infected with COVID-19, the government cannot "order" the employee to be quarantined, and it would merely constitute advice/guidance not to work.

As such, it would depend on the strength of the government's advice/guidance and other factors on a case to case basis, however, given the above nature of the government's advice/guidance, if the company prohibits the employee from working due to such government advice/guidance, it is likely that such absence would still be seen as an absence for reasons attributable to the employer under Article 26 of the LSA, and thus the company would be required to pay the Leave Allowance.

Contrary to the foregoing, if the company decides, as a precautionary measure (that their claim is not based on the government's advice) not to have employees work, it is likely that the Leave Allowance would have to be paid, since the decision would be considered to have been made at the company's own discretion.

Further, if there is no reason for having the employee take leave, even when considering the current situation, then 100% of the employee's salary may need to be paid, pursuant to Article 526-2 of the Civil Code.

Question 4

Can an employer require its employee to use annual paid leave during the employee's absence due to COVID-19?

Answer

Annual paid leave is an employee right granted under the LSA and thus an employer may not force an employee to use annual paid leave.

Therefore, while it is possible for an employer to discuss the situation with the employees and encourage or advise the use of annual paid leave, an employer may not require or force its employees to take annual paid leave.

Outlook

The spread of COVID-19 has not shown any signs of slowing down as of the date of this newsletter, and the Japanese government has been implementing various support measures for employers and employees, such as the expansion of subsidies for Leave Allowances.

We expect the government to further expand such measures, and advise employers to consider the use of government subsidies if an employer is required to have its employees take leave due to COVID-19.



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