

## Client Alert

July 2015

### Proposed Amendment to the Worker Dispatch Act

A bill to amend the Worker Dispatch Act (the "Amendment Bill") was passed in Japan's House of Representatives on June 19, 2015. It is expected that the Amendment Bill will be passed and enacted following further deliberations in the House of Councillors.

The purpose of the Amendment Bill is to ensure employment security and protection for dispatch workers particularly in light of the concerns raised in the collateral resolution attached to the earlier amendment to the Worker Dispatch Act published on April 6, 2012 (the "2012 Amendment") relating to the large discrepancy in the treatment of dispatch workers depending on whether or not they fall under one of the 26 designated specialized job types (the "26 Specialized Job Types" - the number of job types has actually been increased to 28 in the 2012 Amendment). Opposition parties such as the Democratic Party of Japan have voiced strong disagreement over the Amendment Bill, in particular arguing that the Amendment Bill would likely result in the perpetual use of dispatched workers for roles having the nature of permanent positions. However, the Liberal Democratic Party managed to pass the Amendment Bill in the House of Representatives leveraging its prevailing position.

The details of the Amendment Bill can be summarized as follows:

#### 1. Limit on Duration

Under the current Worker Dispatch Act, the length of a dispatching arrangement is generally limited to 1 year, in principle, and can be extended to 3 years by obtaining an opinion from the majority union if any or from an employee representative representing a majority of employees. In relation to this 3-year limit, the Amendment Bill proposes the following changes:

##### (1) *Abolishment of the 26 Specialized Job Types Exception*

Currently, the 3-year limit does not apply to dispatch workers who engage in one of the 26 Specialized Job Types (e.g. software development, designing machineries, operations of office machineries, translators, filings, etc.). However, under the Amendment Bill, the distinction between the 26 Specialized Job Types and other types of jobs has been eliminated, and the 3-year limit will apply regardless of the type of job.

##### (2) *3-Year Limit for Each Worker, NOT for Each Position*

Currently, the 3-year limit is measured for each position - i.e. continuing to use a dispatching arrangement to fill the same position for more than 3 years is not permitted even if the dispatch worker is changed to another person. However, the Amendment Bill proposes to measure the 3-year limit on a dispatch worker basis. As such, if the Amendment Bill is

enacted, it will become permissible to continue to have the same position handled by a dispatch worker as long as the dispatch worker is changed to a new person before the expiry of the 3-year limit.

### (3) *3-Year Limit for Work Place*

The Amendment Bill further proposes a 3-year limit on the use of a dispatch worker at the work place. However, under the proposed amendment, this limit can be excluded by obtaining an opinion from the majority union if any or from an employee representative representing the majority of employees. There would also be a requirement to provide explanations to them in response to their opinion. However, in any case, it is not required to obtain consent from employees in order to be exempted from this requirement, and in that sense, it can be done as a matter of procedure.

With regard to the 26 Specialized Job Types classification, there have been criticisms that the scope of such jobs is not clear and that there is a disproportionate discrepancy between how these 26 Specialized Job Types are treated and how other job types are treated. Further, the 2012 Amendment introduced a provision under which a direct employment relationship between a dispatch worker and a client company will be created if the dispatching arrangement is illegal and this portion of the amendment is scheduled to come into force on October 1, 2015. Taking this provision into consideration, there were concerns that many dispatch workers could argue that they were misclassified as falling under one of the 26 Specialized Job Types and have worked for a period exceeding the 3-year limit, and could make direct employment claims against client companies on this basis. The above change (1) is driven by this concern, and change (2) may be seen as a trade-off for extending the 3-year limit to the 26 Specialized Job Types.

Some opposition parties such as the Democratic Party of Japan strongly disagreed with the change (2), because it will enable companies to continue to have one permanent position held in perpetuity by successive dispatch workers (i.e. just by changing one dispatch worker to another upon reaching the 3-year limit). However, the leading party, the Liberal Democratic Party managed to pass the Amendment Bill in the House of Representatives leveraging its prevailing position.

## 2. Other Changes

In addition to the above, the Amendment Bill also proposes to introduce the following changes:

### (1) *Impartial Treatment for Dispatch Workers*

The Amendment Bill requires the dispatching agency to provide explanations on what have been considered in order to ensure impartial treatment of the dispatch workers. Furthermore, client companies will also be obliged to "pay attention" to: (a) provision of information on the salary level of the employees who are in positions similar to the position the dispatch workers will take to the dispatching agency as necessary and required by the dispatching agency; (b) provision of training and education to the dispatch workers as necessary and required by the dispatching agency; and (c) allowing the dispatch workers to use health and welfare facilities. Currently, client companies have an obligation only to "endeavor" to take these actions, however under the Amendment Bill, they would have an obligation to "pay attention" to take these actions. "Pay attention" is a slightly stronger wording although the precise difference against "endeavor" in terms of practice is not entirely clear.

### (2) *Abolishment of Specific Dispatching Registration*

Currently, there are two types of dispatching. One is general dispatching (*Ippan Haken*) and the other is specific dispatching (*Tokutei Haken*). In specific dispatching, the dispatching agency only dispatches its permanent employees. In general dispatching, on the other hand, the dispatching agency is allowed to have candidates just be registered (i.e. without having an employment relationship) with the dispatching agency while waiting for assignments from client companies and employ them only when the dispatching arrangement is made with the client company. While general a dispatching business requires a license, a specific dispatching business can be engaged through a registration that is merely based only on a notification. This is because specific dispatching is generally considered to provide greater employment security to dispatch employees as compared to general dispatching. However, in practice, dispatch workers under specific dispatch arrangements have not been sufficiently protected in terms of employment security. Therefore, the Amendment Bill proposes to abolish the specific dispatching classification and to uniformly require a license for any dispatching business.

### *(3) Measures for Employment Security and Career Development*

The Amendment Bill will require dispatching agencies to take measures for improving employment security and career development for dispatch workers (e.g. provide training/ educations, career consulting, employment security measures).

### *(4) Dispatching May Not be Used for Permanent Work:*

The Amendment Bill requires the Minister of Health, Labor and Welfare to take into consideration the general principle that companies will not use a dispatch worker for a position that is permanent in nature as this should be handled by a permanent employee. However, it does not directly impose any specific obligations that are binding on either dispatching agencies or client companies.

## **3. Enforcement Date and Transition:**

If the Amendment Bill is passed by the House of Councillors and enacted, it will come into force on September 1, 2015. However, there will be a grace period of 3 years until September 1, 2018 for the amendment 2(2) above (i.e. abolition of specific dispatching) and the dispatching agencies which already have a specific dispatching registration can continue their operations without obtaining a license until then.

Furthermore, the government will continue to monitor the impacts on dispatching and on the employment market, the number of dispatch workers as opposed to permanent workers, and the impartial treatment for dispatch workers, and may consider further reviewing the Amendment Bill as necessary. There will be a review of the Amendment Bill 3 years after its enforcement, but it may also be reviewed earlier than that.

## **4. What can be done?**

The biggest change that client companies will need to address is the change to the limit on the duration of dispatching arrangements. This should be considered together with the part of the amendment brought by 2012 Amendment that will come into force on October 1, 2015 which will create a direct employment relationship between a dispatch worker and a client company if the dispatching arrangement is illegal. As explained above, the changes in this relation are quite significant and may require companies to

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extensively review the resources managed by dispatch workers. This would include the following actions:

- Review and identify the dispatch workers used in the business, particularly the dispatch workers engaging in one of the 26 Specialized Job Types;
- Review how long each dispatch worker can continue to work under the current dispatching arrangement and what actions should be taken after that - e.g. whether to change to another dispatch worker to continue the same job or to convert the dispatch worker to direct employment.
- Review the dispatching contract, and confirm with the dispatching agency as necessary, in order to find out what procedures need to be taken in order to achieve the above plans.

Furthermore, if there are dispatch workers dispatched through a specific dispatching arrangement, the sustainability of such arrangement should be reviewed. Although there will be a grace period of 3 years, a dispatching agency with a specific dispatching registration only will need to obtain a license after that. If it cannot satisfy the requirements for obtaining such a dispatching license at that point, it can no longer continue the dispatching arrangement.