

Increasing Labor Pains (Part III): Increasing Difficulties in Firing, and Increasing Wage Differentials

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This is the 3rd and final part of a series on the current state of affairs in the Japanese labor market by Thomas J. Nevins. Thomas J. Nevins is a long-term member of the BLCCJ. He pioneered labor consulting for foreign-capitalized firms in Japan, and his firm TMT is the only company that also offers recruitment services. For more details, visit www.tmt-aba.com.



More Difficult to Fire when it was Hoped it Would become Easier—and the Stock Option Wrinkle

In the area of dismissal and employment security, a few years back, former Prime Minister Koizumi wanted to follow China's lead, and have Japan become more competitive by making it easier to dismiss or terminate employees in Japan. His proposed new law to this effect also backfired. It became even more difficult!, with a footnote added to the law to the effect that reasons for termination had to be given, and that there had to be a socially justifiable standard and rational reason. In the meantime, employee fight-back on terminations using the courts has increased many folds in recent years. Judges continue not to want to write decisions, but instead drag employers back to court until the employers are so bored and tired they will pay big settlement money just to end it all. More employees hear about this, and the spiral continues up.

What do employers need to do? Stop firing per se. Instead, adjust Rules of Employment (ROE) language such that it allows pay adjustments for job change or lack of performance and

contribution, other than the maximum legal penal one-half day's pay, or maximum 10% of monthly salary pay cut. That 'legal' pay cut is for discipline, or punishable infractions. Fair enough, but discipline is not our problem!! More often, in all countries, people are fired for personality quirks, weaknesses in performance, contribution, teamwork, or an overall inability to fit in, and properly do their jobs. You need to show in your ROE that you can reduce pay by more than 10% on an exceptional basis. And the Labor Standards Office (LSO), and basically even the courts, will accept this. As long as an employer pays above the level of the minimum wage, the LSO will not stop it. Of course the LSO may also mention that an employee could try and get redress by way of a civil suit. However, you will be much better off in court on pay reduction litigation, than you would be on termination litigation.

If you must reduce someone's pay, in consideration for this reduction, also please offer an option to take a modest extra severance package. However, initial low balling is dangerous. Communicate well, and do not fire with a hope and a prayer. Please avoid telling people what is wrong with them. Give them a chance to pull their

own rug out from under themselves. Many people will gladly give up severance money, just to be able to go through life believing, or being able to say that they have never been fired. Most people with family, and other responsibilities, however, will not quit too quickly and easily, unless you gingerly make it clear that even if they decided to go "we take good enough care of our people under those circumstances too". Do not work blind and in the dark, and always get a signature on a 'separation letter'. Know what you are dealing with, before you come in with a fixed-in-stone severance package and the paper work nicely completed. You will most likely get crossed arms and silence if you do that. If you try and protect your backside, by slipping in they 'resigned', most people will get angry.

An interesting insight I gained rather recently is the additional difficulties that can accompany stock option grants. They had not been so common in Japan. In one case, a man missed an opportunity to cash in and make over US\$2,000,000 if he had executed his options several years ago. When they terminated him, his options were only worth about US\$190,000. He was probably madder at himself for not executing the options when they were worth so much. Maybe he was being tough on himself, but after he got his \$190,000, and an additional \$30,000 in severance, he got tough with the employer, and nevertheless took that employer to court. I was called in after it had been in court for one year. The man was cheeky enough to ask for an additional \$1,750,000, which the Labor Standards Office and the Judge laughed at. This individual was annoying and resented by the Judge, and before that at the Labor Standards Office. We gave the Judge the option to order him back to work at a lower salary. The Judge went along with this. However, the Judge would not and could not prevent him from further suing for an additional stock option settle-

ment-as irrational as the dismissed individual's reasoning was on this stock option issue. Other people at the company, including my expat client, had also not executed their options at that juiciest moment several years back.

This individual was making out well in court because he was a gambler, and also extremely stubborn—"No, No, No!" to all the Judge's proposals and jawboning. Whether he was back in the company, or working elsewhere, the prospect of a separate suit over those stock options was too distasteful for us. The way that man played the system, he would have made out well enough in a separate settlement at the stock option law suit; even though it was his own fault he did not exercise his options. There was, of course, no way to know if the options would be worth a lot in the future if he were still able to work at the company. He just kept complaining and talking about such things, like a broken record.

Too make a long story short, we used every trick in the book, and the Judge was not a bad one, but in order to settle everything at once with this stubborn man, it cost my client an additional US\$330,000!! (The individual was willing to settle his 'wrongful dismissal' for the 20,000,000 yen/\$174,000 jawboned by the Judge. However, he made it clear, and the Judge would not/could not stop a separate suit over the stock options.) By the way, as soon as I got involved, and when I clearly asked the Judge, he made it clear even before proceeding with witnesses, that he would not uphold the termination of this man. As I said earlier, that litigation was already at the one year point when I joined the party. The client told me that as of when I got involved, the client's law firm had already cost the client about 6,000,000 (US\$52,000). Legal fees probably closed out at another \$20, or \$30,000 (although I did not want to ask the client, and do not know for sure).

The new message for me, and the lesson for all

of us, I guess, is to think twice about stock options. In Japan there may be too many people who just do not get what they are all about. This may even include Judges who do not want to rule on the issue, and employees who will not accept responsibility for the way they played their stock options.

But then again, Judges in Japan almost never want to make a clear ruling or decision on any termination. Almost everything is done by way of a court officiated 'wakai' or settlement. This is why you need to learn the art of getting the same result without terminating, and at a much cheaper cost.

Regional Wage Differentials further Increase, but Major Metropolitan Labor Markets (essentially the greater Tokyo area) are Still the Recommended Choice for Foreign Capital Investments

In February, 2007, the Ministry of Health, Labor and Welfare published a survey of wage levels by prefecture. The highest scheduled monthly earnings (not counting overtime, commutation at cost, and usually 4 to 6 months of summer and winter bonus payments) as of June, 2006 was 375,000 yen (US\$3,260 at 115yen/\$) in Tokyo. The average age was 40.2 years with 12.1 years of service. The lowest monthly pay level was in Aomori prefecture in the north part of Honshu (Japan's main island). The pay level here was 221,700 yen (\$1,928) with an average age of 41.6 years and 11.6 service years. This would make pay in Aomori only 59.1% of what it is in Tokyo. The figure for Tokyo was 4,900 yen (US\$43) higher than the previous year, while the figure for Aomori was 1,100 yen (\$10) lower than in 2005.

Average monthly earnings increased in 24 prefectures, mainly large metropolitan areas, but decreased in 23 prefectures and particularly in Aomori, the Okinawa Islands, and Iwate (also in northern Honshu).

Foreign capitalized firms, especially if they are going to have an expat, or expats stationed in Japan, or home office visitors/specialists in and out of Japan, have always clustered their operations in Kanto, or the greater Tokyo, Yokohama area. Way fewer firms would happen to get started in the Kansai—Osaka, Kobe, Kyoto area, but even this was often regretted. In more recent years, with foreign capital suppliers serving the Japanese auto industry, some expat staff have found themselves a bit isolated in the Nagoya area as well. Being in these areas, especially greater Tokyo, made sense, and continues to make sense, in terms of the expat and his or her family's life style, not the least of which is presence and choice of international schools, ease and distance to international airports, if not membership in international clubs such as the Tokyo American Club. Many Europeans and other expats also join there with their companies footing the bill.

Even more important than expat convenience/viability is the difficulty of attracting the good, international, foreign language speaking Japanese staff and managers that are needed. There is a reason the population of the large cities, especially Tokyo's 23 wards, has been increasing more than ever in recent years at the expense of the regional areas. Many of these towns and villages are little more than ghost towns, inhabited by very old ghosts at that. A foreign capitalized firm will have even more trouble bucking this trend than an indigenous local firm would have.

I read with interest that more firms are moving into rural areas of China, including some foreign firms. I guess the difference is that in that country wage differentials of several hundred percent make it even more attractive to seek this lower priced and very plentiful labor force. I suppose they are also primary manufacturing operations, without the same internationalized talent needs, and labor shortage that we face in Japan.