

# SUCCESS STORIES JAPAN

Helping Non-Japanese Companies  
Succeed in Japan

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## A SPECIALIST OFFERS ADVICE

### The Most Common Employee and Work Rules Questions Answered

By Thomas J. Nevins, President, TMT Inc. (Part Seven)

SSJ expert contributor Thomas J. Nevins continues further this month with answers for many of Japan P&L managers' most commonly-asked questions in areas such as hiring, compensation, work rules, benefits, retirement, terminations, vacation policy, and employee law generally.

In Part Seven, he moves from trouble-shooting some of the more common situations that arise with terminations to a discussion of unique considerations managers in Japan must have in maintaining amicable staff relations within the company, especially when unions are involved. The entire issue of how to negotiate with unions in Japan, and negotiate with employees who are members of the company union, has been the subject of several of Tom's contributions in this column in past years. It's a topic fraught with peril for those who are not accustomed to the situation, because both Japanese views on negotiation and confrontation, as well as Japanese labor laws, are culturally different from those in the West and the need to understand important differences with both is one of the keys to gaining a successful outcome.

For subscribers interested in more detailed answers than are presented here, feel free to let us know if you want a question to be sent on to Tom Nevins himself. We will gladly do so.

#### **42. Is it true that if someone's contract says they are paid at a certain level, the employer must continue to pay at that level?**

Unfortunately we have to say false, and that is because it is so difficult to fire people in this country. It might make more sense to be able to de-hire someone rather than reduce their pay, but if a person is fighting the termination, unfortunately you are better off thinking pay reduction combined with a safety net severance package. Of course contracts are contracts, and they should be honored as much as possible. As we have described

earlier, it would be unusual for an employment contract in Japan to stipulate an annualized fixed income level, although foreign companies should at least address it with some room for flexibility. As we have described in #25 and #26 a couple of issues ago, Rules of Employment (ROE) can and should provide for the possibility of even significantly reducing someone's pay. Since the order of legal precedence is the national Constitution, the LSL statute, collective bargaining agreements, ROE, and finally the individual employment contract, one could argue that even if an individual contract stipulated a fixed salary level, if the ROE stipulated one could reduce salaries, the ROE could rule the day and help justify the pay reduction.

Having said that, obviously an employment contract with a fixed salary level would not be helpful, as it would create a certain mutual expectation between the parties. The company would and could naturally maintain that it had its own expectation that there would be better skills, higher performance, and a greater contribution. Japanese companies, especially these days, are often maintaining that they used to have an ability to pay, but now they no longer have the ability. There is truth in that.

#### **43. Is it possible to dehire someone quickly and at a reasonable cost, and never have to terminate or fire them?**

We know this is true, unless you have been skipping around as you read. So much of my writing, including the case studies and much material in *Japan True or False (2004)*, is about how to help clients get people to sign a separation letter

and leave, without terminating *per se* these poor and unfortunate people. Some attorneys might sniff, and call this 'con-structive dismissal'. I definitely agree with that one. If it works and gets results with no backlash, and no deep psychological scars or feelings of bitterness, it is very 'constructive'! If not done properly, however, it is ve-ry destructive, and a risky and extremely difficult and unpleasant business. Companies should be careful about damaging the relationship by low-balling on the severance, and attacking people's self-esteem with 'paper trails', especially if they are contrived. Even when they are not contrived, and you are dealing with a lazy, incompetent, and altogether unsavory individual, in this environment, I would bite the bullet, unless the individual is really pressing you, and sees your avoidance of being tough on him as a sign of weakness. But after being in this line of work for over 30 years, and being exposed to the very worst of cases, I predominantly still do believe 'in the best of men', and women, and I believe 'god makes no junk, and sponsors no flops'. There aren't many bad people, just people in bad situations. I am always thankful that I have been able to develop a method, tactics, and a communication process that all people involved can come to see as reasonable, fair, considerate, helpful, sincere, and even logical. And most of all I am thankful everyday, and each time we do this, for the kindness, understanding, cooperation, and the courageous, better nature, that great men and women are capable of displaying under these difficult circumstances.

#### **44. In termination litigation**

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## FROM THE EDITORS

### EVERYBODY'S DEMOGRAPHICS SOON

Well you probably know about Japan's terrible demographics. Mention of it is made in a substantial number of news stories about Japan's economy, budget process and policy-making. It's been every P&L manager's greatest excuse for why Japan sales may have come in less than expected, and every policy-maker's excuse for why Japan can't afford to do this or engage in that.

Don't look now, but Japan isn't the only country in Asia with a rapidly-aging population and a declining workforce. Sure it's in the lead currently. But by 2018 and 2020, less than a decade from now, China, Singapore, Hong Kong, Taiwan and several other countries will also have to cope with the issues involved.

What will pundits have to say when the symptoms of a declining domestic labor force and a rapidly-aging population are pan-Asian challenges? Will Japan be held to a higher standard because it has had to deal with the situation for a longer period? Or will Japan no longer be seen as a stagnant economy with a big demographic problem when neighboring countries manifest the same maladies?

Japan has made some big steps in nursing immigration, robotics technology, family-friendly labor laws, and combining state-supported kindergartens with child-care facilities. And it has much more to do.

But some other countries in Asia will have to deal with it too, and that will make issues of immigration and tax policies even more fraught with peril.

Japan doesn't get credit for the fact that many of its elderly still work and at the same time take care of other elderly family members. So far the troubles of a rapidly-aging population seem to be handed just fine. Let's see if Japan's neighbors do as well when each finally faces its own demographic crisis.

## The Most Common Questions Answered

By Thomas J. Nevins, President, TMT Inc. (Continued)

**cases if you do and say things right (or use a lawyer who is honest and has common sense), is it true that the judge welcomes and supports your offer to allow the person to stay at a much lower pay level?**

This has always been true, based on everything I have been involved with. It is not based on many cases, because my work almost never goes to court. More of the cases were already on stream and in court before I got involved. Related answers and perspective would be in questions #3, 5, 6, 25, 26, 33, and 38 from earlier issues of this series.

The life of a judge in Japan may be a bit frustrating and unsatisfying. It is fairly uncommon to find a judge who feels he is in a position to take a clear and decisive position. Judges rarely send either party to the litigation 'packing', or essentially throw a weak case out of court. I think they rarely cut the profile of a Hollywood movie judge. Although once, a much older judge, in a *karishobun* Temporary Restraining Order (TRO) proceeding, could see the plaintiffs/employees' lawyer was very weak and inexperienced. The judge let us terminate three ineffective fellows with just two months severance package. We didn't use a lawyer and I went with the *gajin* client as his interpreter. The judge even asked if there was a fruit and vegetable store nearby that would surely have empty cartons, which could be used to directly go back together with the three surprised and smoked employees, clear-out their desks, and put their personal belongings into the boxes. In the meantime the judge would write-up the paperwork. He ended the meeting by encouraging the three younger men to 'work harder

next time so this doesn't happen again; it's such a waste'. It began and finished at just this one session. But I think we can rarely count on such a judge who comes right out of a movie. Usually it is an excruciatingly slow, indecisive process, where parties are brought back until the less-committed side gets tired. Then the fulcrum of settlement, as opposed to a *hanketsu* (judge's ruling), usually goes in the favor of the more committed party — the party the judge knows won't compromise and settle for anything less. Because sometimes cases take over two years to settle.

In any case, when a judge is disturbed by the tremendous greed and unreasonableness of the terminated employees who claim their extra severance package should equal the amount of salary they would have been paid until retirement age, even if they are 52 years old — or in one recent case, 29 years old! — I really wish more judges would laugh in their face, tell them he can understand why they were fired for saying such a stupid thing, and throw them out of his court until they wise-up, and get realistic. But not enough of that is happening. I should be writing more in my books about why this mentality, this legal process, and this ludicrous side of Japanese personnel and human capital management, has got to be one of the biggest reasons for the weakness of the Japanese economy.

For now, though, let me go back to this question, and say at least a normal, typical judge in Japan's labor management legal environment, will welcome your offer to provide the greedy plaintiff a job at a lower pay level. The judge will use it to jawbone and pressure down the greedy severance demands. How about a fixed, and firm severance law like they have in Germany, Hong

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Kong, Singapore, and other places?! Japan will start to lose out more and more on foreign investment, unless it gets easier and cheaper to handle problem-employees. (It is because it is so difficult to dismiss 'regular' *seishain* employees, that the number of part-timers and contract employees are increasing so fast.) Labor unions and the socialist, left-leaning parties are hurting the workforce with their insistence on limiting employer rights to terminate.

**45. In the above #44 situation doesn't this allow the judge to win a settlement for you at a reasonable severance cost?**

This is true, and above we already touched on this answer in such questions as #33, 37, 38, 43, and 44 from earlier months. However, it is true only in a comparative and unsettling sense. Unfortunately the results either the employer or employee can expect are all over the map, and depend on many factors. These include the personalities, and temperaments of all parties involved, including the judge. They depend on which party is seen by the judge to be willing to compromise and settle, and in fact who does want to back off and settle. Of course the merits and the circumstances of the case, the strength of the case of a given party, and perhaps hardship, company size, and ability to pay factors have something to do with it. Clearly, the process is not a 'legal' exercise that has very much to do with the rule of law — whether that is statutory law, case law, or court case precedents. Weaknesses in legal systems are not unique to Japan, and I suppose the US and other countries have their own share of irrational and inconsistent proceedings and results, especially perhaps, depending on

the skills of the attorney as they influence the jury, and the relationships and personal power dynamic among the jurors. Traditionally, in postwar Japan there were no juries. As of May 2011, there are still no jurors involved in civil labor disputes, termination litigation, etc. Although there had been talk of introducing a jury system of citizens for years, finally on May 21, 2009 a jury system law was implemented. The first criminal trial began on August 3, 2009. Jury trials, and jury duty on serious criminal cases, have by now touched the lives of many. One result is much more efficient trials of much shorter duration. Citizen jurors are only slightly more inclined not to support the prosecution's case.

**46. Is it true that as few as two people (or even one person!) can start a union in Japan, supposedly requiring you to recognize it, negotiate with it? And such a union can also get relief from the Labor Relations Commission?**

True. My earlier books, and the prevalent legal view was, and is, that at least a union should have two members, but in reality I have experienced several cases where a Labor Relations Commission (LRC) is allowing even a single employee the procedural relief of the LRC. Because these people are loners, and there may be a majority union at the same company not backing them up, they do not have a very strong position. Nonetheless a company must be adroit in defending its interests.

**47. Is it illegal and an Unfair Labor Practice to make it clear that you as an employer want to manage in a union-free environment?**

That's false. Yesterday, I was handling an out-of-court settlement with a lawyer whose law firm exclusively represents unions. She would disagree by degrees at least. If you are OK about managing with a union, I suppose you could remain silent on how you feel on this issue. If you don't want a union, let us think of it as a campaign to influence people and their thinking. This is no different than in the US, where a representative number of law firms and consultants developed union-free environment practices, probably mostly beginning in the late 1970s. Up until then, if unions challenged management into a debate about whether or not to be unionized, the company might lose the debate, and thus might turn down the invitation or challenge. The union organizers would say the company doesn't want unions because it will cost the company more money. Believe it or not, in the 30s, 40s, 50s, and 60s companies often didn't have a good answer for that. Now there is a whole body of information and convincing positions of which companies and their employees who don't want unions can take advantage. In any country I suppose we should watch out for comments, or pressure applied to individuals in isolation. If we are sophisticated, and know what we are doing, we can also win the day without careless threats, or risky, direct reprisals for union activities. Using the right tactics, and delivering the right messages at all-employee meetings can also help maintain a union-free environment.

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