



Updates on the LGBTQ+ Status in Japan and Duties of Companies Related Thereto



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This is an update to my previous article that was published in June 2023¹ regarding the LGBTQ+ status in Japan. The duties of companies related thereto are also discussed herein.

To achieve equality in Japan, among other things, there must be a clear right to same-sex marriage and LGBTQ+ people must be guaranteed protection against violence. In this regard, Japan has achieved significant progress, including enactment of a law, two pro-transgender Supreme Court decisions, and one new gay-friendly Supreme Court decision. This trend demands that companies take LGBTQ+ policies seriously.

I. New Law Promoting LGBTQ+ Understanding

On June 23, 2023, the “Act on Promoting Public Understanding of Diversity in Sexual Orientation and Gender Identity” (Act No. 68 of 2023) was enacted. This act is the second law² in Japan to mention “LGBTQ+.” The law, however, does not impose any legally binding obligations or penalties on companies. Nevertheless, the law does require the Japanese government to publish its LGBTQ+ policy annually

and hold a conference once every two months for the purpose of liaison and coordination efforts among the relevant ministries to achieve the effective promotion of LGBTQ+ understanding. The relevant ministries discuss therein their budget estimates for their respective promotional efforts, recent Supreme Court decisions, and LGBTQ+ survey results. These efforts will increasingly promote an understanding of LGBTQ+ in Japan. So far, this has resulted in the Supreme Court beginning to issue LGBTQ+-favorable rulings on LGBTQ+ issues.

II. Supreme Court Decisions in 2023

The Supreme Court issued two transgender-favorable decisions in 2023.

1. Illegal treatment of a transgender government officer

The first decision of the Supreme Court was published on July 11, 2023.³ The Supreme Court ruled that the restriction imposed by a government office on a transgender employee’s use of the women’s restroom was illegal.

1. See https://www.ohebashi.com/jp/newsletter/Yamamoto_202307summer.pdf.

2. The first law was the “Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder” (Act No. 111 of 2003), which set forth the requirements for gender reassignment.

3. An English translation that was prepared by members of the Lawyers for LGBT & Allies Network (LLAN) is available at: <http://llan-japan.org/llan17/cont/uploads/2023/09/Translation-products-20230920.pdf>.



Under the “Act on Special Cases in Handling Gender Status for Persons with Gender Identity Disorder” (Act No. 111 of 2003) (“**Act No. 111**”),⁴ gender reassignment surgery is required to change a person’s gender in the family register to a gender that is consistent with such person’s gender identity. However, in this transgender case, the transgender employee was unable to undergo gender reassignment surgery because of her medical condition.

The transgender employee began taking female hormones in 1998, received a doctor’s diagnosis of gender incongruence in 1999, has lived her personal life as a woman since 2008, and requested that her workplace allow her to work as a woman in 2009.

In 2010, her supervisor at work asked her to explain to her colleagues who were working in the same department as her about her gender incongruence. She agreed, and when she gave the briefing, there was no clear indication of opposition from her colleagues.

One week later, she began working in women’s clothing and was given permission from her employer to either use the women’s restroom at least two floors away from her workspace or the men’s restroom on her workplace floor. She was prohibited from using the women’s restroom on her workplace floor.

In a subsequent discussion with her supervisor, he said to her, *“If you don’t get gender reassignment surgery, why don’t you go back to being a man?”*

In 2013, she asked the National Personnel Authority (“NPA”) to rescind the government office’s restriction on restroom use because it was illegal. However, in 2015, the NPA ruled that the limitation was legal. She

then filed a lawsuit seeking reversal of the NPA’s decision.

As a result, while a 2021 High Court ruling held that it was legal, the 2023 Supreme Court ruled that the long-term restriction of not allowing her to use the bathroom according to her gender identity was illegal.

The reason why the Supreme Court decision declared such restriction illegal is that although the government office has a duty to maintain an appropriate work environment for all of its employees, the office did not fulfill its duty to maintain a proper work environment by imposing long-term bathroom use restrictions on transgender female employees and instead placed too much emphasis on the discomfort of other employees who had not expressed any clear opposition to the gender identity of the subject transgender employee.

Since companies, like government offices, have the same obligation to maintain an appropriate work environment for all of their employees,⁵ they must respond appropriately to the requests of transgender employees.

The Supreme Court⁶ ruled that the NPA’s decision in 2015 was illegal. Notably, 2015 was also just around the time when the Shibuya and Setagaya wards introduced same-sex partnership certificates for the first time in Japan,⁶ and LGBTQ+ understanding was not yet widespread in Japan. However, even at that time, companies were being required to respond in good faith to earnest requests based on the attributes of their employees. Thus, for new matters involving employees’ attributes, companies should approach such matters seriously bearing in mind the above considerations of the Supreme Court in its decision.

4. A copy of this law is available at <https://www.japaneselawtranslation.go.jp/en/laws/view/2542/en>.

5. Labor Contracts Act (Act No. 128 of December 5, 2007), art. 3(4) and 5.

6. S. Ito and M. Lim, “Tokyo issues Japan’s first same-sex partner certificates,” Reuters, November 5, 2015, at <https://jp.reuters.com/article/us-japan-samesex-idCAKCN0SU0MV20151105/>.



Also, in this transgender case, the transgender employee agreed to give a briefing about her gender incongruence, and the government office held such session. But even if the transgender employee refused to give a briefing, this would not mean that the government office would not have to take any action. For example, suppose a company is aware that an employee's health is deteriorating due to a poor work environment but does not respond to the situation. The company may be held liable for violating its duty to maintain an appropriate work environment.⁷

Companies can fulfill their obligation by taking requests from LGBTQ+ employees as an opportunity to raise awareness and promote D&I efforts successfully.

2. Unconstitutionality of the forced sterilization requirement of Act No. 111 (2023)

In October 2023, the fourth requirement of Article 3 (1) of Act No. 111 (i.e., that the subject person has no

reproductive glands or the reproductive glands thereof have permanently lost their function, or in other words, that the subject person has been permanently sterilized) was declared unconstitutional.⁸ The fifth requirement thereof, which requires external genital removal and genital reconfiguration surgery, is also under review by the Hiroshima High Court and might be similarly declared unconstitutional.

If gender-affirming surgery to meet the fifth requirement is no longer mandatory to change one's gender in the family register, then more transgender people can live according to their gender identity. However, even if the fifth requirement is found to be unconstitutional, Japanese public bathhouses may still require customers to use the gendered baths in accordance with their external genitalia.⁹

A summary of the legal status of the requirements for the change of a person's gender identity is provided below.

| Requirements | Judicial Decision |
|--|--|
| (a) Medical diagnosis of gender incongruence by more than two qualified doctors | |
| (b) Be at least 18 years of age | |
| (c) Is not currently married | Constitutional (Supreme Court, 2020) |
| (d) Currently has no child who is a minor | Constitutional (Supreme Court, 2021) |
| (e) Has no reproductive glands or whose reproductive glands have permanently lost function (be permanently sterilized) | Constitutional (Supreme Court, 2019) > Unconstitutional (Supreme Court, 2023) |
| (f) Has a body which appears to have parts that resemble the genital organs of the opposite gender (requires external genital removal and genital reconfiguration surgery) | Now pending before the Hiroshima High Court |

7. 2416 Hanrei jiho 92 (Tokushima District Court, July 9, 2018).

8. ILGA ASIA, "Japan: Supreme Court Strikes Forced Sterilization Requirement for Gender Recognition in Landmark Victory for Transgender Rights," November 10, 2023, at <https://www.ilgaasia.org/news/2023/11/10/japan-supreme-court-strikes-forced-sterilization-requirement-for-gender-recognition-in-landmark-victory-for-transgender-rights>. An English translation of the Supreme Court decision that was prepared by members of the Lawyers for LGBT & Allies Network (LLAN) is available at: <http://llan-japan.org/lgbtinfo/2498>.

9. Circulars (*tsutatsu*) of the Ministry of Health, Labour and Welfare, 0623 Yakuseieihatsu No. 1 of June 23, 2023.



III. Upcoming and New Judicial Decisions on the Constitutionality of the Ban on Same-Sex Marriages

Japan does not legally allow same-sex marriages. In 2022, the Nagoya High Court ruled that a same-sex partner was not entitled to receive benefits as a crime survivor when his partner was killed due to a crime since he was not the spouse or in a de-facto marital relationship with his partner.¹⁰ However, the Supreme Court has granted leave to appeal this case and has heard arguments in court on March 5, 2024.¹¹ Such hearing before the Supreme Court is required to change the decision of the Nagoya High Court. The decision was published on March 26, 2024. The Supreme Court ruled that the survivor of a same-sex couple is entitled to such benefits.¹²

Moreover, several same-sex marriage lawsuits about whether a ban on same-sex marriage is unconstitutional are still ongoing. So far, two district courts (i.e., the Sapporo District Court¹³ and Nagoya District Court¹⁴) have declared such ban unconstitutional, two district courts (i.e., the Tokyo District Court¹⁵ and Fukuoka District Court¹⁶) have declared such ban almost unconstitutional, and one district court (i.e., the Osaka District Court¹⁷) has declared such ban constitutional.

On March 14, 2024, the first decision by a high court on this legal issue was released by the Sapporo High Court. The Sapporo High Court ruled that not allowing same-sex marriage is an unconstitutional violation of Article 14, which establishes the right to equality, and Article 24, which states that marriage shall only be based on the mutual consent of “both sexes.”¹⁸ On the same day, in a case filed by another group of Tokyo plaintiffs, the Tokyo District Court declared such ban “a deprivation of a key part of [one’s] personal identity” and is very close to being unconstitutional.¹⁹

These developments may result in companies altering their treatment of such same-sex married couples.

IV. Conclusion

As shown in the discussion above, 2023 was a year of significant progress for the LGBTQ+ status in Japan. This year is seeing further developments for LGBTQ+ people. Moreover, now that it is becoming clearer what companies need to address with respect to LGBTQ+ issues, companies should respond appropriately.

10. Jiji Press, “High Court Rejects Survivor Benefits for Same-Sex Partner,” August 26, 2022, at <https://sp.m.jiji.com/english/show/21618>.

11. The Japan Times, “Supreme Court may review judgement against benefits for same-sex partner,” January 18, 2024, at <https://www.japantimes.co.jp/news/2024/01/18/japan/crime-legal/supreme-court-same-sex-couple-benefits/>.

12. T. Endo, “Top court rules same-sex couples eligible for crime victim benefits,” The Asahi Shimbun, March 26, 2024, at <https://www.asahi.com/ajw/articles/15210350>.

13. 2508 Hanrei jiho 152 (Sapporo District Court, March 17, 2021).

14. 516 Hogaku kyoshitsu 107 (Nagoya District Court, May 30, 2023).

15. 2547 Hanrei jiho 45 (Tokyo District Court, November 30, 2022).

16. 1588 Jurist 66 (Fukuoka District Court, June 8, 2023).

17. 2537 Hanrei jiho 40 (Osaka District Court, June 20, 2022).

18. The Mainichi, “Sapporo High Court rules same-sex marriage ban unconstitutional,” March 14, 2024, at <https://mainichi.jp/english/articles/20240314/p2g/00m/0na/042000c>.

19. *Id.*