Japan: Supreme Court rules on Mandatory Retirement

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Japan

Japan’s June 2018 Supreme Court decision signals that mandatory retirement—a core concept underlying “lifetime employment” culture in many Asian countries—persists with some limitations, and employers may want to update and implement mandatory retirement programs accordingly. The country's highest court confirmed that employers can require employees to retire upon reaching mandatory retirement age then offer them fixed-term contracts with less favorable terms if such terms are reasonable.

What is “Mandatory Retirement”?

Employers accustomed to U.S. discrimination laws recoil at the concept of forced age-based retirement—but a standardized retirement age must be understood within a legal and cultural framework quite different from the unique “at-will” default structure present in the United States. Labor laws in countries like China and Japan require employers to enter into contracts, and they prohibit employers from making unilateral decisions adverse to employees (absent extreme circumstances). Their courts frequently order employers to pay bonuses at last year’s levels, continue benefit plans or equivalents, or reinstate discharged employees. The law motivates employees to fight termination and other changes that may (even hypothetically or marginally) result in less favorable employment terms. Conversely, employers often lack much negotiating leverage or means to quantify the costs of implementing a desired change.

Retirement age then, often serves as an employer’s only reliable measure of staffing costs when contemplating workforce restructurings, policy changes, and succession planning—and employers are generally well served by setting one and enforcing it consistently.

In addition to Japan, countries where mandatory retirement is required or permitted include:

- Employees must retire at 55 (or in some cases 50), and male employees must retire at 60. After this age, they are generally ineligible for a local labor contract and may only be engaged under a “services contract” (akin to an independent contractor agreement). Individuals over these ages seeking work permits in China are likely to be rejected.
Employers may set a retirement age by contract or work rules (generally 60).

Though not mandatory for private-sector employees, the official retirement age is 58, and employers can implement binding service rules defining a retirement age.

Employees are deemed retired at 60 (or earlier if specified in the employer's work rules). At that age, their contracts end and they get severance automatically unless they agree with their employers to continue working post-retirement. Employers may also rehire these employees as employees post-retirement on a fixed-term contract.

Despite the prevalence of these mandatory retirement laws, for many, retiring at such a young age does not make sense. Technological and medical advances facilitate employees' ability, desire, and financial need to remain in the workforce beyond the mandatory retirement ages. Moreover, pressures on national pension systems have been mounting from the increased life expectancy of retired employees. As the recent court holding illustrates, laws struggle to keep up.

Mandatory Retirement in Japan

Two facets of Japanese law come into play with regard to retiring employees: (1) the laws on mandatory retirement (including the Labor Standards Act and the Older Person's Employment Stabilization Law), and (2) the laws on discrimination against employees without direct, indefinite contracts (the Labor Contracts Law).

(1) Mandatory Retirement Laws

Japanese law permits but does not require employers to set a mandatory retirement age. Traditionally, employers institute a mandatory requirement age of 60. The national retirement age is now being raised to 65, and the Older Person's Employment Stabilization Law allows employers to retain their mandatory retirement age of 60 but requires any employer that does so to "re-employ" workers age 60 and older until age 65. Employers typically do so on fixed-term contracts.

(2) Discrimination Laws

Labor contract law Article 20 forbids employers from discriminating against employees based on their status as fixed-term employees. Employers may treat employees differently only if rational (goraoki) in light of operations, level of responsibility, work duties, and all relevant circumstances.

Supreme Court Decision

The Supreme Court decision deals with the interaction of these two issues—upholding mandatory retirement at 60, but placing limits on the changes employers can make in post-retirement "reemployment" contracts. Employees who were retired at 60 sued because their fixed-term "reemployment" offer differed substantially from their previous employment contracts, despite that the nature of the job (trucking) was similar. Ultimately, the Court held that some of the changes the employer made in the offer were "rational," and others were "irrational" per Labor Contract Law article 20.
This was the first recorded decision on Article 20. Most surprisingly (and upsetting to employees), the Court specifically found that it was “rational” to reduce certain allowances based on the fact that the employees were now pension-eligible. In other words, employers are “rational” to cut net pay based on the existence of another source of passive income.

**Comment**

On balance, this decision was good news for employers, as it means they do not have to overhaul their age-60 retirement programs in Japan. Now that the dust from this decision has settled, employers may benefit from the following:

1. **Retaining an Age-60 Retirement Program.** Most employers may still derive some benefit from retaining an age-60 retirement program, and this decision, if anything, bolsters that benefit. But it is always worthwhile to consider whether this program is ultimately serving the business given all relevant factors.

2. One might question whether a mandatory retirement program is even worth it at all, given that employers are required to re-employ until age 65 anyway. Given the lack of protections for employers under Japanese law, though, there is often a benefit to maximizing leverage in contemplation of a potential separation negotiation.

3. Employers that retain an age-60 retirement program may want to keep in mind that global codes of conduct often prohibit age discrimination. Of course, employers may want to review their mandatory retirement program and make sure it doesn’t go so far as to explicitly ban legally-considered retirements.

4. Employers may want to review their “Rules of Employment,” which is a handbook or set of rules that employers with more than 30 employees must file in Japanese with the local ministry, to make sure their retirement programs are properly documented—otherwise a retirement action can be challenged on that procedural basis.

5. Employers may find it helpful to check their contracts’ references to retirement. Employers may also want to make sure they don’t have fixed-term (rather than indefinite) contracts that expire after age 60. Employers may also want to make sure that their contracts don’t contradict their Rules of Employment or an age-60 retirement program.

6. **Consistent Application of Retirement Programs.** Employers that decide to retain their age-60 retirement programs may want to make sure that they are applying them consistently. Employers may want to consider taking the following actions to ensure consistent application.

7. Requiring everyone to retire at 60 without exception. In addition, it may be helpful to initiate the conversation before an employee turns 60.

8. Presenting the retiring employee with a new fixed-term contract that looks as much as possible like the employee's previous contract.

9. If the employee does not accept the fixed-term contract, offering a generous severance package in exchange for a separation agreement.
Proceed carefully when the employees are on expatriate assignments or have potential touchpoints or coemployment in multiple countries. These employees may have rights under multiple countries’ laws. Employers may want to have consistent policies as to who is subject to Japan employment law and document those clearly at all stages of the relationship.

Benefits Packages. Employers may want to evaluate the benefits packages that they offer retirees and consider what might be “rational” to offer post-retirement, based on the statute and the recent decision.

The Supreme Court has now held that some reduction of pay and allowances is justifiable. Nevertheless, employers may want to ensure that a reduction is fair under the circumstances (e.g., because the employer simultaneously reduced the employee’s work burden).

Employers will also want to be aware of employee relations. Japanese employment law and relations involve a large psychological and cultural component. For example, in Japan, the concepts of shame and insult are a powerful motivation for employees to challenge an action, and Japan courts are notoriously employer-favorable. Not only is unionization a typical and real threat from unhappy employees, once an employer is unionized, it has even less control over contract terms. Remember that even if the Supreme Court would agree with an employer’s decision, a Japan labor tribunal may not (the procedural history of this case was not unanimous).

Stay tuned. This decision was quite unpopular and may be legislatively overturned. Moreover, Japan’s prime minister has vowed to focus on employment issues, so the landscape may yet change, either as to the law or market practice, if culture continues to trend against employers forcing retirement.

Finally, consider that mandatory retirement is a global issue. Post-retirement engagements are often considered “precarious employment.” Legal challenges to all types of precarious employment, as well as mandatory retirements, are increasing all over the world, whether through unions, labor organizations, media, or political candidates. Employees with touchpoints in multiple jurisdictions (e.g., the United States) often try to sue under age discrimination laws, putting the company to a difficult burden with a difficult narrative as a defense, with not much caselaw to defend themselves.

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