Legal Issues on Long-Term Leave: Conflicting Structure of "Leave Benefits"

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1. Current state of annual leave in Japan and policies

(1) System of guaranteeing the rights to annual leave

Let us first examine how the Japanese system of annual paid leave is guaranteed by law. We do this because, in considering the possibilities of long-term leave, Japan's system of guaranteeing rights to annual paid leave (Labor Standard Law, Article 39) is unique from the viewpoint of comparative law and this forms an important background to the issues concerned.

(a) Rights to annual leave

According to the Labor Standard Law, Article 39, Paragraphs 1 and 2, the rights to annual leave of 10 days occurs when a worker has completed six months of "continuous service" from the first day of employment, on the condition that the worker has reported to work on 80 percent or more of all working days during that period. Subsequent to this six-month period, two more days of leave are added each year, in principle, provided the same condition is met, until, after six years, the leave reaches the maximum of 20 days. Therefore, with the exception of part-time workers who have fewer working days, workers in general have 10 to 20 days of annual leave.

Employers may grant this annual leave of 10 to 20 days as "continuous or scattered" leave. In other words, employers are not necessarily obligated to grant annual leave as continuous leave.

(b) Determination of the timing of leave

Secondly, with respect to the determination of when to take the annual leave, two methods are utilized: The first is the method based on the so-called rights to specify the period of season of the leave. The employer must grant annual leave "in a period or season requested by the worker." If, however, granting the annual leave in that period will "prevent the normal operation of the business," the employer may grant the leave in another period (Paragraph 5).

The second is the method based on the so-called planned annual leave. An agreement is concluded between the employer and the labor union that has

organized the majority of workers at the place of business or, if there is no such labor union, between the employer and a representative of the majority of workers. The employer grants a portion of annual leave in excess of five vacation days (in other words, those five vacation days are excluded from the count of annual leave) in accordance with a plan determined in the agreement. This method is used to provide simultaneous summer leave for all employees and to grant continuous leave in rotation.

(2) Acquisition of annual leave

(a) Acquisition rate of annual leave and number of days of leave taken

How is annual leave, which is guaranteed as shown above, actually taken? Although it is not a particularly appealing subject, we must examine the state of affairs.

If we look at the changes in the last 17 years starting from 1989 (Table 1), the circumstances are very clear.[1] Since peaking in 1991, the acquisition rate of annual leave has been on a decline; in 2005, it made a sharp decline to 46.6 percent. Even more notable is the decline in the number of days of leave taken. After peaking in 1995 at 9.5 days, the number of days of leave has been gradually decreasing to the point where it finally reached 8.4 days in 2005. If we calculate the "remaining number of days" by subtracting the number of days of leave taken from the number of days of leave permitted, we can see that workers are increasingly foregoing their leave. The remaining number of days, which were 7.1 days in 1991 and 1992, increased to 9.6 days in 2005.[2]

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1 "*Shuro Joken Sogo Chosa*" (General Survey on Working Conditions) (for 1999 and before, "*Chingin Rodo Jikan Seido Sogo Chosa*"—General Survey on the System of Wages and Working Hours). The acquisition rate was the highest in 1980 (61.3 percent) with 8.8 days of leave taken.

2 For detailed analysis of the acquisition rates of annual leave, see Kazuya Ogura, *Nihonjin no Nenkyu Shutoku Kozo: Nenji Yukyu Kyuka ni kansuru Keizai Bunseki* (The Structure of Annual Leave Acquisition of the Japanese: Economic Analysis on Annual Paid Leave), (the Japan Institute for Labor, 2000), p.46-.

Table 1: Average Acquisition of Annual Paid Leave per Worker

Year	Number of days permitted	Number of days taken	Acquisition Rate (%)	Remaining number of days
1989	15.4	7.9	51.5	7.5
1990	15.5	8.2	52.9	7.3
1991	15.7	8.6	54.6	7.1
1992	16.1	9.0	56.1	7.1
1993	16.3	9.1	56.1	7.2
1994	16.9	9.1	53.9	7.8
1995	17.2	9.5	55.2	7.8
1996	17.4	9.4	54.1	8.0
1997	17.4	9.4	53.8	8.0
1998	17.5	9.1	51.8	8.4
1999	17.8	9.0	50.5	8.8
2001*	18.0	8.9	49.5	9.1
2002	18.1	8.8	48.4	9.3
2003	18.2	8.8	48.4	9.4
2004	18.0	8.5	47.4	9.5
2005	18.0	8.4	46.6	9.6

Source: Ministry of Health, Labor and Welfare, "*Shuro Joken Sogo Chosa*" (General Survey on Working Conditions) (formerly "*Chingin Rodo Jikan Seido Sogo Chosa*" (General Survey on the System of Wages and Working Hours))

Note: *Figure as of end of December through 1999 and as of January 1 from 2001. The number of days permitted does not include number of days of leave carried forward from previous year.

(b) State of continuous leave

What then is the state of continuous leave? If we examine an annual report published by the Ministry of Health, Labor and Welfare on planned continuous summer leave (Table 2), we can see that, in terms of the implementation rate, such leave is well established and is expanding slightly, which may partly be explained by the fact that the definition of continuous leave is not rigid.[3] Although evaluation on the average number of days is

[3] The "continuous summer leave," in this survey, refers to continuous holidays and leave of three days or more (may be interrupted) that combine weekends, special holidays, and planned annual paid leave during the period starting on July 1 and ending on August 31. Incidentally, there is also an annual report on statistics regarding planned continuous leave during the Golden Week. The author considered that the continuous summer leave was more appropriate for this paper from the point of view of the actual state of long-term leave.

difficult because they are affected by the summer calendar for each year, it can be said that they are gradually increasing, albeit by a small margin.

On the other hand, Table 3 shows that, among the businesses providing continuous leave, the percentage of businesses, employing the system of planned annual paid leave (implementation rate) was around 30 percent, and the average number of days was not more than 3.0 days in both 2003 and 2004. Moreover, it should be noted that the average number of three days is limited only to businesses that implemented continuous summer leave and, at the same time, included planned annual leave in the summer leave.

Table 2: Changes in Continuous Summer Leave (Continuous Leave Implementation Rate, Average Number of Days of Leave)

	Implementation Rate (average number of days of leave)		
	Manufacturing	Non-manufacturing	All
1991	92.0%(8.7 days)	61.3%(6.2 days)	77.1%(7.7 days)
1992	94.2%(8.5 days)	67.3%(5.8 days)	81.0%(7.4 days)
1993	94.0%(8.3 days)	66.5%(5.9 days)	80.5%(7.4 days)
1994	94.6%(8.2 days)	64.5%(5.7 days)	80.0%(7.2 days)
1995	93.0%(8.4 days)	68.2%(6.4 days)	80.8%(7.6 days)
1996	93.1%(8.5 days)	72.0%(6.6 days)	82.9%(7.7 days)
1997	93.2%(9.6 days)	69.8%(7.6 days)	81.7%(8.7 days)
1998	94.3%(9.8 days)	67.5%(7.4 days)	80.9%(8.8 days)
1999	93.3%(8.4 days)	73.8%(6.0 days)	83.5%(7.4 days)
2000	93.1%(8.4 days)	73.1%(6.2 days)	83.3%(7.4 days)
2001	92.6%(10.0 days)	70.9%(7.6 days)	81.8%(9.0 days)
2002	91.6%(8.9 days)	65.9%(6.4 days)	78.6%(7.8 days)
2003	95.0%(9.7 days)	79.9%(7.2 days)	87.4%(8.6 days)
2004	94.8%(9.1 days)	80.1%(6.7 days)	87.4%(8.0 days)

Source: Ministry of Health, Labor and Welfare, "*Heisei 16-nen Kaki ni okeru Renzoku Kyuka no Jisshi Yotei Jokyo Chosa Kekka*" (Results of the Survey on the Planned Implementation of Continuous Leave in the Summer of 2004)

Note: When a continuous leave of three days or more is implemented during the period of the survey more than once, the total number of days is counted as the number of days of continuous leave.

Table 3: Number of Businesses That Grant Planned Annual Leave among the Businesses Implementing Continuous Leave during the Period of the Survey, the Implementation Rate, and the Average Number of Days of Leave

Industry	Year(%)	Implementation rate	Average number of days of annual paid leave
Manufacturing	2003	32.6%	2.8 days
	2004	32.3%	2.9 days
Non-manufacturing	2003	31.6%	3.2 days
	2004	29.2%	3.2 days
Total	2003	32.1%	3.0 days
	2004	30.9%	3.0 days

Note: The number of businesses planning to implement continuous leave is used as the parameter of the implementation rate.

Source: same as Table 2.

(3) What is long-term leave?

(a) The essential meaning of leave

The word "leave" denotes an absence for a continuous number of days over a relatively long period, and it essentially does not require the adjective "long-term." In the ILO Convention No. 52 (1936), which was the first international standard on leave, workers in general had rights to annual leave of six working days. This minimum number of days had to be given as continuous leave, and only the number of days that exceeded the minimum number of days was allowed to be split by domestic laws and regulations. In the ILO Recommendation No. 47 of the same year, it was determined that annual leave could not be split more than twice and that either one of the installments could not be shorter than the minimum number of days of six days prescribed by the Convention. In the ILO Convention No. 132 (1970), the minimum number of days granted as annual leave was set at three workweeks. Countries were free to decide on how to divide the leave, but one of the installments had to be a continuous period of two weeks or more. If we look at the legislations in other countries, the word "leave" is obviously based on the assumption that it extends over a relatively long period.[4]

[4] On other countries' method of guaranteeing continuous leave, see Susumu Noda, "*Shogaikoku no Kyuka Seido to Nihon: Kyuka Seido no Global Standard wo Saguru, 1 and 2*" (Foreign Countries' Leave System and Japan: Exploring the Global Standard

The validity of the term "long-term leave" in Japan proves that because the acquisition rate of leave is low, and because, even when leave is taken, it is generally short-term and in odd pieces, long-term continuous leave takes on an exceptional meaning. In this respect, the very term "long-term leave" paradoxically expresses the current state of leave in Japan and implies where the problems lie.

(b) Long-term leave as a policy challenge

The term "long-term leave" is mainly used with regard to labor policy to ameliorate the current state of affairs.

For example, the goal of the "continuous leave" proposed by the former Ministry of Labor in July 1990 was to realize "20 days, on average, of annual paid leave permitted and 20 days, on average, of annual paid leave actually taken." In 1995, the "relaxation leave," which was to be a "continuous leave of a good number of days," was proposed with the concepts of "leave that makes the best of an individual's wishes" and "objective-oriented leave suited to one's lifestyle or working style." In 2000, the "long-term leave (L leave)" was clearly indicated to be "leave of about two weeks with the minimum unit being about a week." The aim was to realize "L leave" by combining two days on a weekend and annual paid leave. Lastly, in 2004, a proposal was made for a very long period of "long-term leave in the unit of a year," which was to be "a certain substantial period of at least a year or longer."

(c) Long-term leave for the purpose of this paper

When judging from such circumstances, it becomes difficult to specify the meaning of long-term leave. Considering the minimum number of days of continuous leave guaranteed by other countries and by the international standard and the court decisions on long-term leave in Japan (which are discussed later), it would be appropriate to define long-term leave as continuous leave of about a week or two, which is composed of annual paid leave as well as holidays, special leave, etc.

According to an opinion survey conducted on the labor and management on the subject of the "effect of long-term leave" (2000, SRIC Corporation),

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of the Leave System, 1 and 2), *Sekai no Rodo* (Labor of the World), vol. 50, no. 6, p.2 and no. 7, p.28.

"promotion of health" was indicated the most when the leave is a short term of one to three days. For long-term leave of one to two weeks, "enrichment of family life" came first, followed by "promotion of health." For super-long leave of one to two months, "increased opportunity for self-development" was cited the most.[5]

(4) Contradiction of leave policy

(a) Focus of leave policy

The above overview of the state of leave in Japan makes us realize that there is an underlying current of inconsistent policy.

Firstly, on the state of acquisition of leave, it is a "mystery" how the continuous summer leave has become relatively well established and is even increasing at a time when not only the acquisition rate of annual paid leave, but also the number of days of annual paid leave taken, is on the decline. It can be surmised that annual paid leave is not used very much in such continuous leave, and that continuous leave is made up of a combination of "special leave" with pay (not including annual leave), holidays, etc. As seen above, only about 30 percent of businesses that grant continuous summer leave do so by using the planned annual leave and the average number of days of that annual leave is only about three days. In that case, it can be expected that even if continuous summer leave is established in Japan, it is derived from developments not directly linked with acquisition of annual paid leave.

On the other hand, there is contradiction in leave policy where "long-term leave (L leave)" and "long-term leave in the unit of a year" are being recommended at a time when the decline in the number of days of annual paid leave taken can hardly be ignored (in the view of the author). It gives the impression that while the use of annual leave is very weak, long-term leave is being promoted with fanfare (and perhaps in vain, too).

(b) Leave benefits

This state of long-term leave and policy poses the question of where the

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[5] The author is also of the view that the objective of annual paid leave, as in the case of childcare and family-care leave, should be considered from the standpoint of "harmonizing and balancing working life and family life" and that the logic should be reexamined from this standpoint. See Susumu Noda, "*Kyuka" Rodoho no Kenkyu* (Research on "Leave" Labor Law), (Nippon-Hyoronsha, 1999), p. 185-.

focus of leave policy is. In other words, should the issue of long-term leave be considered as an extension of guarantee on annual paid leave? Alternatively, should long-term leave be promoted more as a system of corporate welfare unrelated to the rights and legal context of annual paid leave? This contradistinction does not represent the conflict of interest between the labor and management. Among both labor and management, and in policies, too, there is a strong argument that does not necessarily welcome continuous acquisition of annual leave and that considers short leave that can be taken at any time as a high level of guarantee of rights. From such a standpoint, the use of annual leave for long-term leave is only inconvenient. Therefore, the counterpoints of this issue lie in how to identify the benefits that should be sought in annual leave in Japan's leave system.

We examine below the issues related to such "leave benefits"[6] in relation to long-term leave and the annual paid leave system (Labor Standard Law, Article 39) (2) and consider it in relation to long-term leave (3).

2. Long-term leave and rights to annual leave

(1) Long-term leave and rights to annual leave

(a) "Continuous or scattered"

When we consider the issue of long-term leave and annual paid leave, needless to say, the first issue we inevitably come to is, the abovementioned provision of 10 working days (six working days before the amendment of 1987) of "continuous or scattered" leave. As mentioned earlier,[7] there is an interesting episode about how this expression "continuous or scattered" was inserted during the process of establishing the Labor Standard Law. In the fifth draft of the Labor Standard Law submitted to the second subcommittee of the *Roumu Hosei Shingikai* (Labor Law Council) on July 28, 1946 (held in the Bureau director's room), the expression "six continuous working days" was

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6 The author used the term "leave benefits" in a study on the trend of people's needs on leave and temporary retirement shifting from corporate-centered needs to social needs (see Noda, *op.cit.* under iv, p. 16). In this paper too, people's needs on leave are called "leave benefits," which, specifically in this paper, is used as a concept to contrast the different values attached to long-term leave.

7 Susumu Noda, "*Rodo Jikan Kisei Rippo no Tanjo*" (The Birth of Legislation for Regulating Working Hours), *Nihon Rodoho Gakkaishi* (Japan Labor Law Association Journal), no. 96, (2000), p. 81.

included. Regarding this point, a committee member commented that "continuous" would not be appropriate considering the actual circumstances. To this, another member replied, "How about "continuous or scattered"?" and the matter was settled by this short exchange.[8] In the later process of legislation, neither the government, the labor, the management, nor any of the parties in deliberation at the parliament voiced any concern about granting scattered leave.

Before the establishment of the Labor Standard Law of 1947, there were no laws and regulations guaranteeing annual paid leave to workers in the private sector in Japan,[9] not even in the Factory Act. The above provision on annual leave in the bill submitted to the Labor Law Council was clearly modeled after ILO Conventions and legislations in other countries. As mentioned above, six days were the basic number of days determined by the international standard at that time. Furthermore, "…although permission of a division of the basic days would substantially undermine the original purpose of annual paid leave of promoting rest of the body and mind over a certain continuous period, the current state of affairs in our country was such that there were few facilities for workers to effectively use annual paid leave and workers needed holidays in addition to weekends to secure daily necessities, and considering the opinions of both the labor and management at the time of legislation, it was decided to approve the division of the basic number of days."[10]

In this commentary, "considering the opinions of both the labor and management" is particularly noteworthy. In other words, it appears that continuous acquisition of annual leave was considered negatively by both the labor and management.

This pragmatic attitude, however, corresponded well with the chronicle shortage of labor brought about by the rapid post-war economic growth. As a result, the opportunity for a dramatic development in the leave system as in other countries was nipped in the bud. The distrust in the continuous

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8 Akira Watanabe, "*Rodo Kijunho [Showa 22-nen] (2)*" (Labor Standard Law [1947] (2)), *Nippon Rippo Shiryo Zenshu* (Corpus of Reference Materials on Legislation in Japan), vol. 52, (Shinzansha Publisher, 1988), p. 494.

9 Public sector employees were allowed 20 days of annual leave by "Regarding the Working Hours and Leave of Government Agencies" of the Cabinet Order, No. 6, Paragraph 3 of 1922. See Noda, *op.cit.* under vii, p. 250.

10 Kosaku Teramoto, *Rodo Kijunho Kaisetsu* (Commentary on Labor Standard Law), (Jiji Press, 1950), p. 250.

acquisition of annual leave held by the labor and management and in the prevailing academic doctrines (opinions) has not deteriorated even today.

(b) "Ten working days of paid leave"

While the minimum number of days of annual holiday is 10, it takes at least six and a half years to reach the maximum of 20 days. In actuality, as shown above, the average number of days of annual leave permitted per worker is close to 18 days (including the number of days of nonstatutory leave). These 18 working days, together with the spread of two-day weekends today, correspond to about 3.5 workweeks. While the case in France of 30 working days (five workweeks) may be exceptional,[11] Germany's Federal Paid Leave Act provides for 24 weekdays (four workweeks) and the UK's Working Time Regulations, Article 13 provides for four workweeks. Therefore, the statutory level of 10 to 20 days in Japan is not especially low by international comparison.

Moreover, Japan has statutory public holidays of 14 days a year, which is perhaps the most in the world. Furthermore, as mentioned above, there are usually additions of "special leave" with pay during the New Year holidays, the midsummer *Obon* holidays, and Golden Week. Therefore, the number of days of leave in Japan is actually on a par with other countries.

Therefore, the question is not one of the number of days of annual leave. It is one of whether or not the "benefits" in using annual leave as long-term leave can be recognized.

(2) Rights to specify the period or season of leave and long-term leave

(a) Discretionary decision and employer's consideration

With regard to the guarantee of workers' rights to annual leave (Article 39): "…the import can be recognized as requiring the employer to show consideration of the circumstances, so that workers can take leave at the time they specified as much as possible" (Nippon Telegraph and Telephone Public Corporation Hirosaki Telegraph and Telephone Office Case; Supreme Court,

[11] Although a two-day weekend is widespread in France, the statutory weekend is just one day on Sunday. Therefore, the workweeks are calculated based on a six-day workweek. The same holds for Germany. If the same basis were used in Japan, 18 days would be equivalent to three workweeks. For more details, see Noda, *op.cit.* under iii.

Second Petty Bench Ruling, July 10, 1987; *Saikosai Minji Hanreishu* (Supreme Court Collection of Court Decisions on Civil Actions), vol. 41, no. 5, p. 1,229). As shown above, the discussion on "consideration of the circumstances" is well established in judicial rulings. How does this requirement of "consideration"[12] affect long-term leave?

As it is widely known, the Supreme Court indicated a certain policy on a ruling in the Jiji Press Case (Supreme Court, Third Petty Bench Ruling, June 23, 1992; *Supreme Court Collection of Court Decisions on Civil Actions*, vol. 46, no. 4, p. 306). This is what the policy said in the case of exercise of the rights to specify the season of long-term continuous leave: "…on the exercise by an employer of the rights to change the period of this leave, a certain room of discretionary decision has to be approved to the employer regarding what inconvenience to business operations would be brought about by the said leave and regarding how much change should be made to the period of the said leave." Therefore, "…if the said discretionary decision is considered unreasonable, for instance, because of the lack of consideration of the circumstances that the employer should show in allowing workers to take leave, in contravention of the import of the same article, the exercise of the rights to change the period of leave should be judged as illegal as it lacks the conditions for the exercise of the rights to change the period of leave provided for in the proviso of Article 3."

In other words, for the use of annual leave as long-term leave, "discretionary decision" of certain breadth has to be recognized, and, as one of the bases for judging the reasonableness of the discretionary decision, the lack of consideration is indicated (the ruling states "for instance, because of the lack of consideration").

Unlike the case of taking annual leave for other than long-term leave, the consideration is not regarded as a positive basis or condition for the exercise of

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[12] On the other hand, while the presence or absence of "consideration of the circumstances" was almost always examined in court rulings regarding the legality of the exercise of the rights to change the seasons of leave in the past, recently it is often not taken into consideration. For instance, in the Nippon Telegraph and Telephone Case (Supreme Court, Second Petty Bench Ruling, March 31, 2000; *Supreme Court Collection of Court Decisions on Civil Actions*, vol. 54, no. 3, p. 1,255), the presence or absence of employer's consideration was not included in the matters examined.

the rights to change the period of leave,[13] and that it takes on a negative structure where the "lack of consideration" is a condition for judging the discretionary decision as unreasonable. Basically, because an employer's "discretionary decision" is more broadly recognized in the case of long-term leave, the lack of consideration is used as one of the conditions for negating that discretionary decision.

(b) Limits to discretionary decision

If so, the structure, so to speak, is one where the lack of consideration is permitted only in exceptional cases and it is generally not easily permitted. In the Jiji Press Case, the Supreme Court judged that there was "adequate consideration under the circumstances of that time" regarding replacement, one-man post, adjustment of the period, and the exercise of the rights to change the seasons of leave only for the latter half of the leave. This conclusion, regardless of its validity, was logically a natural consequence.

On the other hand, there was a case where a worker filed for a claim for compensation of cancellation fees for an overseas trip. While the worker had obtained the company's approval for a 15-day leave, including 10 days of annual leave, which the worker specified, the company later cancelled their approval of the long-term leave based on regulations on the account that the worker was later absent from work due to illness. In this case, the limits of "discretionary decision" were indicated (All Nippon Airways Case; Osaka District Court Ruling, September 30, 1998; *Rodo Hanrei* (Labor Law Cases), no. 748, p.80). In this ruling, it was indicated that the "discretionary decision," as in the Jiji Press Case above, "must, needless to say, be reasonable and in conformity with the import of the Labor Standard Law, Article 39." Moreover, it ruled, "the defendant once approved the said long-term leave, and by this approval manifested that it would not exercise the rights to change the seasons of annual paid leave." Furthermore, "it should be said that, even in the case of long-term leave, an employer generally cannot limit a worker's rights to specify the season of annual paid leave by operational guidelines

[13] On how the "consideration" is regarded in its relation with the rights to change the seasons of leave, see Kaoko Okuda, "*Jiki Henkoken to Shiyosha no Hairyo*" (The Rights to Change the Seasons of Leave and Employer's Consideration), *Bessatsu Jurist, Rodo Hanrei Hyakusen* (Selected Labor Rulings 100, the Jurist Magazine Supplement), 7th edition, (2002), p. 124.

unilaterally prepared by the employer and not by the system of planned annual leave… and obviously such operational guidelines are not appropriate as a basis for changing the seasons of the leave once approved."

From the two court rulings shown above, the following points can be noted with regard to the judgment on the legality of the rights to specify the period of long-term leave and rights to change the period of long-term leave. Firstly, unlike in the exercise of the rights to specify the period of leave in ordinary cases, an employer's discretionary decision is recognized in the case of long-term leave, and the scope of the rights to change the period of leave is expanded based on that. Secondly, under exceptional circumstances, such as when an employer lacks consideration against the import of the Labor Standard Law, Article 39 or when annual leave was once approved before it was cancelled, the discretionary decisions may be considered to have deviated from such a scope, and the exercise of the rights to change the period of leave may not be considered as legal.

(c) Obligation to "create an environment for taking annual leave"

As discussed above, it is hard to deny that the exercise by an employer of the rights to change the period of leave is relatively widely recognized in the case of long-term leave. Will it then be possible to have a legal framework for more readily guaranteeing the rights to annual leave, including long-term leave?

As it is widely known, the so-called obligation to hear the period of annual leave was provided for in the former Labor Standard Law Enforcement Regulation, Article 25, Paragraph 1, which was deleted in 1954, as follows: "An employer must, with regard to the annual paid leave provided for in the Law, Article 39, hear the request of a worker on the period immediately after the passing of a period of a continuous year." This provision was supposed to become an effective weapon in removing the factors hindering acquisition of annual leave in the minds of workers, such as that taking leave may inconvenience other workers and that the atmosphere in the workplace makes it difficult to take leave.[14]

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[14] These two have long been cited as the most and the third most commonly cited reasons for "not taking more than six days of annual leave" (Prime Minister's Office, "*Rodo Jikan, Shukyu Futsuka-sei ni kansuru Yoron Chosa*" (Public Opinion Survey on Working Hours and the Two-Day Weekends, 1986). On the analysis of various

However, as mentioned above, this provision was deleted because it would impose a new obligation on employers in addition to the requirements of Article 39 and because little practical benefits could be expected even if it were imposed.[15] Therefore, the obligation to grant annual leave as provided for in the Labor Standard Law, Article 39 had to be structured as a negative sort of obligation centered on the forbearance of exempting obligation to work (no exercise of instruction in the course of employment). It is probable that the discussion on "consideration of the circumstances" became the interpretation devised to fill this inadequacy, but, as we have already seen, there are limits to its interpretation at least with regard to long-term leave.

Rodo Jikan-to no Settei no Kaizen ni kansuru Tokubetsu Sochiho (Special Measures Law on Improvement of the Setting of Working Hours, Etc.) was put into effect as of April of this year as a replacement law of *Jitan Sokushin Ho* (Shorter Working Hours Law). In Article 2, Paragraph 2 of this law, it is stipulated, "an employer must, to improve the setting of working hours, etc. of workers under the employer's employment, make an effort to set the starting time and closing time of the workers in accordance with the volume of business, create an environment so that workers can more easily take annual paid leave, and adopt other measures." Although the obligation is for "making an effort," there is nonetheless an obligation to create an environment to facilitate acquisition of annual leave.[16]

This provision only requires employers to "create an environment so that workers can more easily take annual paid leave." We may, however, expect the new provision to provide leverage in bringing about a more active sort of obligation of employers to grant annual leave by clarifying what is actually meant in "the environment" and then actively incorporating that, in one way or another, into the obligation for granting annual leave of the Labor Standard Law, Article 39.

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factors of not taking annual leave, see Ogura, *op.cit.* under ii, p. 187.

[15] Toru Ariizumi, *Rodo Kijunho* (Labor Standard Law), (Yuhikaku Publishing, 1962), p. 362.

[16] In Paragraph 2 of this article, employers are further required to "make an effort to grant leave or adopt other necessary measures to workers who are recognized, based on their physical and mental conditions, working hours, etc., as requiring efforts to maintain their health."

(3) Planned annual leave and long-term leave

(a) System design of long-term leave

As implied by the abovementioned Supreme Court ruling on the Jiji Press Case, it is clear that the method of planned annual leave as provided for in the Labor Standard Law, Article 39, Paragraph 5 (where annual leave is taken based on a plan agreed to in advance between the labor and management) is more suited to acquisition of long-term leave than the method of determining the period of annual leave based on the rights to specify the season of annual leave.

The planned annual leave of the above Paragraph 5 incorporated a system design for promoting long-term leave. The planned annual leave system was introduced by the amendment of 1987, which, at the same time, increased the minimum number of days of annual leave from six days to 10 days. Of the minimum number of 10 days, five are allotted as annual leave based on the rights to specify the season of leave, as provided for in the above Paragraph 5, and the remaining five days of annual leave can be concentrated in a certain period as planned annual leave. If this is combined with the two-day weekends that had been promoted around this time, it is possible to achieve a week of long-term leave. Through this, it became systematically possible for anyone to select at least a workweek of continuous leave, as envisaged by the ILO Convention No. 52 (1936).[17]

(b) Interpretive legal principles that hinder long-term leave

How then should we see the relation between the method of planned annual leave and the method of specifying annual leave based on the rights to specify the period of annual leave? In other words, if an agreement on planned annual leave is concluded with the majority labor union (or the majority representative in the absence of a majority labor union), would workers still have the rights to individually exercise the rights to specify the period of leave and take leave separately from the planned leave without being constrained by the agreement?

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[17] However, the use of planned annual leave based on the same paragraph is not growing. The percentage of firms employing the planned system in 2000 was 16.0 percent, and the average number of days of planned leave was 3.9 days. It is on a decline since it peaked in 1998 (19.5 percent and 4.1 days, respectively). See Ogura, *op.cit.* under ii, p. 53.

On this issue, the court has already ruled, in the Mitsubishi Heavy Industries Nagasaki Dockyard Case (Fukuoka High Court Ruling, March 24, 1994; *Rodo Kankei Minji Jiken Hanreishu* (Collection of Court Decisions on Labor-Related Civil Actions), vol. 45, nos. 1 and 2, p. 123), that "the introduction of the system of planned annual leave by labor-management agreement in the Labor Standard Law revised the existing principle where individual workers had all rights to specify annual leave… With regard to days in excess of five days, the method of collectively specifying unitary leave through labor-management consultation was recognized in addition to the personal method." The official notice on the execution of the amended law also takes a corresponding view (*Kihatsu*—a notice issued by the director of Labor Standards Office— no. 1, January 1, 1988).

While the case law principles and administrative practice are relatively well established, as shown above, a large number of academic theories still deny restriction on workers covered by labor-management agreements. In other words, they claim that the emphasis of Japan's annual leave system is on workers freely using annual leave based on their rights to specify the period of leave, and that the introduction of the new method of taking leave based on the planned annual leave system does not limit the existing rights to specify the period of leave.

To use planned annual leave for long-term leave, however, the portion in excess of five days of leave must inevitably be freed from the right to specify the period of leave. If workers were to claim the right to specify the period of leave individually, there could be no simultaneous summer leave for all employees or leave taken in rotation. As long as leave is taken based on the rights to specify the period of leave, workers have to depend on the "consideration" of their employers. The proponents of the above academic theories should know that, from the standpoint of comparative law, rather the rights to specify the period of leave is an exceptional system. To begin with, what kind of system design do supporters of free annual leave have on the policy of long-term leave?

The heart of the matter, of course, is not to do with academic theories. This idea that all annual leave should be taken based on free specification of the period of leave has indelibly penetrated the minds of labor and management, the nation and even labor policies. The manifestation of this idea probably leads, as we have already seen, to the inconsistency of policies

where long-term leave and annual leave are considered in different light.

3. Legal contentions over long-term leave

(1) Conflict of "leave benefits"

(a) Is the use of "annual leave in the unit of hours" beneficial?

The Ministry of Health, Labour and Welfare's *Kongo no Rodo Jikan Seido ni kansuru Kenkyukai* (Study Group on the Future Working Hours System) published "*Kongo no Rodo Jikan Seido ni kansuru Kenkyukai Hokokusho*" (Report of the Study Group on the Future Working Hours System; hereinafter simply called the "Report") on January 27 of this year. In this important document, that will set the direction of future policy on working hours, a proposal on the reform of the annual paid leave was included as one of the major focuses.

In the Report, a proposal is made for long-term leave by making workers "systematically take continuous leave of about a week or longer" while continuing to "respect workers' rights to specify the season of leave." Moreover, as "an interim measure," it aimed to "recognize the acquisition of annual paid leave in the unit of hours."

According to the Labor Standard Law, Article 39, annual leave is granted in the minimum unit of days, and considering the general purpose of leave, it should be granted in units of days. Therefore, an employer has the obligation to grant leave in units of days, and even if requested by a worker, an employer has no obligation to grant annual leave in units of half days (*Kishu*—notice issued by the director of Labor Standards Office in response to queries—no. 1428, July 7, 1949; *Kihatsu*—notice issued by the director of Labor Standards Office—no. 150, March 14, 1988). However, in reality, workers do take annual leave in units of half days. According to administrative interpretation that strikes a compromise with this reality, there is no problem in granting annual leave in half days when a worker requests such leave and the employer approves, and provided that it does not interfere with the regular method of taking annual leave (*Kikanhatsu*—notice issued by the director of the Inspection Division of the Labor Standards Office—no. 33, July 27, 1995). There is also a court ruling to this effect (Takamiya Gakuen Case; Tokyo District Court Ruling, June 19, 1995; *Labor Law Cases*, no. 678, p. 18). In these cases, the minimum unit of annual leave is half a day (four hours), and acquisition of more hours of leave is not recognized. The Report, however,

asserts that the latter should also be recognized.

The reason cited in the Report is that "there are those who wish to acquire annual leave in units of hours," and it appears that the Report recognizes that acquisition of annual leave in units of hours is in the interest of workers. However, it is this recognition on "leave benefits" that now must be placed under scrutiny.

(b) Antithesis of leave benefits

Here the question of leave benefits emerges directly in front of our eyes. It is summarized below.

One camp will state as follows: It is in the interest of workers to guarantee short-term leave that can be taken at any time and make it easier for workers to take leave. The acquisition of leave based on the rights of selecting the season of leave is the basic principle of the rights to annual leave, and planned annual leave is an exception. While long-term leave may be desirable, it should develop irrespective of annual paid leave. In particular, for atypical workers such as limited-term contract workers, part-time workers, and temporary workers, who are often not guaranteed long-term leave, it is desirable that they can use annual leave freely to attend to unexpected business.

The other camp will state as follows: It is in the interest of workers to scrap short-term leave and instead guarantee long-term continuous leave to make it easier for workers to take leave. Planned leave is the basic principle of annual leave, and the rights of selecting the season of leave is simply a method for taking the remaining five days of leave. Long-term leave is truly desirable, and annual paid leave should be used as much as possible to raise the acquisition rate of long-term leave. In particular, for atypical workers who often do not receive the benefits of special summer leave should be able to use annual leave as their rights to take leave.

As illustrated above, the two camps will have two opposing answers to the same questions.

(2) Overcoming the conflict

If the law should be interpreted in a compromise with actual conveniences and short-term benefits, the former view could be accepted or be used to provide the logic for the compromise. At times, however, the interpreters of the law must, after all, pursue the "ideal" even if it is not in keeping with the

current realities or even if it may result in something that those concerned now may not be ready to embrace. In this respect, we should promote the latter view and make a persistent effort to persuade the other side.

While supplementing the above argument and to overcome the conflict of interest, let us further clarify below some additional points.

Firstly, it is clear from experience that acquisition of annual leave based on the rights to select the period of leave is not effective in increasing the acquisition rate of annual leave and in allowing more people to receive greater benefits from leave.

Secondly, even when employing long-term leave by use of planned annual leave, workers can still exercise rights to select the period of leave on at least five days of annual leave, so that it is possible to meet the minimum requirement of "leaving some days of annual leave for attending to unexpected business."

Thirdly, as the amendment of the Law Concerning the Welfare of Workers Who Take Care of Children of Other Family Members Including Child Care and Family Care Leave of 2004 made it an obligation of employers to allow "leave for nursing children," the acquisition of annual leave in short pieces should become unnecessary by institutionalizing specific-purpose leave in addition to annual leave (in particular, minimum guarantee on sick leave).

Fourthly, the midsummer *Obon* holidays and Golden Week result in a concentration of leave and a steep rise in the cost of facilities, etc., in effect decreasing the practical value of leave. Long-term leave by using planned annual leave will ease this concentration of leave and make it possible for workers to take leave that is suited to their particular objectives and styles.

Finally, it appears that "taking annual leave in short pieces and continuous leave based on corporate welfare" is the Japanese style of taking leave. It is clear, however, that this method will only allow full-time regular employees of large companies to take long-term leave, and may increase the gap among workers.[18]

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[18] Toshiaki Tachibanaki, *Kigyo Fukushi no Shuen: Kakusa no Jidai ni Do Taio Subekika* (The Coming of End of Corporate Welfare: How Should We Respond in the Age of Widening Gaps), (Chuko Shinsho, 2005).