Obligation of Companies to Consider Safety in Relation to the Spread of COVID-19 - I

In relation to the prevention of the spread of the Novel Coronavirus to employees, what are our Company's obligations as an employer with respect to the safety of our employees?

Under Japanese law, an employer has an obligation to "give the necessary consideration to allow an employee to work while ensuring the employee's physical safety" (Article 5 of the Labor Contracts Act).

Therefore, as an employer, in order to prevent the spread of the Novel Coronavirus to employees, it is necessary to collect information on the Novel Coronavirus in Japan and implement preventive measures in order to reduce the risk of infection to employees and prevent the spread of infection in the workplace.

With respect to new strains of influenza (such as the Novel Coronavirus) stipulated in the Infectious Disease Law, the Ministry of Health, Labour and Welfare previously issued the "Guidelines for Measures Against Pandemic Influenza at Businesses and Workplaces" in response to new strains of influenza which became epidemics. It should be noted that there are differences in the characteristics of the Novel Coronavirus and other influenza viruses; however, there are some common measures against infection. For example, measures to prevent the spread of infection, such as cleaning and disinfecting the area touched by a person who has been found to be infected, maintaining personal distance, washing hands, implementing cough etiquette, and providing guidance to employees ("Guidelines for Measures Against Pandemic Influenza at Businesses and Workplaces" issued by the Ministry of Health, Labour and Welfare, p. 98), can also be applied to the Novel Coronavirus.

If an employee is infected with the Novel Coronavirus at work, the employer will not be immediately liable for violation of the obligation to address safety. However, depending upon the specific risk of infection and the details of the relevant infection prevention measures, the employer may be liable for the violation of the obligation to address safety. Therefore, the employer is required to collect information on the Novel Coronavirus and consider countermeasures on a daily basis according to the specific circumstances.

[Reference]
"Guidelines for Measures Against Pandemic Influenza at Businesses and Workplaces" issued by the Ministry of Health, Labour and Welfare, p. 98
https://www.mhlw.go.jp/bunya/kenkou/kekkaku-kansenshou04/pdf/090217keikaku-08.pdf (Japanese)

Obligation of Companies to Consider Safety in Relation to the Spread of COVID-19 - II

If an employee is confirmed to have been infected with the Novel Coronavirus, what measures should our Company take to fulfill its obligation to address the safety of other employees?

If an infected person is identified among employees, his/her close contacts should be identified first, and efforts should be made to avoid contact among the infected person and his/her close contacts and other employees to prevent the infection from spreading to other employees.

COVID-19 has recently been designated as an infectious disease under Japan's Infectious Disease Law. Therefore, if it is confirmed that an employee is infected with the Novel Coronavirus, the Prefectural Governor may issue a recommendation under the said Law to the relevant employee that the employee be restricted from work in a certain industry or that the employee be hospitalized (Articles 18 through 20, etc. of the Infectious Diseases Law). The employer is also required to prevent an employee who is restricted from work by the Prefectural Governor from working. For close contacts, as with employees who may be infected as in Q1-3 , necessary measures should be considered.

Obligation of Companies to Consider Safety in Relation to the Spread of COVID-19 - III

If there is an employee who may be infected with the Novel Coronavirus, what measures should our Company take to fulfill its obligation to address the safety of other employees?

Employees who are not confirmed to be, but may be, infected with the Novel Coronavirus are not subject to employment restrictions under the Infectious Disease Law.

Nonetheless, a suspension from work or stay at home order may be given under the Company's Rules of Employment. In addition, a stay at home order should be considered if there is a reasonable possibility of infection, even if there is no such provision in the Company's Rules of Employment. In order to prevent the spread of infection to other employees, an employer should issue a suspension from work or stay at home order based on the specific symptoms, etc.

Obligation of Companies to Consider Safety in Relation to the Spread of COVID-19 - IV

Is it necessary to take measures to prevent harassment due to Coronavirus infection?

An employer's obligation to address safety includes taking measures to prevent workplace bullying (Saitama District Court, judgment of September 24, 2004; *Rohan* (Labor Case Reports) No. 883, p. 38 (Seishokai Kitamoto Kyosai Hospital Case)).

For example, if an employee is restricted from working due to being infected with the Novel Coronavirus and does not come to work, or if an employee is suspended from work because he/she may have been infected with the Novel Coronavirus, it is possible that such information will spread to other employees and that the employee will be bullied or harassed. To prepare for such situations, an employer is required to take necessary measures, such as informing and educating employees in order to prevent bullying and harassment related to Coronavirus and providing appropriate consultation services.

[Reference]
"Q&A for New Coronavirus COVID-19 (for Businesses)" by the Ministry of Health, Labour and Welfare, Q10-1
https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/kenkou_iryou/dengue_fever_qa_00007.html#Q10-1 (Japanese)

Employee Health Management - I

In general, is our Company obligated to consider the health condition of employees?

In general, an employer has the obligation to consider the health of employees as part of the obligation to address safety. For example, an employer has an obligation to have employees take a medical examination once a year (Article 66 of the Industrial Safety and Health Act). The obligation to address safety also includes assessing the condition of employees' health through follow-up measures after the medical examination and taking appropriate measures to maintain employees' health (Okayama District Court, judgment of December 20, 1994; Rohan (Labor Case Reports) No. 672, p. 42 (Shinbi Gakuen Case)).

In addition, if it is deemed that the health of an employee who has suffered from a health condition is likely to deteriorate if the employee continues to engage in certain work, necessary measures, such as allowing for prompt recuperation, must be taken (Kobe District Court, judgment of July 31, 1995; Hanta (Hanrei Times) No. 958, p. 200 (Ishikawajima Kogyo Case)). Therefore, as part of its safety obligations, a company is obligated to consider the possibility of infection of employees, including by means such as checking body temperature.

Employee Health Management - II

How much interference is allowed with respect to employees' private lives and privacy, such as requiring them to take their temperature each morning and also requiring them to report their temperature?

Due consideration should be given to the privacy of employees. Under the current circumstances, however, it is considered acceptable for an employer to require employees to: (i) take their own temperature; and (ii) report their body temperature if it exceeds a certain level (for example, 37.5 degrees Celsius). In fact, on Page 105 of the "Guidelines for Measures Against Pandemic Influenza at Businesses and Workplaces" by the Ministry of Health, Labour and Welfare, it is states that, as a measure for preventing infection, a system should be established to immediately detect and report possible infections among employees, and body temperature measurement is mentioned as such a method. Nevertheless, when recording and managing the reported information, such as employee body temperature etc. within the company, it is considered necessary to give sufficient consideration to employee privacy. Therefore, disclosing to customers the body temperatures of staff members in charge of customer service, for example, in order to provide a sense of security, is not

acceptable and constitutes an unjust interference with employee privacy.

[Reference]
"Guidelines for Measures Against Pandemic Influenza at Businesses and Workplaces" by the Ministry of Health, Labour and Welfare
https://www.mhlw.go.jp/bunya/kenkou/kekkaku-kansenshou04/pdf/090217keikaku-08.pdf
(Japanese)

Responding to employees who do not attend work for fear of COVID-19 and whether it is reasonable to make non-attendance a violation of work-related requirements

Some employees do not come to work because they are afraid of being infected with the Novel Coronavirus. Does our Company need to pay such employees for the days on which they do not come to work? Also, the Company instructed such employees to come to work as a work-related order, but they did not. Would it be acceptable to treat these employees as violating such work-related requirements?

As the spread of COVID-19 is expected to cause anxiety among employees in various ways, if there are any employees who do not attend work because they are afraid of being infected with the Novel Coronavirus, it is important to first ask them specifically what they are worried about, explain the company's infection prevention measures, and strive to eliminate their anxiety. In addition, they should be informed of the operational necessity of their attendance at work and encouraged to come to work voluntarily.

Legally, a company is obligated to pay the wages stipulated in the employment contract with the employee and the employee is obligated to work in good faith in accordance with the company's instructions under the terms and conditions stipulated in the employment contract.

Generally, if an employee does not attend work because he/she is afraid of being infected with the Novel Coronavirus, such employee will not be able to claim wages for the relevant day(s) because the duty to work in good faith is not performed for reasons attributable to such employee. Therefore, the company would assume no obligation to pay the employee the wages for days on which the employee is not working. (Regardless of the reason, employees are entitled to take annual paid leave unless subject to the employer's right to change the leave period.)

A company may, as a work-related order, order its employee to come to work on days on which the employee is required to attend work under the employment contract. When issuing such an order, it is desirable to give the order in writing or by email so that the details of the order can be clarified.

If an employee fails to attend work despite a valid order from the company, such failure will constitute a violation of such work-related order. Under normal circumstances, a violation of a work-related order is stipulated as a basis for disciplinary action under the company's Rules of Employment. Therefore, the company should consider taking disciplinary action based on the applicable grounds. However, the company is also required to consider the imposition of disciplinary action in light of the reasonableness of the reasons given by the employee. In addition, in deciding upon appropriate disciplinary action, it would normally be proper to start with a relatively minor disciplinary action in accordance with the appropriate procedures provided for in the Rules of Employment and other internal rules, unless there are circumstances in which an extremely serious disciplinary action should be imposed, such as a history of disciplinary actions in the past (especially of the same kind).

Introduction of Sick Leave System - I

Our Company is considering introducing a sick leave system in the wake of the Novel Coronavirus pandemic. Please tell us the general provisions and rules of sick leave.

A sick leave system is a type of special leave system that allows employees to take leave other than annual paid leave in order to recover from injuries or illness.

Special leave is not a type of "statutory leave" that is required to be granted to employees under Japanese law, such as the "Labor Standards Act" or "Act on Childcare Leave, Caregiver Leave, and Other Measures for the Welfare of Workers Caring for Children or Other Family Members". Rather, special leave is a form of "non-statutory leave" that can be granted voluntarily by the employer. Therefore, the conditions for granting such leave, the number of days of such leave, and whether or not such leave will be paid can be determined

voluntarily through labor-management negotiations. Such special leave must be clearly stated in the company's Rules of Employment as described in Q12-2 . However, it seems that the number of companies that provide paid sick leave in Japan has been decreasing recently.

The following is an example of special leave published by the Ministry of Health, Labour and Welfare in response to the Novel Coronavirus. (Please note that this example is based on the premise that the special leave associated with the closure of elementary schools is allowed.)

[Example]
Article [x] Special Leave
An employee may take special leave (paid) for the number of days deemed necessary in order to prevent the spread of COVID-19 in the event of the following situations.
(1) When it is necessary to take care of a child due to the closure of elementary schools, kindergartens, etc. related to the Novel Coronavirus or when there are other unavoidable socio-economic circumstances;
(2) When a request is made by a pregnant female employee, an elderly employee, or an employee with an underlying disease (diabetes mellitus, heart failure, respiratory disease, etc.); or
(3) When an employee is suspected of having COVID-19.

Introduction of Sick Leave System - II

What procedures are necessary in order to introduce a sick leave system?

Matters pertaining to "leave" must be provided in a company's Rules of Employment (mandatory matters required to be provided) (Article 89 of the Labor Standards Act). Therefore, when introducing a special leave system, including sick leave, an employer is required to amend its Rules of Employment in order to clearly set forth the rules pertaining to such special leave system.

In the case of amendments to the Rules of Employment, the employer must ask the opinion of either a labor union organized by a majority of the employees or, if such labor union does not exist, a person representing a majority of the employees with regard to the proposed amendments to the Rules of Employment (Article 90, Paragraph 1 of the Labor Standards Act). The employer is also required to submit a Notice of Amendment of the Rules of Employment to the Director of the appropriate Labor Standards Inspection Office (Article 89, Paragraph 1 of the Labor Standards Act), together with a document setting forth the employees' opinion on the proposed amendments (Article 90, Paragraph 2 of the Labor Standards Act). In addition, the employer must provide to the employees the revised Rules of Employment (Article 106, Paragraph 1 of the Labor Standards Act).

The aforementioned procedures for amendment are required even if the Rules of Employment are changed in a manner advantageous to employees and without including the so-called problems of "adverse change" (For example, in the case of newly establishing sick leave).

Japan's Ministry of Health, Labour and Welfare has decided to grant a "subsidy for the improvement of overtime work, etc. (special course for improving workplace awareness)" to small and medium-sized business operators who have newly introduced and improved their special leave rules as a countermeasure against COVID-19. Applications for the subsidy have been accepted since March 9, 2020. As of the time of publication of this Q&A (As of Sep 30, 2020), however, applications are only to be accepted until Sep 30, 2020. For details, please refer to "Grants for Promoting Workstyle Reform (Special course for improving workplace awareness)" issued by the Ministry of Health, Labour and Welfare.

[Reference]
"Grants for Promoting Workstyle Reform (Special course for improving workplace awareness)" by the Ministry of Health, Labour and Welfare
https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/koyou_roudou/roudoukijun/jikan/syokubaisiki.html
(Japanese)

【Contacts】

Jiri Mestecky
Partner (Osaka Office) / Registered Foreign Attorney
【E-mail】JMestecky@kitahama.or.jp

Kenji Yamamoto
Partner (Osaka Office) / Attorney at Law
【E-mail】KYamamoto@kitahama.or.jp

Tatsuhito Shiotsu
Partner (Osaka Office) / Attorney at Law
【E-mail】TShiotsu@kitahama.or.jp

Maiko Kunimoto
Associate (Osaka Office) / Attorney at Law
【E-mail】Mkunimoto@kitahama.or.jp

Ryusaku Saito
Associate (Tokyo Office) / Attorney at Law
【E-mail】RSaito@kitahama.or.jp

Shin Nakamori
Associate (Osaka Office) / Attorney at Law
【E-mail】SNakamori@kitahama.or.jp

OSAKA OFFICE
OSAKA SECURITIES EXCHANGE BLDG.
1-8-16 KITAHAMA, CHUO-KU, OSAKA 541-0041, JAPAN
TEL:81-6-6202-1088 FAX:81-6-6202-1080

TOKYO OFFICE
SAPIA TOWER 14F
1-7-12 MARUNOUCHI, CHIYODA-KU, TOKYO 100-0005, JAPAN
TEL:81-3-5219-5151 FAX:81-3-5219-5155

FUKUOKA OFFICE
CANALCITY BUSINESS CENTER BLDG.
1-2-25 SUMIYOSHI, HAKATA-KU, FUKUOKA 812-0018, JAPAN

https://www.kitahama.or.jp/