

Article

Law and Policy on Health Protection in the Workplace during a Pandemic

YAMAMOTO Yota

I. Introduction:¹ Challenges in labor law and labor law policy during the COVID-19 pandemic

The global COVID-19 pandemic, which began in January 2020, raised numerous challenges in relation to Japan's labor law and labor law policy. These challenges can be broadly categorized into two main areas. The first area concerns how to maintain employment and guarantee income for employees when employers are forced to downsize or suspend their business or operations due to a pandemic (Area A). The other area relates to how to protect employees from viral infection and risks to their life or health in workplaces (including “during commuting”)—spaces where people gather (Area B).

In Area A, the Japanese government actively implemented legislative policies, including amendments to the Employment Insurance Act to relax the requirements for receiving the Employment Adjustment Subsidy. Furthermore, issues concerning the interpretation of existing labor laws were also actively discussed. These included the legality of dismissals or disadvantageous changes to working conditions caused by the pandemic, and the possibility of employees' claims for wages and allowances (Article 26, Labor Standards Act) during periods of company closing. In contrast, regarding Area B, while there was some debate about legal interpretation, it centered primarily on issues regarding telework (specifically, home office). Although some policy measures were implemented in this area, there was no response from the perspective of legal policy—at least in the form of

new legislation or legal amendments—unlike in Area A.

Therefore, this paper will discuss how the interpretative approach can address issues in Area B as a whole, as well as what form new legal policies should take, in preparation for the possibility of a future new pandemic in Japan.

II. Law and policy concerning infection prevention measures and labor relations

This section examines legal issues arising in labor relations concerning infection prevention measures against emerging infectious diseases in the workplace. These legal issues can be broadly categorized as follows: (i) the implementation of infection prevention measures by employers in the workplace; (ii) the identification of infected individuals in the workplace by employers; (iii) whether employers can require employees suspected of infection to stay home (as an infection prevention measure); and (iv) whether employers can require employees to report to the workplace or undertake business travel during a pandemic.

1. Issue (i)

(1) Legal policy regarding the implementation of infection prevention measures in the workplace

Regarding Issue (i), the first question concerns how the government should design policy measures to ensure that employers implement appropriate infection prevention measures in each workplace.

In Japan, the Ministry of Health, Labour and Welfare (MHLW) implemented a certain range of

policy measures²—such as requesting labor unions and employers’ organizations to implement infection prevention measures and publishing checklists for workplace health committees to assess the implementation status of infection prevention measures—but no legislative regulation was enacted. A study analyzing the implementation status of infection prevention measures by companies during the COVID-19 pandemic revealed that approximately 30% of companies adopted no infection prevention measures whatsoever.³ Reviewing this fact, it can be said that the introduction of statutory regulations requiring employers to implement infection prevention measures deserves consideration as a labor law policy in the event of a future new pandemic.

However, given that the risk of employees becoming infected with a virus in the workplace varies widely by industry, sector, firm size, region, and other factors, it is desirable to adopt a tailor-made (risk assessment-based) type of regulation. One possible approach would be to amend the Industrial Safety and Health Act (ISHA) to impose on employers an obligation to implement infection-prevention measures, while also requiring each workplace to determine its own specific measures—based on the infection risks particular to that workplace—by consulting with employees through health committees or other representative bodies. In this regard, the government (especially MHLW) should also consider issuing guidelines under the ISHA that set out a range of available infection prevention options, so that labor and management in each workplace can refer to them as needed when determining their own such measures.

(2) Whether employers can force infection prevention measures in the workplace—validity of a mask-wearing order

Regarding Issue (i), another question arises whether employers can force (impose a mandate on) employees to comply with infection prevention measures that the employers have decided to implement. A particularly contentious point is whether employers can order mask-wearing as part

of their lawful work orders to employees. The efficacy of masks in preventing droplet and aerosol transmission is generally recognized, and court decisions tend to uphold the validity of such an order.⁴

Because a mask-wearing order is issued as a work order by the employer (i.e., as an exercise of the employer’s right to direct), the prohibition on the abuse of rights under Article 3, paragraph (5) of the Labor Contracts Act (LCA) applies. Accordingly, the validity of such an order is not unconditionally recognized; rather, it must be determined by weighing the interests between the employers’ legitimate business necessity for mask-wearing against the disadvantages imposed on employees due to wearing masks. From this perspective, during a pandemic, while the physical burden of wearing masks is relatively minor for employees who are healthy individuals, the employer faces a significant operational need to prevent workplace infections by requiring the employees to wear masks. Thus, the employer’s mask-wearing order is generally considered valid. However, if an employee has a developmental disability such that mask-wearing would substantially impair their daily functioning, and this condition is substantiated by medical documentation, the application of a blanket mask-wearing order may constitute an abuse of the employer’s right to direct, and could therefore be held invalid.

2. Issue (ii)

Issue (ii) concerns whether employers can order employees to undergo COVID-19 testing—specifically PCR tests or temperature screenings—or to use contact tracing applications such as COCOA, in order to identify infected individuals, including asymptomatic carriers, in the workplace.

First, issues involved in cases where an employer orders employees to take PCR tests and temperature screening are similar to those involved in cases where an employer orders employees to undergo (non-statutory) medical examinations. Therefore, the Supreme Court’s existing analytical framework for evaluating the validity of such orders on medical

examinations may provide relevant guidance in assessing orders for PCR tests and temperature screening.⁵ When evaluating the validity of such orders in each case, it should not be overlooked that PCR tests and temperature screenings involve the collection of employees' health data, in addition to raising concerns regarding the degree of medical invasiveness to the employee's body. Accordingly, any judicial assessment of the validity of orders to undergo PCR tests or temperature screenings must consider whether the employer properly handles the employees' health data obtained through these measures. In this regard, MHLW has published guidelines for the appropriate handling of data on physical and mental conditions of employees based on Article 104, paragraph (3) of the ISHA.⁶ The matters stipulated in these guidelines (e.g., establishing rules for the handling of data and developing necessary systems) may serve as a reference for judging that point.

Furthermore, regarding the mandatory use of contact tracing applications, because an employer's work orders are fundamentally not effective against employees' private property, it is interpreted that an employer would not be permitted to order employees to install such an application on their personal smartphones. Even if the employer's order applies to company-issued devices, the validity of such an order should be strictly judged from the perspective of the risks to privacy and personal data protection inherent in contact tracing technology.⁷

3. Issue (iii)

Issue (iii) concerns whether employers can order employees suspected of infection to stay home as an infection prevention measure.⁸ In this respect, the framework developed in established Japanese case law concerning the validity of stay-at-home orders issued by employers as work orders may provide a useful point of reference.⁹ More specifically, when assessing the validity of such a stay-at-home order, it is first necessary to determine whether a business necessity exists for employers to require the employees to stay at home, considering the employees' specific symptoms and relevant conduct

or contact history. At the same time, the extent of the disadvantages imposed on the employees by such an order should be examined, particularly from the viewpoint of whether the duration of the order is unnecessarily prolonged and whether the employer has explored alternative arrangements (such as home office) that would allow the employee to continue working.

4. Issue (iv)

Furthermore, as Issue (iv), can employers order employees to report to the workplace or undertake business travel during a pandemic? Regarding this issue, based on the Supreme Court's precedent,¹⁰ employees would be excused from the obligation to report to the workplace or undertake business travel where there is an objectively reasonable expectation that such workplace attendance or business travel would expose them to an infectious disease, thereby jeopardizing their health or safety. Factors that should be considered in determining whether such a risk exists include: a) the infection-prevention measures implemented by employers in the workplace; b) employee's individual risk of severe illness if infected; and c) the prevailing infection risk in the relevant geographic area, particularly where business travel is required. Among these factors, in assessing factor b), the employee's age and presence of underlying conditions (such as heart disease or diabetes) should also be taken into consideration. As for factor c), particularly in the case of ordering an overseas business travel, the infectious disease risk information published by the Ministry of Foreign Affairs may serve as an important indicator. Thus, an employee's subjective or vague fear of infection, without objective supporting circumstances, does not constitute grounds for exemption from workplace attendance or business travel obligations even during a pandemic.

III. Law and policy concerning telework (home office) during a pandemic

Telework, particularly home office where employees work from home using information and

communication technology (ICT), serves as an effective intervention against infectious disease transmission by eliminating interpersonal contact both at the workplaces and during commuting. It is therefore unsurprising that this mode of work gained rapid and widespread adoption in Japan in response to the COVID-19 pandemic. While home office gives rise to a number of legal issues even in ordinary times, the following issues also require consideration during a pandemic: (i) whether employers can order employees to work from home; (ii) whether employees can claim employers to allow them to work from home; and (iii) whether employers can order working-from-home employees to report to the workplace.

1. Issues (i) and (ii) in ordinary times

In ordinary times, Issues (i) and (ii) should be considered as follows:

Turning to Issue (i), the Japanese Constitution provides two foundations directly relevant to this question; the inviolability of the home (Article 35) and the right to privacy as an aspect of the right to life, liberty, and the pursuit of happiness (Article 13). These constitutional guarantees collectively establish that how employees utilize their private space, such as their home, is fundamentally left to their personal discretion. It should be interpreted that at least in ordinary times, an employer does not have the legal authority to order an employee to use their private residence for work purposes. Regarding Issue (ii), as an employee's place of work is a matter to be determined based on the employer's right to direct, in principle, an employee does not have the right to request the employer to allow them to work from home. Accordingly, in ordinary times, the implementation of home office requires an individual agreement between the parties to the employment relationship.

However, regarding Issue (ii), a question arises whether an employee can claim a right to work from home under Article 36-3 of the Act to Facilitate the Employment of Persons with Disabilities (AFEPD), which prescribes an employer's duty to provide reasonable accommodations to workers, as an

exception to the principle mentioned above when an employee has disabilities and faces difficulties performing work in the workplace. In this regard, in Japan, the duty to provide reasonable accommodations under this provision is framed as an obligation of the employer (business operator) to take necessary measures. Therefore, although an employer must respect the wishes of an employee with disabilities when providing reasonable accommodations (Article 36-4 of the AFEPD), the employer retains a certain degree of discretion in determining the specific form of accommodations to be provided. Consequently, Article 36-3 cannot readily be interpreted as providing a basis for employees to claim a right to work from home by treating it as the only acceptable form of reasonable accommodations.

2. Issues (i) and (ii) during a pandemic

How, then, should we consider Issues (i) and (ii) during a pandemic? As noted above, at least during ordinary times, neither the employer's right to order working from home nor the employee's right to work from home should be recognized. That said, during a pandemic, such as the COVID-19 pandemic, employers bear a duty of care for the safety of employees as a whole under Article 5 of the LCA. Moreover, reducing contact opportunities within workplaces, particularly those with extensive shared spaces, can contribute to lowering the overall number of infected individuals in society. Therefore, in such exceptional circumstances of a pandemic, it is not impossible, as a matter of legal interpretation, to recognize either an employer's authority to order working from home or an employee's right to work from home on the basis of the principle of good faith under the labor contract (Article 3, paragraph (4) of the LCA). The effective implementation of home office requires the establishment of workplace rules through labor-management coordination. Accordingly, there are limits to either party unilaterally compelling the introduction of such a work arrangement by asserting it as a right.

Therefore, during a pandemic, it may be preferable to encourage employers and employees to explore the possibilities of home office arrangements

and to facilitate their implementation through individual agreements. Specifically, for instance, in circumstances where a state of emergency has been declared (Article 32 of the Act on Special Measures Against Novel Influenza), a possible approach would be to oblige both employers and employees to engage in mutual consultations regarding the implementation of home office. Although such an obligation to hold a consultation could theoretically be derived from the principle of good faith under labor contracts (Article 3, paragraph (4) of the LCA), it would be more appropriate to stipulate this obligation in statutes, such as the ISHA, in order to clarify the respective responsibilities of both employers and employees.

3. Issue (iii)

Turning to Issue (iii), a question arises as to whether an employer can order employees who have previously worked from home office to report to the workplace during a pandemic.¹¹ Considering that such orders to report to the workplace are also issued based on the employer's right to direct, they are ultimately subject to the regulation against an abuse of rights (Article 3, paragraph (5) of the LCA). Accordingly, the validity of such orders should be assessed by weighing the employer's legitimate business necessity against the disadvantages the employee would face in complying with them. Furthermore, for the employer's business necessity to be recognized in this specific assessment, it is interpreted that there must be objective circumstances that would prevent the smooth implementation of home office. Such circumstances may include a decline in the quality of the employee's work or a breach of obligations while working from home, difficulties in managing confidential information, or a deterioration in the information and communication environment. In assessing the disadvantages to the employee, particularly during the COVID-19 pandemic, it is necessary to consider circumstances that pose a risk to the employee's life or physical safety due to infection or severe illness associated with commuting to work, as well as circumstances that render work outside the home impracticable.

The former may include circumstances such as where the employee or their family are elderly persons or have underlying health conditions, or the infection prevention measures implemented in the workplace are insufficient. The latter may include circumstances such as where the closure of schools or daycare centers due to the spread of an infectious disease requires the employee to stay home to care for children, or where the employee is subject to a request from the government (including local authorities) to refrain from going out due to infection or suspected infection.

As stated earlier, it should be understood that the employee's right to request to work from home cannot be derived from the provisions of Article 36-3 of the AFEPD. However, when determining whether an employer's order requiring an employee with disabilities who has previously worked from home to report to the workplace constitutes an abuse of rights, factors such as the difficulty of commuting to work due to the employee's disabilities and the obligation to provide reasonable accommodations under that Article should be given due consideration. Furthermore, in making this determination, it is also appropriate to consider whether the employer has complied with certain procedures, such as providing advance notice, so that the employer's order would not constitute an abrupt change for employees who currently work from home.

IV. Law and policy concerning vaccination and workplaces or labor relations

The last topic concerns vaccination. The first issue is how the government should utilize workplaces and what actions it should require employers to take in order to encourage vaccination among employees and increase vaccination rates across society (*promotion* of vaccination; Issue (i)). In connection with this, another question arises as to whether employers can directly order vaccination for employees, or indirectly force employees to undergo vaccination by, for example, prohibiting unvaccinated employees from entering the workplace (*forcing* vaccination; Issue (ii)).

1. Issue (i): *Promotion of vaccination*

Regarding Issue (i), as a policy response to promote vaccination in the workplace, so-called “workplace vaccination” programs were implemented in Japan beginning in June 2021 during a pandemic pursuant to Article 6, paragraph (3) of the Immunization Act. However, although the Immunization Act requires individuals concerned to endeavor to undergo vaccination (Article 9), the decision whether to be vaccinated ultimately remains a matter of individual choice and consent (including employees).¹²

In this respect, during a future new pandemic, the following measures deserve consideration as legal policy options to increase vaccination rates: encouraging employers to introduce a leave system for vaccination by, for example, providing subsidies, so as to make vaccination more accessible to employees; and requiring employers to provide information about and raise awareness of vaccination among employees within the framework of worker safety and health education (Article 59) under the ISHA.

2. Issue (ii): *Forcing vaccination*

On the other hand, regarding Issue (ii), vaccination entails a non-negligible level of medical invasiveness to the body, produces irreversible effects through immunity, and in some cases poses risks to life and health due to side effects. For these reasons, the decision whether to be vaccinated should be left to the rights of the individuals concerned as protected under Article 13 of the Japanese Constitution. Accordingly, it is construed that, at least with respect to employees in general, employers cannot oblige employees to undergo vaccination as a work order (direct *compulsion*).

Finally, in the event of a future new pandemic comparable to, or more severe than the COVID-19 pandemic, the question arises whether employers operating hospitals or nursing care facilities can order medical and nursing care employees to undergo vaccination, or implement measures prohibiting unvaccinated employees from entering the workplace.

Given that these medical and nursing care employees inevitably come into contact with vulnerable populations—older adults and patients at heightened risk of serious illness or death if infected—such orders and measures cannot immediately be regarded as unreasonable. That said, the validity of the orders and measures should be determined by assessing the following factors based on the latest scientific and medical knowledge: (a) the risks of adverse reactions and other potential risks that may occur when medical and nursing care employees are vaccinated; (b) the need to protect vulnerable individuals from infection; (c) the effectiveness of vaccination in preventing the spread of infection, especially its effectiveness in preventing infection; and (d) other alternatives to direct or indirect compelling vaccination.

Notes

1. This article draws on the author’s prior work, *Comparative Law and Policy on Emerging Infectious Diseases: Occupational Health Protection in Japan and Germany during COVID-19 Pandemic*, JILPT Research Report no.232 (Japan Institute for Labour Policy and Training, 2025), authored under the name Yota Yamamoto. It distills and reconstitutes the report’s analysis of Japanese law into article form, reorganizing its central arguments for this publication. Readers seeking a more comprehensive treatment of the issues discussed herein, including a comparative examination of German law, are directed to the full report.
2. Ministry of Health, Labour and Welfare (MHLW), “Shingata korona uirusu kansen sho no daikibona kansen kakudai boshi ni muketa shokuba ni okeru taio ni tsuite (yosei)” [Request regarding response in workplaces for prevention of large-scale spread of COVID-19 infection], March 31, 2020.
3. “Kigyo no kansen boshi taisaku” [Infection prevention measures by companies], Kota Tagami, *JILPT Research Eye*, no.68 last modified September 8, 2021, https://www.jil.go.jp/researcheye/bn/068_210908.html.
4. The *Kintetsu Housing Management Co., Ltd.* case, Osaka District Court (Dec. 5, 2022) 1283 *Rohan* 13, etc.
5. The *Nippon Telegraph and Telephone Public Corporation, Obihiro Bureau* case, Supreme Court (Mar. 13, 1986) 147 *Shumin* 237.
6. “Rodo-sha no shin-shin no jotai ni kan-suru joho no tekisei na toriatsukai no tameni jigyousha ga kozubeki sochi ni kansuru shishin” [Guidelines concerning measures to be taken by employers for proper handling of information on workers’ physical and mental health], MHLW, Last modified March 31, 2022, <https://www.mhlw.go.jp/content/000922318.pdf>
7. The Personal Information Protection Commission states that contact tracing applications are “supposed to handle information such as the result of the users’ PCR tests and records of their activities (including records of contact with

others), which could significantly infringe users' rights and interests if mishandled," and further notes that "the decision whether to use these applications should be left to the voluntary judgment (consent) of the individuals concerned, based on the provision of sufficient and concrete information" (Personal Information Protection Commission, "Personal Information Protection Commission's view on the effective use of contact tracing applications to help deal with Coronavirus disease.

Personal Information Protection Commission, "Shingata koronauirusukansensho taisaku to shite kontakuto toreshingu apuri o katsuyo suru tame no kojinhohogoinkai no kangae-kata ni tsuite" [Personal Information Protection Commission's view on effective use of contact tracing App to help deal with Coronavirus disease (COVID-19)], news release, May 1, 2020.

8. During the pandemic in Japan, COVID-19 was categorized as either a designated infectious disease or a novel and reemerging influenza or coronavirus infection under the Act on the Prevention of Infectious Diseases and Medical Care for Patients with Infectious Diseases, and accordingly, restrictions on work participation prescribed under Article 18 of that Act were applicable to individuals infected with COVID-19 or

asymptomatic carriers. If employees fall within the scope of those subject to these regulations, the competent administrative authorities—namely, prefectural governors—would implement measures to prevent infection in the workplace. However, given that this provision cannot necessarily cover all infected or potentially infected individuals, a question arises: whether employers can, on their own initiative, restrict or prohibit employees from engaging in work and order them to remain at home as an infection prevention measure in the workplace (Issue (iii)).

9. The *All Japan Seamen's Union* case, Tokyo High Court (Jan. 25, 2012) 2135 *Rokeisoku* 3.
10. The *Nippon Telegraph and Telephone Public Corporation, Chiyoda-maru* case, Supreme Court (Dec. 24, 1968) 22-13 *Minshu* 3050.
11. This contested point was addressed in the *IDH* case, Tokyo District Court (Nov. 16, 2022) 1287 *Rohan* 52.
12. "Shingata koronauirusu ni kansuru Q&A (ippan no kata muke) 1.Toi 7" [COVID-19 Q&A (For the public), 1. Q7], MHLW, accessed Apr. 28, 2026, https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/kenkou_iryuu/dengue_fever_qa_00001.html#Q1-7.

YAMAMOTO Yota

Doctor of Law. Senior Researcher, The Japan Institute for Labour Policy and Training. Research interest: Labor law and labor law policy.

<https://www.jil.go.jp/english/profile/yamamoto.html>

