

Employment and Labor Law Questions and Answers Related to the Earthquake and Tsunami in Northern Japan

Article By:

David A. McManus

Mark S. Dichter

The earthquake and tsunami in northern Japan have presented many challenges, including challenges for both employers and employees impacted by these events. To assist employers in dealing with the varied employment and labor law issues facing them at this time, we have prepared a brief set of Q&As based on the information available to us as of April 14, 2011. Please be advised that the content of these Q&As is subject to change should any new administrative notice be issued.

I. Obtaining Personal Information from Employees

Question: *Is it acceptable to require employees to submit their personal phone numbers and email addresses to the company in the aftermath of the earthquake/tsunami and/or to prepare for future emergencies? May an employer require employees to submit their emergency contact information or the contact information of their family members?*

Answer: A company should not compel employees to submit personal information. It is appropriate for a company to first obtain the employees' consent and subsequently ask employees to voluntarily declare such information by clearly specifying the purpose for which such information shall be used.

According to the guidelines issued by the Japanese Ministry of Health, Labour, and Welfare (the "Employment Management Guidelines"), when handling personal information of personnel such as employees, companies are required to specify and identify the purpose of use of the personal information. Therefore, in collecting personal information, it is considered necessary to limit the purpose for which the personal information will be used by clearly stating the reason for which it is being collected.

Question: *In relation to the previous questions, will the same apply to contract employees?*

Answer: The Employment Management Guideline provides that contract employees should be treated the same way as regular employees.

Because contract employees are "workers employed by employers" for the purpose of the Employment Management Guideline, contract employees fall under the definition of workers under the Employment Management Guideline. Therefore, employers are required to properly handle any personal information of contract employees.

II. Suspension of Operations

Question: *In the event that a company suspends its operations because the company's building is not inhabitable or has been destroyed as a result of an earthquake and it becomes objectively impossible for the company to operate its business, is the company required to pay work absence allowance to its employees who work at the building?*

Answer: No, the company is not required to pay such a work absence allowance.

The Labour Standards Act provides that in the event of a business interruption for "a cause attributable to the employer" (Article 26 of the Labour Standards Act), the employer shall pay an allowance equal to at least 60% of the worker's average wage to each worker affected by the business interruption.

The case described in this question is an example of a force majeure event caused by an act of God that does not fall under "a cause attributable to the employer." Therefore, the company is not required to pay a work absence allowance.

Question: *Is a company required to pay its employees a work absence allowance in the event of a suspension of business operations due to a rolling blackout?*

Answer: In principle, the company is not required to pay any work absence allowance in the event of a business interruption due to electricity supply problems in the workplace during the relevant scheduled rolling blackout.

According to an administrative notice issued by the Ministry of Health, Labour, and Welfare on March 15, 2011, an interruption of business operations from electricity supply problems during a rolling blackout does not constitute business interruption due to a cause attributable to the employer.

It is, therefore, unnecessary for the company to pay any work absence allowance for a business interruption caused by electricity not being supplied to the workplace during a rolling blackout. A business interruption allowance must, however, be paid in respect to a business interruption outside of the relevant scheduled rolling blackout.

If a scheduled rolling blackout is not actually conducted but the company still suspends business operations due to the scheduled rolling blackout, the need for the payment of wages or work absence allowance is determined by taking into account the schedule for the rolling blackout, the content of the change to the schedule, and the time when the change was announced.

Accordingly, each company is required to make specific reasonable efforts to safely continue its business, to avoid any business interruption, and to prevent any disturbance to the employees' daily lives as a result of the business interruption and the nonpayment of wages.

III. Working from Home

Question: *If a company has issued to all of its employees an order to stay at home and an employee works at home at his or her own discretion, is the company required to pay wages to this employee?*

Answer: If the company instructs its employees to not work at home at the time when the company issues an order to stay at home, then the company will not be required to pay any wages, provided that there are not separate issues of whether a work absence allowance must be paid, as discussed in the previous section. If, however, the company gives an express or implied instruction to work at home, the payment of wages is considered to be necessary.

If a company is aware of an employee's voluntary labor and allows the employee to continue working, the company may be found to have given an implied work order.

IV. Transportation Problems

Question: *If a company's business is carried out without being particularly affected by the earthquake but an employee of the company is absent from work due to traffic disturbances or other transportation problems, is the company required to pay wages and a work absence allowance to this employee?*

Answer: The company is not required to pay any work absence allowance except where the employee takes paid annual leave or any other paid leave.

The issue of whether the employee in the situation described above has a claim for wages depends on whether the employee's inability to provide labor is attributable to the employer. Because there is no cause attributable to the employer in this circumstance, the employee will have no claim for wages unless the relevant collective labor agreement or work rules contain a provision for payment of wages under such a situation. If, however, an employee applies for paid leave, the company must pay regular wages.

Question: *If an employee uses a different travel route due to a rolling blackout, will an employer be legally obligated to pay any additional travel expenses incurred by the employee?*

Answer: Unless it is provided in an employment agreement, the collective labor agreement, or work rules, the employer is not legally obligated to pay any additional travel expenses.

If, however, it is common labor practice for an employer to pay additional travel expenses incurred by an employee due to a disaster, the employer may be obligated to pay such expenses. In addition, employers could choose to voluntarily pay such additional expenses incurred by the employee.

Employers that are deciding whether or not to voluntarily pay additional expenses incurred by

employees should consider that such voluntary payment may lead to subsequent common labor practices, which in turn may oblige the company to pay for any possible additional expense in the future.

V. Staying at the Workplace During a Disaster

Question: *If a company instructs an employee to stay at a workplace to deal with a disaster, is the company required to pay wages to the employee for the time at the workplace even if there is no actual work to do?*

Answer: The issue involved here is whether the period that the company causes its employee to wait constitutes working hours. The answer is determined by whether the employee is under the employer's direction.

Even if there is no actual work, if the employee is obligated to immediately deal with any work when required and is not guaranteed the right to disengage him- or herself from such work, then the employee is under the company's direction and order; therefore, the waiting period constitutes working hours. The company is required to pay wages in that case.

Question: *If an employee voluntarily stays at the workplace in order to deal with a disaster without an express instruction from the company, is the company required to pay wages to the employee in proportion to the waiting period even if there was no actual work to do?*

Answer: In principle, it is unnecessary to pay any wages in this circumstance. However, if it is determined that the company implicitly ordered an employee to stay at the workplace, the company is required to pay wages.

As mentioned in the answer to the previous question, whether the waiting period constitutes working hours is determined based upon whether an employee is under the company's direction and order. In the present case, the employee is not obliged by the company to stay at the workplace. Because the employee may disengage him- or herself from the work, he or she is not under the company's direction.

However, if the company is aware that the employee voluntarily stays at the workplace to prepare for a disaster and to deal with any work that may arise and the company lets the employee do so, there is a possibility that the company will be deemed to have implicitly ordered the employee to stay at the workplace and the employee will be considered to be under the company's direction. In this case, such a waiting period constitutes working hours, and the company is required to pay wages.

It is thus advisable for an employer to encourage its employees to go home so that the company will not be regarded as having implicitly ordered the employees to stay at the workplace. However, it is unnecessary to prohibit the employees from staying at the workplace if they have difficulty in going home.

VI. Dismissal of Employees

Question: *Does the Employment Management Guideline include information*

regarding the reduction or dismissal of employees when reorganizing the business due to the effects of an earthquake?

Answer: No, the Employment Management Guideline does not address the reduction or dismissal of employees. In practice, most employers in Japan do not implement reorganizational dismissal under such circumstances but, if necessary, employers generally seek to terminate employment through mutual agreement with an employee.

However, if an employer attempts to take advantage of an event such as the earthquake and tsunami to make unilateral changes to existing arrangements or business practices to the detriment of employees, the changes will generally be impermissible.

VII. Advance and Special Payments for Disaster Relief

Question: *If one of its employees requests an advance payment of his or her salary due to an earthquake, is a company required to make an advance payment even before payday? What measures can be taken for providing monetary assistance to employees?*

Answer: A company is required to pay wages for the period during which an employee has already rendered his or her services. If an employee requests payment of wages to cover emergency expenses incurred as a result of events such as a disaster, the employer must pay the accrued wages for the services that have been already rendered by the employee before the scheduled payment date. The payment must be made without delay due to the nature of such an emergency payment. As for additional monetary assistance to an employee, a company may, among other things, offer special payments for disaster relief.

Question: *Is a company required to make special payments to its employees who suffered from an earthquake?*

Answer: A company does not have a legal obligation to make special payments for disaster relief to its employees. However, if it is specified under the provisions of the collective labor agreement, work rules, or labor contract that the company will make special payments for disaster relief under certain circumstances, the company must pay in accordance with the provisions.

A company will also need to make payments in accordance with the provisions of the rules of the company, such as the "rules on congratulatory or condolence payments." Even if there is no such provision, the company may make special payments for disaster relief at its discretion.

VIII. Government Subsidies

Question: *Are companies that temporarily suspend operations while maintaining employment eligible for certain subsidies from the Japanese government?*

Answer: Yes, these include the Employment Adjustment Subsidy and the Subsidy for Emergency Employment Stabilization for Workers in Small and Mid-sized Companies. These subsidies are available if (i) employees are unable to come to work due to transportation problems, (ii) the employer is unable to quickly restore the workplace due to damage from the earthquake, (iii) raw

materials cannot be shipped or received, or (iv) a scheduled rolling blackout has been implemented.

Eligibility for these subsidies is not dependent on whether the suspension of operations is due to a "reason attributable to the employer."

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