

▶▶ Human Resource Management

▼ Labor-Management Relations

▼ Labor Market

▼ Labor Administration and Legislation

▼ Social Security System

Termination of Employment Relationships in Japan (Part I):

Resignation and Termination of Employment Contracts by Mutual Consent

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This is the first in a series of three articles on the topic of the termination of employment relationships in Japan. These articles provide an outline of the main reasons for such terminations from a legal perspective, while also touching on the actual conditions in Japan. This time, we will look at resignation and termination of employment contracts by mutual consent. (The following and the third (final) articles will cover dismissals and the mandatory retirement age system respectively.)

I. Resignation

Resignation refers to an employee's unilateral notification to their employer of the termination of an employment contract. It tends to be regulated under the Civil Code, as opposed to under the regulations of labor law.

Looking at the present state of conflict resolution by government bodies (see Figure 1), of the 255,000 consultations related to civil affairs in FY 2016, there were a considerable number of consultations regarding resignations—with around 40,000 consultations regarding voluntary resignations, and 22,000 regarding solicited resignations—in contrast with 37,000 regarding dismissals. Moreover, around 71,000 consultations regarding workplace bullying and harassment may include cases in which employers went too far in soliciting resignations. Therefore, judging from the significant numbers of conflicts, such issues related to resignation are a problem that society cannot ignore. Even in the event of employment relationships being terminated due to corporate downsizing and other reasons such as early retirement, both employers and employees tend to aim to end the relationship in a way that avoids conflict. In such a situation, importance of issues related to resignations

becomes more evident, in contrast to dismissals, where the employer unilaterally terminates the employment relationship.

Here we look at the legal treatment of resignations under the Civil Code. (Issues regarding the validity of manifestations of intention to end an employment relationship are summarized in section II.)

According to Article 627 of the Civil Code, when the employment contract does not specify the term of employment, the termination of employment shall take effect when 2 weeks have passed from the day of the request to terminate (Civil Code, Article 627, Paragraph 1). Although scholars' opinions are divided, it is generally understood that the employer is not permitted to extend the notice period to a period longer than 2 weeks, considering the provisions of the Labor Standards Act (such as Article 5, "Prohibition of Forced Labor") and the freedom to choose an occupation (Constitution of Japan, Article 22, Paragraph 1). Systems by which a company prescribes that it must approve resignations also have no legal force as they restrict the freedom of employees to resign (The *Takano Meriyasu* case, Tokyo District Court, Oct. 29, 1976; 841 *Hanrei Jiho* 102, etc.). On the other hand, an employee who has resigned may face liability to provide damages to employers (such as when the employee has resigned suddenly [4 days after starting work at the employing company]; the *K's International* case, Tokyo District Court, Sept. 30, 1992; 616 *Rohan* 10).

In the event that remuneration is specified with reference to a time period, it is possible to request

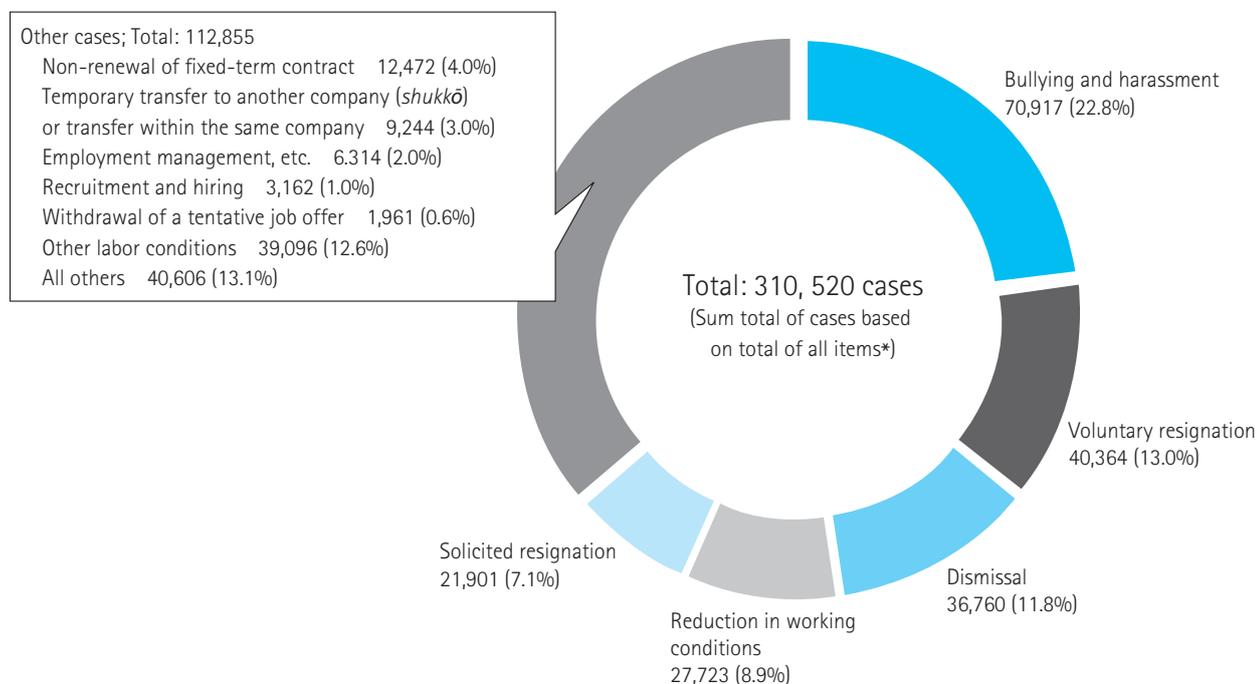


that the employment contract be terminated in the next time period or later, provided that the request is made within the first half of the current period (Civil Code, Article 627, Paragraph 2). Moreover, when remuneration is specified with reference to a period of 6 months or more, the request must be made at least 3 months before the termination of employment (Paragraph 3). It must, however, be noted that for employees who receive annual salaries, the regulations set out in Paragraphs 2 and 3 are excessively restrictive at the time of resignation. In the Amended Civil Code (law of obligations), such regulations are therefore only applied to the termination notification by the employer to the employee (Amended Civil Code, Article 627, Paragraph 2), and termination notifications made by employees are to be subject to the general principle of 2 weeks' notice as set out in Paragraph 1.

On the other hand, in the case of fixed-term employment contracts, the general principle is for the contract to terminate when the term of employment expires. Furthermore, Article 14 of the Labor

Standards Act prescribes the maximum length of contract periods as 3 years as the general rule, and 5 years for contracts concluded with (a) employees with expert knowledge, and (b) employees aged 60 or older. However, Article 137 of the Labor Standards Act seeks to protect employees, by specifying that employees in contracts pertaining to the completion of a certain business lasting more than one year and employees in contracts pertaining to items (a) and (b) above may resign by notifying request to their employer at any point after one year has passed.

The Civil Code addresses such relatively long contract periods by specifying that where the contract period is for a long period such as over 5 years, the parties concerned may terminate the contract after 5 years have passed (Civil Code, Article 626, Paragraph 1). In such cases, 3 months' notice is required (Paragraph 2). However, as under the present regulations, long, fixed-term contracts may also lead to excessive restrictions on employees when resigning, it was decided that the 3 months' notice of contract termination only applies to the



Source: MHLW, "The status of implementation of the individual labor dispute resolution system in FY 2016," press release, June 16, 2017.
 Note: Percentages reflect the proportion of cases within the total for all consultations (sum total of cases based on total of all items*). The total may not be exactly 100% due to the fact that figures are rounded up or down. Moreover, in calculating the sum total of cases based on the total of all items, consultations covering several different areas were counted multiple times.

Figure 1. Individual labor disputes related to civil affairs: Number of cases according to consultation content

employer's duty to the employee, and employees are permitted to terminate their employment contract with 2 weeks' notice (Amended Civil Code, Article 626, Paragraph 2). Moreover, when an employee has continued to work after the expiration of the original period of a fixed-term contract and the contract has been implicitly renewed by the parties concerned, from the point of renewal onward, the employee may terminate the contract with 2 weeks' notice (Article 629, Paragraph 1).

The Amended Civil Code touched on above is due to come into effect in 2020.

II. Termination of employment contracts by mutual consent

The termination of employment contracts by mutual consent refers to a mutual agreement by the employee and the employer to terminate an employment contract. Such an agreement normally takes effect once the employee has manifested to the employer their intention to resign from the company and the employer—in particular, a person with the authority to accept the resignation—manifests their approval of the resignation (The *Okuma Machinery Works* case, Supreme Court, Third Petty Bench, Sept. 18, 1987; 504 *Rohan* 6; Person of authority was head of the personnel department). However, termination by mutual consent is recognized to have taken effect even in such a case where the proprietor of the company the employee was originally employed with has established a temporary staffing agency and an agreement has been formed that the employee will thereafter work under an employment contract with that temporary staffing agency (The *Nikken Sekkei Ltd.* case, Osaka District Court, Feb. 18, 2005; 897 *Rohan* 91, etc.). In contrast, even where the employee is working on the premise that they will resign—and handing over their duties while preparing to leave the company for a new job—termination of the contract by mutual consent cannot be said to have taken effect in such cases where no official written confirmation of the resignation has been exchanged (The *FreeBit* case, Tokyo District Court, Feb. 28, 2007; 948 *Rohan* 90). In other words, substantial agreement of the intentions, of both the employee and the employer, to terminate the employment contract is necessary for termination by

mutual consent to be recognized (albeit, there may be cases in which such mutual consent is acknowledged based on various circumstances).

III. Overview of precedents related to resignation and termination of employment contracts by mutual consent

Here we will provide an overview of specific precedents regarding resignation and termination of employment contracts by mutual consent.

A. Lack or error of manifestation of intention

An employee's manifestation of intention to resign must be the employee's true intention. In the eyes of the law, cases where it is not the employee's real intention are handled under the Civil Code as issues of concealment of true intention, mistakes, or duress.

Concealment of true intention refers to cases such as situations in which an employee submits a letter of resignation despite having no intention to resign from the company, where the employer is aware that the employee in fact has no intention to resign from the company (The *Showa Women's University* case, Tokyo District Court, Feb. 6, 1992; 610 *Rohan* 72). Such manifestations of intention are void (Civil Code, proviso to Article 93).

Mistakes refer to cases in which, for instance, an employee has submitted a letter of resignation because he or she wrongly assumed that he or she would be dismissed and was attempting to avoid that dismissal, but there was in fact no possibility of him or her being dismissed (The *Showa Electric Wire and Cable* case, Yokohama District Court, Kawasaki Branch, May 28, 2004; 878 *Rohan* 40, etc.). Such manifestations of intention are void (Civil Code, Article 95).

Duress refers to cases in which, for example, an employee has been compelled to tender his or her resignation as the employer has hinted that the employee will be subject to disciplinary action or disadvantageous treatment (The *Nishimura* case, Osaka District Court, Oct. 17, 1986; 486 *Rohan* 83, etc.). Such manifestations of intention may be rescinded (Civil Code, Article 96).

B. Solicited resignations

There are some cases in which an employer may encourage an employee to resign, but as a general rule, it is illegal to repeatedly and persistently recommend to an employee that the employee resign in such a way that they are almost obliged to, and the person who solicited the resignation and the employer may be liable to pay damages (The *Shimonoseki Commercial High School* case, Supreme Court, First Petty Bench, Jul. 10, 1980; 345 *Rohan* 20).

Using grounds such as gender or union activities as the basis for soliciting a resignation is of course illegal, as it is in violation of the Equal Employment Opportunity Act or the Labor Union Act. It is also illegal to set a gender-based difference in the ages used as a basis for determining which employees should be solicited to resign (The *Tottori Prefectural Teaching Staff* case, Tottori District Court, Dec. 4, 1986; 486 *Rohan* 53). Encouraging or coercing a woman to resign on the grounds of pregnancy also places the company liable to pay damages, given that it is illegal behavior in violation of the objectives of the Equal Employment Opportunity Act (The *Imagawa Gakuen Konomi Kindergarten* case, Osaka District Court, Sakai Branch, Mar. 13, 2002; 828 *Rohan* 59).

Furthermore, going beyond encouraging and thereby coercing resignation is of course an illegal act. This includes such cases as coercing an employee to resign in a way that constitutes defamation of character, due to the use of particularly derogatory expressions in a public setting (The *Tokyo Women's Medical University* [coercion of resignation] case, Tokyo District Court, Jul. 15, 2003; 865 *Rohan* 57), or hinting at disciplinary dismissal such that an employee is pressured to choose between resigning of their own accord or putting up with being demoted, taking a pay cut, or being transferred to a different position (The *Gunma town* [coercion of resignation] case, Maebashi District Court, Nov. 26, 2004; 887 *Rohan* 84).

C. Early retirement (incentive) systems

Systems to encourage retirement earlier than the normal mandatory retirement age by incorporating more financially favorable treatment are known as

“early retirement incentive systems” among other such names.

As early retirement incentive systems are temporary measures for employment adjustment, they are not specifically applied unless an employee fulfils certain qualification requirements and applies within a certain period or the company has the system automatically applied to the employees. However, if it is prescribed in a company's internal regulations that there may be cases in which the system is also applied to people of other ages—even those of an age that would not normally be subject to the system—the system may be applied with modifications (The *Asahi Advertising* case is an example of a precedent in which a claim for the difference between the actual retirement allowance and the retirement incentive allowance was upheld; Osaka High Court, Apr. 27, 1999; 774 *Rohan* 83).

In order to prevent a call for employees willing to take early retirement resulting in an outflow of talented human resources, companies will often attempt to dissuade people from leaving. As a result, not everyone to whom the system is applied is able to resign with incentives. This is also why it is generally necessary for the employer to give their approval of early retirement. Furthermore, as the right to the additional retirement allowance provided for early retirement only takes effect once the employer approves the early retirement (The *Kanagawa Agricultural Credit Cooperative* [claim for additional retirement allowance] case, Supreme Court, First Petty Bench, Jan. 18, 2007; 931 *Rohan* 5), persons whose early retirement was not approved and other such persons who received relatively disadvantageous financial treatment will not have any claims for payment of the difference (The *Sumitomo Metal Industries* [retirement allowance] case, Osaka District Court, Apr. 19, 2000; 785 *Rohan* 38).

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