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LABOR LAW SERIES
Part 1: Pre-Employment Relationship

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I. Introduction

Effective utilization of human resources is instrumental to companies' overall success. And, with the robust compliance with labor laws becoming the norm, people in charge of companies' labor-related issues, are making every effort to establish more productive but less stressful working environment for all employees. This is particularly challenging in the aftermath of the COVID-19 pandemic during which time companies had to deal with unprecedented changes in employees' working conditions, such as digitalization and remote working.

With the foregoing as a background, Chuo Sogo Law Office has decided to embark upon a series of articles entitled the *Labor Law Series* in which selected labor-related issues, not only the typical or well-known but also new or controversial ones will be presented in a more or less comprehensive manner.

In this first publication of the *Labor Law Series*, we will consider:

- ✓ the legal nature of a "*naitei*," or a traditional pre-employment notice commonly issued as a tentative job offer by Japanese companies ("**Preliminary Notice**");
- ✓ at which point in time a labor contract is considered to become legally binding; and
- ✓ the situations in which a withdrawal of a Preliminary Notice is acceptable.

II. When Labor Contract Becomes Legally Binding – Legal Nature of Preliminary Notice

1. Why It Matters

Most Japanese companies intending to recruit new employees will: (a) put out a job posting, (b) screen the applicants by examining their credentials and/or interviewing them, and (c) send a Preliminary Notice to prospective hires.

If, hypothetically, a labor contract becomes legally binding (or, is "formed," as used in

Article 522(1) of the Civil Code[1]) upon the candidate's acceptance of the Preliminary Notice issued under step (c) above, a withdrawal of such Preliminary Notice will constitute, in legal terms, termination of a labor contract (i.e., dismissal), which is subject to Articles 16 and 17 of the Labor Contracts Act. In this scenario, it is likely that the candidate who accepted the Preliminary Notice (a "**Preliminary Notice Recipient**") may claim entitlement under the labor contract and/or right to receive wages. Furthermore, if a labor contract is considered to have been formed upon a Preliminary Notice, withdrawal of such Preliminary Notice will be subject to certain provisions of the Labor Standards Act (e.g., Articles 20 and 22), and if the Preliminary Notice Recipient is a new graduate[2], the company must notify the public employment security office, or the head of the vocational school or other facility from which the Preliminary Notice Recipient graduated, of its intention to withdraw the Preliminary Notice, in advance of such withdrawal and by using a prescribed form (Article 35(2) of the Enforcement Regulation of the Employment Security Act).[3]

If, on the other hand, the Preliminary Notice issued in step (c) is considered to be a mere notice of contemplated future employment, a labor contract will not be formed by giving such notice. However, even in this case, there is a possibility that a withdrawal of the Preliminary Notice by the company could constitute a tort under the Civil Code, potentially giving rise to a claim for compensation by the Preliminary Notice Recipient.

In light of the foregoing, the legal nature of a Preliminary Notice should be of profound interest to both the companies and the Preliminary Notice Recipients.

2. Judicial Rulings

To fully understand the legal nature of a Preliminary Notice and the timing of when a labor contract is considered to be formed, it is essential to understand several relevant court rulings issued in connection with these matters, the outline of which are described below.

(1) Supreme Court's Ruling

[1] Article 522(1) of the Civil Code reads: "A contract is formed when a party manifests the intention to offer to conclude a contract (hereinafter referred to as an "offer") showing the terms of the contract and the other party accepts the offer."

[2] As defined in the Enforcement Regulation of the Employment Security Act.

[3] Employers are required to take every possible measure, such as making the best effort to manage employment of new graduates who have received Preliminary Notice from the company, to avoid the withdrawal of the Preliminary Notice (*Guidelines on Graduate Recruitment*).

According to the Supreme Court in the Dai Nippon Printing Case (***Dai Nippon Printing***)[4]:

- ✓ It is virtually impossible to define the legal nature of Preliminary Notices with one single definition because their nature may vary depending on circumstances. The legal nature of Preliminary Notices should only be discussed in the context of the facts found in connection with each individual Preliminary Notice issued by a specific company during a specific fiscal year.

- ✓ The following ruling by the court of prior instance is well-founded:

> When taking into account all the facts found in the present case, including the situation where no specific manifestation of intention other than the Preliminary Notice was scheduled to be made in order to effect the formation of a labor contract, it is reasonable to consider that a labor contract that:
>
> > (a) specifies the time when the Preliminary Notice Recipient commences his/her job as immediately after his/her graduation from the university, and
> >
> > (b) at the same time, entitles the Company to terminate the same contract upon the occurrence or existence of any of the five grounds for withdrawing the Preliminary Notice specifically listed in the Written Pledge,
>
> was indeed formed on the theory that the Preliminary Notice Recipient's application for the job posted by the Company should be construed as an offer to enter into a labor contract, and the Preliminary Notice issued by the Company should be construed as the Company's acceptance of such offer, taken as a whole together with the Preliminary Notice Recipient's submission of the Written Pledge.

(a) Regarding Legal Nature of Preliminary Notice

It is clear from the Supreme Court's ruling quoted above that the Supreme Court endorses the view that the legal nature of Preliminary Notices should be determined on a case-by-case basis.

While holding such a view, in that case, the Supreme Court upheld the lower court's ruling made in connection with the formation of a labor contract, in which it was concluded that the legal nature of a Preliminary Notice should be that of a labor contract with a specific commencement date and the reserved right to cancel ("**Conditional Contract**").

[4] Dai Nippon Printing Case (Supreme Court's Second Petty Bench, July 20, 1979, 33 Minshū, no. 5, page 582). In addition, a Preliminary Notice withdrawal case involving the Nippon Telegraph and Telephone Public Corporation (Supreme Court's Second Petty Bench, May 30, 1980, 34 Minshū, no. 3, page 464) might also provide a useful reference.

(b) Regarding When Labor Contract is Formed

In the context of determining whether a labor contract is formed during the sequence of events involving the Preliminary Notice in the above-mentioned case, the Supreme Court concluded that it was reasonable to consider that such contract was indeed formed, by specifically referring to one particular finding in the lower court's decision that "no specific manifestation of intention other than the Preliminary Notice was scheduled to be made in order to effect the formation of a labor contract," as part of the basis for such conclusion.

According to this ruling, whether a labor contract has been formed during the course of interactions associated with a Preliminary Notice depends on whether any additional "specific manifestation of intention," for example, a formal notice of employment planned to be issued subsequently, was contemplated following such Preliminary Notice. In other words, in cases where such other specific manifestation of intention is not planned, it would be safe to conclude that a labor contract has been formed upon the issuance of the Preliminary Notice.

(2) Informix Case – Case in Which Labor Contract Was Ruled to Have Been Formed[5]

In the Informix Case (***Informix***) the court ruled that a labor contract was formed upon issuance of Preliminary Notice. The *Informix* court also ruled that the purported withdrawal of a Preliminary Notice issued by the employer was null and void.

(Outline of *Informix*)

- ✓ A company issued a Preliminary Notice through a human resources scouting process (i.e., headhunting) but withdrew it subsequently due to deterioration in its business.
- ✓ The company provided written conditions of employment to the Preliminary Notice Recipient specifying, among other things, the department to which the Preliminary Notice Recipient was to be assigned, the level of competence attained by the Preliminary Notice Recipient, salary conditions and the preferred date on which the Preliminary Notice Recipient was to join the company. The Preliminary Notice Recipient submitted to the company a written consent to join the company ("**Consent Form**") in which the date of joining the company ("**Date of Joining**") was modified from April 1, 1997 to April 20, 1997 in accordance with the company's prior approval for such rescheduling.

[5] Informix Case (Tokyo Dist. Ct., Oct. 31, 1997, Rōhan no. 726, page 37).

- ✓ Statements made in the Consent Form included the following sentences: "I will not change the Date of Joining without the Company's prior approval"; "I will not refuse to join the Company without justifiable grounds after submitting this Consent Form."

(Summary of Court's Ruling)

The court concluded to the effect that:

(a) It can reasonably be found that (i) the company informed the Preliminary Notice Recipient that it received the submitted Consent Form, (ii) the company provided the Preliminary Notice Recipient with a document entitled "Guidance on Joining the Company," and (iii) no other steps were scheduled or required to enter into a labor contract; and

(b) Based on these findings, it is reasonable to conclude that, as a result of the above-mentioned sequence of events, the parties have entered into a labor contract in the nature of a Conditional Contract.

In that case, the court examined, following the manner discussed in *Dai Nippon Printing*, whether any additional process or procedures for entering into a labor contract were planned or required. In doing so, the court found that no specific manifestation of intention was planned to be subsequently made, and concluded that a labor contract was duly formed.

(3) KOSE R.E. Case – Case in Which Formation of Labor Contract Was Found Lacking[6]

The KOSE R.E. Case (***KOSE***) is an example of a case in which the court found that a labor contract was not formed. In that case, a job applicant (the plaintiff) received a "*nai-naitei*" offer (a tentative job offer typically made in advance of a Preliminary Notice, which is considered to be even of a less firm nature than the Preliminary Notice; hereinafter "**Internal Tentative Offer**," or an "**ITO**") from a company, which ITO was withdrawn just before the scheduled issuance of a Preliminary Notice.

(Outline of the Case)

- ✓ A set of documents, including a letter entitled "Notice of ITO" (the "**ITO Letter**") and a Consent Form, was sent to the plaintiff, who then completed and sent back the Consent Form to the company as required.
- ✓ The ITO Letter was prepared in the name of a person who was in charge of the

[6] KOSE R.E. Case (Fukuoka High Ct., Mar. 10, 2011, Rōhan No. 1020, page 5).

company's HR, and read as follows:

> We sincerely appreciate your application for the job we posted. Please be advised that, after completing a robust selection process, we have tentatively decided (by way of an Internal Tentative Offer) to hire you. Please fill out the enclosed form and mail it back to us.

The ITO Letter specified the deadline for the submission of the enclosed Consent Form, and contained a statement that read "the Preliminary Notice is scheduled to be officially issued on October 1, 2008."

(Summary of Court's Ruling)

The court made the following findings:

- ✓ The ITO Letter sent by a person who was in charge of the company's HR presupposed that a Preliminary Notice would be officially issued later on October 1, 2008;
- ✓ After the delivery of the ITO Letter, no provision or confirmation of any specific working conditions was made, nor any procedure to have the plaintiff join the company followed;
- ✓ Although the company asked the plaintiff to submit a Consent Form, the Consent Form did not contain any statements typically seen in cases where a Preliminary Notice is issued, such as a pledge to join the company and/or acknowledgement of the company's reserved right to cancel the offer; and
- ✓ Until 2007, when new graduates looked for a job, some of them would receive ITOs not from one but from multiple companies, and such circumstances continued at least in the early stage of job-seeking activities carried out by new graduates in 2008, during which quite a few graduates, including the plaintiff, continued their job-seeking activities even after receiving an ITO from one company.

Upon making those findings, the court concluded that the nature of the ITO made in that case differed from that of a formally-issued Preliminary Notice (which constitutes a definitive manifestation of intention to form a labor contract) in that the ITO was made merely as part of the company's attempt to round up as many talented graduates as possible by preventing them from being drawn to other companies pending the scheduled official issuance of the Preliminary Notice.

A key difference between *Dai Nippon Printing* on the one hand, and *KOSE*, on the other hand, in which the court did not recognize formation of a labor contract, is that, in *KOSE*, an official issuance of a Preliminary Notice was being planned as procedure to be followed

before entering into the labor contract.

Nonetheless, the *KOSE* court ultimately upheld the plaintiff's claim for compensation and granted damages of 550,000 yen (comprising a solatium of 500,000 yen plus attorney's fees of 50,000 yen), stating that, inasmuch as the plaintiff had a legitimate expectation of securing employment with the company and such expectation deserved legal protection, the company's withdrawal of the ITO constituted a tort by violating the principle of good faith underlying the process of labor contract negotiations.

3. In Practice

The above-described rulings suggest that one of the decisive factors in determining if a labor contract is formed upon a Preliminary Notice is whether any specific manifestation of intention other than a Preliminary Notice is still contemplated to take place in the future, although the facts of each individual case should be examined to make sure that such conclusion is indeed warranted.

It is also noteworthy that, in cases involving giving out employment offers, courts tend to find that a labor contract has been formed when (i) the Date of Joining is specified in the Preliminary Notice, (ii) a Consent Form is obtained from the Preliminary Notice Recipient, or (iii) the Preliminary Notice Recipient has participated in any training session provided by the company, or when a situation similar to any of the foregoing exists.[7]

III. Withdrawal of Preliminary Notices

In cases involving withdrawals of Preliminary Notices, assuming that a Conditional Contract is deemed to have been formed upon issuance of a Preliminary Notice as ruled in *Dai Nippon Printing*, it requires further consideration to determine in what situations a company may lawfully withdraw a Preliminary Notice. Here is some advice, in terms of both precedents and practice:

1. Standard Utilized in *Dai Nippon Printing*

With regard to situations in which withdrawal of a Preliminary Notice may be considered acceptable, the Supreme Court in *Dai Nippon Printing* ruled that such withdrawal would be effective only if it was predicated on

> any fact(s) that could not have been known or expected to be known at the time of issuance of the Preliminary Notice, and that can be considered, in light of the purpose and objective of reserving the right to cancel, objectively reasonable and acceptable in terms of general social norms as grounds for the withdrawal of such

[7] Takeo Okazeri, *Employers' Phronesis: The Practice of Labor Laws* at 14 (2d ed., Yuhikaku Publishing 2022).

Preliminary Notice.

This is the same standard as that is often applied in cases where dismissal of an employee during a probationary period (i.e., where the reserved right to cancel a labor contract is exercised) is concerned. It is explained in *Dai Nippon Printing* that it is reasonable to adopt such standard, which is designed for cases involving dismissal of an employee during a probationary period, because the status of Preliminary Notice Recipients does not substantially differ from that of employees during a probationary period specified in their labor contract, considering that, in the ordinary course of events, even though the right to cancel is reserved, most Preliminary Notice Recipients give up other chances or possibilities for being hired by other companies after receiving one Preliminary Notice, in anticipation of starting their job upon graduation in the company that issued the Preliminary Notice.

2. Legitimacy of Withdrawing Preliminary Notices

Typical grounds for a withdrawal of a Preliminary Notice (which grounds are typically specified either on the face of the Preliminary Notices themselves and/or on the Consent Forms) include failure by the Preliminary Notice Recipient to graduate from university or some other institution such as a vocational school; significant deterioration of the Preliminary Notice Recipient's health so much so that he/she cannot properly perform the duties of the offered position; making of a false statement in the submitted résumé or during interviews; commission of a criminal offence or similar wrongdoing by the Preliminary Notice Recipient; or a serious deterioration of the company's business.

However, the sole presence of such grounds does not automatically render a withdrawal of a Preliminary Notice legitimate. For example, even in cases involving false statements, while the court is likely to refer to the relevant grounds for withdrawal listed therein, a withdrawal of a Preliminary Notice will not be determined to be legitimate unless the court considers it to be objectively reasonable and acceptable in terms of general social norms.

For example, in reference to a false statement made on a résumé submitted by a Preliminary Notice Recipient, the meaning of a "false statement" as one of the grounds for cancellation could be construed in a limited manner, in terms of whether, for example, such false statement materially harms the mutual trust between the parties and/or whether the company's ethos would be substantially disrupted as a result of such false statement.[8]

IV. Summary

[8] Yuichiro Mizumachi, *Labor Laws Explained* at 469-470 (2d ed., Univ. of Tokyo Press 2021).

- ✓ To determine whether a labor contract has been formed, check for the presence of any of the determinative factors described in this article, e.g., whether (i) a Preliminary Notice specifying the Date of Joining was issued, (ii) a Consent Form was obtained from the Preliminary Notice Recipient, or (iii) the Preliminary Notice Recipient participated in any training session held by the company that provided the Preliminary Notice Recipient with a Preliminary Notice. And always bear in mind that, notwithstanding the presence or absence of any of these factors, whether a labor contract came into existence may still depend on the particular set of facts considered on a case-by-case basis.

- ✓ When you intend to withdraw a Preliminary Notice for some compelling reason arising after the formation of a labor contract, make sure that such reason constitutes legitimate grounds to exercise the reserved right to cancel the contract; and

- ✓ When withdrawing a Preliminary Notice, always be careful to do so at the right time and in an appropriate manner, even when a labor contract is not likely to have been formed for there is always a possibility that potential claims for damages could be upheld against you by the court, for reasons such as unjustly thwarting the Preliminary Notice Recipient's justifiable expectations during the course of making the withdrawal, or a failure of providing adequate explanation in accordance with the principle of good faith.