

Japan Labor Review

Volume 4, Number 3, Summer 2007

Special Edition

Recent Tendencies of Labor Legislations

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NEXT ISSUE (Autumn 2007)

The Autumn 2007 issue of the Review will be a special edition devoted to **The Current State of Measures for Work-Life Balance and Their Effect.**

Introduction

Recent Tendencies of Labor Legislations

In this issue, a number of amendments as well as enactment of new laws made in the field of labor in recent years are presented, together with comments on the contents of the amendments and new laws.

(1) Equal Employment Opportunity Act

According to Nakakubo, the Equal Employment Opportunity Act, which was first enacted in 1985, made a significant transformation from a stage where there were noticeable compromises, such as businesses were only required to “make an endeavor” in equal treatment of men and women in recruitment and employment, to the amendment of 1997 that reinforced the provisions on equality and set down additional provisions on sexual harassment, and finally to the amendment of 2006 that prohibited sexual discrimination. Nakakubo says that by the amendment of 2006, the Equal Employment Opportunity Act has entered into its third stage.

The main features of the amendment of 2006 are as follows. First, it brought about a change from prohibition of discrimination against women to prohibition of sexual discrimination *per se*, including discrimination against men. Second, it widened the scope of discrimination that it prohibits. Third, it prohibited indirect discrimination. On this point, employers had been firmly opposed, claiming that the definition of indirect discrimination was unclear, and this opposition made it the most contentious issue of the amendment. Finally, it was decided that indirect discrimination cases would be limited to those specifically set down in ministerial ordinances. Nakakubo says that the fact that prohibition of indirect discrimination was provided for in spite of the tough opposition was a significant step forward. The amendment also includes prohibition of disadvantageous treatment of woman workers on grounds of pregnancy, birth, etc., prohibition of sexual harassment committed against men, and requirement of employers not just to take into consideration the prevention of sexual harassment, which was the case before, but also to take actual measures

for prevention.

Nakakubo points out that there are still criticisms that the amendments do not go far enough. However, he says that rather than make negative statements about the law, he prefers to watch with anticipation how the amendment would bring about positive changes in corporate behavior.

(2) Act on the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave

The Act on the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave, which originated in the Child Care Leave Act of 1991, steadily transformed itself through a number of amendments and against the backdrop of the declining birthrate and aging of the population, so that the system can now more readily be used by workers (Kanno paper). In the amendment of 2004, in particular, the child care leave and family care leave, which were not allowed for limited-term contract workers before, were allowed for such workers on certain conditions. To apply, they must have been in continuous employment for a year or longer. In addition, in the case of child care leave, they must be expected to continue to be in employment beyond the point where the child in care will reach a year of age and, in case of family care leave, they must be expected to continue to be in employment beyond 93 days counting from the day on which the family care leave is to commence. The amendment of 2004 also allowed, under certain conditions, extension of a child care leave, which previously was to terminate at a point where the child in care reached a year of age, to a point where the child is a year and six months old. The amendment also provided that workers looking after a preschool child may take up to five days of leave within a single business year for nursing the child.

Kanno points out that although the number of workers who take child care leave is rising due to the amendments of the law, the majority of such workers are women and that even though it is now well recognized that women have the justifiable right to take child care leave, it is still regarded that child care is the work of women. Kanno is pessimistic about the child care leave system alone being able to put a stop to the declining birthrate. On the other hand, a

higher percentage of men are taking family care leave, in comparison with child care leave, and this, Kanno points out, “is an important step towards gender equality in society.”

(3) Industrial Safety and Health Act and Other Related Acts

In the autumn of 2005, a series of amendments was made to “reflect the reality of workers’ diversified lives (Obata).” Particularly noteworthy is the provision on consultation with a physician introduced into the Industrial Safety and Health Act to deal with an increase in brain and heart diseases and mental diseases arising from overwork. By this provision, if a worker engages in more than 100 hours of overtime a month (overtime is considered as hours worked in excess of 40-hour workweek), it is clear that fatigue is accumulated in the worker, and the worker so requests, the worker must be seen by a physician and receive instructions from the physician.

The amendment of the Industrial Accident Compensation Insurance Act also changed the provision on compensation for an accident that occurs while a worker is commuting. It was provided for before the amendment that such an accident must arise from a worker’s travel between the worker’s residence and place of work. By the amendment, commuting now includes travel from a place of work to another place of work and for workers who have been transferred to a new location without their families, from the worker’s residence in that location to the residence of his or her family.

The “Act on Temporary Measures Concerning the Promotion of the Reduction of Working Hours” was amended and became the “Act on Special Measures Concerning the Improvement of the Establishment of Working Hours.” The new act provides that an employer must establish a labor-management “Committee for Improving the Establishment of Working Hours,” which will have “a purpose to investigate and examine on measures for improving the establishment of working hours, etc. and other matters related to the improvement of the establishment of working hours, etc. and to express its views to the employer.” An employer must also endeavor to introduce necessary systems for effectively improving the establishment of working hours, etc.

(4) Act Concerning Stabilization of Employment of Older Persons

In June 2004, the Act Concerning Stabilization of Employment of Older Persons was amended. The main points of the amendment include (1) obligation of employers to implement measures for securing the employment of older persons up until the age of 65, (2) obligation of employers to clearly indicate measures they will implement in helping older persons find reemployment and of employers to prepare documents for assisting in older persons' job search activities, and (3) disclosure by employers of reasons for setting age restrictions in recruitment and employment. Yamashita says that in recent years the government policy, which is at the base of the amendment, has stressed the importance of "society in which people can work regardless of age." As a result, Yamashita points out, in lieu of the element of a worker's "age," which has had a significant impact on the treatment of workers, other elements such as "competence" and "performance" will determine how workers are treated, and the transformation of the system will be promoted in this direction.

The most noteworthy point about the amendment of 2004 is the obligation of employers to implement measures for securing the employment of older persons up until the age of 65. By this provision, an employer must implement either one of raising the mandatory retirement age, introducing a continuous employment system, or eliminating the mandatory retirement age. In practice, many firms have apparently introduced a continuous employment system. A recent survey has shown, however, that it is difficult to secure jobs that meet the needs of older persons. Yamashita points out that there needs to be in-house mechanisms for employment of older workers as well as awareness raising among young and prime-aged workers on the subject, and that for this purpose, the concept of "age discrimination" will be an important frame of reference.

(5) Whistleblower Protection Act

As an increasing number of corporate scandals were exposed through employees blowing the whistle, discussions began on protecting employees' whistleblowing in order to promote firms' compliance. Formally, whistleblowing was often subject to disciplinary action or dismissal on grounds that the act of whistleblowing constituted violation of employees' obligation to maintain

confidentiality or that it resulted in damaging a company's credibility. On this point, the courts judged individual cases, and, if whistleblowing was found to be justifiable, they tended to rule the company's disciplinary action or dismissal as an abuse of rights and therefore voidable. However, as these court rulings were not enough to set down a clear standard of judgment, the Whistleblower Protection Act was enacted clearly determine by statute the conditions for whistleblower protection and its effect.

The act prohibits dismissal and other disadvantageous treatment of a worker on grounds that the worker disclosed facts about a certain criminal act that is occurring or is about to occur at a workplace in which the worker is providing his or her services and such disclosure is made to that workplace, the administrative organ with jurisdiction, or a third party outside the business operator's organization to whom the disclosure needs to be made. The specific conditions for protection differ depending on to whom the disclosure is made.

Mizutani speaks positively about the fact that whistleblower protection was clearly enacted into statute by the act. On the other hand, he is critical about the act in that its coverage is too narrow and in that it sets rigorous conditions for external disclosure in order to promote internal disclosure within companies.

Shinya Ouchi
Kobe University

English Translation of Japanese Labor Laws

In this issue, readers may notice that the English translation of the names of Japanese labor laws, such as the Labor Standards Act and the Equal Employment Opportunity Act, are somewhat different from previous ones.

Thus far, Japanese laws have been translated into English by related ministries and various private bodies without consistent rules. To ameliorate the situation, the Japanese government convened a council of experts a couple of years ago, and in March 2006 the council formulated a “dictionary” (basic rules) for unifying the English translations of Japanese laws.

The Japan Institute for Labor Policy and Training (JILPT), in cooperation with the Ministry of Health, Labour and Welfare, has translated major labor laws of Japan into English and offered them to the public via booklets and web pages. However, in view of the new uniformity efforts, JILPT is currently revising its English translations so that they conform to the “dictionary” given by the council.

In this “dictionary,” for example, the Japanese word “*ho*,” which literally means “law,” is now translated as “Act” when used in the name of a statute, such as the “Labor Standards Act” instead of the “Labor Standards Law.” There are many other points in the current translation of JILPT which require modification, and a little more time is needed to complete the work of new translation.

In the mean time, as a first step in this effort, we decided to change the word “Law” to “Act” when referring to a statute from this volume of Japan Labor Review. New translations of Japanese labor laws will be published in web pages and others upon completion, and we will make an announcement thereof.

Editorial Board

“Phase III” of the Japanese Equal Employment Opportunity Act

Hiroya Nakakubo

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Introduction

Presently in Japan, more than 40% of all employed persons (more precisely, 22.8 million or 41.6% of 54.7 million employees) are women, with female workers comprising more than 40% of the entire labor force population.¹ What was once a low percentage for female students entering universities now exceeds 40%, bringing it nearly on a par with that of male students when also including students entering two-year colleges.² This suggests that business firms will not grow without effectively utilizing these valuable human resources. Nevertheless, there are still countless employers who fail to treat male and female workers equally in the workplace.

From a social perspective, it is imperative that female workers not be excluded simply because of their gender. They should be provided with equal opportunities to exercise their capability to perform important roles at work. For the purpose of establishing gender-equal workplaces, the Japanese Equal Employment Opportunity Act (hereinafter referred to as the “EEOA”) was enacted in 1985 and took effect in April of the following year.³

¹ Figures for 2006 shown in the annual “*Rodoryoku Chosa*” (Labor Force Survey) by the Ministry of Internal Affairs and Communications.

² 53.6% for male students and 51.0% for female students, according to figures for 2006 shown in the annual “*Gakko Kihon Chosa*” (Basic Survey on Schools) by the Ministry of Education, Culture, Sports, Science and Technology. The percentage of students entering universities is calculated by dividing the number of students entering universities (including students entering universities one or more years after graduation from high schools) by the number of 18-year-olds. The percentage of female students among all university (undergraduate) students has also reached 40.4%.

³ Strictly speaking, this act was originally made in 1972 as the Act to Promote the Welfare of Working Women. It became the so-called Equal Employment Opportunity Act in 1985 when the provisions for equal employment opportunities of male and female workers were added. Its complete name, which was slightly changed in 1997, is the Act on Securing Etc. of Equal Opportunity and Treatment between Men and Women in Employment. English translation of the act after the 2006 revisions is available from <http://www.cas.go.jp/jp/seisaku/hourei/data/MandW.pdf>, although this paper deviates from it in some respects.

Incidentally, the expression of the Equal Employment Opportunity Law (EEOA) was

Prior to this act, although Article 14 of the Constitution clearly stipulated the prohibition of discrimination on the basis of sex, it was construed as not directly applicable to private employment relations. The only provision relating this principle to employment issues was Article 4 of the Labor Standards Act (hereinafter referred to as the “LSA”), which prohibits wage discrimination between male and female workers. Sex discrimination regarding loss of employment was outside the reach of Article 4, but Japanese courts, invoking Article 90 of the Civil Code which nullifies a contractual provision repugnant to “the public order and good morals of the society,” struck down some types of unfavorable measures against women, such as the “retirement on marriage” rule and the lower mandatory retirement age.⁴ It was certainly a commendable effort on the part of judiciary to realize the spirit of the Constitution in the workplace. However, as for the stage of recruitment and hiring, the Supreme Court, in contrast to its attitude towards employment termination, emphasized that a wide range of freedom should be given to employers, allowing them even to make discriminatory selections unless there is a specific statutory ban.⁵ Thus, a policy of employing only men for main career positions on the career advancement track was widespread, and women were often hired for ancillary positions with inferior educational background. Even when there was a wage differential between male and female workers, the employer could easily argue that they did not engage in equivalent work, thereby severely limiting the functions of Article 4 of the LSA.

The purpose of adopting the EEOA was to rectify such situations, as well as to ratify the United Nations Convention on the Elimination of All Forms of Discrimination against Women (1979). However, the legislative movement met with strong opposition that it conflicted with the traditional employment practices and the social values of Japan. As a result, the original EEOA became a product of compromise, wherein, for example, employers were only obligated to

more popular in the past, but the Japanese government recently adopted a policy of using the word “Act” instead of “Law” in English translation of the names of statutes and this paper follows it. The same applies to the Labor Standards Act.

⁴ The Supreme Court endorsed this theory in Nissan Motor Co. case (March 24, 1981, *Minshu* 35-2-300), holding that mandatory retirement age of 55 for women was null and void when men could be employed until age 60. The provision of work rules setting such discriminatory retirement ages was in breach of Article 90 of the Civil Code, which should reflect the spirit of Article 14 of the Constitution.

⁵ Mitsubishi Jushi Co. case, December 12, 1973, *Minshu* 27-11-1536.

“endeavor” to treat men and women equally during the recruiting and hiring processes. This law was therefore criticized for being lukewarm and ineffective, but substantial strides were made with the 1997 revisions (implemented in April 1999). They reinforced provisions for equality, such as a square mandate of equal treatment at the time of recruitment and hiring, and added special provisions pertaining to sexual harassment.⁶

Then, in June 2006, more than 20 years after the enactment of the EEOA, a bill requiring further major revisions was passed by the Diet, and took effect on April 1 of this year. The current revisions achieved significant development with a move from prohibiting discrimination against women to prohibiting “discrimination on the basis of sex.” At the same time, new provisions were added to prohibit so-called indirect discrimination and to protect female workers from pregnancy-related discrimination. In fact, the issue of indirect discrimination attracted a great deal of attention as opposing opinions repeatedly found their way into newspapers and other media. The following paragraphs will show an outline of the EEOA embodied in the 2006 revisions.⁷

1. Prohibition of “Discrimination on the Basis of Sex”

(1) From Discrimination against Women to Discrimination on the Basis of Sex

In the current revisions, the most important issue affecting the nature of the law is a change from “discrimination against women” to “discrimination on the basis of sex,” which applies to both men and women.

⁶ For the 1985 Act, see Loraine Parkinson, *Note, Japan's Equal Employment Opportunity Law: An Alternative Approach to Social Change*, 89 Colum. L. Rev. 604 (1989). For the 1997 revision and the situation thereafter, see Takashi Araki, *Recent Legislative Developments in Equal Employment and Harmonization of Work and Family Life in Japan*, 37-4 Japan Labor Bulletin 5, <http://www.jil.go.jp/jil/bulletin/year/1998/vol37-04/05.htm> (1998); Kiyoko Kamio Knapp, *Don't Awaken the Sleeping Child: Japan's Gender Equality Law and the Rhetoric of Gradualism*, 8 Colum. J. Gender & L. 143 (1999); Jennifer S. Fan, *From Office Ladies to Women Warriors?: The Effect of the EEOL on Japanese Women*, 10 UCLA Women's L. J. 103 (1999); Robert Larsen, *Ryousai Kenbo Revisited: The Future of Gender Equality in Japan After the 1997 Equal Employment Opportunity Law*, 24 Hastings Int'l & Comp. L. Rev. 189 (2001); Tadashi Hanami, *Last 20 Years of Equal Employment Opportunity in Japan*, in ISLSSL, 8TH ASIAN REGIONAL CONGRESS OF LABOUR AND SOCIAL SECURITY LAW 107 (2005), <http://www.airroc.org.tw/ISLSSL2005/program/invited.asp>.

⁷ The provisions quoted in this paper are those of the current act after the 2006 revision. When referring to a provision of the act prior to the revision, it will be indicated as “Former Article _.”

The previous provisions for equality stipulated that “employers shall provide women with opportunities equal to men” (former Article 5) or that “employers shall not treat women workers discriminatorily on the basis that they are female” (former Articles 6 through 8). These provisions were designed to protect only women from discrimination. The revised law modified these to “employers shall provide equal opportunities for all persons regardless of sex” (Article 5) or “they shall not discriminate against workers on the basis of sex” (Article 6), descriptions that are universally applicable to male and female workers. Furthermore, in the provision stating the basic principle of the law (Article 2), the word “women” was deleted from the former description, “women workers be enabled to engage in full working lives . . . without discrimination based on sex.”

It is a well-known fact that the purpose of the original EEOA was to “promote the welfare” of female workers. According to the administrative interpretation given by the then Ministry of Labor, while excluding female workers from certain positions or providing them with less favorable treatment than their male counterparts (for example, “employing only men for main career positions” or “limiting the number of men and women to 10 and 5 respectively” was clearly in conflict with the goals of the act, it did not prevent employers from taking preferential treatments for female workers. Therefore, for instance, “employing only females for part-time positions” was permissible because it would promote the welfare of female workers by expanding their opportunity. This interpretation was criticized for not embracing the true concept of equality and leading women to segregated, unfavorable jobs.

Consequently, a new interpretation surfaced in conjunction with the 1997 revisions, which established a provision on positive (affirmative) actions (former Article 9, and Article 8 of the current EEOA). It specifically permits the employer to take “measures in connection with women workers with the purpose of improving circumstances that impede the securing of equal opportunity and treatment between men and women in employment.” It was understood that the revised EEOA prohibited even preferential treatment of women as falling under the discriminatory treatment and therefore the new provision was needed to legalize positive actions in support of female workers. Hence, except for cases of appropriate positive actions, the discriminatory treatment of male workers became illegal. However, it was only an incidental result of having prohibited the discrimination against female workers.

By contrast, the current revisions changed the purpose of the law itself to the “prohibition of discrimination on the basis of sex.” Male workers were recognized for the first time as subject of protection under the EEOA. Practically speaking, if a male worker is treated discriminatorily, he may now take the procedure of the EEOA to solve his dispute, asking for assistance (advice, guidance, or recommendations) from the Prefectural Labor Bureau and for mediation by the (Prefectural) Dispute Adjustment Commission (Articles 17 and 18). The prohibition of sex discrimination applies to both male and female workers in other developed countries, and the EEOA has finally evolved into such an act.⁸

(2) Expansion of Matters Subject to the Prohibition of Discrimination

One major feature of the equality provisions of the Japanese EEOA is that they do not cover the entire employment relationship, but individually list those matters subject to the law. At the time of its enactment in 1985, provisions were established concerning (a) recruitment and hiring, (b) placement and promotion, (c) education and training, (d) fringe benefits, and (e) retirement and dismissal. No provisions were made regarding wages because Article 4 of the LSA had already dealt with it. As for (a) and (b) above, bearing in mind the wide range of “freedoms” previously enjoyed by employers, the legal mandate was so placidly restricted that the only obligation to employers was to “endeavor” to avoid discrimination. At the time of the 1997 revisions, however, these provisions were strengthened and converted to provisions prohibiting discrimination.⁹ In addition, provisions (b) and (c) were integrated.

In the 2006 revisions, the areas subject to the prohibition of discrimination were extended in the following two points. First, it is stipulated that the term “placement” includes the “allocation of duties” and “grant of authority” (Article

⁸ For comparison, Article 4 of the LSA states that an employer “shall not engage in discriminatory treatment of a woman with respect to wages on the basis that they are female.” Despite this seemingly one-sided wording, it has long been interpreted that preferential treatments of female workers are also prohibited as discriminatory treatment. Kazuo Sugeno, *JAPANESE LABOR AND EMPLOYMENT LAW* 162 (2002).

⁹ This change may make a difference to pre-existing employees as well. Those female workers who were employed for a non-career track before the arrival of the EEOA were awarded damages for the period after the revision of the EEOA, because it was held illegal to continue disparate placement of these women without making efforts to remedy the situation. See *Nomura Securities Co. case*, Tokyo District Court, February 20, 2002, *Rodo-hanrei* 822-13.

6, Item 1). Thus, for example, if workers occupy the same managerial position but their duties and authorities vary by gender, it constitutes sex discrimination regarding “placement.” Second, the “demotion” of workers, “change in job type or employment status,” “encouragement of retirement” and “renewal of the labor contract” were added as new areas subject to the prohibition of discrimination (Article 6, Items 1, 3 and 4). The renewal of labor contracts actually means an employer’s refusal to renew a fixed-term employment contract because of the employee’s sex. Although these matters are closely related to placement, promotion or dismissal, it was arguable that they are technically outside the coverage of the EEOA. The revision aims to fill the gap.

In addition, there was an organizational change to the equality provisions. Except for the provision dealing with recruitment and hiring (Article 5), three provisions for the prohibition of discrimination—former Article 6 (placement, promotion and training), former Article 7 (fringe benefits), and former Article 8 (retirement and dismissal)—were integrated into a single provision of new Article 6, which prohibits discrimination with regard to Items 1 through 4.

On the other hand, the ban on discrimination concerning retirement and dismissal based on female worker’s marriage, pregnancy, childbirth or maternity leave, which was included in provisions of (e) above, was reallocated and included in Article 9 as described below. Because pregnancy and maternity issues are unique to female workers, it was considered appropriate to separate them from the prohibition of discrimination on the basis of sex.

Article 5 (Prohibition of Discrimination on the Basis of Sex)

With regard to the recruitment and hiring of workers, employers shall provide equal opportunities for all persons regardless of sex.

Article 6

With regard to the following matters, employers shall not discriminate against workers on the basis of sex.

- (i) Assignment (including allocation of duties and grant of authority), promotion, demotion, and training of workers;*
- (ii) Loans for housing and other similar fringe benefits as provided by Ordinance of the Ministry of Health, Labor and Welfare;*
- (iii) Change in job type and employment status of workers; and*

(iv) Encouragement of retirement, mandatory retirement age, dismissal, and renewal of the labor contract.

(3) Prohibition of Indirect Discrimination

After the 2006 revisions, the above two provisions for the prohibition of discrimination are followed by a new provision entitled “Measures on the Basis of Conditions other than Sex” (Article 7), which prohibits what is known as indirect sex discrimination. It is targeted at the employer’s measures regarding matters covered by Articles 5 or 6 which apply “a criterion concerning a person’s condition other than the person’s sex” and which are specified by the Ordinance of the Ministry of Health, Labor and Welfare as measures that may cause discrimination in effect by reason of sex, considering the proportion of men and women who satisfy the criterion and other factors. This provision says that the employer may not take such a measure unless there is a legitimate reason, such as cases where it is specifically required for the purpose of performing the job in question or for the purpose of employment management of the firm.

There was no provision in the former EEOA addressing indirect discrimination, and it was not generally understood to subsume this legal principle. However, as the prohibition of indirect discrimination became an international trend, a growing number of people began proclaiming the need to tackle the problem of inequality resulting from facially gender-neutral standards in order to effectively promote equality. However, employers showed strong opposition, claiming that the concept of indirect discrimination was not only unfamiliar in Japan but also dangerously ambiguous and undefined. This became the greatest point of contention during the current revisions of the EEOA.

Consequently, the prohibition of indirect discrimination was introduced in a compromised form, limiting its application to “the measures specified by the Ordinance of the Ministry of Health, Labor and Welfare.” The Labor Policy Council (tripartite advisory committee under the Minister of Health, Labor and Welfare), which established the contents of the bill, agreed that for the time being the prohibition of indirect discrimination should apply only to the following three cases: (i) applying a criterion concerning body height, weight or physical capacity when recruiting or hiring workers, (ii) in case the employer adopts dual career ladder system, requiring workers to be able to accept future transfers with a change of residence when recruiting or hiring workers for

main positions of the core career course, and (iii) requiring workers to have experiences of job relocation when deciding their promotion. After the passage of the revised EEOA, the Ministry of Health, Labor and Welfare issued a new ordinance incorporating the above items (Article 2 of the EEOA Enforcement Regulations). Such limitation may be deplorable to those who sought a general prohibition of indirect discrimination. Still, the fact that they were adopted overcoming fierce opposition is indeed an achievement.

In any event, as for the above three cases, it was officially recognized that such criteria are likely to cause unfavorable outcomes for one sex (female workers in particular) and could lead to discrimination on the basis of sex. In order to adopt these measures, employers must have “a legitimate reason” arising from the nature of the job or the necessity of business operations. Whether such a reason exists or not is determined on a case-by-case basis. The Ministry of Health, Labor and Welfare has given guidelines on this issue, showing some examples where it is recognized that no legitimate reason exists. In the case of (ii) above, for instance, no company can justifiably claim to have a legitimate reason if it has no branches or regional offices across wide areas and has no plans to have ones in the foreseeable future.

On the other hand, Article 7 does not apply when a company, for example, specifies required college degree (such as engineering or literature) at the time of recruitment or adopts the criterion of “head of household” with regard to fringe benefits, even though they may bring about a significant disparity in the ratio of male and female workers among applicable persons.¹⁰ According to the Ministry, these applicable criteria are to be reviewed from time to time on the basis of the trend of court cases and other developments, and new criteria pertaining to indirect discrimination may be added when the Ordinance is revised in the future. Furthermore, if a civil lawsuit pertaining to such a criterion is filed, a bold judge may decide it to be indirect discrimination even under the current law, either by interpreting the EEOA widely or by relying on Article 90 of Civil Code.

¹⁰ There is also an argument that differences in treatment between regular employees and part-time workers are forms of indirect discrimination against female workers. However, at least, the current ordinance under Article 7 of the EEOA does not cover such cases. At the same time, measures to require equality according to relative conditions of regular and part-time workers have been considered, apart from the theory of indirect sex discrimination. The Diet has just passed a revision pursuing such a direction to the Act for the Improvement in Managing the Employment of Short-time Workers.

As mentioned earlier, wage discrimination between male and female workers is subject to Article 4 of the LSA. The act has not been revised and there is no special provision for indirect discrimination, but some people have contended that the theory of indirect discrimination be accepted as the interpretation of the article.¹¹ This argument is expected to continue.

Article 7 (Measures on the basis of Conditions other than Sex)

An employer shall not take measures concerning the recruitment and hiring of workers or any of the matters listed in the items of the preceding Article which apply a criterion concerning a person's condition other than the person's sex and which are specified by the Ordinance of the Ministry of Health, Labor and Welfare as measures that may cause a discrimination in effect by reason of sex, considering the proportion of men and women who satisfy the criterion and other matters, except in cases where there is a legitimate reason to take such measures, such as where said measures are specifically required for the purpose of performing the relevant job in light of the nature of that job, or cases where such measures are specifically required for the purpose of employment management in light of the circumstances of the conduct of the employer's business.

2. Prohibition of Disadvantageous Treatment of Female Workers by Reason of Pregnancy and Childbirth, etc.

Although the EEOA has become an act for the prohibition of sex discrimination of both male and female workers, pregnancy and childbirth remain unique to female workers. Disadvantageous treatment of female workers based on these issues would undermine equality among men and women, which clearly is contrary to the aim of the EEOA.¹² However, as the cases of

¹¹ The decision of the Tokyo District Court in Sanyo Bussan Co. case (June 16, 1994, *Rodo-hanrei* 651-15) is known for its statement that because most of the persons listed as “head of household” on residence registries are men, paying higher salaries to these householders puts female workers at a disadvantage. The court held the employer in breach of Article 4 of the LSA, and the decision aroused a controversy whether it adopted the notion of indirect discrimination under the article. It was, however, a case where the employer's intention to treat female workers disadvantageously was so clear from the outset. There was so much evidence of direct discrimination that it is hard to tell the relevance of indirect discrimination.

¹² For example, in Shokokai Uwajima Hospital case (Matsuyama District Court, Uwajima

“*ninshin-risutora*” (termination upon pregnancy) are reported in weekly magazines, it is not rare at all that a female worker is forced to retire from her company or to accept a change in employment status to part-time when the employer knows of her pregnancy. In fact, according to 2006 statistical data, among the cases in which the Equal Employment Opportunity Offices of Prefectural Labor Bureaus assisted in the resolution of disputes under the EEOA, 90.8% of cases pertaining to retirement and dismissal were allegedly “by reason of pregnancy, childbirth, etc.”¹³

In the 2006 revisions, while the sentence requiring that female workers be enabled to engage in full working lives “with respect for maternity” was maintained in the basic principle of the EEOA (Article 2), amendments were made so as to strictly prevent the disadvantageous treatment of female workers by reason of pregnancy or childbirth. As mentioned earlier, some of such provisions were contained in the former EEOA prohibiting discrimination against female workers regarding retirement and dismissal. They were separated from Article 6, which now stipulates the prohibition of discrimination of both genders, and were reallocated and included in a separate article (Article 9).

(1) Forced Retirement by Reason of Marriage, Pregnancy or Childbirth, and Dismissal for Marriage

Paragraph 1 of Article 9 prohibits employers from stipulating “marriage, pregnancy or childbirth” as a reason for retirement of female workers, and Paragraph 2 of the same article states that employers shall not dismiss female workers for marriage. These provisions were contained in the former EEOA, although dismissal for marriage was prohibited together with dismissals by reason of pregnancy, childbirth or maternity leaves taken before and after childbirth. These are dealt with separately in Paragraph 3 of Article 9, as shown below.

Aside from pregnancy and childbirth, “marriage” may happen to male workers, too. Therefore, establishing a provision that applies only to female workers in this regard goes not without question. If female workers alone are

Branch, December 18, 2001, *Rodo-hanrei* 839-68), the employer refused to renew the employment contract of a female worker because of her pregnancy. The court nullified the termination, holding that it was against the aim of the EEOA.

¹³ Ministry of Health, Labor and Welfare, “FY2005, *Danjo Koyo Kintoho no Shiko Jokyo*” (The Status of EEOA Implementation) (2006).

forced to retire or dismissed for marriage while their male counterparts are retained, it clearly falls under discriminatory treatment on the basis of sex concerning retirement and dismissal (Article 6, Item 4). However, it was decided to maintain the provision to address retirement and dismissal of female workers for marriage, considering the fact that specific legal regulations on this subject are required by the Convention on the Elimination of All Forms of Discrimination against Women. Moreover, the system of retirement-on-marriage for female workers¹⁴ was once prevalent among Japanese companies, and a similar mentality may still exist today. It could be helpful to indicate the significance of the issue by prohibiting such dismissals directly (in other words, regardless of how male workers are treated).

(2) Additional Prohibited Reasons and the Prohibition of Disadvantageous Treatment

Paragraph 3 of Article 9 prohibits the dismissal of female workers by reason of pregnancy, childbirth, or maternity leaves taken before and after childbirth as guaranteed by Paragraphs 1 and 2 of Article 65 of the LSA. This provision was contained in Paragraph 3 of Article 8 of the former EEOA together with the prohibition of dismissal for marriage, but the latter forms an independent paragraph now (Paragraph 2 of Article 9, mentioned above). At the same time, Paragraph 3 is strengthened over its predecessor in the following two points.

The first is an expansion of prohibited reasons. The words “other reasons related to pregnancy or childbirth as provided by the Ordinance of the Ministry of Health, Labor and Welfare” were added. For example, dismissal is now prohibited in cases where a female worker requires a change in work hours or a reduction in workload in accordance with a doctor’s recommendation, or in cases of decreased efficiency or inability to work due to the worker’s health condition arising from pregnancy or childbirth, which includes morning sickness.

The second is the prohibition of “disadvantageous treatment” of female

¹⁴ The leading case on this issue is the Sumitomo Cement case (Tokyo District Court, December 20, 1966, *Rominshu* 17-1-1407). The court held that the stipulation requiring female workers to resign upon marriage was null and void under Article 90 of the Civil Code because it was repugnant to the public order and good morals of the society, which should reflect the equality principles of the Constitution. The decision repudiated the “common practice” of the time and significantly contributed to the development of a legal theory of equality between men and women before the arrival of the EEOA. See Frank K. Upham, *LAW AND SOCIAL CHANGE IN POSTWAR JAPAN* 131-139 (1987).

workers in addition to “dismissal.” For example, if a woman is demoted because of her pregnancy, it was once necessary to employ a technique of interpretation, such as it should not be permitted in light of the “aim” and “spirit” of the EEOA, which prohibits dismissal by reason of pregnancy. Now it constitutes a clear violation of the revised act. However, sometimes it is not easy to tell whether or not a particular measure falls under illegal disadvantageous treatment by reason of pregnancy, childbirth, etc.¹⁵ The Ministry of Health, Labor and Welfare has established guidelines to aid in that determination.

(3) Dismissal during Pregnancy or in the First Year after Childbirth

Moreover, Paragraph 4 of Article 9 was added as an entirely new provision, which says that dismissal of female workers who are pregnant or in the first year after childbirth shall be “void.” At first glance this provision appears rather drastic, but the following proviso states that this shall not apply in the event that employers prove that the dismissal is not for reasons prescribed in Paragraph 3 of Article 9. Hence, this is in essence a change in the burden of proof. Nonetheless, it will be of great significance in the real workplace that the dismissal is presumed to be void, since employers have to refrain from dismissing female workers in the absence of a fully persuasive reason for termination.

Article 9 (Prohibition, etc. of Disadvantageous Treatment by Reason of Marriage, Pregnancy, Childbirth, etc.)

- (1) Employers shall not stipulate marriage, pregnancy or childbirth as a reason for retirement of women workers.*
- (2) Employers shall not dismiss women workers for marriage.*
- (3) Employers shall not dismiss or give disadvantageous treatment to women workers by reason of pregnancy, childbirth, or for requesting absence from*

¹⁵ For example, the Supreme Court held in Toho Gakuen case (December 4, 2003, *Rodo-hanrei* 862-14) that, under a system in which the attendance ratio of 90% or more is needed for an employee to receive semi-annual bonuses, the employer may not refuse to pay a bonus at all by treating the leaves taken by a female worker before and after childbirth as absence from work, because it defeats the purpose of the LSA which guarantees the right to maternity leave. However, the same decision indicated that reducing the amount of the bonus in proportion to the length of absence from work is permitted. Although not a case under the EEOA, it shows the difficulty of drawing a line between proper measure taken according to the actual length of absence and illegal disadvantageous treatments because of pregnancy, childbirth and/or maternity leave.

work as prescribed in Article 65, paragraph 1, of the Labor Standards Act (Act No. 49 of 1947), or having taken absence from work as prescribed in the same Article, paragraph 1 or 2, of the same act, or by other reasons relating to pregnancy, childbirth as provided by Ordinance of the Ministry of Health, Labor and Welfare.

- (4) *Dismissal of women workers who are pregnant or in the first year after childbirth shall be void. However, this shall not apply in the event that the employer proves that the dismissal in question was not for reasons prescribed in the preceding paragraph.*

3. Employer’s Obligation to Take Measures against Sexual Harassment

Japanese legal theory on sexual harassment was developed, at the outset, under the Civil Code with almost no correlation to the EEOA. A victimized female worker sued the perpetrator and his employer for damages under tort provisions of the Civil Code, contending that her rights of human dignity and sexual freedom were injured.¹⁶ While the number of successful cases increased rapidly and everybody knows the concept of sexual harassment (or at least the word “*sekuhara*” in abbreviated Japanese language) today, it has not been viewed clearly as a form of discrimination because of sex.

Nonetheless, in the 1990s, as many lawsuits were filed against sexual harassment, public awareness was raised that it is an important issue for female workers. Consequently, in conjunction with the 1997 revisions, a special provision to address sexual harassment was added to the EEOA. Embracing two types of sexual harassment known as “*quid pro quo*” and “hostile environment” cases, the provision mandated employers to “give necessary consideration from a viewpoint of employment management” so that female workers may not suffer from these two types of sexual harassment (Former Article 21, Paragraph 1). The Ministry of Health, Labor and Welfare issued guidelines detailing the provision. As easily perceived from its weak wording, however, the nature of this provision, unlike the equality provisions to prohibit discrimination, was best characterized as a supportive measure for female

¹⁶ The most famous decision on sexual harassment in the early days was rendered in 1992 in so-called Fukuoka Sexual Harassment case (Fukuoka District Court, April 16, 1992, *Rodo-hanrei* 607-6). For Japanese legal theory on sexual harassment, see Ryuichi Yamakawa, *We’ve Only Just Begun: The Law of Sexual Harassment in Japan*, 22 *Hastings Int’l & Comp. L. Rev.* 523 (1999).

workers. It was written in Chapter 3, “Measures to be Considered Regarding the Employment of Women Workers,” along with measures to be taken for health management during pregnancy and after childbirth. Accordingly, protection by the provision was limited to female workers, with no measures afforded to male counterparts victimized by sexual harassment.

The 2006 revisions, firstly, strengthened the obligation by requiring that employers “shall establish necessary measures in terms of employment management to give advice to workers and cope with problems of workers, and take other necessary measures...” (Article 11, Paragraph 1). Therefore, the law imposes a positive duty upon the employer to take necessary measures with respect to sexual harassment. According to new guidelines, the contents of such measures are almost identical to those advocated under the former EEOA, consisting of the following three pillars: (a) to clarify the employer’s policy against sexual harassment and to inform and educate all employees about such policy, (b) to establish internal systems to respond to grievances of sexual harassment and take adequate measures, and (c) to take immediate and adequate measures at the time of occurrence of sexual harassment. Secondly, the phrase “women workers” of the former provision was replaced in all instances with “workers,” so as to equalize the treatment of male and female workers. Hence, sexual harassment against male workers has been taken cognizance of for the first time by the EEOA.

Furthermore, although the new provision is still placed alongside of the provisions of measures for healthcare during pregnancy and after childbirth (Articles 12 and 13), these provisions are bound together under the title of “Measures to Be Taken by Employers” (Section II) and are found in Chapter II, “Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment.” This makes it clear that the measures for healthcare during pregnancy and after childbirth and those concerning sexual harassment are not mere welfare but integral part of efforts to achieve equality in the workplace.

Article 11 (Employment Management Measures Concerning Problems Caused by Sexual Speech or Behavior in the Workplace)

(1) Employers shall establish necessary systems in terms of employment management to counsel workers and cope with their problems, and take other necessary measures so that workers they employ do not suffer any disadvantage in their working conditions by reason of said workers’

responses to sexual speech or behavior in the workplace and that their working environments do not suffer any harm due to such sexual speech or behavior.

(2) and (3) omitted.

4. Other Points of Revision

(1) Strengthened Procedures

In order to settle disputes under the equality provisions, the EEOA establishes procedures for assistance (advice, guidance and recommendations) provided by the Prefectural Labor Bureau and those for mediation by the Disputes Adjustment Commission (Articles 17 and 18). The 2006 revisions have expanded the areas of dispute covered by these procedures. Disputes related to discrimination on the basis of sex (above 1), disadvantageous treatment by reason of pregnancy, childbirth, etc. (above 2), as well as disputes related to the obligations of employers to take measures regarding sexual harassment and measures concerning healthcare during pregnancy and after childbirth (above 3) are now all subject to these procedures.

Moreover, in connection with the procedures for mediation by the Disputes Adjustment Commission, the revised EEOA clearly states that the Commission has power to make the parties appear and hear their views (Article 20), and that the Commission may discontinue the procedures when it finds no chance for amicable resolution (Article 23). It also establishes provisions for interruption of prescription (Article 24) and for suspension of court proceedings (Article 25). In addition, under the revised EEOA, the Health, Labor and Welfare Minister may announce to the public the name of violating employer regarding wider range of issues than before (Article 30), and the employer must face tougher sanction than before if it refuses to comply with, or files a false report to, the Minister's request for reports (Article 33). Although relatively modest, these procedural improvements are designed to enhance the effectiveness of the EEOA.

There is a persistent criticism that the administrative remedies provided by the EEOA are toothless and ineffective, and the victims of discrimination have no other choice but to file a civil lawsuit against the employer in cases of noncompliance. The current revisions do not change this picture. However, it is also true that there are many cases of successful assistance in which the

employer, taking advice of the Prefectural Labor Bureau, corrects its practices.¹⁷ Greater opportunities for government involvement under the revised act will certainly help workers.

(2) Assistance for Positive Action Measures

As for positive action programs, the 1997 revisions introduced two provisions: one to recognize their legality and the other for governmental assistance for them. Taking over these provisions, the revised 2006 EEOA states (1) that the prohibition of discrimination on the basis of sex shall not preclude employers from taking “measures in connection with women workers with the purpose of improving circumstances that impede the securing of equal opportunity and treatment between men and women in employment” (Article 8), and (2) that the State may provide consultation services and other assistance to employers regarding such measures (Article 14).

With regards to the above (1), which is exactly the same as its predecessor, it is noteworthy that even though the prohibition of sex discrimination has become applicable to both men and women, the object of positive action is limited to female workers. According to the guidelines prepared by the Ministry of Health, Labor and Welfare, employers are allowed to take positive action measures if the ratio of female to total workers in a particular workplace (employment-management division) is less than 40%.

The above (2) is also almost identical to its predecessor. Only a slight change was made by specifying government assistance for disclosure of information on the implementation of positive action measures (Article 14, Item 5). It is aimed at promoting voluntary actions of business firms through publicizing good examples.

Meanwhile, in Japan, implementation of positive action programs depends upon the initiative of the employers and is not required by law or regulation.

¹⁷ According to “FY2005, *Danjo Koyo Kintoho no Shiko Jokyo*,” *supra* note 13, the Prefectural Labor Bureaus (to be precise, their Equal Employment Offices) received 19,724 inquiries and requests for consultation in 2005, of which 141 were requests of action from workers regarding specific cases of equal treatment. In addition, based on reports from employers, the Prefectural Labor Bureaus provided 5,042 corrective instructions to 2,827 organizations. In most of these cases, the employer corrected its practices in accordance with the Bureau’s guidance. Meanwhile, the number of mediation cases handled by the Disputes Adjustment Commission was typically low at 4 cases, but all parties concerned accepted proposed plans and resolved their disputes accordingly.

They are only encouraged and expected mildly by the Basic Act for Gender-equal Society (1999). This did not change in the latest revisions of the EEOA. However, the fact that the EEOA has become an act for prohibiting sex discrimination regardless of men or women raises the question all the more acutely, whether the “equality” that keeps the legacy of inequalities of the past untouched should be acceptable.

According to 2005 figures on Japanese companies, 20 years after the enactment of the EEOA, the ratio of females was only 10.4% among assistant managers, 5.1% among section managers, and 2.8% among general managers.¹⁸ This suggests that business firms need to take a more aggressive attitude toward promoting female workers. If no substantial improvements are made, the reinforcement of positive action measures will be discussed during the next EEOA revision, perhaps in a more drastic way.

(3) Easing of Regulations on Female Underground Work under the LSA

The promotion of sexual equality through the EEOA has been accompanied by the easing of female protection provisions of the LSA, because they tended to limit job opportunities of women unnecessarily.¹⁹ When the EEOA was adopted in 1985, the LSA was also amended so that, firstly, the former Chapter 6, “Women and Minors,” which provided for their special protection, was divided into Chapter 6, “Minors,” and Chapter 6-2, “Women,” reflecting their differing needs and conditions. Secondly, restrictions on overtime and rest-day work, night work, and dangerous or injurious work by female workers were moderately relaxed.

It was a somewhat compromised move, commensurate with the lenience of the original EEOA. However, when the EEOA was revised in 1997, the special restrictions related to working hours, rest-day, and night work of female workers stipulated in the LSA were completely abolished, although they enjoy special protection regarding these matters during pregnancy and for a year following childbirth (so-called expectant or postnatal women). On the other hand, ban on female workers in general remained applicable to underground work (Article

¹⁸ Ministry of Health, Labor and Welfare, “*Hataraku Josei no Jitsujō*” (Actual Conditions of Working Women), 2005 edition (2006).

¹⁹ It should be noted that protection of female workers during pregnancy and after childbirth has been reinforced while restrictions on female workers in general have been abolished or relaxed.

64-2 of LSA) and to certain types of hazardous work, or, to be exact, work involving the lifting of heavy materials and work in locations where poisonous gasses or dusts such as lead or mercury are emitted (Articles 64-3, Paragraph 2 of the LSA; Article 3 of the Women's Labor Standards Regulations).

At the time of the 2006 revisions of the EEOA, restrictions on underground work of women were relaxed. Excluding the cases of expectant or postnatal women, the conventional default rule of prohibition was removed and female workers may be employed for underground work unless it falls under the prohibited category, that is, manual excavation and other sort of work "specified by the Ordinance of the Ministry of Health, Labor and Welfare as injurious work for women." In reality, in addition to manual labor, the ordinance also prohibits working with engines and dynamite, and only allows employers to use female workers for management and supervisory work below the ground. Nevertheless, this change undeniably benefits female civil engineers, who are increasing in number lately, by expanding their opportunities for work.²⁰

Moreover, as a result of the current revisions, the title of Chapter 6-2 of the LSA was changed to "Expectant or Postnatal Women, etc." from "Women." Thus, it is clear now that the provisions of this chapter, beginning with maternity leaves before and after childbirth (Article 65) focuses not on women in general but on their functions of pregnancy and childbirth. This seems to be in line with the prohibition of discrimination regardless of gender as stipulated in the EEOA.

Conclusion

As shown above, the EEOA was significantly improved by the 2006 revisions. The legal concept of equality was streamlined and the new doctrine of indirect discrimination was introduced in limited areas. It is also notable that the EEOA addresses the issues of pregnancy and childbirth, considering the reality facing female workers. In addition, the EEOA improved in terms of the ease of use by workers and the government.

Of course, it remains to be seen whether the "new and improved" EEOA may cut into Japanese workplaces effectively, where traditional male-based thoughts and practices die hard. Although the Child Care and Family Care Leave

²⁰ In the Japanese LSA, the underground work is interpreted as including not only work in mines but also underground work for tunnel construction.

Act has developed considerably since the 1990s to overcome practical obstacles to gender-free workplace, unless male workers are really able to, and learn to, balance work and family life, there will be still many female workers who have to pass up opportunities for promotion or retire upon marriage or childbirth.

Nevertheless, slowly but steadily, the Japanese EEOA has been improving. Naturally, there are criticisms such as that it took too long to get this far or that the EEOA is still too subdued. However, instead of providing a list of complaints about the EEOA, the author would like to conclude this paper with the hope for positive impact that phase III of the EEOA will have on the behavior of Japanese employers.

Act on the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave

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Introduction

The Act on the Welfare of Workers for Child Care Leave (Act No. 76 of 1991, hereinafter “the Act on Child Care Leave”), established in Japan on May 8, 1991, allows workers to take child care leave regardless of sex. Since the act was put into effect on April 1 the following year, any worker with a child, regardless of sex, is permitted to take child care leave by requesting it from his or her employer. In the last 15 years since the act was put into effect, drastic changes have taken place in the social environment as well as in public awareness. It is not necessarily inaccurate to claim that these changes have been promoted by legislation giving both male and female workers the right to take child care leave.

In the last 15 years, substantial revisions have been made to the Act on Child Care Leave with the incorporation of a provision on family care leave as well as a series of important revisions to facilitate a worker’s use of the system. The main reasons for such changes include the persistently declining birthrate, which is one of the decisive factors in legislation, and the aging population problem that has not been alleviated. It can be said that the Child Care Leave System has been revised since we are entering a period with fewer children and a perpetually aging population.¹

Based on the Act on Child Care Leave, later revised to the Act on the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave (hereinafter called “the Act on Child and Family Care Leave”), this paper introduces an outline of the Child Care Leave and Family Care Leave Systems, which establish rights for workers who have children or family members requiring care.

¹ Since the total fertility rate (the number of children given birth to women between the ages of 15 and 49) was recorded at 1.57 in 1989, the lowest figure after the war, it has continued to fall, reaching 1.29 in 2003 and 2004, and further decreasing to 1.25 in 2005. The rate is expected to slightly rise in Fiscal Year 2006.

1. Child Care Leave System

(1) Income Security during the Period of Child Care and Other Leaves

Since its establishment in 1991, the Child Care Leave System has provided both male and female workers with income security for the period up to the day before their child's first birthday. Subsequent to April 1, 2005, however, income security could be extended for up to eighteen months, provided there are circumstances preventing the child from being sent to a child care facility after his or her first birthday.²

The period of leave permitted varies depending on whether or not the child is biological and if it is the father or mother applying. The allotted time is decided based on the Labor Standards Act, which provides working mothers with prenatal (six weeks in principle) and postnatal leave (eight weeks in principle or six weeks when granted permission by a medical professional).³ If a working mother were to take postnatal leave and a child care leave consecutively, the child care leave would continue for a period of ten months (16 months when an extension is granted) under the Child Care Leave System.

On the other hand, a father is entitled to take leave for up to a year (eighteen months when an extension is granted), assuming he takes the entire period available to him prior to the child's first birthday and provided that the child's mother, his wife, is employed. If she is a fulltime housewife, it is assumed that she is "unable to bring up the child in the normal way" for "eight weeks after the birth," the same period allowed for postnatal leave.⁴ The father is thus entitled to take child care leave for that period. It is of course up to the father to choose whether or not to take child care leave, but the act indicates that the wife is deemed in such a health condition that she is unable to devote herself to child care for the period of eight weeks following the birth. For any additional periods, should the wife be able to devote herself to child care in the home, the employer is entitled to exclude the worker (the father in this case) as an exception to those entitled to take child care leave, provided the employer makes a

² This is designed for those who wish to send their children to a child care facility but are unable to do so and for a spouse raising a child who planned to raise the child after the age of one year, but has difficulty doing so on account of death, injury, or illness, etc.

³ See the Labor Standards Act, Article 65.

⁴ See the Act on Child and Family Care Leave, Article 6, Paragraph 1, Item 2, and Ordinance for Enforcement of the Act on Child and Family Care Leave, Article 6, Item 3.

labor-management agreement outlining this condition.⁵ The exclusion made under the labor-management agreement is discussed in the next section.

In reality, it is extremely rare for only the father to take the full available period of leave. This is not only due to the fact that male workers, as regular fulltime employees in a Japanese company, would face various difficulties if they were out of work for nearly a year, but it is also because the Act on Child and Family Care Leave exempts employers from the obligation to pay wages during the period of child care leave, reducing wage security to the low level of 30% of wages received prior to the period of leave, the amount of which is provided by employment insurance (Basic Benefits for Child Care Leave) during the period of leave, with 10% being provided after returning to work (Benefits for Workers Returning from Child Care Leave).⁶ The amount of these benefits increased after enactment of the act and a decision has been made to increase the amount of Benefits for Workers Returning from Child Care Leave, which is provided after returning to work, from the current 10% to 20% starting in October 2007. While employers can discretely provide wages during the period of leave, few companies are inclined to provide such wage security given that the act does not require them to pay wages during the period of leave coupled with the fact that employers often need to hire replacements for the period of leave. When the act was initially put into effect in 1992, however, there were cases where employers paid for the portion of social insurance fees to be borne by the worker during the period of leave, exempting the worker from the burden. This indicates that some employers accepted the burden of paying partial wages for workers on leave. The act underwent several revisions and ever since April 1, 2005, fully exempts both the employer and insured (the worker) from the burden of social insurance fees when child care leave is initiated. The period of exemption has also been extended from a child up to one year old to three years old.

(2) Employers, Workers and Children Falling under the Act

Under the Act on Child Care Leave put into effect on April 1, 1992, companies with 30 fulltime regular employees or less were given a preparatory

⁵ See Ordinance for Enforcement of the Act on Child and Family Care Leave, Article 6, Paragraph 1.

⁶ The period of payment was extended to eighteen months in 2005.

grace period of three years to establish their programs for child care leave and shorter working hours. After April 1, 1995, employers of all companies became obligated to accept all applications made by those who are eligible. Since that time, the range of eligible workers has drastically increased.

In reality, however, the act excluded “day laborers” and “contract workers,”⁷ and many companies also excluded “workers not yet employed continuously for a period of one year,” “workers whose spouse, the parent of the child, is able to care for the child in a normal way”⁸ and “others who are specified in other ordinances of the Labour Ministry (currently the Ministry of Health, Labour and Welfare)”⁹, provided that a labor-management agreement for such conditions was made between the employer and the trade union or representatives representing the majority of workers.

On April 1, 2005, however, certain contract employees also became eligible for child care leave as a result of revisions made to reflect the reality that many of those who were contract employees actually worked for the same employer for a number of years with renewed contracts. To be eligible, applicable contract employees must satisfy two conditions at the time of application for leave: “be continuously employed by the same employer for a period longer than one year” and “expect to be employed subsequent to the child’s first birthday (excluding those who complete the term of work contract and show no evidence of renewal of said contract between the child’s first and second birthday).” “No renewal of contract” does not denote a dismissal and can occur with relative ease due to the lack of legal restrictions on it compared to a dismissal. Consequently, only a limited number of individuals will be able to confirm at the time of application for leave that they will have a renewed contract after

⁷ See the Act on Child Care Leave, Article 2, Paragraph 1, and the current Act on Child and Family Care Leave, Article 2, Paragraph 1, Item 1.

⁸ For example, a spouse who is a full time homemaker.

⁹ The provision stipulates a case in which a child can be fully taken care of by “the worker who is scheduled to terminate the employment contract within one year from the day of application for the child care leave,” “the worker who works only a few days a week, working less than the number of working days defined by the Ministry of Health, Labour and Welfare (two day or less)” or “the person who is a parent of the child in question but who is neither the applicant worker nor its spouse” (for example, the child is adopted by grandparents and one of the grandparents is fit to raise the child, not being under employment and living in the same house). See Ordinance for Enforcement of the Act on Child Care Leave, Article 7, and Public Notice No. 114 of the Ministry of Labour in 1995.

the leave. This revision, therefore, is only considered an expansion of the Child Care Program for those workers who repeatedly renew contracts over a period of several years under a limited term of contract, and future trends must be watched in order to gauge whether or not the number of applicants actually increases.

Adopted children are also included in the program and adoptive parents are eligible for leave in the same manner. A legal parent-child relationship is required and the child must be either biological or adopted. Stepchildren and foster children are not applicable for child care leave and no revision has been made in this regard since the act was originally put into effect. Child adoption is not yet common in Japan and children from a second marriage are not always under a year old, making revisions necessary in this area.

(3) Obstacles to Taking Child Care Leave

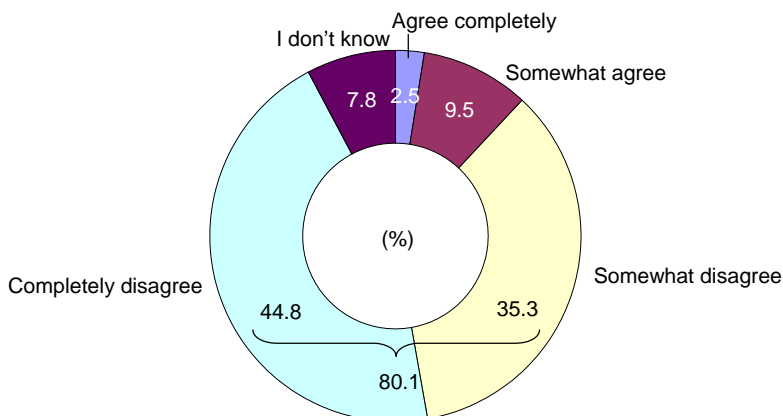
Today, even in Japan more men are interested in being involved in raising their children, but it is not exactly simple for them to actually take child care leave. Figure 1 shows that men are facing stumbling blocks when trying to take child care leave both in the workplace and in society.

It is well-known that many workers are hired in small and medium businesses in Japan. It was small and medium businesses that suffered the greatest damage during the period of long recession after the collapse of the bubble economy in the 1990s.

Even in those circumstances, employers were not allowed to turn down workers' applications for child care leave. Today, there is also a provision that prohibits disadvantageous treatment. Article 10 of the Act on Child and Family Care Leave stipulates, "An employer shall not dismiss or otherwise treat a worker disadvantageously by reason of said worker's making Child Care Leave Application or taking Child Care Leave."

The phrase, "otherwise treat a worker disadvantageously" includes extortive treatment regarding resignation or change of employment contract such as a change of status from fulltime regular to part time employee, involuntary furlough, demotion, wage reductions, unfavorable evaluation for bonus, unfavorable transfer orders, impaired work environment, etc. Examples are provided in the Guidance of Child and Family Care, Part 2-3 (2).

Figure 1. Do you believe that society and your company provide enough support for men to take child care leave?



Source: *White Paper on the National Lifestyle 2003*.

Notes: 1. Based on *Public Opinion Poll on a Gender-equal Society 2000* (The Cabinet Office).

2. The percentage breakdown of replies to the question on men's child care leave, "Do you believe that society and your company provide enough support for men to take child care leave?"

3. 3,404 responses, men and women aged 20 or older nationwide.

While it is easier for large businesses to find replacement workers, small and medium businesses face difficulties when their workers take child care leave. For this reason various subsidies have been established by administrative organizations.

For example, to promote the utilization of child care leave and the Program for Shortening Working Hours in small and medium businesses, the Child Care Subsidy for Small and Medium Businesses is provided by the Prefectural Labor Bureau to employers of small and medium business (with 100 fulltime regular employees or less) upon encountering their first case of a worker taking child care leave or using the Program for Shortening Working Hours.

The Japan Institute of Workers' Evolution¹⁰ has launched a project for a Child and Family Care and Secure Employment Subsidy (subsidy to improve

¹⁰ A judicial foundation, which was established when the Act on Equal Employment Opportunity for Men and Women was put into effect in 1986. Its main purpose is to develop skills and promote the welfare of female workers.

support for both work and housekeeping). This subsidy is subdivided into different courses depending on the type of support provided to the worker by the employer. For example, the employer is given a subsidy under the “Course of Securing Alternative Workforce” when he or she has established labor-management agreements or employment regulations for placing a worker who takes child care leave in the original or equivalent job subsequent to the leave by securing replacement workers for those on child care leave, and when the employer has reinstated the worker in his or her position following the child care leave.

(4) Making the Child Care Leave System More Flexible – the Program for Shortening Working Hours

The Child Care Leave System is not limited to the full-day leave program. The Act on Child and Family Care Leave obliges employers to establish one of the following measures for workers who do not take advantage of the Child Care Leave System (the Act on Child and Family Care Leave, Article 23, Paragraph 1 and Ordinance for Enforcement of the Act on Child and Family Care Leave, Article 34, Paragraph 1): (i) the Program for Shortening Working Hours, (ii) a flextime program, (iii) a program to change start/finish times without altering total daily working hours, (iv) an overtime exemption program, or (v) the provision and management of a child care facility or similar for children under the age of three. The employer is obliged to establish at least one of the above measures for workers with a child under one year of age¹¹ and who does not take advantage of the Child Care Leave System. For those workers raising children between the ages of one and three, the act also stipulates the provision of measures including the Program for Shortening Working Hours or others similar to those provided by the Child Care Leave System (in the later part of Article 23, Paragraph 1). In other words, the employer is free to establish provisions in the employment regulations to make the Child Care Leave System available for workers raising children between the ages of one and three, and said employer should, as a minimum, provide “measures including a program for shortening working hours,” one of the provisions listed above. In other words, he or she must provide the Program for

¹¹ Up to eighteen months old when an extension is granted under the Act on Child and Family Care Leave, Article 5, Paragraph 3.

Shortening Working Hours, an overtime exemption program, flextime program, program to change start/finish times without altering total daily working hours, or a child care facility.

The employer is obliged to make efforts to establish provisions for workers raising a child over the abovementioned age. For workers raising a child of three years old and up, the employer is required to endeavor to provide at least one of the five measures listed above (the Act on Child and Family Care Leave, Article 24, Paragraph 1) until the child is of elementary school age.

Depending on the measures provided by the employer, the worker assuming child care responsibilities has various options to continue working in addition to taking continuous and complete leave by sending the child to a child care facility within the workplace, adjusting start and finish times for work in arrangement with a child care facility or babysitter, or using the Program for Shortening Working Hours. Also, use of a flextime program allows workers to schedule full working days, abbreviated days and days off.

It is a fact that workers bearing the responsibility of child care desperately require numerous options from which they can select according to lifestyle and needs. Also in Japan, many workers wish to continue working even for short hours instead of completely leaving work, as they do not want their skills or professional instincts to diminish or to fall behind on business information. If a child care facility were available in the workplace, it would be extremely convenient for those who desire to return to work, but are unable to, as they cannot find someone to watch their child or a facility where the child can be left. They will also feel a sense of security while they are working if their child is nearby. Substantial benefits are being afforded to workers with the introduction of the provision to oblige employers (to endeavor) to establish different options in addition to the leave program under the Act on Child and Family Care Leave.

There is, however, room for improvement. For the worker with a child of three and older, but prior to elementary school age, the employer is only obliged to make efforts to provide measures. The belief is that shorter working hours become a real requirement for a parent when the child begins attending elementary school. Unlike child care facilities, school children come home at an earlier time. An after-school child care program may be available, but if it is not located within the child's school, it may be unsafe for the child to travel alone to the facility. In light of this circumstance, it would be beneficial to

extend the provision for the Program for Shortening Working Hours in a way that would offer support for workers with a child in elementary school. This is one of the points that must be examined for future revision of the Act on Child and Family Care Leave to improve its usability.

(5) Restrictions on Overtime Work and the Exemption of Late-night Work

In addition to the provisions given to the employer as obligations or requirements to exert effort as described above, there is one additional provision reducing the maximum amount of overtime to a lower level than that of regular workers to ensure that those raising a child are not overwhelmed by the time they must spend at work. The employer is required to satisfy this provision at the request of the worker.

Under Article 17 of the Act on Child and Family Care Leave, at the request of the worker the employer is not allowed to order overtime exceeding 24 hours per month or 150 hours per year to workers caring for a child not yet enrolled in elementary school, provided that the worker meets certain requirements. Since regular workers are allowed to work overtime for a maximum of 360 hours a year, this provision halves the maximum overtime for workers needing time to take care of a child not yet of elementary school age.

The specific requirements refer to a worker being continuously employed under the same employer for more than one year, a spouse who is the child's parent, but not fully engaged in child care,¹² and no rational reason for refusing such a request.¹³

¹² A worker is deemed ineligible to apply for a limitation of overtime under Article 17 of the Act on Child and Family Care Leave if the spouse meets all of the following conditions:

- (1) He or she does not work and is engaged in child care, or works for two days or less per week and "is not in employment" (Ordinance for Enforcement of the Act on Child and Family Care Leave, Article 31-2, Item 1).
- (2) He or she is not injured or sick nor has any physical or mental disabilities (Ordinance for Enforcement, Article 31-2, Item 2).
- (3) It is not in the period of six weeks before (14 weeks before in the case of multiple gestation) or eight weeks after childbirth (Ordinance for Enforcement, Article 31-2, Item 3).
- (4) He or she is a spouse living in the same house as the child (Ordinance for Enforcement, Article 31-2, Item 4).

¹³ The worker applying for a limitation on overtime

- (1) works for two days or less per week, or
- (2) is a parent of the child but the worker or anyone other than the spouse of the

There are other provisions that can be employed by workers with a child including the exemption of late-night work (10 pm to 5 am). Under Article 19 of the Act on Child and Family Care Leave, at the request of the worker the employer is not permitted to require late-night work of workers caring for a child not yet of elementary school age. Certain eligibility requirements exist for this provision. As with the exemption of overtime work, the worker must be employed under the same employer for more than one year. Workers are not eligible, however, to apply for an exemption of late-night work from their employer under this provision if there is another member of the family who is able to take care of the child and who lives in the same house during the time of night that falls under late-night work.¹⁴ Also, workers are not eligible to apply for an exemption of late-night work if they are scheduled to work for two days or less per week and the given work consists entirely of late-night work (the Act on Child and Family Care Leave, Article 19, Paragraph 1, Item 3, and Ordinance for Enforcement of the Act on Child and Family Care Leave, Article 31-12).

When applying for the exemption, workers must specify the start and finish dates for the period during which they request an exemption of late-night work, and the period must fall between one and six months. The worker must specify

worker meets all the criteria listed in Note 12. In this case, the worker is deemed to have “a reasonable reason for the request not being granted” (the Act on Child and Family Care Leave, Article 17, Paragraph 1, Item 3) (Ordinance for Enforcement of the Act on Child and Family Care Leave, Article 31-3). This applies, for example, when a child who is adopted by a parent of the biological parent (grandfather or grandmother) and when the grandfather or grandmother meets all the criteria listed in Note 12.

¹⁴ “A worker who has a person specified by Ordinance of the Ministry of Health, Labour and Welfare, such as a Family Member who is living in the same household with said child and can normally take care of said child during Late-Night pertaining to said request” (the Act on Child and Family Care Leave, Article 19, Paragraph 1, Item 2) He or she must be a family member living in the same house aged 16 years or older (defined in reference to the age for completing a compulsory education) and should meet all the following criteria (Ordinance for Enforcement of the Act on Child and Family Care Leave, Article 31-11):

- (1) He or she does not work at night (10 pm to 5 am) (including those who work three late-nights or less a month).
- (2) He or she does not have any difficulty raising the child such as an injury, sickness, etc.
- (3) It is not in the period of six weeks before (14 weeks before in the case of multiple gestation) or eight weeks after childbirth.

the start and finish dates and apply for the exemption one month prior to the start date of the exemption period (the Act on Child and Family Care Leave, Article 19, Paragraph 2). No restriction is given for the number of applications for exemption, and therefore, it is possible to apply for a period of six months every six months until the child is enrolled in elementary school.

In principle, the employer is required to accept the application of any worker meeting the aforementioned conditions, however, employers can refuse the application on the grounds that it “would impede normal business operations” (the Act on Child and Family Care Leave, Article 19, Paragraph 1).

The two abovementioned measures, applying for a limitation on overtime work or for an exemption from late-night work, were established in relation to the 1998 revision of the Act on Equal Employment Opportunity for Men and Women in order to close the gap between men and women with regards to their treatment at work and alongside a revision of the Labor Standards Act, which removed all provisions concerning the protection of women excluding the section on pregnancy and childbirth. When these revisions were made, they eliminated the provision establishing a lower maximum number of overtime hours for women as compared to men and the provision that banned late-night work for women. Debate continued until the very end, however, as to whether or not these provisions should be made available to workers raising a small child or caring for a family member. Today, the system has been changed to provide a limitation on overtime and an exemption of late-night work regardless of sex.

It appears that an exemption of late-night work has a positive effect on workers raising small children. Avoiding late-night work is a very important factor for workers with no other family member available to take care of their children.¹⁵ On the other hand, the nature of limiting overtime work is somewhat different. One of the options for the Program for Shortening Working Hours, which the employer is obligated to establish, is the exemption of overtime work. For workers raising a child, this option is often better than a program establishing a lower maximum number of overtime hours, provided this is the option selected and established by the employer. Since the employer is obliged only to endeavor to establish this option for workers with a child of three years

¹⁵ The question still remains for workers with no family members to take care of their elementary school age children during late-night hours.

and older, but prior to elementary school age, similar results may be achieved by limiting overtime under Article 17 of the Act on Child and Family Care Leave, which covers a long period of time leading up to a child's enrollment in elementary school. What is most important for workers raising a child is to return home at a fixed time each day and to maintain and continue a fixed schedule for their daily lives. Despite the care option a worker selects for his or her child, be it sending and picking a child up from a child care facility or hiring a babysitter, it is important to finish work at a fixed time in order carry out daily life with efficiency. Thus, workers will probably select to ensure no overtime, despite it being limited to 150 hours a year, instead of opting for work conditions where workers can be required to put in overtime at any time. Consequently, the provision of Article 17 for Limitations on Overtime Work is still being questioned in terms of satisfying workers' needs.

(6) Nursing Leave Program

Under the Act on Child and Family Care Leave put into effect in 2004, an employer is obligated to provide workers with children under elementary school age with nursing leave for five working days per fiscal year when the child requires nursing care in the event of injury or sickness (Article 16-2). Typically, the parent would use annual paid holidays to take leave to handle such situations, but small children frequently become ill and many child care facilities ask parents to pick up sick children because they are unable to take responsibility for watching them and because they may infect other children. Children are affected by many different diseases in the process of acquiring various types of immunity at the age when they begin attending child care facilities and preschools. During this period, a number of mothers give up in their attempt to continue working.

To support such parents, the Nursing Leave Program is exceedingly important. After consuming all annual paid leave for the fiscal year, workers are given an additional five days off under this program. In some situations, this program could provide a great assistance.

An employer is not allowed to refuse an application for nursing leave made workers meeting the requirements (Article 16-3).

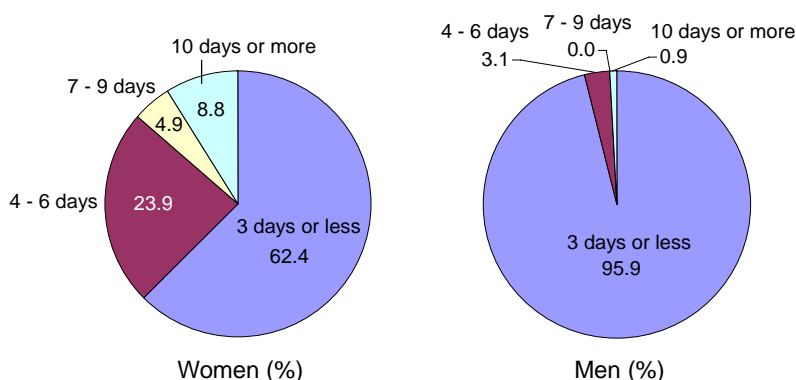
Although the Nursing Leave Program is defined in the provision as described above, it is still a young provision and it is difficult to grasp what types of programs are actually being established by businesses and to what extent the

program is being utilized. In this paper, the situation of the Nursing Leave Program is estimated using statistical information.

The charts listed below show data from the 2005 Basic Survey on Women's Employment by the Ministry of Health, Labour and Welfare. Since 2004, when the Nursing Leave Program was defined in the Act on Child and Family Care Leave, there has been a substantial increase in the number of companies that established the Nursing Leave Program (Figure 3). This indicates that more women take nursing leave than men, and that the vast majority of individuals, regardless of sex, take nursing leave for "less than three days." Some individuals take "more than ten days," indicating that certain companies offer a program of more than ten days of nursing leave in a fiscal year (all in Figure 2). In fact, most companies (91.6%) limit the leave to five days as it is defined by the act (Table 2), but some companies (8.6%) provide security for more than six days. Although some 90% of companies (87.2% to be exact) define eligible children as those of the age "before commencement of elementary school" as defined in the Act on Child and Family Care Leave, there are a few companies (9.6%) that accept children "already enrolled in elementary school" (Table 1).

In any case, nursing leave for children necessary beyond any shadow of a doubt and the time has come to examine whether or not the five-working-day provision is sufficient and whether it should be limited to children under elementary school age.

Figure 2. Duration of Child Nursing Leave



Source: The Ministry of Health, Labour and Welfare, *The 2005 Basic Survey on Women's Employment*.

Table 1. Companies with/without the provision and maximum duration (partial excerpt)

(%)

	Total	With the provision	(With the provision)					Without the provision	Unknown
			Before elementary school	First half of elementary school (up to 3rd grade or 9 years old)	4th grade to the end of elementary school (or up to 12 years old)	Including after elementary school	Other		
[Total]	100.0 《100.0》	33.8 《26.5》 (100.0)	(87.2)	(1.4)	(1.7)	(9.6)	(0.0)	66.2 《73.2》	0.0 《0.3》
[Company size]									
500 or more employees	100.0 《100.0》	91.3 《59.7》 (100.0)	(87.3)	(1.3)	(2.8)	(8.6)	(—)	8.7 《40.3》	— 《—》
100 to 499 employees	100.0 《100.0》	70.4 《39.8》 (100.0)	(91.4)	(0.9)	(1.2)	(6.3)	(0.0)	29.6 《60.1》	— 《0.0》
30 to 99 employees	100.0 《100.0》	47.9 《32.9》 (100.0)	(89.6)	(0.4)	(1.6)	(7.9)	(0.1)	52.1 《67.1》	0.1 《0.0》
5 to 29 employees	100.0 《100.0》	29.8 《25.2》 (100.0)	(86.2)	(1.7)	(1.7)	(10.3)	(0.0)	70.2 《74.5》	— 《0.3》
30 or more employees (overlapped)	100.0 《100.0》	52.7 《34.4》 (100.0)	(47.5)	(0.3)	(0.8)	(4.0)	(0.0)	47.2 《65.6》	0.0 《0.0》

Number of companies = 100.0%

Source: The Ministry of Health, Labour and Welfare, *The 2005 Basic Survey on Women's Employment*.

Note: 1. The number in 《 》 indicates data from the 2004 survey.

2. In the 2004 survey, there was no question regarding the presence or absence of the provision, but there were questions addressing the presence or absence of the program (including the practice and use of expired annual paid leave, etc.).

Table 2. Companies with a limited number of days for the Child Nursing Leave Program

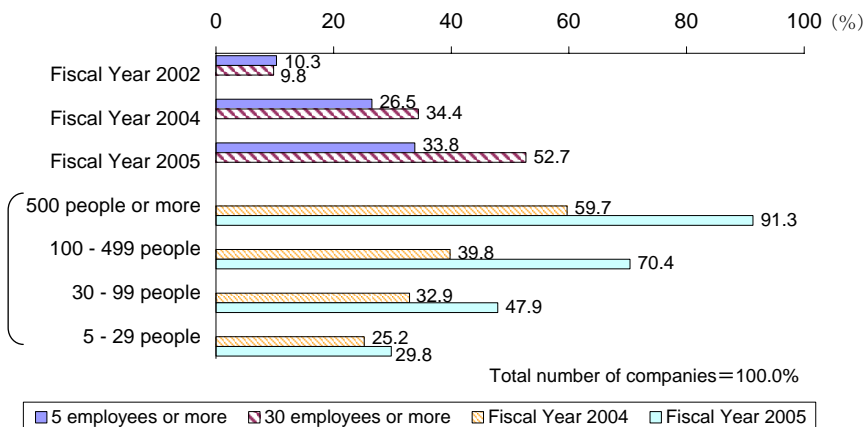
(%)

	Gross total	With limitation														
		Total	Per worker							Per child						
			Subtotal	5 days	6 - 9 days	10 days	11 - 20 days	21 days or more	Other	Subtotal	5 days	6 - 9 days	10 days	11 - 20 days	21 days or more	Others
[Gross total]	100.0	90.4 (100.0)	(65.2) (100.0)	(91.6)	(2.5)	(1.6)	(2.2)	(2.0)	(0.0)	(30.3) (100.0)	(90.3)	(0.1)	(1.1)	(2.4)	(6.1)	(—)
[Company size]	100.0	93.1 (100.0)	(62.7) (100.0)	(95.5)	(1.9)	(0.9)	(1.0)	(0.6)	(0.1)	(31.6) (100.0)	(91.3)	(0.3)	(1.4)	(1.3)	(5.6)	(—)
30 or more employees																
	Gross total	With limitation										No limitation	Not known			
		Total	Other													
			Subtotal	5 days	6 - 9 days	10 days	11 - 20 days	21 days or more	Other							
[Gross total]	100.0	90.4 (100.0)	(4.5) (100.0)	(81.1)	(2.2)	(3.1)	(8.5)	(5.0)	(0.1)	9.5	0.0					
[Company size]	100.0	93.1 (100.0)	(5.7) (100.0)	(69.9)	(6.2)	(8.9)	(4.0)	(10.9)	(0.2)	6.8	0.1					
30 or more employees																

Companies with the Child Nursing Leave Program = 100%

Source: The Ministry of Health, Labour and Welfare, *The 2005 Basic Survey on Women's Employment*.

Figure 3. Companies with the Child Nursing Leave Program



Source: The Ministry of Health, Labour and Welfare, *The 2005 Basic Survey on Women's Employment*.

Note: The figures for FY 2002 and 2004 indicate the percentage of companies "with the program."

2. Family Care Leave Programs

The Family Care Leave Program was not included in the Act on the Welfare of Workers for Child Care Leave when it was established in 1991. When the Act on the Welfare of Workers for Child Care Leave was drastically revised on June 5, 1995, the Family Care Leave Program was included in the act. It was provisionally called the Act on the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care Leave between October 1, 1995, when it was partially put into effect, until March 31, 1999, when it was renamed to the current Act on the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave (hereinafter "the Act on Child and Family Care Leave") and all provisions were put into effect.

The Japanese society is rapidly becoming a super aging society. This situational change has made putting into effect the Act on Long-term Care Insurance (April 2000) for taking care of the elderly a necessity. It can be argued that the Long-term Care Insurance system is an institutionalized insurance system for care giving that clearly defines the right of every individual who requires care to receive public care. On the other hand, there

are a number of workers who personally wish to care for an elderly individual in need such as a parent or spouse's parent, or who wish to tend to the elderly individual toward the end of his or her life. The Family Care Leave System was established to meet this need.

There are differences in nature between child care and family care, though the corresponding leave systems have been incorporated through legislation into a single act. Child care is generally associated with the expectation of a child's growth and a reduction in burden borne by the caregiver (typically a parent), while family care is required for those tending to persons approaching the end of their lives, and has a wide variety of burdens associated therein. For both employers and workers, however, it is a long-term leave of the same nature from the perspective that it is for the purpose of providing care for one's family. Under the Act on Child and Family Care Leave, the Family Care Leave System was established with consideration to matters distinctive of the Child Care Leave System.

(1) Outline of the Family Care Leave System

Workers who are continuously employed by the same employer for over one year are eligible to apply and take advantage of family care leave. The duration is limited to 93 days (three months) for each family member requiring care (the Act on Child and Family Care Leave, Article 11, Paragraph 1, Item 2 and Article 11, Paragraph 2). At the time of the act's establishment, it was not possible to divide this period, but that has since been amended.

The period of family care leave is three months or shorter due to a debate that occurred at the time of its establishment. The care of an elderly family member was traditionally the responsibility of a specific family member, such as the wife of the first-born son or the first-born daughter, putting a heavy burden on these particular individuals. There has been debate as to whether it is irrational to give long-term leave to the family member responsible for providing care, since a long-term absence from work could potentially thwart the individual's return.

It is not hard to visualize how different family care is from child care, which consists of holding and washing a baby and changing diapers. An elderly requiring care is a heavy adult, and it is hard work simply moving the person for the purpose of bathing or using the restroom. Despite the fact that it is family, it is only natural that there be a limit to the amount of time one

person can bear the burden.

The Act on Long-term Care Insurance (put into effect in 2000) clearly stipulates the participation of external care professionals for elderly care, which was traditionally the responsibility of a family member. The practice of using external care professionals has become popular and widely recognized, and the concept that care should be the responsibility of the family is gradually changing. Consequently, no change has been made for the period of family care leave since the Act on Child and Family Care Leave was put into effect.

Family care leave can be provided to a spouse, father, mother, child, father and mother of the spouse, as well as other dependent family members who live in the same house including a grandfather, grandmother, brother, sister and grandchild (the Act on Child and Family Care Leave, Article 2, Item 4). The spouse includes a common-law spouse (a person in a relationship with the worker where the marital relationship is *de facto*, though a marriage has not been registered).

When a family member meeting these conditions becomes injured, sick or physically or mentally disabled to the extent where he or she requires fulltime care for a period greater than two weeks (the Act on Child and Family Care Leave, Article 2, Item 3, and Ordinance for Enforcement of the Act on Child and Family Care Leave, Article 1), it is deemed that the person is in need of care and the worker in question is eligible to take family care leave.

In terms of the eligibility requirements for workers to apply for family care leave, a worker is generally eligible without restriction when he or she is hired without a specific term of contract (i.e. a regular fulltime employee). After the 2004 revision, contract workers are also eligible for family care leave in addition to child care leave (the Act on Child and Family Care Leave, Article 11, Paragraph 1, Items 1 and 2). To be specific, the worker must meet the following two conditions: be employed under the same employer for more than one year and expect to remain employed after the 93 day period following the scheduled start date of family care leave. Just as in the case of child care leave, it is not easy for contract employees to meet the condition, “likely to remain employed.”

The employer shall not refuse Family Care Leave Applications filed by workers meeting these conditions (the Act on Child and Family Care Leave, Article 12). Furthermore, the employer shall not dismiss or otherwise treat workers disadvantageously by reason of the application for or utilization of

Family Care Leave (the Act on Child and Family Care Leave, Articles 10 and 16).

(2) Alternative Options to Leave

The Family Care Leave System can be used flexibly as well. The provisions of child care leave are used to limit overtime and apply for an exemption from late-night work (the Act on Child and Family Care Leave, Articles 17, 18, 19 and 20). The maximum overtime is identical to child care leave at 24 hours a month and 150 hours a year.

The employer is required to take one of the following measures for workers who need to care for a family member in need and who are eligible for family care leave: (i) the Program for Shortening Working Hours, (ii) a flextime program, (iii) a program to change start/finish times for work, and (iv) a subsidy or similar program for family care costs.

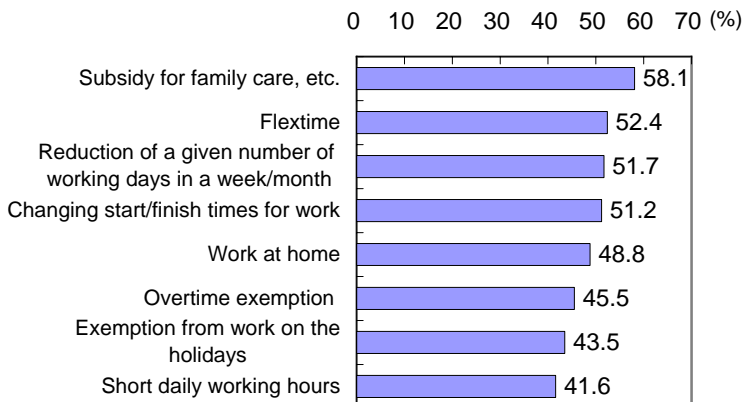
While there is an optional “program to prohibit working beyond given work hours” under the Child Care Leave System, this option is not found in the Family Care Leave System. According to the Ministry of Health, Labour and Welfare, this is because no other provisions are available for workers taking care of an eligible family member even if there is a provision allowing them to eliminate overtime.¹⁶ In reference to child care, while workers can conveniently leave work at a fixed time in collaboration with child care facilities, family care has no such collaborative system.

According to the “Situations of Working Women in 2005” published by the Ministry of Health, Labour and Welfare, the most popular “Family care program provided by a company that is not currently used but that will be used if possible” (individuals with family care experience, multiple answers allowed) is the “subsidy for family care cost” (58.1%) (See Figure 4).

Naturally, many individuals would like to sample other programs, especially those with high percentages. According to the statistics for those with family care experience who took advantage of the system, the “subsidy for family care costs” was used by only a small percentage of individuals (1.0%) (Figure 5).

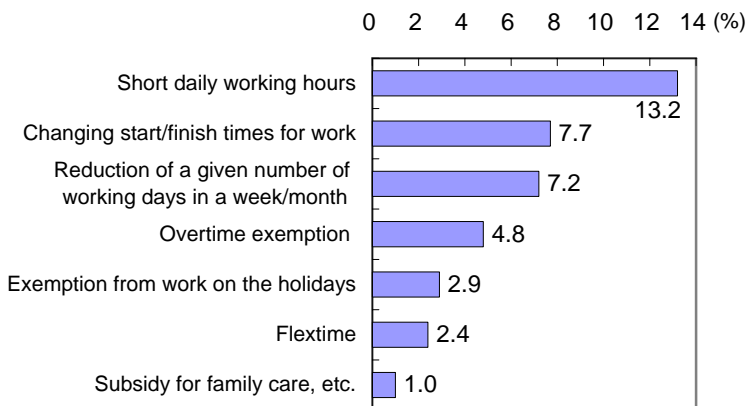
¹⁶ Interpretative Communication, 5 (1) d.

Figure 4. Family care program provided by a company that is not currently used but that will be used if possible (workers with family care experience, multiple answers allowed)



Source: The Japan Institute of Labour, *Survey on Managing both Child/Family Care and Work* (2003).

Figure 5. Company family care programs used by workers (workers with family care experience)



Source: The Japan Institute of Labour, *Survey on Managing both Child/Family Care and Work* (2003).

It is possible that the “subsidy for family care cost” is often excluded from the programs made available by companies. If only a few companies are offering a program in such demand, the issue must be examined when the act

is revised in future.

Looking the situation from a different angle, one can also say that worthy progress is being made toward “socialization of the care system.” In all probability, far more individuals now feel that if the cost were reduced, they would rely on professionals to ease the physical burden of daily care and take care of a family member in need mainly by talking to them for emotional support and providing a meaningful existence. From this perspective, the two above sets of data are of extreme interest.

3. Gender Equality and the Act on Child and Family Care Leave: Prospects

As described above, women have always been the primary family caregiver. Although a similar situation can occur with child care, family care often requires that women take care of their parents as well as their father/mother-in-laws, and the relationship between caregiver and family member in need is not always a good one. As a practical issue, there was thus an undoubtedly strong need for male workers to also be eligible for family care leave to care for their parents.

According to the 2002 Basic Survey on Women’s Employment, published by the Ministry of Health, Labour and Welfare, only 0.05% of all workers took family care leave and of those 66.2% were women and 33.8% were men. Compared to child care leave where 90% were women,¹⁷ a large percentage of men are taking family care leave. Although child care is still a “woman’s job,” visible signs of change are occurring with family care. It may only be a small step, but it is a giant leap forward in achieving a gender equal society.

On the other hand, the Child Care Leave System was clearly established as part of the measures to reverse the declining birthrate following the “1.57 shock”¹⁸ in 1990. Nevertheless, the total fertility rate did not increase until at least 2005. The number of individuals taking child care leave, however, increased due to a rise in the number of female workers who take child care leave. In other words, society now takes it for granted that working mothers have the right to take child care leave, but childcare is still considered a

¹⁷ According to the 2004 Basic Survey on Women’s Employment, 0.56% of men (with spouses giving birth to a child) and 70.6% of women took child care leave.

¹⁸ See note 1.

woman's a job. Although child care leave can be taken until a child is eighteen months old by receiving an extension of the measure, women are lucky if they are able to take advantage of the Program for Shortening Working Hours, and in general they are racing against the clock running between their workplace, a child care facility and home. That is the main role of a working mother. It is doubtful the birthrate will increase under such conditions. It is only natural for working mothers to want a quick end to such hard work (child care) and for the prospect of such hard work to deter them from having children in the first place.

It is difficult to know how or what changes to make to reverse the declining birthrate and to facilitate a society for doing so. In any case, the one-sided burden of child care placed on women must be alleviated as much as possible. To an extent, this is related to the employment format of male workers and the issue of organizing the work environment to include a social security system that allows single mothers and single parents to continue working while raising children.

As part of the Family Policy Act, the Act for Measures to Support the Development of the Next Generation was recently established in 2003, and requires companies with 301 employees or more to establish private sector employer action plans.¹⁹ Under this Act, employers are obliged to clarify their action plans and whether they implement them. Their plans should include actions to improve the number of both men and women taking child care leave.²⁰ While achieving the targeted achievement ratio is improbable, the Act on Child and Family Care Leave is expected to provide more significant effects coupled with the Act for Measures to Support the Development of the Next Generation. It is uncertain, however, whether or not Japan will be able to reverse the declining birthrate and establish a “work-life balance” in the future.

Reference

Cabinet Office. 2003. *Kokumin Seikatsu Hakusho* [White Paper on the national lifestyle 2003].

¹⁹ The Act for Measures to Support the Development of the Next Generation, Article 12.

²⁰ An official certification is given to companies meeting certain criteria after implementing a general action plan by achieving a rate of 70% of women and at least one male worker taking child care leave, etc. The official certification can be used in company advertisements to improve the company image.

The Japan Institute of Labour. 2003. *Ikuji ya Kaigo to Shigoto no Ryoritsu ni kansuru Chosa* [Survey on managing both child/family care and work].

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* English translation of Act on the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave:

<http://www.cas.go.jp/jp/seisaku/hourei/data/wwt.pdf>

Bill for the Partial Amendment of the Industrial Safety and Health Act and Other Related Acts

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1. Introduction

A bill for the Partial Amendment of the Industrial Safety and Health Act and Other Related Acts was approved by the Cabinet on September 30, 2005, and presented during the 163rd special Diet session. After undergoing subsequent examination in the Lower and Upper Houses, it was approved on October 26, 2005, and promulgated on November 2 of the same year.

Amidst growing competition between corporations and a diversification of work styles, the amendment intends to respond to an aggravation of issues related to workers' lives: 1) frequent occurrence of serious accidents due to lack of voluntary safety and health activities; 2) an increase in health problems associated with long labor hours for persons with high work volumes; 3) difficulties securing family time for those raising children; and 4) an increase in the number of workers transferred away from home and those with multiple jobs who require more extensive protection during their commute/travel (Takeno 2006, 21).

Specific items in the amendment include: overwork and mental health (2.2), voluntary safety and health activities (2.3), the improvement of labeling and delivery of documents for containers and packages containing chemical substances (2.4), provision of information regarding hazardous materials from the orderers to the contractor (2.5), liaison and coordination on related works by principal employers of manufacturers (2.6), as per the Industrial Safety and Health Act; defining the scope of commuting accidents suffered by workers transferred away from home and those with multiple jobs (3) as per the Industrial Accident Compensation Insurance Act; and an amendment to the Act on Special Measures Concerning the Improvement of the Establishment of Working Hours (4) as per the Act on Temporary Measures Concerning the Promotion of the Reduction of Working Hours.

2. Partial Amendment of the Industrial Safety and Health Act

2.1. Industrial Safety and Health Act

The Industrial Safety and Health Act is a law for the prevention of industrial accidents. Formerly a chapter entitled “Safety and Health” from the Labour Standards Act, it was extracted and formulated into law in 1972. The Act was designed to facilitate the prevention of more complex industrial accidents, which required the establishment of extensive and diverse provisions obligating not only employers but also many related parties, thus rendering it quantitatively impossible to contain in a single chapter of the Labour Standards Act. Qualitatively, it was also appropriate to establish a law independent of the Labour Standards Act, which deals primarily with obligations for employers (Obata 1995, 224-26; Obata 2000b, 7; Obata 2003a, 772).

The purpose of the Industrial Safety and Health Act is provided in Article 1 as follows: “The purpose of this law is to secure, in conjunction with the Labour Standards Act..., the safety and health of workers in workplaces, as well as to facilitate the establishment of comfortable working environment, by promoting comprehensive and systematic countermeasures concerning the prevention of industrial accidents, such as taking measures for the establishment of standards for hazard prevention, the clarification of responsibility and the promotion of voluntary activities with a view to preventing industrial accidents.”

The Industrial Safety and Health Act consists of twelve chapters. The Act establishes a declaration of general responsibilities for relevant parties (Chapter 1), specific obligations including the obligation to develop a safety and health management system (Chapter 3), the obligation to take necessary measures for preventing the hazards or health impairment of workers (Chapter 4), the obligation to comply to regulations concerning machines and hazardous substances (Chapter 5), the obligation to take necessary measures such as safety and health education in placing workers (Chapter 6), obligations relevant to health care such as working environment measurement and medical examination (Chapter 7), and the dissemination of the law and ordinances, etc. (Chapter 11), and provides penal provisions (Chapter 12) and inspections, etc. (Chapter 10) to ensure its performance. Furthermore, the Act provides administrative policies, such as establishment of an industrial accident prevention program, etc. in Chapter 2, prohibition and permission for manufacturing, inspection, examination, etc. in Chapter 5, license, etc. in Chapter 8, instructions for the formulation of a safety and health improvement program, etc. in Chapter 9,

and in review investigation of plan previously submitted, etc. in Chapter 10, to promote occupational safety and health from a variety of angles (Obata 2000b, 7; Obata 2003a, 774).

2.2. Overwork and Mental Health

2.2.1. Conditions Prior to the Amendment

In reference to Chapter 7 of the Industrial Safety and Health Act entitled “Measures for Maintaining and Promoting Industrial Health,” active preventative measures taken through a clinical approach have gained attention in recent years (Obata 2000a, 6-11; Obata 2000b, 13; Obata 2001, 18). The number of workers suffering from job or workplace-related problems or stress has risen along with changes in industrial structures and the advancement of technical innovations, making *Karoushi* or death from overwork a major issue in Japanese society. In response to this, an amendment made in 1996 called for the enhancement of workers’ health management in the workplace through means including: 1) hearing medical doctor's advice on the results of medical examination (Article 66-4); 2) measures following conduction of medical examination (Article 66-5), 3) notification of the results of general medical examination (Article 66-6), and 4) health guidance etc. (Article 66-7) (Obata 2000b, 13; Obata 2003a, 780; Obata 2007, 37).

The Comprehensive Program for the Prevention of Health Impairment Due to Overwork (February 12, 2002, LSB No.212001) by the Ministry of Health, Labour and Welfare in 2002 includes: 1) notification and education for the prevention of health impairment due to overwork; 2) guidance concerning limitations on the extension of working hours; 3) guidance to restrict actual overtime work for employers where overtime work exceeding 45 hours per month and to ask for the opinions of the medical advisor on industrial health by submitting relevant information; and 4) in cases of overtime work exceeding 100 hours per month or in cases in which the monthly average overtime work in a period of two to six months exceeds 80 hours, the employers shall provide information with respect to workers engaged in the relevant overtime work to the industrial physician, and shall have the worker receive health guidance through an interview with the industrial physician. If deemed necessary by the industrial physician, the employer shall have the worker undergo medical examinations for matters that the industrial physician considers necessary, shall heed the opinions of the relevant industrial physician, based on the results,

and shall take necessary follow-up measures (Obata 2003a; 780).

As for mental health, the Guidelines for Promoting Mental Health Care in Enterprises (August 9, 2000, LSB No.522-2), established in August 2000, obligated employers to establish a program to promote workers' mental health (Obata 2003a, 781; Obata 2007, 37).

2.2.2. Reason for the Amendment

The number of cases in fiscal year 2003 qualifying for workers' compensation due to brain and/or heart disease clearly resulting from overwork was 310 (Takeno 2006, 21), and the number of cases qualifying for workers' compensation due to mental disorder caused by psychological burden or due to suicide as a result of such mental disorder exceeded 100 in the same year (Takeno 2006, 22).

In response, the Ministry of Health, Labour and Welfare established the Overwork and Mental Health Measures Commission in April 2004 to allow employers and other related individuals to make further efforts. The commission then compiled a report in August 2004 (Takeno 2006, 22).

Consequently, to prevent health impairment due to overwork it was recommended that face-to-face guidance with a physician be provided in cases where monthly overtime exceeded 100 hours, a circumstance with a purportedly strong correlation to brain and/or heart disease. The recommendation also suggested that worker's mental health be checked as a part of said face-to-face guidance (Takeno 2006, 22).

2.2.3. Contents of the Amendment

According to the amendment, should workers with mounting fatigue due to overwork from circumstances including long hours of overtime meet certain requirements, including working hours conditions, employers have an obligation to provide them with face-to-face guidance with a physician and to take necessary measures based on the result of such guidance in order to promptly evaluate the worker's health and take any necessary measures to determine if they are at an increased risk of developing brain and/or heart disease (Takeno 2006, 23; Obata 2007, 38). As per those requirements provided in the Ordinance of the Ministry, such face-to-face guidance is provided for workers whose monthly working hours exceed 100 with over 40 weekly working hours who are found to suffer from mounting fatigue and who make

such a request (Re: Article 66-8).

Items checked by the physician include: 1) working conditions (such as overtime and working late-night shifts); 2) risk factors for brain and/or heart disease; and 3) symptoms due to stress (insomnia, loss of appetite, fatigue). The physician is also required to check the worker's mental health status (Takeno 2006, 24).

The amendment further states that in addition to the workers for whom the face-to-face guidance is provided under the provision, employers shall endeavor to provide face-to-face guidance or other similar measures to workers who are found to suffer from mounting fatigue attributable to working long hours (Re: Article 66-9).

2.3. Voluntary Safety and Health Activities

2.3.1. Conditions Prior to the Amendment

The Industrial Safety and Health Act included provisions and detailed regulations with ordinances regarding obligations to take measures for preventing the hazards or health impairment of workers (Chapter 4), and obligations for compliance with regulations concerning machines and hazardous substances (Chapter 5) (Obata 2000b, 7; Obata 2003a, 773). Legal regulations and enforcement alone are not sufficient to successfully achieve the purpose of the law: the prevention of industrial accidents. As the purpose of the Act states, the promotion of voluntary activities is also effective.

Regarding said voluntary activities, the 9th Industrial Accident Prevention Plan called for the establishment of guidelines for a labor safety and health management system, which to a certain degree became prevalent as a continuous and ongoing safety and health management system that clearly defines a series of processes in the PDCA cycle: plan, do, check, and act (Obata 2000b, 15; Obata 2003a, 776).

2.3.2. Reason for the Amendment

Although the number of industrial accidents has been decreasing over the long-term, 530,000 workers still suffer annually from such accidents. In fiscal year 2004, death toll reached 1,620, and the casualty toll of workers who had taken four or more days of leave was 122,804. The number of serious accidents with three or more victims at one time increased from 141 in 1985 to 274 in 2004. Since the summer of 2003 in particular, major corporations in Japan

have been suffering from serious industrial accidents including explosion and fire (Takeno 2006, 21).

In response, the Ministry of Health, Labour and Welfare implemented a Voluntary Inspection Concerning the Safety Management in Large-scale Manufacturing Industries in November 2003. The Ministry of Internal Affairs and Communications, the Ministry of Health, Labour and Welfare and the Ministry of Economy, Trade and Industry jointly held a Liaison Conference of Related Ministries for the Promotion of Industrial Accident Prevention and examined measures to prevent industrial accidents by exchanging information gathered through each ministry's efforts and holding hearings for industries. In March 2004, the Future Industrial Safety and Health Measures Commission was established and a report was compiled in August of that year (Takeno 2006, 21).

These reviews identified that the following points were essential to the prevention of serious accidents including explosion and fire: 1) the importance of efforts made by management; 2) the need for understanding and the establishment of measures for hazards and toxicity; and 3) the need for liaison and coordination with contractors (Takeno 2006, 21).

It was also pointed out that: 4) with production processes becoming more diversified and complicated, hazards and toxins in the workplace have diversified with the introduction of new chemical substances, making them increasingly more difficult to understand. Therefore, in addition to complying with hazard prevention standards provided in acts and regulations, it is essential for corporations to voluntarily identify hazards and toxins, evaluate them, and implement measures to reduce them (Takeno 2006, 22).

2.3.3. History of the Amendment

Based on the reports mentioned above in 2.2.2 and 2.3.2, the Labour Policy Council Safety Session began a review in September 2004 on the establishment of an environment to promote employers' voluntary efforts toward safety and health, as well as labor safety and health measures for overwork and/or mental health. The Council then presented a recommendation to the Health Minister on Future Industrial Safety and Health Measures on December 27 of that year (Takeno 2006, 22).

Based on this and other Council recommendations regarding improvements to the industrial accident compensation insurance system and the future measures for working hours described below, the Ministry of Health, Labour and Welfare

compiled the Outline of the Bill for the Partial Amendment of the Industrial Safety and Health Act and Other Related Acts by including the abovementioned recommendations, and on January 24, 2005 consulted the Labour Policy Council. The following month, on February 3, the Council instructed the Health Minister to develop a bill, which set in motion the planning and introduction of the Bill for the Partial Amendment of the Industrial Safety and Health Act and Other Related Acts to the Diet following a Cabinet meeting decision on March 4, 2005 (Takeno 2006, 22).

Although the bill was repealed amid the dissolution of the Lower House, a bill with the same content received Cabinet approval at a meeting on September 30, 2005, and was re-introduced during the 163rd special session of the Diet. Following examination by the Upper and Lower Houses, it was approved during an Upper House plenary session on October 26, 2005, and was promulgated as Act No. 108 of 2005 on November 2 of that year (Takeno 2006, 22).

2.3.4. Contents of the Amendment

The amendment stipulates that each employer is obligated to do the following: 1) the employer shall endeavor to investigate the danger or harm and/or toxicity due to buildings, facilities, raw materials, gases, vapors, dust, etc. and those arising from work actions and other duties, 2) based on the results thereof, the employer shall endeavor to take necessary measures to prevent danger or health impairment to workers (Re: Article 28-2).

Furthermore, to promote voluntary safety and health activities on the part of the employer, those who are certified by the head of a relevant labor standards supervision office as appropriately implementing an industrial safety and health management system incorporating the above hazards and toxicity are exempted from the obligation to employer provided in the existing Industrial Safety and Health Act, Article 88, Paragraph 1 and 2 to submit a prior notification of a plan when the employer intends installing etc., the building, machines, etc. (Re: Article 88).

2.4. Improvement of Labeling and Delivery of Documents for Containers and Packages Containing Chemical Substances

2.4.1. Conditions Prior to the Amendment

The former Labour Standards Act included a general provision prohibiting

the manufacture of toxic materials. The Industrial Safety and Health Act developed and expanded the system of permission for manufacturing (Article 56) and labeling (Article 57) (Obata 2000b, 5; Obata 2003a, 781). An employer who intends to manufacture or import a chemical was obligated to undertake an investigation of toxicity (Article 57-3). In connection with this, the Minister of Health, Labour and Welfare is obliged to instruct the employer to carry out an investigation and to report the result, and recommend the employer to take measures for preventing workers' health impairment (Article 57-4). Generally, the employer is obliged to endeavor to investigate the toxicity of chemical substances and take necessary measures for preventing the impairment of workers' health (Article 58) (Obata 2003a, 781).

As for toxic substances, it was provided in 1978 that an employer who intends to introduce new chemical substance shall investigate the toxicity before introducing it to a workplace (Article 57-2 to 57-4)(February 10, 1978, LSB No.9). In 1979, provision was established for procedure, etc. of investigation of toxicity for new chemical substance. Following an amendment to the Ordinance on Prevention of Hazards Due to Specified Chemical Substances (September 16, 1988, ESB No.84, LSB No.602) in 1988, consideration of a physician's opinion concerning the results of medical examinations was stipulated (Article 40-2 of the above ordinance) in 1996 (Obata 2000b, 11; Obata 2003a, 781).

2.4.2. Reason for the Amendment

Article 57 and 57-2 of the existing Industrial Safety and Health Act provides a delivery system of labels relevant to chemical substances and the Material Safety Data Sheet (MSDS). The goal is to prevent occupational diseases and the like caused by a worker's lack of prior knowledge regarding substances and the toxicity of the chemical substances they employ, as well as to provide precautionary measures for handling such substances (Takeno 2006, 23).

With reference to the labeling and document delivery system, in 2003 the United Nations published its recommendation, "Globally Harmonized System of Classification and Labeling of Chemicals" (hereafter referred to as the GHS UN Recommendation). This recommendation includes a classification of the degree of hazard and toxicity of a chemical substance and the attachment of a corresponding pictogram. It was expected that APEC countries would comply with this recommendation by the end of 2006 (Takeno 2006, 23).

2.4.3. Contents of the Amendment

The subject of the labeling and document delivery system in the existing Industrial Safety and Health Act is limited to toxic substances, and does not make reference to dangerous substances. The GHS UN recommendation, however, addresses both dangerous and toxic substances. Accidents such as explosions and fire have been caused by a worker's lack of knowledge regarding the handling of dangerous materials. Therefore, in accordance with the GHS UN recommendation, the amendment includes a labeling and document delivery system for dangerous materials, as well as the review of the labels to bring them in line with international standards (Re: Article 57, 57-2) (Takeno 2006, 22).

2.5. Provision of Information Regarding Hazardous Materials from the Orderers to the Contractor

2.5.1. Conditions Prior to the Amendment

Obligations placed on the orderer by the Industrial Safety and Health Act were not extensive until recent years.

The Act provides that an orderer who himself carries out the work in the specified undertaking (construction, shipbuilding, etc.), shall, where he has workers employed by his contractor use buildings, etc., take necessary measures for preventing industrial accidents among the workers concerned in respect to the buildings, etc., concerned (Article 31) (Obata 2003a, 775). It also provides that an orderer who himself carries out the work in the specified undertaking shall take the necessary measures for preventing industrial accidents to all of the workers engaged in the specified undertaking at the said work site (former Article 31-2). The orderer shall not instruct the contractor to direct his workers to work in contravention to the Act or to the provisions of ordinances based on it in respect to the said undertaking (Article 31-3).

2.5.2. Reason for the Amendment

In recent years, as the number of businesses outsourcing their services increases, a growing number of services including the renovation, repair, and cleaning of facilities used for manufacturing or employing chemical substances are being outsourced. Some industrial accidents have occurred as a result of the orderer's failure to sufficiently inform the contractor of knowledge regarding such facilities (Takeno 2006, 23).

Therefore, the party ordering the renovation and repair of facilities used for the manufacturing of dangerous and/or toxic chemical substances is now obligated to provide information regarding the danger and/or toxicity of such substances and to provide precautionary measures for handling them (Takeno 2006, 23).

2.5.3. Contents of the Amendment

Article 31-2 of the New Act provides that the orderer of the work for alteration or as provided for by the Ordinance of Ministry of Health, Labour and Welfare pertaining to the facilities manufacturing or handling chemical substances, preparations containing chemicals or other substances which is prescribed in the Cabinet Order, shall take necessary measures concerning said materials to prevent workers of contractors of the said works from industrial accidents.

According to the Cabinet Order, the abovementioned facilities include those that manufacture or handle preparations containing chemicals or other substances or chemical substances possessing a certain danger or toxicity such as flammability or acute toxicity. The work in question deals with the handling of facilities in a manner distinct from its original function for the purpose of manufacturing, renovating, repairing or cleaning, during which accidents occur due to a contractor's lack of knowledge. Details are clearly stipulated in the Ordinance of the Ministry (Re: Article 31-2) (Takeno 2006, 23).

2.6. Liaison and Coordination on Related Works by Principal Employers of Manufacturers

2.6.1. Conditions Prior to the Amendment

As the construction and shipbuilding industries began subcontracting more extensively, the need grew for preventative measures against the frequent accidents occurring at contractor's construction sites (Obata 2000b, 12; Obata 2003a, 775).

In response to this, the Industrial Safety and Health Act provided that the specified principal employer (principal employer who carries out construction work or other business stipulated in the Cabinet Order) shall, in order to prevent industrial accidents resulting from the work of workers employed by him or by the related contractors carrying out work at the same work site, take necessary measures concerning the following matters: 1) establishment and administration

of a consultative organization; 2) liaison and coordination between related works; 3) inspecting tour in the work site; 4) guidance and assistance for the education conducted by the related contractors for the worker's safety and health; 5) specified principal employer who is in a type of industries whose work sites usually differ depending upon works, and carries out undertakings designated by Ministry of Health, Labour and Welfare Ordinance shall make a plan relating to the work process and a plan relating to the arrangement of machines, equipment, etc., in the work site as well as providing guidance on measures to be taken based on this Act and the provisions of ordinances based thereon by contractors using the said machines, equipment, etc., in the execution of work, and 6) necessary matters for preventing the said industrial accidents in addition to the matters listed in the preceding items (Article 30).

2.6.2. Reason for the Amendment

In recent years, the amount of work in which workers of both principal employer and contractor are involved has increased due to a boost in on-premise subcontracting in the manufacturing industry. Accordingly, some industrial accidents occurred due to the principal employer's failure to conduct liaison and coordination with contractors or failure to have contractors conduct such liaison amongst themselves. Results of the Voluntary Inspection Concerning the Safety Management in Large-Scale Manufacturing Industries showed a correlation between higher accident rates and insufficient communication regarding said adjustments (Takeno 2006, 23).

Consequently, it was decided that the amendment shall require the principal employer of manufacturing and other industries to conduct liaison and coordination on related works and to take measures such as unifying symbols, as the existing Industrial Safety and Health Act only requires this of specified principal employers (principal employers of construction and ship-building industries) (Re: Article 30-2) (Takeno 2006, 23).

2.6.3. Contents of the Amendment

A provision similar to the one in Article 30 for the specified principal employer is now provided for the principal employer (Article 30-2).

3. Partial Amendment of the Industrial Accident Compensation Insurance Act

3.1. Background of the Amendment

The object of the Industrial Accident Compensation Insurance Act (enacted in 1947) is to grant insurance benefits to workers in order to give them protection against injury, disease, disability or death resulting from employment, and to promote the rehabilitation of workers who have suffered from such accidents, and assist those workers and their survivors.

Between 1955 and 1975, many workers suffered accidents occurred involving workers during their commute. In response to this, the Industrial Accident Compensation Insurance Act was amended in 1972 so that insurance benefits shall include those in respect of the injury, disease, disability or death of workers resulting not only from employment, but also from commuting (Article 7).

The commuting referred here is defined as the round-trip travel undertaken by a worker with respect to that worker's employment by a reasonable route and means between his or her residence and workplace, excluding commuting which is in the nature of performance of duties (Article 7, Paragraph 2).

Job transfers where workers are transferred away from home without their families to assume new positions are a common practice in Japan. These workers travel between their workplace and home on the weekends, provoking debate as to whether accidents occurring during this travel should be regarded as commuting accidents. Therefore, in 1991, the Ministry of Health and Welfare instructed that the act of commuting from one's workplace to home on the weekends, etc., and commuting back to the workplace at the start of the week, etc., (referred as commuting with return home on the weekends) shall be treated as "commuting" as it is described in Article 7, Paragraph 2 and thus the home shall be treated as "residence" as specified in the same paragraph when such act meets the following two requirements: 1) round-trip travel between the workplace and home is found, in principle, to be recurrent and continuous at a frequency of one or more times per week, 2) the time and distance required for a one-way trip between the workplace and home is, in principle, no more than 3 hours or 200 kilometers (Dake 2003, 890; Obata 2003b, 299).

According to this instruction, travel between the workplace and home where the worker's family resides is considered "commuting," and accidents occurring during said travel are treated as "commuting accidents." However, travel between home and the worker's temporary residence near the workplace would

not be treated as “commuting.” Thus, for example, should a worker suffer an accident while traveling from home to a temporary residence on Sunday in preparation for work the next day, it would not be treated as a “commuting accident.” With such cases gathering attention, there was rising debate as to whether such travel should also be treated as “commuting” (Dake 2003, 891; Obata 2003b, 301). These discussions attracted considerable attention as the number of workers living away from home continued to increase; the number of male workers transferred away from home rose from 419,000 in 1987 to 715,000 in 2002 (Takeno 2006, 24).

With the diversification of employment styles the number of workers holding two jobs has jumped from 550,000 in 1987 to 815,000 in 2002. This also spurred some debate as to whether travel from one workplace to another should be treated as “commuting” (Takeno 2006, 24).

3.2. History of the Amendment

In light of the aforementioned social situation, a Research Group for the Industrial Accident Compensation Insurance System was organized in February 2002 for the key purpose of examining the protection system for commuting accidents. An interim report was then compiled in July 2004. Based on this report, the Industrial Accident Compensation Committee of Labour Conditions Session of Labour Policy Council examined the issue further and proposed a recommendation for the improvement of the industrial accident compensation insurance system on December 21, 2004 (Takeno 2006, 24).

The recommendation indicated that; 1) travel between several workplaces for workers holding multiple jobs should be included in the system since such travel is indispensable to providing labor to the workplace where the worker is traveling. It also pointed out that 2) for workers transferred away from home, travel between a temporary residence and home should also be included in the system, since such transfer is crucial to balancing a worker’s family life and employer’s business needs to have him/her working at a location too far to commute to from home (Takeno 2006, 24).

The history of the bill’s presentation through its approval is similar to the path described in 2.3.3.

3.3. Contents of the Amendment

Traditionally, commuting accidents were defined as stated in the former of

Article 7, Paragraph 2 as noted above in 3.1. The amendment indicates that the commuting referred to in Item 2 of the previous paragraph is defined as the travel specified hereinafter undertaken by a worker with respect to that worker's employment by a reasonable route and means, excluding that in the nature of performance of duties, and outlines the following three types of commuting: 1) round-trip travel between the worker's home and workplace; 2) travel from one workplace to another workplace specified by the Ordinance of the Ministry of Health, Labour and Welfare; 3) travel between residences, preceding or succeeding the round-trip travel listed in Item 1 (limited to those meeting the requirements specified by the Ordinance of the Ministry of Health, Labour and Welfare).

The requirements specified by the Ordinance of the Ministry of Health, Labour and Welfare in the above 3) refer to requirements provided in Article 7 of the Enforcement Rules of the Industrial Accident Compensation Act. They apply to workers who moved to a new residence upon being transferred, owing to the difficulty of daily round-trip travel between the workplace and home with regards to distance or other factors, and those who have: 1) spouses requiring nursing care or who continue working; 2) children in school; 3) parents or relatives requiring nursing care in the area where they carried out their daily lives immediately prior to the transfer.

4. Partial Amendment of the Act on Temporary Measures Concerning the Promotion of the Reduction of Working Hours

4.1. Background of the Amendment

The annual total of hours actually worked in Japan in fiscal year 1991 was 2,008, and by fiscal year 2004 it was down to 1,834 hours. Thus, the expected goal of 1800 hours, based on the Act on Temporary Measures Concerning the Promotion of the Reduction of Working Hours (Act No. 90 of 1992) enacted in 1992, was nearly achieved. In reality, however, the decline in average working hours was caused by a higher ratio of short-hour workers, such as part-time employees. The working hours of regular employees did not actually lessen. Amid fierce competition between corporations, despite a drop in the number of employees working 35 or more to less than 60 hours a week, the number of employees working less than 35 hours or 60 hours or more a week has risen, demonstrating a mounting polarization in the distribution of long and short working hours (Takeno 2006, 25).

Since September 2004, the Labour Conditions Session of the Labour Policy Council has been investigating future challenges facing measures for working hour issues and contemplating a proper course of action. On December 17, 2004, they presented a recommendation to the Health Minister on future measures for working hour issues (Takeno 2006, 25).

The recommendation stated that as human resources are Japan's foundation, with the rapidly declining birthrate and aging population alongside a diversification of workers' attitudes and needs, in order to maintain a sustainable economic society it is imperative that workers, as its bearer, be able to fully motivate and realize their potential throughout their careers. It was also noted that an environment should be developed in the future where all workers can maintain proper mental and physical health, flexibly manage the time required for family, community activities, self-improvement, and working hours, and fully motivate and realize their potential in a state of both physical and mental fulfillment during each stage of their career. It was argued that the fundamental direction of the amendment should be to maintain the basic characteristics of an act focused on a commitment to promoting the voluntary efforts of labor and management, while also progressing from an act endeavoring to achieve a goal of shorter working hours to one establishing working hours and other factors in the workplace by first taking into account a worker's health and lifestyle and reflecting various work styles (Takeno 2006, 25).

It was also discussed that "1,800 hours of annual total hours actually worked" is not a suitable goal in light of the current situation. The recommendation also stated that in setting a goal for the future, when laying down new guidelines based on the amendment, it is necessary to individually examine the necessity and details pertaining to each issue, including the regulation of long working hours and promoting the use of annual paid leave (Takeno 2006, 26).

The history of the bill's presentation through its approval is similar to the path described in 2.3.3.

4.2. Contents of the Amendment

(1) Amendment of the Title

To progress from an act endeavoring to achieve a goal of less working hours to one determining working hours and other factors in the workplace by first taking into account a worker's health and lifestyle and reflecting various work

styles, the title was change from the Act on Temporary Measures Concerning the Promotion of the Reduction of Working Hours to the Act on Special Measures Concerning the Improvement of the Establishment of Working Hours, and provisions for the purpose and definition were amended. Accordingly, instead of an interim act to promote concentrated efforts to achieve a goal prior to a deadline, it has become as a permanent act to promote continuous efforts by labor and management (Title and Re: Article 1).

(2) Guidelines for Improving the Establishment of Working Hours

Instead of the government's plan to promote shorter working hours, the Health Minister is now providing employers with guidelines for an appropriate method of improving the establishment of employees' working hours (Re: Article 4, Paragraph 1).

(3) A System for Implementation in the Workplace

Since the Committee for the Promotion of the Reduction of Working Hours based on the Act on Temporary Measures Concerning the Promotion of the Reduction of Working Hours enjoyed some success, it was decided that, even after the amendment, further efforts should be made to develop any necessary systems such as establishing the Committee for Improving the Establishment of Working Hours to present an opinion to employers by investigating and examining measures for improving working hours through individual labor and management negotiations and taking into consideration the workers' health and lifestyle. It was also determined that the labor and management agreement could be replaced by applying the Special Provisions on Labour Standards Act (Re: Article 6 and Article 7, Paragraph 1).

In order to promote improvement for the establishment of working hours through labor and management negotiations in the workplace without the Committee for Improving the Establishment of Working Hours, should a health committee that is established based on the Industrial Safety and Health Act meet certain requirements, it could then be regarded as a replacement for the Committee for Improving the Establishment of Working Hours and its resolutions would take the place of a labor-management agreement (Re: Article 7, Paragraph 2).

(4) Others

Formerly, grants would be provided through a designated corporation, the Support Center for Reducing Working Hours, as a support measure for employers who endeavored to shorten working hours. This system, however,

was abolished in lieu of following public service corporation reforms (Re: the existing Chapter 5 and 6) (Takeno 2006, 26; Obata 2007, 39).

5. Conclusion

All items in the amendment are vital and reflect the reality of workers' diversified lives. Some of the items promote voluntary efforts by employers, and the amendment strives, through its precise implementation, to secure the safety and health of workers and to realize a fulfilling work style with an optimal balance of work and private life. It is the author's sound desire that the amendment be accurately understood, and that employers, workers, and administrations cooperate and actively make efforts to meet that end.

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Act Concerning Stabilization of Employment of Older Persons

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1. Significance of the Act Concerning Stabilization of Employment of Older Persons

(1) Development of the Act Concerning Stabilization of Employment of Older Persons

A large number of baby boomers are retiring in the coming years. Under the mandatory retirement system it was normal to retire at age 60, a turning point that changed the lifestyle from work to retirement. This retirement process had virtually been determined not by the labor law but by the public pension system, and policies were introduced to link the pensionable age to the retirement age.¹ This link was made through the Act Concerning Stabilization of Employment of Older Persons (hereinafter “Older Persons Act”).

The Older Persons Act was established in 1986 after a drastic revision of the Act on Special Measures Concerning Job Development for Middle-aged and Older Persons. This Act was designed to raise the retirement age while the retirement was introduced at the age below 60 at a majority of businesses among those that provided the fixed retirement age program, and it defined a provision (Article 4) obliging employers to make efforts to establish programs for retiring at the age of 60. With administrative guidance and promotions provided to employers, the program to retire at the age of 60 was implemented by a majority of businesses that provided the fixed retirement age program.² In 1990, another provision (Article 4-5) was defined to oblige employers to make efforts to establish reemployment of those who reached the age of 60 (persons reaching the retirement age).

In the period when the retirement program at the age of 60 was beginning to be established, a considerable attempt was made to raise the pensionable age

¹ For details, see Iwamura, “Changing Retirement Process,” 301.

² Of the companies that had fixed retirement age, 55.4% of them had the retirement program for the age of 60 and above in 1985, while it was 80.0% in 1994 when it was made compulsory (67.9% of all companies surveyed had the fixed retirement age for 60 and above). See Terayama, “Legislation Policies for Shifting from Effort-making Provision to Compulsory Provision in Employment”, 116.

to 65 and the 1994 revision of the Employees' Pension Act introduced a gradual change of the pensionable age to 65 starting from 2001. To link the pensionable age to the retirement age, the Older Persons Act was revised to prohibit a retirement program for those who were below 60 (Article 4), and obliged employers to make efforts to continue employing employees for the period from the retirement age to the age of 65 (Article 4-2).³ For the prohibition of the retirement program below age of 60 and obligation of effort-making in continued employment, a preparatory period was provided to make the Act fully effective starting from April 1998.

However, due to the extended recession that followed in the period, an attention was paid to the crisis of employment for the middle-aged and elderly people in the age group of 45 and above⁴ rather than the stabilization of employment for elderly people above the age of 60. Consequently, the Older Persons Act, which was revised in 2000, obliged employers to make efforts to implement the Employment Security Measures for Elderly People by raising the retirement age and introducing continued employment programs, to ensure stable employment for employees up to the age of 65 (Article 4-2). Simultaneously, the Reemployment Assistance Plan Program was enhanced to oblige employers to attempt providing reemployment assistance for the middle-aged and elderly people of ages 45 and above if any of them had to leave their job due to retirement or dismissal, by making reemployment assistance for them by assisting in job searches, etc (Article 9, Paragraph 1). In the same year, the Employment Insurance Act was drastically revised and the Employment Measure Act was also revised for smoother reemployment,⁵ putting focus on policies to emphasize not only continued employment of the middle-aged and elderly people but also practical issues in promoting their reemployment after leaving jobs.

While raising the pensionable age starting from 2001, a new approach became necessary for policies to promptly implement a link between

³ For policies related to elderly employment in the recent years, see Abe, "Employment Policies for Society with Elderly Workers", 176.

⁴ An elderly person indicates 55 years old and above, while a middle-aged and elderly person indicates 45 years old and older. See Older Persons Act, Article 2, Paragraph 1 and Article 2, Paragraph 2, Item 1. Ordinance for Enforcement of the Stabilization of Employment of Older Persons Act, Articles 1 and 2.

⁵ For the outline and issues related this revised act, see Yamashita, "Problems and Issues Related to Revision of the Act Concerning Employment Measures," 241.

employment and pension. To solve the issue, the Older Persons Act was revised in June 2004,⁶ abolishing the provision for the retirement age and also making provisions of the Employment Security Measures for Elderly People compulsory instead of effort-making obligation. This obliged employers to ensure employment for all those who wanted continued employment after reaching the retirement age, provisionally, until the age of 62 (Article 9, Paragraph 1). Implementation of the Employment Security Measures for Elderly People was scheduled for April 2006, leaving a period of two years prior to the actual implementation. In April this year, the age eligible for the Employment Ensuring Measure was raised from 62 to 63.

(2) Background of the 2004 Revision

Prior to the 2004 revision to the current Act, the Ministry of Health, Labour and Welfare established the Study Group on Future Employment Measures for Elderly People. The report, “Employment Measures for Elderly People in the Future” (hereinafter “the Report”),⁷ presented by the Group, was used as the basis of the revision. The report was based on the idea of “having the society that allows people to continue to work regardless of their age” and this key phrase was already used in the Basic Policy for Employment Stabilization Measures of Elderly People, published in September, 2000. An emphasis was put on this keyword for recent employment measures from the viewpoint of promoting reemployment of the middle-aged and elderly people and it was used in a variety of acts and policies.

From the Report, the following two points can be raised as issues that require attention. They are: (i) in response to the raised pensionable age, there is a need to ensure employment up to age 65 and to enhance the link between the employment and pension, and (ii) while the workforce is on the decline in the younger generation, the elderly people in their early 60s exhibit a strong work motivation and a higher degree of work participation compared with their counterparts in other countries, and they can play significant roles in

⁶ For article-by-article commentary, see the Institute of Labor Administration, ed, “Version 7: Practical commentary on Act Concerning Stabilization of Employment of Older Persons.”

⁷ For the report, see Yamashita, “Elderly Employment Measures in Future and Legal Issues,” 54ff. Also, see the report, the Ministry of Health, Labour and Welfare, “Employment Measures for Elderly People in the Future,” 78.

supporting the society to sustain the vitality of the economy. Currently, specific policies are being designed for “creation of the system without obstacles that may prevent people from working until the age of 65 due to their age” and “creation of the environment that enables people to work as long as they have the motivation and the capability regardless of their age.” These ideas are incorporated to the current Older Persons Act with the following points of revision.

(3) Significance of the 2004 Revision

Based on the Report and following debates made by related councils and other committees, the Older Persons Act was revised in June 2004⁸ with introduction of the following four major changes: (i) introduction of compulsory provision for the Employment Security Measures for Elderly People (Article 9), (ii) clarification of the reemployment assistance measures and compulsory creation of the job search assistance report (Articles 15 to 18), (iii) disclosure of the reasons for age limit in job postings and recruitment (Article 18-2) and (iv) dispatching service by the Silver Human Resource Center (Article 42, Paragraph 5 and 6). Of these, (i) introduction of compulsory provision for the Employment Security Measures for Elderly People was made so that employers must secure jobs for all those who wanted jobs when reaching their retirement age, up to age 65 (62 for the time being). Put in effect in April 2006, the Act requires the employers to take prompt actions, making a huge impact on their businesses.

That is, the effect of introduction of compulsory provision for the Employment Security Measures for Elderly People goes beyond simple extension of employment and it is expected to make a large change in working conditions of the middle-aged and elderly workers (possibly including young workers). In the past when the retirement age was raised from 55 to 60, a number of unfavorable changes were made in working conditions of the middle-aged and elderly workers, and caused a series of court actions. Similar problems may possibly be generated with the introduction of compulsory provision for the Employment Security Measures for Elderly People. More recently with

⁸ For the content and background of the revision, see Kikuchi, “Employment of Elderly People,” 38, and Yanagisawa, “New System under the Act Concerning Stabilization of Employment of Older Persons,” 112.

increasing competition in the international market, the age-based seniority system is gradually and steadily being replaced with the performance-based evaluation systems and this change could be promoted with the introduction of the compulsory provision for the Employment Security Measures for Elderly People. In response to the revision of laws and acts, a number of businesses will be required to revise their human resource management for the middle-aged and elderly workers in terms of human resource allocation and labor costs.

The policy that focuses on the “society that allows people to continue to work regardless of the age” will consequently promote a change replacing the “age” element, which has made significant effects on the human resource management of workers, with a new system that determines the management of workers from the viewpoint of capability, motivation, performance and results. In turn this will possibly make a significant reform in the management of not only the elderly workers but also the entire work force (including permanent and contract employees). Such a change may be driven with the introduction of compulsory provision for the Employment Security Measures for Elderly People.

2. Significance of the Employment Security Measures for Elderly People

(1) What are the Employment Security Measures for Elderly People?

The following describes an overview of the Employment Security Measures for Elderly People, incorporated in the 2004 revision. First of all, the existing act still defines that the retirement program shall not be applied for those who are below 60 (Article 8). In other words, the system of retiring at age 60 is legal. With this provision still in effect, the same Act, Article 9, Paragraph 1, obliges the employers to take one of the Employment Security Measures for Elderly People, by (i) raising the retirement age, (ii) establishing a continued employment program, or (iii) eliminating the retirement age, to ensure secure employment up to age “65.” In practice, this compulsory provision was based on the Employment Security Measures for Elderly People, specified by the act prior to the revision, with addition of the provision that required elimination of the retirement program.⁹

⁹ For discussions on the elderly people employment secure measures, see Seisyo, “Legal Issues on Employment of Elderly People,” 285, and Masato Hara, “Employment of

In reality, however, the age of “65” is gradually changed according to the raise of the eligible age for the pension (fixed amount portion) for men, and it is set at age 62 from April 1, 2006, 63 from April 1, 2007, 64 from April 1, 2010, and 65 from April 1, 2013 (Supplementary Provisions, Article 4, Paragraph 1, hereinafter “Legal Retirement Age”), and therefore, the Employment Secure Measures are presently applied up to 63.

Consequently, employers are obliged to take the Employment Security Measures for Elderly People for people up to the Legal Retirement Age. For people who have reached the Legal Retirement Age but are not yet 65, employers are obliged to make efforts to take the Employment Security Measures for Elderly People (excluding elimination of the retirement age) (Supplementary Provisions, Article 4, Paragraph 2). As a result, the same provisions are applied during the period from the Legal Retirement Age to 65 as before.

(2) Situations Prior to the Introduction of Compulsory Provision

The following describes the actions taken by businesses prior to the introduction of compulsory provision for the Employment Security Measures for Elderly People when they were obliged to make efforts. According to the Employment Management Survey (figures as of January, 2004) published by the Ministry of Health, Labour and Welfare in 2004,¹⁰ the same year when the act was revised, only 8.5% of the companies did not have the established retirement program.¹¹ Of the companies that had the fixed retirement age programs, 90.5% used the retirement programs for age 60, while 2.4% had retirement programs between ages 61 and 64, and only 6.5% already had the retirement program at age 65. It indicates that only a few companies either raised the retirement age to the Legal Retirement Age or eliminated the retirement age.

While having retirement programs, a number of companies also had established the extended employment programs and reemployment programs.

Elderly People: Policies Principles on the Continued Employment Measures,” 27.

¹⁰ The outcome of the Employment Management Survey can be downloaded from the web site of the Ministry of Health, Labour and Welfare, <http://www.mhlw.go.jp/toukei/itiran/roudou/koyou/kanri/kanri04/index.html>. This survey was not conducted after 2006.

¹¹ The proportion of the companies that do not have the retirement program remain around 8.5% of all since 1998 when the law was put into effect to prohibit the retirement program below 60.

This was done by 73.8% of the companies and the rate of applying the reemployment programs only increased as the size of company increased. Only 24.8% of the companies allow the reemployment programs to “all those who request, by principle,” among the eligible workers. On the other hand, as much as 58.2% of the companies limit the application to “only those who are specifically allowed by the company.” When adding the companies that limit the application to “only those who are eligible according to the company standards” (14.0%), most companies had some kind of limitations in applying their continued employment programs. As a result, not many companies satisfied the requirements of the Employment Security Measures for Elderly People that are required by the new Older Persons Act.

(3) Continued Employment Programs

Prior to the introduction of compulsory provision and while companies were obliged to make efforts, the Employment Security Measures for Elderly People mainly consisted of reemployment of “those who are allowed by the company” under the retirement system at age 60. This background indicates that the Employment Security Measures for Elderly People obliged employers of three measures, namely (i) raising of the retirement age, (ii) implementation of the continued employment programs, and (iii) elimination of the retirement age. But in reality, what the companies implemented is the continued employment programs (ii), focusing on the reemployment in practice (the actions taken by companies after introduction of compulsory provision are described in Section [5]).

The Continued Employment Program is defined as a system to provide continued employment for current employees who have reached their retirement age and they wish to continue to work (Article 9, Paragraph 1, Item 2). In principle, therefore, employers are required to employ all those who wish to continue to work. Prior to the introduction of the compulsory provision, however, a number of companies limited the application of their Continued Employment Programs to “only those who are specifically allowed by the company” or “only those who are eligible according to the company standards.” As a result, there was a concern that a number of companies would find it difficult to continue to employ all those who wish to work even when the provision was made compulsory.

(4) Standards for the Elderly People

In consideration to the various situations of the employers, exceptions were made for the criteria of continued employment for all applicant employees. That is, the current Older Persons Act, Article 9, Paragraph 2, defines that the Continued Employment Program shall be deemed executed as specified in the Act, Article 9, Paragraph 1, Item 2, when a standard for the elderly people is established through the labor-management agreement with the majority labor union or the majority representative(s) (agreement of the business office) for implementation of a Continued Employment Program and when the program is implemented based on such standards.

Furthermore, in case the labor-management agreement cannot be made despite the efforts made, the Measures for Alleviating Drastic Changes can be applied for the preparatory period in implementing the Employment Security Measures for Elderly People. For example, employers are allowed to establish standards of the Continued Employment Program according to their employment regulations, if the labor-management agreement can not be made within the period of three years after the implementation (five years for small and medium companies with 300 or less fulltime employees) (Supplementary Provisions, Article 5, Paragraph 1 and 2, Cabinet Order (Cabinet Order No. 342), Article 1, concerning organization of the Order related to implementation of the laws that revise part of the Stabilization of Employment of Older Persons Act). Considering changes in the employment situations of elderly people at small and medium companies, socio-economic conditions, etc., the Minister of Health, Labour and Welfare is ready to review the Order and take necessary measures accordingly if required, also allowing extension of this preparatory period (Supplementary Provisions, Article 5, Paragraph 3).

Thus, the standard for the elderly people applied for the Continued Employment Program is defined through labor-management agreement or employment regulations, and those who have reached the retirement age are excluded from the Continued Employment Program even if they request it, unless they meet the standard. As it is described above, the act allows the retirement age for the people of age 60 and above, and those who do not meet the standard must leave or they are dismissed when reaching the retirement age. Employers are required to make efforts in providing reemployment assistance measures (Article 15) to those who are eliminated from the program according to the appropriate standard and to fulfill the obligation of creating the job

seeking assistance report (Article 17), although they are allowed to dismiss the workers. In other words, whether meeting the standard for the elderly people or not is critically important for the elderly people as it affects their life in retirement.

(5) Responses from the Businesses after Introduction of the Compulsory Provision

Among alternatives to the Continued Employment Measures, the retirement program is normally recognized as a logical system for optimizing the organization and management of companies, renewing human resources and improving business management.¹² It is, therefore, considered valid to enforce retirement or dismissal for the reason of reaching the retirement age. On the other hand, provision of retirement programs in turn makes workers to feel assured that their company will not dismiss them for any reason related to their age until they reach their retirement age. A raise of the retirement age, therefore, indicates a strong and practical security of employment since it limits dismissal for any reason related to the age until the retirement age. On the other hand, elimination of the retirement program is designed to secure stable employment based on the motivation and capability of workers regardless of their age, and it controls cancellation of the employment agreement by employers under the theory of abuse of the right of dismissal. In this case, employers are required to abandon their retirement program, losing ways of making valid employment adjustment or renewing their human resources, and therefore, they will hesitate to select the option of raising the retirement age or eliminating the retirement program for the purpose of the Employment Security Measures for Elderly People.

From the viewpoint of the legal structure, implementation of the compulsory Employment Security Measures for Elderly People is associated with policies that lead to the Continued Employment Program, by providing establishment of the standard for the elderly people and exceptions such as Measures for Alleviating Drastic Changes. For a number of employers it is easier to take the Continued Employment Program rather than the option to raise the retirement age or to eliminate the retirement program, increasing their chance of establishing the standard for the elderly people and limiting those who are eligible.

¹² Shuhoku Bus Case. Supreme Court Decision, Dec. 25, 1968. Civil Law Report 22, no. 13:3459.

In fact, to the question on the Employment Security Measures for Elderly People for those who are 60 years and older, asked in the survey of the Japan Institute for Labour Policy and Training conducted after the law was put into effect (hereinafter “JILPT Survey”),¹³ 91.3% of the companies replied that they “implemented the Reemployment Programs for those who were reaching the retirement age” and 7.7% “implemented the Extended Employment Programs for those who were reaching the retirement age.” On the other hand, 2.4% “raised the retirement age” and only 0.6% “had no retirement program.” To determine the eligibility for the Continued Employment Program, only 24.6% provide the program, “in principle, to all those who apply,” and 72.2% provide the program to only those who are eligible according to the standards that they established for the Continued Employment Programs.

3. Implementation of the Continued Employment Programs

(1) Eligibility for the Continued Employment Program

As we have examined, the realistic solution for corporations is to introduce the Continued Employment Program, and, in many cases, to establish a standard for the elderly to limit those who are eligible for the program. Then, the standard for the elderly should be evaluated to see if it conforms to the purpose of the Older Persons Act so as to determine if it is valid to dismiss those elderly who are excluded by the standard.

First of all, the standard for the elderly people is invalid if it is contrary to mandatory provisions or public policies, regardless of whether or not it is part of either labor-management agreement or employment regulations. For example, it must not violate the following: Article 3 of the Labor Standards Act which prohibits discrimination by reason of nationality, creed or social status; Articles 5 and 6 of the Act on Equal Employment Opportunities between Men and Women which prohibit discriminatory treatment for recruitment, employment, assignment, retirement and dismissal; and Article 7, Paragraph 1 of the Labor Union Act which prohibits unfair labor practices (disadvantageous treatment).¹⁴

¹³ “Fact-finding Survey on Continued Employment of Elderly People” (published in April 2, 2007) describes the situation as of October 1, 2006. The survey was conducted on private companies with 300 employees or more, receiving valid responses from 1,105 companies. The survey result can be downloaded from the web site of the Institute, <http://www.jil.go.jp/press/documents/20070402.pdf>.

¹⁴ See Seisyo, “Legal Issues on Employment of Elderly People,” 300.

There are standard that are established without infringing mandatory provisions or public policies, but are contrary to the purpose of the Older Persons Act. Inappropriate examples are listed on “On the implementation of the law revising part of the Act Concerning Stabilization of Employment of Older Persons” (Shokuko, No. 1104001, dated November 4, 2004, hereinafter “Notice”), including “only those who are approved by the company” and “only those who are recommended by superiors” (indicating that there is no standard in practice and is possibly against the purpose of the act), “men (women) only” (discrimination between men and women), and “those who do not take part of union activities” (disadvantageous treatment).

The Notice recommends that the standard be established, taking the following two factors into consideration: (i) specific measurement of motivation and capability (specificity), and (ii) objective identification of requirements that determines eligibility (objectivity). Specificity means that the standard shall be specifically described in a way so that workers are enabled to a certain degree to determine whether or not they are eligible and that workers are promoted to engage in their capability development activities if they do not meet the requirements. The objectivity means that the selection process shall not be made at the discretion of the company or the superiors but that the standard shall be specifically described in a way so that workers are enabled to objectively see whether or not they are eligible, with considerations taken into account to prevent any dispute regarding the eligibility. Specific examples are listed, including “in-house skill certificate level A,” “person with extensive experience of sales” (with working experience in three sales offices or more throughout the country), “person with personal evaluation points exceeding the average in the last three years” (if the personal evaluation point is disclosed), etc. The standard shall not be allowed, if it relies on discretion or subjective determination of employers with lack of specificity or objectivity, as it is clearly contrary to the purpose of the law.

In reality, however, a variety of standards may be established as a result of labor-management negotiations, possibly not fully satisfying the specificity and objectivity but not being contrary to the purpose of the Older Persons Act. For example, a standard may include abstract and subjective elements such as “cooperative person” or “person of good work behavior.” This kind of standard will have more influence from the party that evaluates cooperativeness and work behavior.

According to the JILPT Survey, the selection standards (multiple answers allowed) include, at the top of list, “no health problems” (88.7%), “motivation and desire to work” (83.5%), “work attendance rate and work behavior” (62.7%), “a certain level of performance evaluation” (57.4%), “agreement with the job descriptions provided by the company” (45.3%) and “person that is specifically needed by the company” (29.2%). A number of companies use the standards that lack specificity or objectivity, such as “work behavior” and “person that is specifically needed by the company.” Consequently, 63.7% of the companies take “almost everyone” that apply for the Continued Employment Program, 20.2% of the companies take “70 to 90%” and 7.5% of the companies take “50 to 70%.” Although the Continued Employment Programs are put in practice, there are some elderly people whose wishes are not realized.

(2) Procedure of Establishing Standards

To secure suitability of the standards, the Minister of Health, Labour and Welfare provides advice, guidance and recommendations (Article 10 of the Older Persons Act), and the Labor Standards Office receives the required report on employment regulations (the Labor Standards Act, Article 89, Item 3, Matters pertaining to retirement). As far as the purpose of the Act is concerned, however, the Act relies on the labor-management agreement for establishment of the standard and therefore it is understood that it pays respect to self-initiative of workers and employers for establishment of the standard. Consequently, as long as the standard is established based on the labor-management agreement through appropriate and sufficient negotiations between workers and the management, it can contain abstract terms such as “cooperative person” or “person of good work behavior” without infringing the Older Persons Act.¹⁵ The following two points can be captured from this purpose of the Act that relies on the labor-management agreement for establishment of the standard.

Firstly, involvement of the worker representatives provides expectation to secure suitability of the standard. In other words, it is considered possible for representatives of interests of the entire workers to have negotiations and agreement with their employers to establish specific and objective standard,

¹⁵ Questions are answered in “Q&A for the Revised Act Concerning Stabilization of Employment of Older Persons,” published by the Ministry of Labour, Health and Welfare, <http://www.mhlw.go.jp/general/seido/anteikyoku/kourei2/qa/index.html>. Extracts are also found in *Rosei Jiho*, no. 3645:118.

incorporating conditions of workplace and opinion of workers. Although the standard is applied to workers in the workplace through the labor-management agreement, the application of the standard is limited to the elderly workers in reality. It is eventually applied to middle-aged and young workers in future, but it is inevitable that this generates disparities in attitudes and opinions depending on the age groups.¹⁶ From this viewpoint, some point out difficulties to secure suitability of the standard when it is established through the majority labor union or the majority representative.¹⁷

Secondly, the purpose of the Act can be understood as exempting employers from liability of public law to apply the program in principle to all those who apply for it even when the standard lacks specificity or objectivity as long as the workers agree. Although the standard is not preferable from the viewpoint of the purpose of the Act, if it does not sufficiently demonstrate specificity or objectivity, involvement of the representatives of workers enhances the degree of satisfaction of the entire workers, and this Act indicates no interference of act (no regulation by public act) as long as the worker representatives (or the entire workers) agree to the standard. Therefore, unless contrary to mandatory provisions or public policies, or unless clear evidence shows infringement of the purpose of the Act, the labor-management agreement made for the standard is presumed valid.

Since an appropriate standard is expected to be established through labor-management consultations and employers are entrusted to define contents of the Employment Security Measures for Elderly People, a variety of standards and programs should be accepted to accommodate actual conditions of the companies. Assuming that the purpose of the Act is to pay respect to self-initiative of workers and employers, the standard, which is established through labor-management consultations, can have a wide range of validity and if the standard is clearly unreasonable and contrary to the purpose of the Act, or if at least the standard is contrary to mandatory provisions or public policies, the standard may be determined illegal.

According to the JILPT Survey, 60.3% of the companies “talked to the labor

¹⁶ Elderly workers may need to have the standard that take all those who apply, while young and middle-aged workers may need the standard that poses strict selection of applicants, and the standard can be established without full specificity.

¹⁷ Some claim that elderly workers must be heard and must be involved in negotiations institutionally in long term. See , Hara, “Employment of Elderly People,” 34.

union or worker representatives” and as much as 14.6% of the companies “heard opinions.” Meanwhile, 11.5% of the companies “only reported/explained” and 8.7% “did not consult/hear opinions/explanations.” In the case of unsuccessful labor-management consultation, an exceptional measure can be applied to establish the standard for the elderly people by using employment regulations. Other surveys indicate that a number of standards have in fact been established based on employment regulations.¹⁸

(3) Designing the Continued Employment Program

A variety of practical Continued Employment Programs can be provided and the way it is designed is entrusted to the party in charge. For example, the program can be designed with alternative options that are selected at the age of 55, such as (i) retiring at 60 without a large change in working conditions, or (ii) changing the employment contract to one-year contract renewable every year up to the legally allowed maximum age from the age of 55 for continued employment with a reduction in working capacity. These options are considered part of the implementation of the Continued Employment Programs as long as they secure stable employment up to the legally determined age.¹⁹ According to the JILPT Survey in reality, the great majority check for requests at the age of 59 (69.3%), at 60 (12.4%) and at 58 (11.5%), showing that over 90% check for requests at the age of 58 or later.

In designing the program, is it possible to establish different standards for different job categories or standards depending on whether it is a management position or not? For example, it is not considered contrary to the purpose of the Older Persons Act, if the retirement age is raised to 65 for those who are in the manufacturing departments where manual skills count, while the contract-type reemployment program is introduced for those who are in the administrative departments, as long as workers and the management agree through sufficient consultations between them. It is quite unfair in terms of human resource

¹⁸ According to the survey conducted by the Tokyo Employers' Association (on 1,264 member companies of the Association with valid response from 381 companies) in September 2005, 43.3% had the standard established with labor-management agreements and as much as 39.6% had the standard established with employment regulations. See *Rosei Jiho*, no. 3672:116.

¹⁹ See the Ministry of Labour, Health and Welfare, “Q&A for the Revised Act Concerning Stabilization of Employment of Older Persons.”

management if the fate of workers is affected depending on the position he/she happens to be in at the specific age when he/she selects the option while moving through different positions in the rotational human resource management. Thus, introduction of different programs must be reasonable in the generally accepted idea.²⁰ On the other hand, establishment of different retirement rules or different continued employment programs is not necessarily unreasonable, when different treatments are set for recruitment, human resource management or employment regulations for different job categories.

(4) Types of the Continued Employment Programs

While the standard for the elderly people are established based on the labor-management agreement, the agreement is not required to specifically define the type of employment for the workers to whom the continued employment program is applied based on the standard. Since it is about working conditions of the workers in question, it can be defined in the working agreement but most likely it will be defined in employment regulations. In this case, agreement of workers is not required in principle and employers alone can create and modify it. In practice, the following three types of continued employment programs can be established.

Firstly, the Extended Employment Program can be introduced to continue to employ those who reach the retirement age without sending them to retirement. The severance pay can be paid at the end of the extended employment, helping to maintain motivation to work and loyalty to the company. In addition to the same job as before, they can also be assigned to different positions and different jobs or they can be dispatched to other companies as employees of the dispatching company. Their working conditions are changed if they are sent to different positions or dispatched to other companies and this must be regulated by laws and regulations regarding modifications of working conditions.

Secondly, the Reemployment Program can be introduced to reemploy those who have retired after reaching their retirement age. It is the most common practice for the continued employment programs. From the legal viewpoint, a

²⁰ According to the Policy Planning Division, the Department of Employment Measures for the Elderly and Persons with Disabilities, the Employment Security Bureau, the Ministry of Labour, Health and Welfare, it must also be reasonable in the generally accepted idea and in principle it should secure continued employment up to 65. See *Rosei Jiho*, no.3662:150.

new employment agreement is made after the retirement and a new set of working conditions is established, therefore, this practice has advantages as it is easy to modify working conditions. The form of employment can also be changed, making a contract for limited term, short-hour work or alternate-day work, with possibility of many more alternatives. As it has been discussed above, a number of companies are planning to implement the reemployment program for continued employment only because it offers advantages of flexibilities with the reemployment programs.

Thirdly, the re-recruitment is also possible with other employers hiring those who are retired at the retirement age. For example, employment transfer (dispatched and transferred) is practiced by many companies to maintain employment of elderly people, transferring employees within the group companies.²¹ According to the Ministry of Health, Labour and Welfare²², “the system of employing the currently employed elderly people continuously also after their retirement” can be interpreted that re-recruitment is allowed as long as employment is secured up to the legal retirement age, though the preference is continued employment by the company by which workers are employed before their retirement. It is considered one of the Continued Employment Programs, if (i) there is a close relationship between the two companies (close relationship) and (ii) the continued employment is secured by the subsidiary company (clarity). Close relationship means existence of clear governance by the parent company over the subsidiary company (for example consolidated subsidiary), operating the human resource management between the two companies for recruitment and allocation of human resources. Clarity means existence of employment agreement by the parent company for continued employment at the subsidiary company after the retirement and employment agreement or employment practice by the subsidiary company for acceptance and continued employment of those who have retired from the parent company.

²¹ According to the survey conducted by the Tokyo Employers' Association listed above, 87.6% had their own continued employment programs, 23.2% used transfer programs to subsidiary or affiliated companies, and 15.1% used dispatched programs to subsidiary or affiliated companies. In case of their own continued employment programs, it is not known if it is based on extended employment or reemployment.

²² See the Ministry of Labour, Health and Welfare, “Q&A for the Revised Act Concerning Stabilization of Employment of Older Persons.”

If a worker is dispatched to another company from the subsidiary company which is a temporary agency for continuation of employment (this is one of the types of re-recruitment since the worker is hired by a different employer), the provision stipulates that the above requirements (i) and (ii) shall be considered together and requires “fulltime employment” (Specified Worker Dispatch Business, Worker Dispatch Act, Article 2, Item 5) but the dispatch destination can be either the original company or the other companies. In case of re-recruitment which involves a change of the employer, the worker can be transferred to work in another company as well as be employed by another company as a dispatched worker from the subsidiary temporary agency with possibility of being dispatched to the original company or other companies. According to the JILPT Survey, fulltime dispatched employees do exist, although it is only 1.8% of all.

(5) Change of Working Conditions and Job Descriptions

Let us now see the new working conditions of the elderly people under these Continued Employment Programs. According to the JILPT Survey, most of them work fulltime (89.1%) but the issue is that there is a change in their employment pattern and job descriptions.

In case of the extended employment program, the existing working conditions can be maintained but they can also be downgraded based on the employment regulations (with restrictions under the theory of judicial precedents regarding disadvantageous change of working conditions). In case of reemployment, on the other hand, a new employment agreement is made, allowing for fixing the term length (or no fixed term), deciding on wages, job descriptions and modes of employment. This makes it easier to revise the working conditions than the extended employment.²³ When reemployment is selected, there is a change of the employer and workplace, requiring the dispatching company to establish the program for continued employment and the receiving company to establish conditions to receive the worker. This is because the continued employment is assumed up to the legal retirement age in principle and it is understood that the dispatching company bears a certain responsibility on the continued

²³ Even for the contract-type reemployment programs, a debate can be made on disadvantageous changes of employment regulations. See Kyowa Shuppan Distribution Case, Tokyo District Court Decisions, March 24, 2006, Labor Case Decisions, no. 917:79.

employment after reemployment takes place. Sufficient explanation shall also be required on working conditions that are applied after the reemployment.

According to the JILPT Survey on the mode of employment of the continued employment programs (multiple answers allowed), 83.4% of the workers are temporary or contract employees and 19.8% are part timers, while only 12.0% are fulltime regular employees. 83.5% of them have one-year agreement and only 2.1% do not have fixed term of agreement. Regarding the question about the workplace (multiple answers allowed), most of them (90.1%) work in “the same department in the same office as before the retirement,” followed by “a different department in the same office as before the retirement” (24.1%), “a different office after the retirement” (13.4%), and “a closely related subsidiary or affiliate company” (12.0%). Job descriptions are “the same as before the retirement” (71.9%) and “different from person to person” (23.3%).

Some point out that obligation of the continued employment program may cause a change of worker status from regular to non-regular employee in their early 60s, consequently establishing the status of workers in their early 60s as non-regular employee and generating a new low-income group.²⁴ Although many work for the same job at the same place as before the retirement, there is an issue that the wage level is substantially reduced, as it is described later.

(6) Wage Level

The wage level after reemployment, the most important factor, is determined according to the program implemented by the company. In reality, the wage for workers at age 60 and above is influenced by two public benefit packages: the old-age pension for active employees and the old workers continued employment benefit (Employment Insurance Act, Article 61).²⁵ The old-age pension for active employees provides the insured person the employees pension insurance (Kosei-nenkin) with benefits that is reduced when the insured has income from work (active employee) after reaching the eligible age for the old age pension and it has the feature of supplementing income for the reduced pay due to old

²⁴ See Iwamura, “Changing Retirement Process,” 359.

²⁵ In addition, in establishing the Elderly People Employment Security Measures, companies are given promotion subsidies for continued employment as part of the employment security projects for the Unemployment Insurance Act and the subsidies for increased continued employments (Article 62, Paragraph 1, Item 3, Ordinance for Enforcement of the Unemployment Insurance Act, Article 104).

age.²⁶ The old workers continued employment benefit provides the amount equal to 15% of the monthly wage when the wage is reduced to below 61% after reaching the age of 60 (providing the amount less than 15% proportionately when the wage is reduced to between 61% or higher and below 75%).

Using these systems, the total amount of the public benefits and wage income reaches the maximum when the average annual wage is reduced to around 60% in the early 60s, and the total amount received is slightly reduced when the average annual wage is increased to above 60%, and therefore, some point out that the reduced wages will be close to 60% of what was earned at the age of 60.²⁷ According to the JILPT Survey on the wage level of the continued employment programs, 44.4% receives 60 to 70% of the annual income earned at the time of retirement, and 20.4% receives approximately half. The most important factor considered in establishing the wage level was the wage level at the time of retirement (48.0%), followed by amount received from the old workers continued employment benefit (27.6%) and the old-age pension for active employees (27.3%), and these factors weigh more than the situations of other companies in the same industry (25.1%) or the market wage and normal wage for the job description (17.0%). Bonus is often paid but it is a fixed amount or fixed rate (per number of months worked) (37.2% in total), which is a different level from before, and 30.3% do not receive bonuses.

In addition to public benefits, partial coverage by corporate pension averts a substantial reduction of income after reemployment. For example, according to the post-retirement reemployment model designed by Sumitomo Electric Industries, 60 to 70% of the the annual income that is received before retirement can be secured: 47.6% by monthly pay and bonus, 27.7% by the old-age pension for active employees, 18.0% by corporate pension fund and 6.6% by the old workers continued employment benefit.²⁸

In general, a large variation is seen among individuals in the elderly group for work motivation and physical strength (motivation and capability do not

²⁶ See Iwamura, "Changing Retirement Process," 326, and Nishimura, "Social Security Act," 253.

²⁷ See Shibuya, "Q&A in Counseling Room," 152. Also, according to the survey conducted by the Tokyo Employers' Association listed above, 53.2% of the companies replied that the monthly wage will reduce more than 40% and more than 80% considers public benefits in determining the wage level.

²⁸ See *Rosei Jiho*, no 3669:72.

necessarily decline uniformly with aging), and substantial changes (disadvantages) are expected to occur in the working conditions for the continued employment compared with before the retirement. Since uniform reduction of working conditions of the elderly people would reduce their motivation for continued employment and incentive for achievements, different compensation should be allowed depending on the work behavior, work motivation, performance and results of those who work.

(7) Failure of the Continued Employment Program

Reflecting individual differences in motivation and physical strength, the elderly people demonstrate a variety of needs in the mode of employment and work descriptions. The continued employment program for the elderly people not only requires a substantial revision of institutional compensation system, but it also poses issues for determining individual compensations (for example, wage level based on the performance or job descriptions). Ideally the continued employment program should meet a wide range of such requirements, but the proposed working conditions and compensations do not always meet those or eligibility of the applicants even if they wish to continue to work.

In principle, the Older Persons Act requires implementation of the continued employment program and it does not oblige employers to meet working conditions that the retired people want when employing these people. As long as employers propose working conditions within the range of reasonable discretion and meet the standard for the elderly people, it is not illegal for employers to reject workers who wish to continue to work at the end for the reason of failure to agree on working conditions between the worker and employer. In short, the continued employment can fail, if agreement on wages is not made.²⁹ In reality, the standard for the elderly people requires agreement between workers and the management, but employers are allowed to unilaterally define the mode of employment and working conditions. The continued employment, therefore, could fail when the working condition for the continued employment does not meet the requirement of the workers, but this has to be accepted because of the way the system works. Also, it is not illegal to propose a substantial downgrading of working conditions that may discourage people from applying for reemployment.

²⁹ See Hara, "Employment of Elderly People," 32.

If, however, the elderly people are retiring due to the retirement age or at the end of the continued employment program and if they wish to have reemployment, the employer is required to make efforts in providing measures for reemployment assistance, and if these elderly people wish to have reemployment, then the employer is required to provide assistance for reemployment by developing job search activities, etc (Articles 15 and 17).

4. Conclusion: Future Issues

The Elderly People Employment Secure Measures introduced under the current Older Persons Act are not meant to uniformly expand employment by raising the retirement age as it was targeted by the conventional Older Persons Act, but they are to be designed through labor-management consultations on diversified employment of the elderly people to allow them to have a choice for their lifestyle of semi-employment based on their motivation and physical strength (semi-retired life). The JILPT Survey clearly indicates that companies are responding to the revised act, and some achievements are being made from the purpose of continued employment of the elderly people.

On the other hand, issues are also presented. According to the Survey, issues on the continued employment (multiple answers allowed) include difficulties in securing jobs for elderly people within the company (39.6%), difficulties in handling people in the management (38.9%), difficulties in determining the compensation after continued employment (24.5%) and difficulties in securing jobs for elderly people with subsidiaries and affiliated companies (12.3%). This shows that in reality it is difficult to find jobs that meet the requirement of the elderly people. On the other hand, issues such as increase in the labor cost (11.2%) and reduced productivity (9.0%) are not high values. It is possible that some effects come from the old workers continued employment benefit and the old-age pension for active employees, but the main barrier of the continued employment is not financial burden, rather, it is how to secure jobs. In other words, expansion of the public benefit programs will not necessarily help the promotion of the Elderly People Secure Employment Measures. Since issues pointed out also include no precedence and hence no experience in utilizing the elderly workers (19.1%) and reduced morale among the young and middle-aged workers (14.3%), companies need to gradually develop their mechanisms and build up the concept with workers to promote the Elderly People Secure Employment Measures, and this requires time.

Although it is possible to take an approach of anti-age-discrimination³⁰ to start a review of employment issues in relation to the elderly people, “it is not appropriate to fully introduce anti-age-discrimination measures for the time being due to the current situation of Japan,” as it is pointed out in the report by the “Study Group on Future Employment Measures for Elderly.” In Japan, the policies regarding the employment termination has been discussed with a focus on the link between the pensionable age and the retirement age, and the age is still an important factor that determines treatments and compensations for the elderly people. However, the new direction of “the society that allows people to continue to work regardless of the age” has been presented, and the idea of “age discrimination” can be an important viewpoint in the future in building mechanisms and the concept for workers in companies.

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³⁰ For age discrimination, see Yanagisawa, “Legal Theory for Age Discrimination in Employment.”

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Whistleblower Protection Act

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I. Introduction

1. Whistleblower Protection Act

The Whistleblower Protection Act (hereafter called the “Protection Act”) was enacted in June 2004 (it came into effect as of April 1, 2006). By setting down civil rules on avoidance of dismissal, avoidance of cancellation of worker dispatch contracts, and prohibition of disadvantageous treatment regarding criticism of companies and whistleblowing that meets the conditions set down in the Protection Act, while limiting such whistleblowing to penal laws and providing for additional conditions for protection in cases where disclosure is made outside the organization in question, the Protection Act is designed to promote compliance by firms. On the other hand, for whistleblowing and other activities criticizing a company that are not provided for in the Protection Act, such activities’ validity is individually judged, as before, in relation to corporate order, based on the legal principle restricting dismissal and other general rules of the law.

2. Background of the Enactment of the Protection Act

There is a social, economic and political background to enactment of any law. As for the Protection Act, it can firstly be pointed to a succession of corporate scandals. Especially after 2000, corporate scandals occurred one after another, including Mitsubishi Motors’ concealment of recall data, Yukijirushi Shokuhin’s and Nippon Meat Packers’ food frauds, and Tokyo Electric Power Company’s concealment of data on nuclear reactor accidents. Moreover, these incidents, as they involved foods, transportation, power, etc., were all related to the basic order of a civil society. They had a direct or indirect effect on people’s lives, person, etc., and a significant impact upon society. Secondly, the majority of these corporate scandals emerged as social issues because employees and business partners of those companies reported the wrongful activities (“whistleblowing”). In the background, there were changes in employment and in the industrial structure and social environment that were brought about by the IT revolution. In other words, the advancement of the

globalized economy since the 1990s and changes in employment practices brought about by introduction of performance-based pay, restructuring, an increase in employment of non-regular employees, etc., diluted employees' feeling of belonging to their firms. The advancement of IT and the Internet also made it technically easier to disclose trade secrets outside the organization. Moreover, community activities such as volunteering and NPO activities, an increased sense of belonging to regional communities, and a growing interest in social justice made employees and society to regard "whistleblowing" and criticism of companies in a positive light and promoted disclosure of corporate scandals. Thirdly, companies that were exposed of their scandals faced a major setback, such as a dent in their profile and brand, and corporate social responsibility (CSR) and compliance were emphasized. In particular, Enron's and WorldCom's large-scale stock price scandals that were exposed after 2001 had a major impact on the corporate society in the U.S., and prompted enactment of the Sarbanes-Oxley Act (SOX) in 2002 that obligated firms to create internal control systems, including public disclosure of information, preparation of accounts, etc. These developments also led to giving a greater emphasis on compliance in corporate activities, and the need for institutionalizing "whistleblowing" was recognized.¹

II. Significance of the Enactment of the Whistleblower Protection Act

1. Need for Protection of "Whistleblowers"

As corporate scandals were mainly exposed by whistleblowing as mentioned above, countries began to adopt a policy of providing a certain measure of protection to whistleblowers in order to improve compliance by firms. Starting in the 1990s, the Public Interest Disclosure Act was enacted in the U.K. (1998), the Protected Disclosure Act in New Zealand (2000), and SOX in the U.S. (2002) (Table 1).

In Japan, as laws protecting whistleblowers on companies' violations of laws and other illegal acts, various labor laws have prohibited disadvantageous treatment of workers who, by reporting to an administrative organ, blow the whistle on their employer's illegal acts concerning working conditions and

¹ Mizutani, "'Whistleblowing' and Labor Law", 11.

occupational safety.² In recent years, provisions on protection of whistleblowers were introduced into the Act on the Regulation of Nuclear Reactors, which was revised after the nuclear fuel accident in Tokaimura in 1999. The new provisions prohibit dismissal and other disadvantageous treatment and include a penal provision (Articles 66-4 and 78). The code of ethics of national public employees, based on the National Public Service Ethics Act, which was enacted after the Ministry of Finance's payoff scandals in 1999, also substantially protects whistleblowers. The Child Abuse Prevention Act, which was enacted in 2000 as part of an effort to implement a system for early detection and reporting of child abuse and domestic violence (DV), which have surfaced as social issues in recent years, provide for effectively canceling confidentiality obligation on physicians, lawyers and other experts as well as public employees (Article 6). The DV Prevention Act of 2001 also has similar provisions (Article 6).

As described above, even though legislation has just begun to be made individually to protect whistleblowers on companies' violations of laws and other illegal acts, there were, generally speaking, no laws prohibiting disadvantageous treatment, etc. of whistleblowers and others who engaged in criticism of companies on matters related to companies' violations of laws and other illegal acts and on matters related to public safety and environmental protection.

2. "Whistleblowing" and "Corporate Order"

Needless to say, companies are required to ensure that their acts are socially and legally reasonable and may not engage in any acts that violate this. As a means to correct any acts of violation, therefore, there is value, socially and legally speaking, in protecting employees' whistleblowing and criticism. On the other hand, companies have "personality" as components of society, and

² For example, the Labor Standards Act, Article 104, Paragraph 1 provides, "In the event that a violation of this Act or of an ordinance issued pursuant to this Act exists at a workplace, a worker may report such fact to the relevant administrative organ or to a labor standards inspector" and Paragraph 2 provides, "An employer shall not dismiss a worker or shall not give a worker other disadvantageous treatment by reason of such worker's having made a report set forth in the preceding paragraph." An employer who violates this provision is subject to criminal sanction (Article 119). Similar provisions are included in the Industrial Safety and Health Act, Article 97; the Mariners Act, Article 112; the Dockworkers Act, Article 44; the Dispatched Workers Act, Article 49-3; the Security of Wage Payment Act, Article 14; the Pneumoconiosis Act, Article 43-2; the Mine Safety Act, Article 38, etc.

Table 1. Outline of Whistleblower Protection Acts in various countries

Country	UK	New Zealand	Japan
Existence of a Comprehensive Act	○	○	○
Act Title	Public Interest Disclosure Act (1998)	Protected Disclosure Act (2000)	Whistleblower Protection Act (2006)
Coverage	Private and public sectors	Private and public sectors	Private and public sectors
Covered Whistle-blower	Workers under an employment contract or other contracts (including dispatched workers)	Employees of organizations ³	Workers under an employment contract or other contracts (including dispatched workers)
Reportable Facts	"A criminal offence," "failing of a legal obligation," "endangerment of the health or safety of any individual," etc.	"An illegal use of public funds and resources," "a substantial danger to public health and safety and the environment," "an illegal act," etc.	Criminal acts provided for in specific acts concerning citizen's lives, bodies, property and other interests and violation of a law or regulation that leads to a criminal act
Disclosure Made To	Disclosure made primarily to the employer or others within the organization (external disclosure to the mass media, etc. is protected under certain conditions)	Disclosure made primarily through the organization's internal procedures (disclosure to related authorities or ombudsman is protected in certain cases).	Disclosure made primarily to the employer or others within the organization (external disclosure to a government agency, the mass media, etc. is protected under certain conditions)
Procedures of Relief Against Disadvantageous Treatment	Filing of a complaint with an employment tribunal (the complainant may appeal the decision in a court proceeding)	Either institution of a suit at a court or filing of a complaint with an agency dealing with complaints related to labor issues	An administrative organ must take measures under certain conditions
Relief	Reinstatement, reemployment, or compensation	Reinstatement, damages, etc.	Voidance of dismissal, etc.

Note:

- Specifically, these include the Clean Air Act, Federal Water Pollution Control Act, Safe Drinking Water Act, Toxic Substances other words, protection is provided to internal disclosure made by those who are required to be sensitive about safety in
 - In addition to directly protecting employees, the Act prohibits any person from taking any harmful action against an provides for imposition of penalties against such a person (Article 1107).
 - An "organization" is a group of people, regardless of whether it is incorporated or not, and includes groups with an employee
- The table was prepared based on information of the Cabinet Office (<http://www.consumer.go.jp/info/shingikai/bukai20/>)

US			
×			
Federal law			State law
Whistleblower Protection Act (1989)	Individual acts in the fields of environment and atomic energy ¹	Sarbanes-Oxley Act (2002) ²	
Public sector	Private sector in the fields of the environment and atomic energy	Listed companies and securities firms	Public sector (more than 15 states also cover the private sector.)
Federal government employees (incl. former employees, applicants for employment)	Differ by applicable act	Employees of listed companies and securities firms	Differ by state
Violation of a law or regulation (fraud, bribery, etc.), a gross waste of funds, an abuse of authority, a substantial danger to public health and safety, etc.	Differ by applicable act	Fraud in transactions, violation of listing criteria, illegal acts against shareholders, etc.	Violation of the law, misgovernment, a gross waste, an abuse of authority, a threat against public health and safety (may be limited to specific violations of the law, depending on the state)
Anyone within or outside the organization	Generally, in the environment field, internal disclosure to the Congress, a government agency, or other specific agency is protected.	<ul style="list-style-type: none"> • A person with supervisory authority over the employee • A member of Congress • Law enforcement agency, etc. 	A number of states require preliminary internal reporting, while others require no preliminary reporting.
Allegation filed with the Office of Special Counsel (the complainant may appeal OSC's decision in a court proceeding)	Filing of a complaint with the Office of Administrative Law Judge of the Department of Labor (the complainant may appeal the Office's decision in a court proceeding.)	Filing of a complaint with the Secretary of Labor, etc. (if the Secretary's decision is not presented within the prescribed period, a court proceedings may be started.)	Primarily by institution of a civil suit (the complainant may request government relief prior to the institution, depending on the state.)
Reinstatement, retrospective pay, damages, etc.	Reinstatement, retrospective pay, damages, etc.	Reinstatement, retrospective pay, damages, etc.	Reinstatement, retrospective pay, damages, punitive damages, etc.

Control Act, Energy Reorganization Act, and are limited almost entirely to the fields of the environment and atomic energy. In Fields where a widespread effect can be anticipated.

employee of any organization who provides information to a law enforcement officer of commission of a federal offence and

or more than an employee.

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they obviously have rights to legal relief when whistleblowing and criticism damage their social credibility, on which they depend for their existence, and disrupt corporate order. Therefore, needless to say, employees' whistleblowing and criticism may not unreasonably or illegally disrupt corporate order or destroy a company's credibility or reputation. Against this background, the social and legal validity of "whistleblowing" was disputed in relation to whether or not it conflicted with "corporate order." In cases where a company took a disciplinary action against or dismissed an employee because the employee's act corresponded to a cause for a disciplinary action provided for in the rules of employment, such as that the employee "spread a false rumor" or "injured the company's credibility and reputation," the validity of such a disciplinary action was disputed in court.

In other words, the obligations inherent in the personal and continuous nature of labor contracts require employer and workers to act faithfully in consideration of each other's interest. As such, it is understood that a worker has an obligation to act in good faith and may not, as obligations appendant to a labor contract, leak a company's trade secret or damage its credibility or reputation, and companies have taken disciplinary action against or dismissed whistleblowers based on the rules of employment on grounds they have violated the above obligations. On this point, the courts, while assuming that an employer's rights to disciplinary action and dismissal did exist, voided it, in cases where exercise of such rights was objectively without a reasonable cause or it could not be accepted in light of the social norm, as an abuse of the rights to disciplinary action. As for dismissal, the courts voided similar cases of dismissal based on the legal principle of the abuse of the rights to dismissal. As confirming these legal principles, the revision of the Labor Standards Act in 2003 provides, "A dismissal shall, where the dismissal lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, be treated as a misuse of that right and invalid." (Article 18-2).³

Based on such a frame of reference, the courts legally assessed the act of whistleblowing as a part of a judgment on the validity of a company's exercise

³ Daihatsu Motor Incident, the Supreme Court, the Second Petty Bench Judgment, Sept. 16, 1983, *Hanrei Jiho* [Law Cases Reports], no.1093:135; Nihon Salt Manufacturing Incident, the Supreme Court, the Second Petty Bench Judgment, April 25, 1975, *Saiko Saibansho Minji Hanrenshu* [Supreme Court Reports (civil cases)], vol.29, no.4:456; etc.

of the right of disciplinary action or dismissal. In other words, it can be said that in relation to the validity of “whistleblowing,” the courts generally judged the justifiability of a dismissal or disciplinary action by comprehensively considering the whistleblower’s objective, motive and means leading up to the whistleblowing, the level of the significance of the report made, and the truthfulness of the report. More specifically, it was ruled, for instance, that “with respect to whistleblowing, if it is made up of false facts or the claim made is otherwise unreasonable, it may have a significant impact upon the reputation, credibility, etc. of the organization in question. On the other hand, if it contains truth, such whistleblowing may offer a chance for the organization to ameliorate its management method, etc. Considering also that there is a need to make adjustments regarding the whistleblower’s personality, personal interest, freedom of expression, etc., if the whistleblowing is recognized as valid, after comprehensively reviewing whether or not the fundamental claim made by the whistleblower is truthful or there is a reasonable cause to believe truthfulness in the whistleblower, whether the objective of the whistleblowing serves the interest of the public, the significance for the organization in question of the claims made, and the reasonableness of the means or methods used in the whistleblowing, it is reasonable to interpret that even if the whistleblowing injured the organization’s reputation, credibility, etc., the organization may not dismiss the whistleblower in a disciplinary action for the damage made to the organization’s reputation, credibility, etc.”⁴

3. Developments Leading up to the Enactment of the Protection Act

As described above, since there was no legal system for generally protecting whistleblowers, the courts judged the reasonableness and validity of the act of whistleblowing in individual cases based on the legal principles of the abuse of the rights to disciplinary action and dismissal.

However, as already mentioned, as the exposure of corporate scandals through whistleblowing began to have a serious impact upon society in recent years, the idea that protecting socially and legally justifiable whistleblowing and criticism of companies and laying down legal rules on whistleblowing was beneficial in excluding companies’ violations of laws and other illegal acts

⁴ Osaka Izumi Co-operative Society (Whistleblowing) Incident, Osaka District Court, Sakai Branch Judgment, June 18, 2003, *Rodo Hanrei* [Labor Reports], no.855:22.

from society became a public opinion. Against this background, the Consumer Policy Committee of the Quality-of-life Policy Council of the Cabinet Office spoke of the need to introduce “a system for protecting whistleblowers” as a means for assuring the effectiveness of consumer measures in an interim report titled, “Ideal Consumer Policy for the 21st Century” published in December 2002. To complement the government’s monitoring system, the report called on companies to work actively towards compliance management in order to ensure compliance by employers and to protect consumer interest. At the same time, to protect employees from dismissal and other disadvantageous treatment on grounds of whistleblowing, the report pointed out the need for introducing a system for employers to respond appropriately to whistleblowing. (The proposal was originally modeled after the Public Interest Disclosure Act of the U.K.)

However, on the questions of the coverage of protection of whistleblowers, to whom a whistleblower can report a wrongdoing, and procedures for disclosure outside one’s own organization, there were repeated clashes between companies, which claimed that the coverage should be narrowed as much as possible, and consumers, who harbored strong distrust as the government’s late response to Yukijirushi Shokuhin’s and Tokyo Electric Power Company’s scandals, HIV-tainted blood product scandal, etc. was a cause for further spreading the damage. As a result, the Protection Act was finally enacted with a policy objective of setting down rules for whistleblowers to sound an alarm within their own organization, as a general rule, and providing additional conditions for disclosure outside the organization, thus providing an incentive for companies to set up their own internal disclosure system (such as a help line) to promote their compliance.

The Protection Act therefore is designed to protect certain “whistleblowers” by introducing a new and positive concept of “whistleblowing” and to encourage companies to promote compliance management by requiring companies to abide by laws and regulations relating to the basic order of a civil society, including “life, body, property, and other interests of citizens” (Article 1). It, however, limits whistleblowing to criminal acts as defined by the law and other violations of laws and regulations, and, with regard to the whistleblowing procedures, it raised the hurdle for disclosure outside one’s own organization, such as to an administrative organ and the mass media, by setting down additional conditions for such disclosure. It can therefore be described as a law for “promoting internal whistleblowing,” and as such there may be problems

related to its effectiveness.

Considering the situation in our country (lack of ability for self-purification on the part of businesses and businesses' heavy reliance on the government as the authorities have traditionally leaned towards development rather than supervision of businesses) and the structural problems of corporate scandals, which will be described below, it must be said that the Protection Act, which aims to promote compliance by companies through introduction of an internal disclosure system, is limited in its effectiveness.

III. Mechanism of the Whistleblower Protection Act

The Protection Act is a compact legislation of 11 articles in all. In line with the purpose of the act, it is explained below using a number of keywords.

1. Who Should Be Protected?

(1) Whistleblower and worker: The protected person is limited to the “worker” who blew the whistle (Article 2); business partners who are not workers are not protected. The reason the protection is restricted to “workers” is that when a company is violating the law or is engaged in other wrongdoing, workers within the company and workers of a business partner’s company are in a position to best know any wrongdoing and have the greatest motive for whistleblowing. On the other hand, as seen in court cases described above, there is a strong probability that these workers may be punished for whistleblowing and disrupting corporate order and be subjected to disciplinary action by their company. Therefore, there is a need to protect such workers.

Therefore, even though the text of the law limits “workers” to workers as defined by the Labor Standards Act, it is understood that the Protection Act covers a wider range of workers, because the Protection Act has a different purpose than the Labor Standards Act of protecting whistleblowers from being dismissed or treated disadvantageously. From this point of view, the Cabinet Office also explains that it is understood that workers include employees directly employed by the company, such as full-time regular employees, part-time workers, and temporary workers, dispatched workers, and workers of business partners’ companies as well as families and relatives living in the same household, housekeepers, supervisors, public

employees (with a proviso in Article 7), and seafarers.⁵

- (2) Director: Company directors who are board members are not covered by the Protection Act. Board members are in a position to execute the company's business based on a contract signed with the company commissioning such a work. They generally do not receive instructions and orders from the employer. Moreover, they have a heavier duty of loyalty than workers and are in a position to prevent or correct any wrongdoing by the company and ensure compliance. In addition, it is the shareholders' meeting that resolves, based on the Companies Act, on the appointment and removal of board members. For these reasons, protection of board members is considered unnecessary.

Therefore, directors who serve concurrently as employees, a common arrangement in Japan, are considered, even if they are formally directors, as "workers" covered by the Protection Act if they are in practicality under the supervision and order of the company representative.⁶

- (3) Business partner: The Protection Act does not cover subcontractors and other business partners. However, considering that activities of group companies, such as parent companies, subsidiaries and subcontractors, are widespread in Japan, subcontractors are often familiar with what is happening within their parent companies. In Yukijirushi Shokuhin's incidence, for example, the company's business partner who exposed the company's passing off imported beef for domestic beef for fraud was forced to suspend business temporarily because all products had to be returned to the shipper. Therefore, there is a strong need for protecting such businesses. During the process leading up to the legislation, the need for protecting business partners did become an issue, but it was finally agreed that the system would have a simple design of protecting solely the workers. Today, freelancers and other so-called self-employed people are incorporated into company groups. They are for all practical purposes in the same position as "workers" and need to be protected. The law should be interpreted more flexibly in individual cases, and it should be revised in the future to cover these business partners.

⁵ Cabinet Office, Quality-of-life Policy Bureau, Policy Planning Division, *Detailed explanation of Whistleblower Protection Act*, 26.

⁶ Koueisyu Incident, the Supreme Court, the First Petty Bench Judgment, February 9, 1995, *Hanrei Jiho* [Law Cases Reports], no.1523:149.

- (4) Retiree: For retirees, their labor contract is already terminated, and they are normally not in a position to be treated disadvantageously by their former employer. However, in cases where their retirement allowance has not yet been paid or it is to be paid as pension, they may be subjected to disadvantageous treatment in the form of reduction or forfeit of such allowance. In consideration of these cases, the Protection Act covers retirees as well (Article 5).

In the Cabinet Office's explanation, it appears that their interpretation is that the protection is to be limited to those who retired after the act of whistleblowing. However, there are no reasonable grounds, considering the Protection Act's purpose of legislation and interpretation of the provisions, for distinguishing between those who were still in employment at the time of whistleblowing and those who retired after blowing the whistle. Both should be covered by the Protection Act.⁷

2. Which Act Should Be Protected?

An act protected by the Protection Act corresponds to an act (whistleblowing) whereby a worker reports, not based on "an unlawful purpose," to the effect that a company is "about to" commit an illegal act that will violate the law ("reportable facts" will be discussed in the next section). More specifically, it can be discussed as below.

- (1) Validity of objective: Whistleblowing by a worker for the purpose of threat or other intent to do damage is against the principle of good faith in a labor contract, and obviously such an act is not protected by the law. As a condition for such "good faith," the Protection Act provides that the act must be "without a wrongful purpose" (Article 2, Paragraph 1). On the validity of objective, it was possible to set a positive condition that the act must be conducted "solely for the benefit of the public," as in the bar to defamation provided for in the Penal Code (Penal Code, Articles 230 and 230-2). This condition, however, was not introduced because whereas "alleging facts in public" to a large number of unspecified people is an condition for defamation, the Protection Act had additional conditions for "whistleblowing" outside the company, and there was little need in introducing rigorous conditions on the purpose of whistleblowing. Moreover, whistleblowing is

⁷ Cabinet Office, *Detailed explanation of Whistleblower Protection Act*, 96.

often conducted based on a complicated motive, and it was not realistic to rigorously limit the purpose of whistleblowing to “sole benefit of the public.” On the contrary, such a condition might have put a curb on the act of whistleblowing. It can be said that for these reasons, the negative condition was introduced.

As for “a wrongful purpose,” the “purpose of obtaining wrongful gain” and the “purpose of causing damages to others” are provided for. More specifically, this may include act of demanding money and valuables. On the other hand, in cases where whistleblowing is engaged in on the motive of dislike or reprisal against a specific superior or executive, such a motive alone is not considered as “a wrongful purpose,” because whistleblowing is normally engaged in based on a complicated motive and it is also normal for an investigation to be made on the responsibility of a specific executive as a result of whistleblowing. Incidentally, in the British legislation, the worker must “make the disclosure in good faith,” and when making a disclosure outside one’s organization, the worker may not “make the disclosure for purposes of personal gain,” like selling a personal scandal to a medium that cannot be trusted.

On the burden of proof, the Cabinet Office states in its explanation that “since it is not fair to require the whistleblower to claim and prove that the disclosure is “without a wrongful purpose,” the burden of proof is considered to rest with the person who claims that the disclosure does not correspond to whistleblowing.” Therefore, it is the businesses that must bear the burden of proof.⁸

- (2) Subject (the entity to whom the worker’s services are provided): The Protection Act provides that the subject of whistleblowing, in other words the business operator who violates any law or regulation (the entity to whom a worker provides his or her services to), is the entity to whom the whistleblower “actually” provides his or her services, and categorizes such an entity into four types (Article 2, Paragraph 1, Items 1 to 3).
- (i) The business operator who employs the worker (Item 1),
 - (ii) If the worker is a dispatched worker, the business operator to whom the worker is dispatched to perform such operator’s business (Item 2),
 - (iii) If the worker is to engage in work based on a contract concluded with

⁸ *Ibid.*, 34.

another business operator, that business operator (business partner, group company, etc.; Item 3), and

- (iv) Director, employee, etc. of the business operator of (i) to (iii) above (Figure 1).

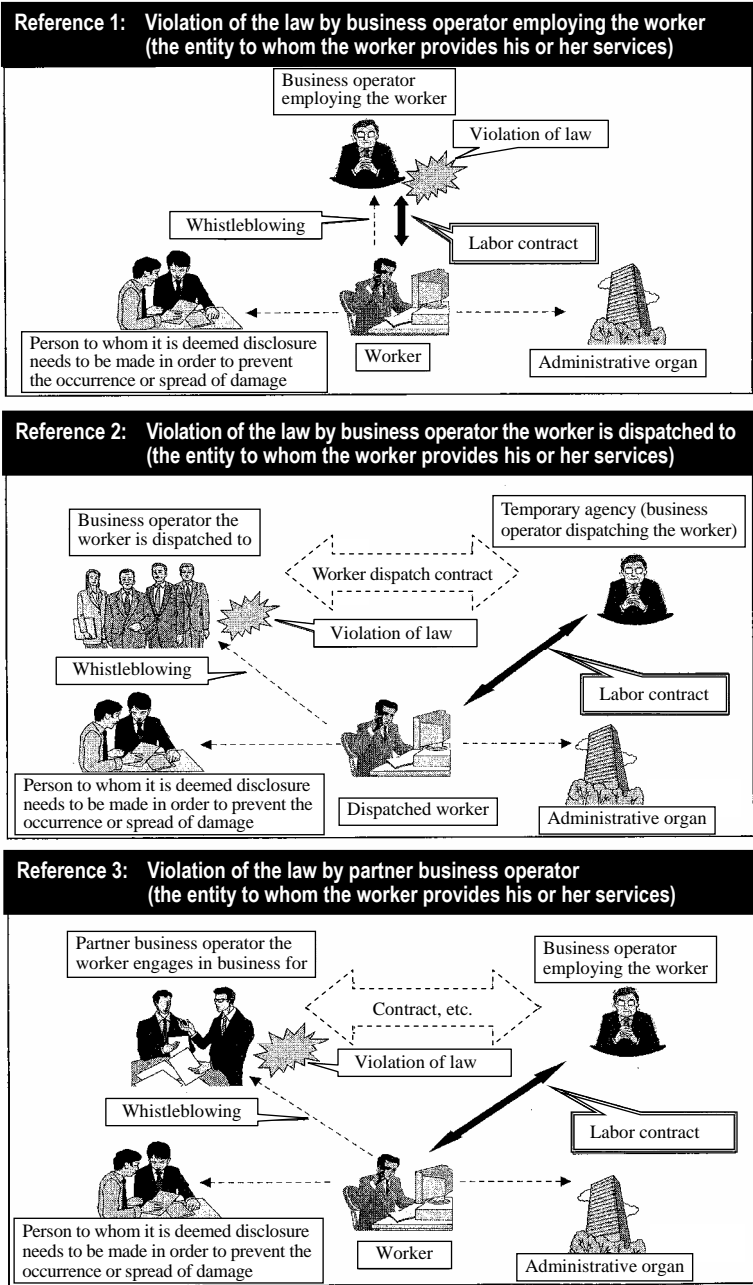
The Protection Act provides that, without regard to the worker's employment relationship, "the entity to whom the worker actually provides his or her services" must be the party violating the law, the violation that may be disclosed under the Protection Act (especially in (ii) and (iii) above). It is apparent that by having the whistleblower disclose the fact of violation to the business operator who is in a position to be able to directly investigate and correct the violation of the law, the Protection Act aims to promote compliance by companies by giving business operators the opportunity to correct the act of violation and by encouraging whistleblowing.

Therefore, if, in a situation involving a parent company and a subsidiary or among group companies, for example, a worker from a subsidiary is dispatched to work for the parent company and on discovering violation of the law by the parent company, the worker discloses this fact to the subsidiary, which is the worker's employer, this disclosure will be considered not as "internal" disclosure, because the subsidiary is not the entity to whom the worker actually provides his or her services, but as "external" disclosure. In cases like this, however, happenings within a parent company will have a significant bearing upon a subsidiary, and a worker's disclosure of the fact to a subsidiary that is the worker's employer will be deemed valid as beneficial and lawful operations reporting. Even though the disclosure will be considered as "external" disclosure under the Protection Act, the disclosure will be protected as a valid act under general legal principles.

If, in a similar situation, the worker discovers violation of the law by the subsidiary, which is the worker's employer, and reports this fact to the parent company, the disclosure will be deemed as "external" disclosure in relation to the subsidiary, and the validity of the disclosure will again be judged based on general legal principles. In cases, however, where the parent company wholly owns the subsidiary and the two companies are considered to be practically the same even though they are formally separate companies, the disclosure will be protected as "internal" disclosure.⁹

⁹ *Ibid.*, 88.

Figure 1. The entity to whom the worker provides his or her services



- (3) Act giving rise to whistleblowing: The Protection Act provides that whistleblowing must be “about Reportable Fact that has been occurred, is being occurred or is about to be occurred,” in other words, about occurrence of an act that violates a law or regulation or a fact that a law or regulation “is about to be violated.” For the purpose of preventing misconception of the facts by the worker and business operator, it is understood that both the probability of the occurrence of the reportable fact and the urgency with respect to time must be high. However, it is already clear from nuclear energy accidents, harmful effects of chemicals, etc. that disclosure after the fact will cause a significant damage on citizens’ life, body, and safety. From the viewpoint of preventing and minimizing damage, the Protection Act should be interpreted more flexibly based on individual cases. Revision of the provision should also be considered in the future.

3. To Whom the Disclosure Should Be Made?

The Protection Act provides that the whistleblower may disclose the fact (1) within the business operator’s organization, (2) to an administrative organ, or (3) outside the business operator’s organization (the mass media, etc.). The conditions for disclosure become more rigorous in the order of (1) , (2) and (3).

- (1) Within the business operator’s organization: The Protection Act provides disclosure to the “the entity to whom the worker provides his or her services” or to “a person designated by such an entity” as disclosure within the business operator’s organization.

- (i) The entity to whom the worker provides his or her services: “The entity to whom the worker provides his or her services,” as described above, is the business operator to whom a worker actually provides his or her services. In practice, this disclosure is likely to be made through a help line, a hot line or other office charged with receiving reports from a whistleblower, the department of internal audit, a director or other top manager, or a worker’s immediate superior. A report made to a superior will often be considered as “consultation” (an act of receiving advice from another) done before disclosure (an act of notifying a certain fact to another).

Disclosure within the business operator’s organization may be made by a worker if the worker “considers” that a reportable fact has

occurred, is occurring or is about to occur. It suffices that such disclosure is made based on the whistleblower's subjective perception, and the whistleblower is not required to present objective proof of the truthfulness of the fact. As long as the disclosure is without "a wrongful purpose," the whistleblower will be protected even if the disclosure is a "misunderstanding." (Incidentally, the Code of Criminal Procedure, Article 239 provides that a person may inform investigative authorities of a suspected crime if the person "considers a crime has occurred.") This is in line with the purpose of the Protection Act to lower the hurdle for internal disclosure and encourage such disclosure. It is also believed that such an arrangement will not be of particular detriment to business operators.

- (ii) "A person designated by such an entity": By setting a lower hurdle, as described above, for internal disclosure in comparison with disclosure to an administrative organ or other external disclosure, the Protection Act is designed to promote introduction of a disclosure system within the business operator's organization. Cooperation with an external law office, specialist service provider, labor union, and other help line is required to fulfill such a function, and these partners are considered as "persons designated by such an entity."
- (iii) Method of disclosure: The Protection Act does not specifically provide for the method of disclosure. It does provide, however, that only when the disclosure is onymous and made in writing (including via the Internet) to the business operator that the business operator is obligated to make an effort in notifying the whistleblower of the measures taken to correct any violation (Article 9). The business operator does not have this obligation obviously if the disclosure is anonymous and if the disclosure is not made in writing, even if it is onymous. The Protection Act also protects external disclosure in cases where a business operator who was notified by a whistleblower of a wrongdoing fails to investigate into the case and take other measures for 20 days after such disclosure is made, provided that the disclosure to the business operator was made in writing (Article 3, Item 3d). These provisions suggest that the Protection Act encourages disclosure in writing. (Anonymous disclosure obviously cannot be protected.)

- (2) Administrative organ: The Protection Act requires disclosure to “an Administrative Organ with the authority to impose disposition or recommendation, etc.” Considering that it is normally difficult for a whistleblower to know which administrative organ has the authority to impose disposition or recommendation, etc., the Protection Act provides that if disclosure is made to an administrative organ without such authority, that administrative organ must “inform” the whistleblower which administrative organ has such authority (Article 11).

On disclosure by a worker to an administrative organ, the Protection Act provides an additional condition of objectivity that the worker must have “reasonable grounds to believe” that a reportable fact has occurred, is occurring, or is about to occur. “Reasonable grounds” on the truthfulness of the fact are generally considered as grounds that are objectively reasonable in light of the social norm, and a whistleblower is likely to be required in ordinary circumstances to present internal documents to ensure the truthfulness of the fact. However, since the administrative organ with the jurisdiction can investigate the matter and confirm the truthfulness of the fact for itself, there is no reason in setting a higher hurdle for a whistleblower’s disclosure to an administrative organ compared with informing the police or the Public Prosecutor’s Office, which have jurisdiction over criminal offences (as mentioned above, a person only needs to “consider a crime has occurred”). (Incidentally, in the British legislation, it suffices that the whistleblower has “reasonable belief” in the truthfulness of the fact to disclose the information to a designated administrative organ or to make other external disclosure.)

- (3) Outside the business operator’s organization (the mass media, etc.): When a worker intends to make disclosure outside the business operator’s organization, the Protection Act requires the worker to meet, in addition to the condition mentioned under (2) above, two conditions of (i) the person to whom external disclosure is made and (ii) truthfulness.
- (i) Person to whom external disclosure is made: The Protection Act provides that external disclosure must be made to “any person to whom such Whistleblowing is considered necessary to prevent the occurrence of the Reportable Fact or the spread of damage caused by the Reportable Fact (including person who suffers or might suffer damage from the said Reportable Fact, but excluding any person who might cause

damages to the competitive position or any other legitimate interests of the Business Operator) (Article 3, Item 3 and Article 2, Paragraph 1). This person to whom external disclosure may be made is interpreted broadly and may include newspapers, television networks and other news media, NPOs run by lawyers, accountants, etc., employers' organizations promoting member firms' compliance activities, consumer groups, and members of the Diet.

The "person who suffers or might suffer damage from the said Reportable Fact" may include residents of a locality where a harmful substance is being removed and purchasers of harmful foods and chemicals. (Disclosure to a competition or to a crime syndicate that may use the information for extortion, etc. is likely to be excluded as it will also be contrary to a worker's contractual obligation to act in good faith and not to unreasonably infringe upon the employer's interest.)

- (ii) Truthfulness: In addition to the condition of truthfulness of the reportable fact required as in disclosure to an administrative organ, a worker may disclose the fact outside the business operator's organization only when meeting any one of the following cases:

(a) The whistleblower may be subjected to dismissal or other disadvantageous treatment if the whistleblower makes the disclosure within the business operator's organization or to an administrative organ; (b) evidence of wrongdoing may be concealed, etc. as a result of the whistleblower's disclosure within the business operator's organization; (c) the worker was asked by the entity to whom the worker provides his or her services not to make the disclosure within the business operator's organization or to an administrative organ; (d) the business operator does not commence investigation into the wrongdoing without any justifiable reason even though the whistleblower disclosed the fact within the business operator's organization; and (e) a person's life or body is at risk.

More specifically, (a) above corresponds to a case where the worker or the worker's colleague was subjected to demotion or other disadvantageous treatment for disclosure within the business operator's organization of the company's past scandal. (b), which may overlap with (a) in many instances, corresponds to a case where a company as

a whole systematically engaged in violation of the law or concealment of evidence. (c) corresponds to cases where work rules prohibit whistleblowing or the worker's superior forbids the worker from whistleblowing. (d) corresponds to a case where the business operator fails to notify the whistleblower for a period of 20 days commencing from the date on which the whistleblower made the disclosure within the business operator's organization. (e) corresponds to a case where a food product that may be harmful to public health is sold to consumers.

In addition, for (a), (b) and (e), the whistleblower is required to have "reasonable grounds to believe" and has the burden of proof.¹⁰

By providing for these rigorous conditions on disclosure outside the business operator's organization, the Protection Act aims to restrain external disclosure and promote disclosure within companies. However, it can be said that such restraint on external disclosure may, on the contrary, allow companies to do nothing about introducing a compliance system within them. To begin with, there is no need or validity in providing for additional conditions for disclosure outside the business operator's organization that go beyond the condition of the truthfulness of the fact required for disclosure to an administrative organ. The conditions for disclosure outside the business operator's organization are too rigorous and should be abolished in the future. For the implementation of the current provisions, individual cases should be interpreted flexibly. At the least, the burden of proof should be on the business operator to prove that the worker does not meet the conditions for disclosure outside the business operator's organization.

4. What Are Reportable Facts?

The Protection Act defines reportable facts as criminal acts provided for in the Acts concerning "the protection of citizen's lives, bodies, property and other interests" and violation of a law or regulation that leads to a criminal act (Article 2, Paragraph 3).

(1) Reportable fact: The Protection Act covers two types of reportable facts as shown below.

(i) The first is facts that are considered as a criminal act in the acts

¹⁰ *Ibid.*, 90.

“concerning the protection of citizen’s lives, bodies, property and other interests” covering five genres (as of the end of March 2007, 7 acts shown in the appendix of the Protection Act and 409 acts provided for by government ordinance: a total of 416 acts).

These acts include (a) acts concerning the protection of individuals’ lives and bodies, such as Food Sanitation Act, Act on the Regulation of Nuclear Source Material, Nuclear Fuel Material and Reactors, Penal Code, Road Traffic Act, and Medical Practitioners Act; (b) acts concerning protection of interest of consumers, such as the Securities Trade Act, Installment Sales Act, Bank Act, and Construction Industry Act; (c) acts concerning conservation of the environment, such as the Air Pollution Control Act, Water Pollution Control Act, and Waste Disposal and Cleaning Act; (d) acts concerning protection of fair competition, such as the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade and Act against Unjustifiable Premiums and Misleading Representations; and (e) other acts concerning protection of citizens’ lives, bodies, properties and other interests, such as the Act on the Protection of Personal Information, Labor Standards Act, Companies Act, and Bankruptcy Act.

- (ii) The second is facts that are considered as an illegal act for which the acts of (i) above do not directly provide for a penalty but a penalty will be imposed on the offender if the offender fails to abide by the administrative disposition or recommendation made against such an illegal act. In other words, the Protection Act protects disclosure of violation of any of the above laws for which no penalties are immediately applicable but for which penalties will apply if there is violation of the administrative disposition, etc.

- (2) Acts that are considered outside the coverage of the reportable facts

Whistleblowing may be engaged in in relation to acts concerning the protection of citizen’s lives, bodies, property, etc., and any other acts are excluded. For example, various tax laws, acts related to political activities, such as the Public Offices Election Act and the Act to Regulate Money Used for Political Activities, and acts related to defense and foreign relations, such as the Immigration Control and Refugee Recognition Act, Foreign Exchange and Foreign Trade Act, and Self-Defense Forces Act, are excluded as acts “specifically concerning state functions.” Whistleblowing, however, is particularly effective

against companies' large-scale tax evasion and illegal donations to politicians. Considering also that one of the principal aims of the legislations in the U.K., U.S., etc. is to eliminate such illegal acts, it must be said that Japan's Protection Act lacks consistency.

The reportable facts are also limited to criminal acts and violation of a law or regulation that leads to a criminal act. Violation of a civil law or regulation (violation of public order and standards of decency, tort, and default) and "unjustifiable" acts (such as violation of obligation to make an effort provided for in various basic acts) lack predictability in whistleblowing and are excluded as damaging legal stability.

(3) Legal protection of disclosure not covered by the Protection Act

On the legal protection of disclosure not covered by the Protection Act (for example, disclosure to an administrative organ or other external disclosure that do not meet the conditions provided for in the Protection Act), the Diet, at the enactment of the Protection Act, passed a collateral resolution to the effect, "General legal principles will apply as before to disclosure not covered by this Act. The enactment of this Act may not be construed to the contrary."

As described above, court decisions formed the legal principle on restriction of dismissal in Japan, and the Labor Standards Act, Article 18-2 (came into effect in 2003) was provided as a result of accumulation of the court decisions. In cases where, prior to the enactment of the Protection Act, the validity of dismissal on grounds of whistleblowing was disputed, the legal principle on restriction of dismissal was applied. On the relation between this legal principle on restriction of dismissal and the Protection Act, it is understood that the Act, "by setting down specifically and clearly the conditions for avoidance of dismissal of whistleblowers, aims to protect workers who intend to engage in a rightful act of making disclosure for the public interest" and provides that the Act "does not preclude the application of the provision of Article 18-2 of the Labor Standards Act" (Article 6, Paragraph 2).

With respect to whistleblowing not covered by the Protection Act, there was a concern that the prohibition on dismissal of whistleblowers based on the general legal principles of abuse of rights might be compromised by the enactment of the Protection Act. The above collateral resolution was passed in response to such a concern. The validity of acts of disclosure not covered by the Protection Act will be judged individually based on the application of the general legal principles.

IV. Summary: Is the Whistleblower Protection Act Useful for Promoting Compliance by Companies?

1. Merit of the Protection Act: Protection of Whistleblowers

The Protection Act provides for avoidance of dismissal, avoidance of cancellation of worker dispatch contracts, and prohibition of disadvantageous treatment (demotion, pay cut, request for replacement of dispatched workers, etc.) on grounds of whistleblowing, and provides furthermore for not precluding the application of the provision of Article 18-2 of the Labor Standards Act (the legal principle on abuse of the rights to dismissal) (Articles 3 to 6). Therefore, with regard to criticism of companies and disclosure that meet the conditions of the Protection Act, there are now civil protection standards and rules in place dealing not only with avoidance of dismissal, but also with avoidance of cancellation of worker dispatch contracts and disadvantageous treatment such as demotion and pay cut. In the past, the validity of such dismissal, cancellation, etc. was individually judged in the court. In addition to the Labor Standards Act (Article 18-2), the Protection Act sets additional regulation with respect to civil rules by clearly providing for avoidance of dismissal, cancellation of worker dispatch contracts, prohibition of disadvantageous treatment, etc., and these provisions should be considered meaningful.

2. Limitations of the Protection Act: Narrow Coverage

The Protection Act has its limitations particularly because its effectiveness has been compromised by narrow coverage and the setting of rigorous conditions for disclosure to an administrative organ and other external disclosure. The Protection Act should be made more effective by flexible implementation of the law at the onset and by revision of the law planned in 2011 in the future. As a number of issues related to the Protection Act have already been pointed out, the author will point out a few other points in this concluding section.

It has already been pointed out, with respect to the coverage of protection, that the Protection Act does not cover tax laws and the Act to Regulate Money Used for Political Activities, the fields in which whistleblowing is most effective. In the U.K. and U.S., in addition, there have noticeably been cases of whistleblowing against accidental firing of arms, illegal accounting, tax evasion, etc. not only by companies, but also by the police, military, hospitals,

universities, religious organizations, etc., and countries are taking steps to protect such whistleblowing. Expanded application of the Protection Act in these fields should be made an issue in the future.

On the procedures of protection, it is a problem that protection is restricted to workers within an organization and that conditions for external disclosure, such as disclosure to the mass media, are too rigorous. In the majority of corporate scandals that became an issue, the company as a whole was systematically engaged in the wrongdoing or the company's executives were directly or indirectly involved. In the legislations in the U.K., U.S. and other countries, even if whistleblowers are limited to insiders (i.e. workers), internal and external disclosure are equally protected (the U.S. federal laws Whistleblower Protection Act, SOX, etc.), or even if disclosure should first be made to the business operator, disclosure to a related administrative organ or an ombudsman, etc. under certain conditions is equally protected (the U.K. and New Zealand). The Japanese legislation, where whistleblowers are limited to insiders (business partners are not included) and conditions for external disclosure are rigorous, is exceptional. It is difficult for such a legal system to function effectively in preventing and eliminating corporate scandals. The conditions for external disclosure should be eased to make the Protection Act more effective.

The protection's effect is also limited to avoidance of dismissal of whistleblowers and prohibition of disadvantageous treatment. To assure the truthfulness of the disclosure, a whistleblower will in fact be required to present documents and other information, and in removing such documents and information, the whistleblower may be subjected to criminal charges of larceny, etc. or civil charge for damages. Protection against such charges is also lacking.

Moreover, while the Protection Act is designed to promote and encourage internal disclosure, it does not obligate firms to introduce an internal disclosure system, which is an important key to promoting compliance by companies. It must be said therefore that the Act's effectiveness is compromised. Therefore, if companies, without introducing an internal disclosure system, obligate workers by work rules, etc. to give precedence to internal disclosure at all times, the Protection Act, contrary to its purpose, would lack rationality as described further below.

3. To Secure the Effectiveness of the Whistleblower Protection Act

The policy objective of the Protection Act is to promote compliance by companies through reinforcement and introduction of an internal disclosure system, and it should be considered that as long as it is within the company that disclosure should primarily be made to, the business operator as the employer has a contractual obligation to the workers to prepare an internal disclosure system within the business operator's company. Therefore, in accordance with the purpose of the Protection Act, a worker may demand an employer who does not prepare an internal disclosure system to prepare such a system. It may also be said that from the point of view of the obligation of good faith in labor contracts, an employer may not, without preparing an internal disclosure system, obligate workers to give precedence to internal disclosure at all times, dismiss or disadvantageously treat workers who make external disclosure, or bring a civil charge against such workers.

On the other hand, the Protection Act alone cannot promote compliance by companies. There is a need to reinforce the Act's effectiveness in coordination with various other acts that have been enacted. The Act on Prohibition of Private Monopolization and Maintenance of Fair Trade was revised, and the revised act came into effect in January 2006. By this revision, the base percentage used for calculation of penalties imposed on companies that engage in bid-rigging or form a cartel was raised. At the same time, a system for reducing penalties on those companies that admit wrongdoing to the Fair Trade Commission was introduced to encourage external disclosure about cartels, bid-rigging, etc. to administrative organs. As a result, large-scale bid-rigging incidents have been exposed. The Companies Act was also revised in May 2006. By this revision, the board of directors of large companies (a capitalization of ¥500 million or more or liabilities of ¥25 billion or more) and of companies with committees was obligated to resolve on "building up internal control," which effectively obligated such companies to introduce an internal disclosure system. In addition, the Japanese version of SOX, which is expected to be introduced in 2008, is likely to obligate preparation of the internal disclosure system in greater detail.

As examined above, the Whistleblower Protection Act, while having various limitations, is expected to fulfill a certain role in eliminating corporate scandals and promoting compliance by companies in coordination with other legislations.

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Legal Concept of “Employee” in Labor Protective Laws of Japan¹ —From an Analysis of Court Cases—

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This paper presents a general examination, primarily through an assessment of court precedents, of the legal concept of “employee” in labor protective laws in Japan, such as the Labor Standards Act, Minimum Wage Act, Security of Wage Payment Act, Industrial Safety and Health Act, and Industrial Accident Compensation Insurance Act.

I. Definition of Employee in Labor Protective Laws and Related Issues

While each labor protective law has a different purpose and objective, the definitions of employee therein are identical.² Specifically, Article 9 of the Labor Standards Act, the heart of labor protective laws, defines an employee as one who is employed at an enterprise or office and receives wages therefrom, without regard to the kind of occupation. In other words, being an employee necessitates being “employed” and “receiving wages.” The definition of wages

¹ This paper is based on Chapter 4 of Part 1 of “Court Precedents in Japan” in Comparative Study on Legal Notion of ‘Employee’ (JILPT Research Report No.67) by the Japan Institute for Labour Policy and Training, co-written by the author and Hisashi Okuno, associate professor of the Department of Law, St. Paul University (Tokyo, Japan). The study was compiled by adding the legal definition of employee and its related issues to the above chapter. The author is responsible for any errors in this report. Descriptions regarding examination of legislative politics in academic theories were excluded due to limited space.

² Article 9 of the Labor Standards Act, Article 2, Item 1 of the Minimum Wage Act, Article 2, Paragraph 2 of the Security of Wage Payment Act, and Article 2, Item 2 of the Industrial Safety and Health Act. The definition of employee is not stipulated in the Industrial Accident Compensation Insurance Act, however, since the act is based on the compensation insurance system in the Labor Standards Act, theories, legal precedents (Yukito Suzuka v. Yokohama Minami Rodo-kijun-kantoku-shocho [the head of Yokohama Minami Labor Standards Office], Supreme Court, Petty Bench 1, November 28, 1996, 714 Rodo Hanrei 14), and administrative interpretations (Koseirodo-sho, Rodo-kijun-kyoku, Rosaihoshu-bu, Rosaikanri-ka Hen (Ministry of Health, Labour and Welfare, Labour Standards Bureau, Workers’ Compensation Division, Workers’ Compensation Supervision Section ed.), Rodosha Saigai-hosho Hokenho, 5 Tei-Shinban (Industrial Accident Compensation Insurance Act, 5th ed.), p.18, p.79, (Romu Gyosei Kenkyu-jo, 2001)) maintain that the definition of employee under the act is identical to that of the Labor Standards Act.

is stipulated in Article 11 of the Labor Standards Act as the wage, salary, allowance, bonus and every other payment to the worker from the employer as remuneration for labor, regardless of the name by which such payment may be called. Thus, as long as the reward is recognized as remuneration for labor, it is regarded as wages, thereby making the receipt of wages as a qualification for “employee” of relatively minor relevance to its definition. A more significant qualification for an employee is the concept of “being employed.” This concept is otherwise known as the “subordinate-to-employer relationship” in several academic theories, court precedents, and administrative interpretations, and is quintessentially “working under the direction of an employer.”

According to a 1985 report by the Labor Standards Act Research Panel,³ standards for determining an “employee” are classified according to “standards for a subordinate-to-employer relationship” and “factors reinforcing the determination of an employee.” Specific factors for such standards are as follows:

Standards for a subordinate-to-employer relationship

- Standards for working under the direction and supervision of an employer
 - The freedom to accept or refuse a work request or direction
 - Direction and supervision of an employer on work performance
 - Direction and control by the employer of work content and performance
 - Others (performing work aside from that which is normally planned by order/request of the employer)
 - Restrictive status (an individual’s freedom to choose when and where to work)
 - Status of alternativeness (outsourcing services to others) —factors reinforcing the determination of degree of direction and supervision
- Standards for reward as remuneration for labor
 - Reward as remuneration for labor

³ Rodo-sho, Rodo-kijun-kantoku-ka Hen [Ministry of Labour, Labour Standards Bureau, Supervision Section ed.], Kongo No Rodo-keiyaku-to-hosei No Arikata Ni Tsuite [Legal System of Future Employment Contracts], pp.50-68 (The Japan Institute of Labour, 1993).

Factors reinforcing the determination of an “employee”

- Business operator status
 - Being responsible for the machinery and equipment
 - Amount of reward
 - Other
 - Bearing liability for damages incurred during the performance of work
 - Permission of original trade name
- Degree of exclusivity
 - Institutional restriction or actual difficulty working for other employers
 - Presence of fixed wages (partially) sufficient to make a living; reward being a strong factor in life security
- Other
 - Selection process of hiring/contracting being very similar to that of regular employees
 - Income tax deductions from salary
 - Application of labor insurance
 - Application of work regulations
 - Use of retirement package system and benefits

All of the above factors are taken into account when determining if an individual is an employee. Whether he or she is an employee or not, however, is unclear for the parties directly involved, thereby making it difficult to predict legal decisions. There is also the issue of legal stability.

The subordinate-to-employer relationship, or concept of “being employed” stated in Article 9 of the Labor Standards Act, brings about a challenge regarding the realities of labor. For example, even though an individual performs the same job as that of an employee, he or she will be treated as a non-employee (e.g. a contract worker) if the work is carried out based on a contract other than an employment contract (e.g. an agreement for contract workers), since such contracts do not contain an employer’s right to direct and control a worker as employment contracts naturally do, and since in reality employers have no intention of exerting such direction and control over an individual. Consequently, the aforementioned individual is not protected under labor protection laws. The number of non-employee contract workers may be

affected by the business cycle, but nonetheless it has been steadily on the rise.⁴ In light of this, the fact that labor protective laws are inapplicable to such workers must not be overlooked, and could be an issue for examination in legal policy to determine if certain means of protection should be provided. Legally, whether or not being an employee could determine if an individual enjoys full protection under labor protective laws, and this radical result is another challenge. Furthermore, if an individual is defined as an employee, it could result in a number of ex-post facto burdens on the employer.

In the following sections, as a step toward examining the definition or concept of an employee in future labor act policies, a general discussion is provided of the investigative results of court precedents where the definition of an employee under labor protective laws was disputed. The court cases are grouped according to different job patterns and labor conditions.⁵

Working under the direction of an employer, which is a factor used in determining if one is an employee, is also referred to when determining whether or not a contract is one of employment. Therefore, in the following sections we will take a look at cases where determining if a contract was one of employment was the point of argument.

II. Discussion of Court Precedents

Since the current criteria for determining if an individual is an employee is outwardly based on “Standards for Determining an ‘Employee’ under the Labor Standards Act” found in the Section One Report of the Labor Standards Act Research Panel (Employment Contracts),⁶ we will examine court precedents published in court reports from December 19, 1985 (publication date of the Report of the Labor Standards Act) until the end of 2005.

⁴ Yutaka Asao, Gyomu-ukeoi Toshite Romu Wo Teikyo-suru Kojin-jieigyoshu [The Self-employed Who Provide Work as a Contract Worker], in Tayo-na Hataraki-kata No Jittai To Kadai [Current Conditions and Problems Regarding the Diversification of Employment Formats], pp. 131-135 (The Japan Institute for Labour Policy and Training, 2007).

⁵ All of the court precedents examined should be cited here, however, due to limited space, we will cite essential precedents only.

⁶ Rodo-sho *supra* note 3.

1. Standards for Defining an “Employee” in Different Job Types⁷

Jobs types that have little or no apparent subordinate-to-employer relationship, which have emerged as actual legal disputes, will be classified into groups and examined. The groups are: 1) professionals (jobs requiring professional knowledge or techniques, or jobs in the entertainment industry); 2) contracted drivers of transport operators (transportation); 3) door-to-door salespersons etc.; 4) small business operators; and 5) interns. Home-based workers were initially included in this study, but excluded from the investigation as there were no court cases involving said type of workers.

(1) Professionals

There are 19 court cases involving professionals. The court determined that the individuals were employees in an overwhelming majority of cases, with all but four defined as employees.

In three out of the four cases, the determining factors for the conclusion were the individuals’ freedom to accept or refuse a work request, ability to decide when and where to work, and potential to work for other employers.

On the contrary, the determining factors in many of the winning 15 cases were a lack of freedom to accept or refuse a work request or direction and/or inability to choose when and where to work.

When determining if a professional is an employee, difficulties or impossibilities for the employers to give (specific) directions regarding work performance can be a key factor. The court precedents indicate that if such professionals perform their work not by themselves but by cooperating with others, then direction by employers, as well as freedom to accept or refuse work request and level of restrictiveness, are used by the court in making decision. Generally, if such workers’ schedules and work procedures are controlled by their employer, then there is direction and control by the employer of work content and performance, and the court would thus conclude that such individuals satisfied the definition of an employee. Particularly, if they perform their work in cooperation with others of a similar profession, direction and control by an employer of work content and performance, as well

⁷ Analysis of standards for defining an “employee” in different job types was performed by Hisashi Okuno, associate professor at St. Paul University. The author of this paper uses and summarizes Okuno’s analysis in this study.

as the freedom to accept or refuse a work request or to choose when and where to work become important factors.

As for cases where a professional performs his or her job alone based on an agreement, direction and control by the employer of work content and performance are not mentioned in many of the court cases. For this type of case, the freedom to accept or refuse a work request or to choose when and where to work become major and crucial factors in determining whether an individual is an employee.

(2) Contracted Drivers of Transport Operators

There are 16 court precedents involving contracted drivers of transport operators. The court found that the drivers were employees in six cases, as opposed to the 10 cases in which the court found them not to be employees. As far as those cases occurring during our investigation period, chronologically speaking, all cases defined the individuals as employees except for one before the Tokyo High Court's decision in *Yukito Suzuka v. Yokohama Minami Rodo-kijun-kantoku-shocho* [the head of Yokohama Minami Labor Standards Office].⁸ Subsequent to this decision, however, in all but one case no further individuals were defined as employees.

A key issue in determining if contracted drivers are employees is whether or not they are responsible for bearing the supply of their vehicles, an important constituent for performing work, in which case they would be defined as a business operator and not an employee.

Before *Yukito Suzuka* Case, there were court cases in which individuals were defined as employees, while stating that such employees were responsible for their vehicles. Thus, being responsible for one's vehicles was not necessarily a key factor in determining if a driver is an employee. In such cases, the courts found that when the cost born by the drivers was subtracted from their payment, their salary was not much higher than that of an employee. They also determined that such drivers were not able to work for other companies (in addition, some did not have the freedom to accept or refuse a work request). Thus, in the above cases, being responsible for one's vehicles is merely one of the standards; the drivers were not found to be business

⁸ *Yukito Suzuka v. Yokohama Minami Rodo-kijun-kantoku-shocho*, Tokyo High Court, November 24, 1994, 714 Rodo Hanrei 16.

operators since they could not collect interest despite being responsible for the vehicles. If there were other factors divergent from the characteristics of a business operator (such as incapability of working for other companies), then the individual was defined as an employee and not as a business operator.

On the other hand, after *Yukito Suzuka* Case, in cases which drivers were deemed responsible for their vehicles, the court tended to determine that the drivers were not employees even if they were not allowed to work in other companies. In these recent cases, being responsible for one’s vehicles outwardly becomes a factor directly indicating the characteristics of a business operator.

Other characteristics of contracted drivers include factors such as the direction and control of work content and performance, and the degree of time constraint. The courts tend to find that employers’ directions on transportation methods are part of the nature of the transportation business, namely, delivering goods to a specific place at a specific time, and thus are not indicative of direction and control. The courts also tend to conclude that even in cases where individuals are time-constrained as a result of such directions, this derives from the nature of the business and is therefore not indicative of an employer’s restrictive control. These tendencies are particularly conspicuous in cases after *Yukito Suzuka* Case.

(3) Door-to-Door Salespersons etc.

There have been 10 court cases involving individuals such as door-to-door salespersons; the individuals were defined as employees in six cases, and not so in four, demonstrating a similar number of rulings in both directions.

In cases where the salespersons were defined as employees, the court determined the presence of direction and supervision by an employer on work content and performance and working hours were controlled. On the other hand, in those cases where workers were not defined as employees, there was no direction or supervision of work content or performance, or no time constraints (working for other companies was also permitted). In many of these cases, it was easy to determine if an individual could be defined as an employee. Thus, with the exception of a few court cases,⁹ defining a

⁹ Plaintiff (name undisclosed) v. Nippon Hoso Kyokai [Japan Broadcasting Corporation], Plaintiffs (name undisclosed) v. Nippon Hoso Kyokai, Tokyo High Court, August 27, 2003, 868 Rodo Hanrei 75, Plaintiffs (name undisclosed) v. Nippon Hoso Kyokai, Sendai

salesperson as an employee is relatively clear-cut based on the presence or absence of direction and supervision and whether or not the individual has the freedom to choose when he or she works.

(4) Small Business Operators

There have been 19 court cases involving small business operators. The court held that they were employees in eight cases, and not so in 11 cases, the latter slightly exceeding the former.

Since small business operators run businesses as small business owners or establish a company at least as a formality, a key factor in defining them as employees is whether they can be defined as business operators, not only formally but also practically. Aside from three cases that drew conclusions without referring to general standards or criteria, responsibility for machinery and equipment was mentioned in all of the remaining 16 cases during the fact finding process or court ruling. Similar to contracted drivers, one characteristic of small business operators is that responsibility for machinery and equipment is a key factor in defining them as employees.

Furthermore, the degree of exclusivity, particularly whether an individual is permitted to work for other companies, is mentioned in a relatively large number of cases—13 out of the 19 to be exact. The degree of exclusivity is presumably used to examine whether an individual is a business operator in practice, regardless of the size of the business.

The results show that, in regards to machinery and equipment, in 14 out of 16 cases, the court found that the employer was responsible for the machinery and equipment in cases where individuals were defined as employees. The

High Court, September 29, 2004, 881 Rodo Hanrei 15. In these cases regarding bill collectors there was a relatively long list of facts indicating that they were not employees, for example, the individuals had freedom to choose when they worked, they were able to outsource their services (alternativeness), and were permitted to work for others. On the other hand, they had to follow a nationally unified method of collecting money, and were also asked to submit a table of plan and regular progress report to achieve each sales center's goals. Therefore, the argument was whether or not the employer maintained direction and control despite the abovementioned factors. Each high court's decision stated that the collection of money is based on the law and is necessary due to the nature of collecting public fees from across Japan, thereby denying the presence of direction and control. The individuals were thus not defined as employees.

court determined that the individuals bore the responsibility in cases where they were not defined as employees. In regards to the individual’s freedom to work for others, the court found that they did not enjoy such freedom in cases where they were defined as employees, while they did have such freedom in cases where they were not defined as employees. These factors are mentioned in addition to determining the presence or absence of direction and supervision by employers and reward as remuneration for labor. It is difficult to determine whether they played a crucial role in the decision, but it is clear that they have a strong correlation.

Some small business operators work in groups with others of a similar profession or outsource the service to others. In such cases, the individual tends to be defined as a business operator and not an employee.

(5) Interns

A series of court cases involving *Kansai-ika-daigaku* [Kansai Medical University],¹⁰ wherein a medical intern was examined to determine if he was an employee, is an example of court precedent concerning interns. The court determined the presence of direction and supervision by an employer and in each case ruled that the individual was an employee. As the university claimed in these court cases, the issue is how to take into account the academic aspect or the fact that the individual is a student. The court found that, despite the academic aspect, as long as there were factors defining him as an employee, such as (lack of) freedom to accept or refuse a work request, the direction and supervision of an employer, and wages as a remuneration of labor, the individual satisfied the definition of an employee. The court cases demonstrated that the academic nature of an intern does not affect its determination, which is made by based on general standards and criteria for defining an employee.

2. Standards for Defining an “Employee” in Different Labor Conditions

The following labor conditions are examined: 1) wage/working hours/

¹⁰ *Damages Case*: Plaintiffs (name undisclosed) v. Gakko-hojin Kansai-ika-daigaku, Osaka High Court, May 10, 2002, 836 Rodo Hanrei 127. *Unpaid Wages Case*: Plaintiffs (name undisclosed) v. Gakko-hojin Kansai-ika-daigaku, Supreme Court, Petty Bench 2, June 3, 2005, 893 Rodo Hanrei 14. *Damages for Karoshi Case*: Plaintiffs (name undisclosed) v. Gakko-hojin Kansai-ika-daigaku, Osaka High Court, July 15, 2004, 879 Rodo Hanrei 22.

vacations, 2) industrial accident compensation, 3) safety and health (including obligations of care for safety), 4) termination, and 5) discrimination. Discrimination was excluded from the investigation since there were no cases involving such a condition. Cases involving safety and health were more a violation of obligations of care for safety than the Industrial Safety and Health Act.

(1) Wage/Working hours/Vacations

There were 26 cases involving wage/working hours/vacations, 29 when including different instances of the cases. Below we will examine the number of cases including the different instances.

Out of the 29 cases, 23 were examined to determine if the contract was one of employment, and eight cases were examined to determine if the individuals were employees under the Labor Standards Act. Two cases were reviewed both as to whether the contract was one of employment and whether the individuals were employees. Out of the above 23 cases, the court found that the contract was one of employment in 15 cases, and not so in eight cases. As for the eight cases examining whether the individuals were employees, the court ruled affirmatively in all cases.

a. Denial of the Existence of an Employment Contract

As for the eight cases where the existence of an employment contract was denied, among the “standards for a subordinate-to-employer relationship,” “direction and supervision” or “direction and control of work content and performance” were examined in seven cases, “reward as remuneration for labor” was examined in five cases, “restrictiveness” was examined in five cases, and “alternativeness” was examined in two cases. Thus, one can state that “direction and supervision” or “direction and control of work content and performance,” “reward as remuneration for labor,” and “restrictiveness” were recognized in this order as factors of high importance.

Out of the seven cases where “direction and supervision” or “direction and control of work content and performance” were examined, these factors were recognized in three cases, while the existence of an employment contract was ultimately denied. In the first case, the court recognized that the individual had “the freedom to accept or refuse a work request” and “alternativeness,” and received “reward as remuneration for labor,” but that “direction and control”

was only present as part of the nature of the business, thus the court determined that the worker was not an employee. In the second case, the court found that “restrictiveness” existed, but “reward as remuneration for labor” was strongly negated. In the third case, the court ruled that the contract was not one of employment since, notwithstanding the presence of “restrictiveness,” there was no “reward as remuneration for labor,” “the amount of reward” was high, and there was a weak estimation of “reward being a strong factor in life security.” Therefore, even when factors indicating “direction and control” are recognized, if other factors regarding the subordinate-to-employer relationship negate the determination of an individual as an employee, and if the factors reinforcing the determination of an “employee” do the same, then consequently, the court denies the existence of an employment contract.

There was a case where the contract was determined not to be one of employment without examining “direction and control” or “direction and control of work content and performance.” In this case, the court recognized both “the freedom to accept or refuse a work request” and “alternativeness,” and among the “factors reinforcing the determination of an ‘employee,’” the court held that the individual had “the freedom to work for others,” and there was a weak estimation of “reward being a strong factor in life security.” The court therefore determined that the worker was not an employee. Reinforcing factors aside, having “the freedom to accept or refuse a work request” and “alternativeness” is interpreted as characteristics of being unconstrained by an employer’s “direction and control.” Therefore, although “direction and supervision” or “direction and control of work content and performance,” “reward as remuneration for labor,” and “restrictiveness” are factors of great importance, if they are not found to be present, other factors are used in determining a subordinate-to-employer relationship.

b. Acceptance of the Existence of an Employment Contract and Defining an Individual as an Employee

In 15 cases where the existence of an employment contract was argued, “direction and supervision” or “direction and control of work content and performance” were examined in 11 cases, with the court determining that these factors existed in all instances. On the other hand, in cases examining whether workers were employees, “direction and supervision” or “direction and control of work content and performance” were examined in six out of eight cases,

with the court determining the existence of these factors in all instances. In one case the court tried to determine both if a contract was one of employment and if the individual was an employee. The court concluded affirmatively with regards to both factors.

In cases where a subordinate-to-employer relationship is not examined, how does a court determine whether such a relationship exists? There were five cases in which “direction and supervision” or “direction and control of work content and performance” were not examined. In one of these cases, the court presumably assumed and recognized a subordinate-to-employer relationship since it determined that the worker lacked “the freedom to accept or refuse a work request,” was subject to “restrictiveness,” lacked “alternativeness,” and he or she was receiving “reward as remuneration for labor.” Similarly, the court outwardly assumed and recognized the subordinate-to-employer relationship for the following reasons in two cases: the court determined the presence of “restrictiveness” and “reward as remuneration for labor” in both cases; in one of these cases no “alternativeness” was found present, and in the other it confirmed “performing unscheduled work” and “restrictiveness.” Particularly, in two of these five cases, among the “factors reinforcing the determination of an ‘employee,’” the “amount of reward” was found to be high and there were no “income tax deductions from salary.” The court ruled the contract to be one of employment, although the workers’ characteristics slightly resembled those of a business operator. Consequently, even when the core factors of a subordinate-to-employer relationship such as “direction and supervision” are absent, if other factors by which one can assume such a relationship are present, the court presumably finds the contract to be one of employment.

As for other factors concerning the “standards for a subordinate-to-employer relationship,” in cases where the existence of an employment contract was argued, “the freedom to accept or refuse a work request” was examined in six cases, resulting in decisions on both ends. “Restrictiveness” was examined in 13 cases, with the court determining that such control existed in all cases. “Alternativeness” was examined in three cases, and found absent in each instance. “Reward as remuneration for labor” was examined in 12 cases, with the court confirming its presence in all instances.

As for the cases examining whether an individual was an employee, “restrictiveness” was examined in seven cases, with the court determining that

such control existed in all the cases. “Alternativeness” was examined in one case, and found to be absent. “Reward as remuneration for labor” was examined in five cases, with the court confirming its presence in all cases.

Thus, “direction and control,” “restrictiveness,” and “reward as remuneration for labor” are relatively important factors, and even in cases where there is no “direction and control,” the court occasionally assumes its presence and recognizes it based on other factors. That recognition is not altered even in cases where there are reinforcing factors negating the existence of an employment contract.

(2) Industrial Accident Compensation

There were 14 cases regarding accident compensation, 19 when including different instances of the cases. The definition of employee under the Labor Standards Act was argued in all 19 cases. Among these, the court defined the individuals as employees in four cases, and denied employee status in the remaining 15. The larger number of denials is in all likelihood associated with the fact that the individuals in question were in the transportation industry or were small business owners, making them characteristic of business operators. In addition, since these cases involve compensation, one must consider the financial aspects of a system in which benefits are provided according to the Act. Therefore, determining as to whether an individual is an employee may have become naturally strict. In general, there are comparatively more factors to be considered in these cases than with other labor conditions both in the “standards for a subordinate-to-employer relationship” and the “reinforcing factors in defining an ‘employee.’” The issue of defining employees with characteristics of business operators, as well as the financial issues of the insurance system may also have an effect in this regard.

a. Individuals Defined as Employees

In cases where individuals were defined as employees, from among the “standards for subordinate-to-employer relationship,” “direction and control of work content and performance,” “reward as remuneration for labor,” and “restrictiveness” were examined in each case, with the court confirming the existence of all factors, with the exception of one case, which lacked “restrictiveness.” In three cases, the court confirmed the absence of “freedom to accept or refuse a work request” and “alternativeness.” Thus, as far as these

were concerned, it was primarily “direction and control of work content and performance,” “reward as remuneration for labor,” and “restrictiveness” that were used in determining whether or not the individuals were employees. It seems that in particular, the first two factors are the key to determining the presence of a subordinate-to-employer relationship or whether an individual is an employee. On the other hand, “the freedom to accept or refuse a work request” and “alternativeness” do not appear to be regarded as mandatory factors.

As for the “reinforcing factors in defining an ‘employee,’” “machinery and equipment” were examined in all cases, but the court’s decisions were divided. In those cases where individuals were responsible for the machinery and equipment, since the amount of their reward was the same as those of regular employees and they were not permitted to work for other companies, subordinate-to-employer relationship was presumably not diminished. As for other reinforcing factors, the “amount of reward” and “freedom to work for others,” “income tax deductions from salary,” and “work regulations” were examined in three cases, and “damage liability” was examined in two cases. It is thus evident that these factors have a tendency to be considered characteristic of business operators.

b. Individuals not Defined as Employees

As for the cases where workers were not defined as employees, all but two of 13 cases were examined: in one case the court determined that the individual was entirely uncharacteristic of an employee even without examining the subordinate-to-employer relationship, and in the other the appeal was dismissed by accepting high court’s decision.

In all 13 cases, from among the “standards for a subordinate-to-employer relationship,” “direction and supervision” or “direction and control of work content and performance” were examined. The court denied these factors in all but one case. In all 13 cases, “reward as remuneration for labor” was examined, with the court confirming the absence of any such reward in all instances. Thus, it can be assumed that “direction and supervision” or “direction and control of work content and performance” and “reward as remuneration for labor” are considered key factors in determining a subordinate-to-employer relationship, and the absence of these factors indicates a negation of the definition of an employee.

In regards to other factors comprising the “standards for a subordinate-to

-employer relationship," "the freedom to accept or refuse a work request," "restrictiveness," and "alternativeness" were examined in the following cases: "The freedom to accept or refuse a work request" was examined in seven cases; the court denied the presence of such freedom in three cases and recognized it in four. There were nine cases in which "restrictiveness" was examined, of which the court confirmed the presence thereof in three cases, and refuted it in six. "Alternativeness" was examined in nine cases, of which only one confirmed a lack thereof. Thus, in many cases "the freedom to accept or refuse a work request," "restrictiveness," and "alternativeness," were investigated, but this is not necessarily true of all cases. Hence, they tend to be of relatively minimal importance compared to "direction and supervision" or "direction and control of work content and performance" and "reward as remuneration for labor." Also, even if there are characteristics negating "the freedom to accept or refuse a work request" and "alternativeness" and confirming the presence of "restrictiveness," which indicates a subordinate-to-employer relationship, in light of the fact that the individuals in these cases were ultimately not defined as employees, we can assume that these characteristics are merely secondary indicators.

On the other hand, as for the "reinforcing factors in defining an 'employee,'" the following is the number of cases examined from greatest to least. Thirteen cases involved "machinery and equipment," among which the individuals were deemed responsible for their machinery and equipment in 11 cases, and the employer was deemed responsible in two cases. In 11 cases "the freedom to work for others" was examined, of which eight cases confirmed the presence thereof and three cases the lack. "Income tax deductions from salary" were investigated in 11 cases, with no such tax deduction confirmed in any case. The "application of labor insurance" was examined in six cases, all of which confirmed no such application. "Amount of reward" was examined in five cases, of which two confirmed it to be identical to that of a regular employee and three found it to be higher than that of a regular employee. "Work regulations" were examined in five cases and found absent in all instances. "Retirement packages" were also examined in five cases, and found absent in all instances. "Reward as a factor in life security" was investigated in four cases, and estimated to be weak in all cases. "Damage liability" was examined in three cases, and found to exist in all cases. "Degree of exclusivity" was examined in two cases, and found to be high in one case and low in the other.

Therefore, upon review of the information above, comparatively speaking, “machinery and equipment,” “the freedom to work for others,” and “income tax deductions from salary” are outwardly regarded as factors strongly associated with a subordinate-to-employer relationship and are investigated accordingly.

Next, let us examine those cases where workers were denied the status of business operator and defined as an employee. As for the “reinforcing factors in defining an ‘employee,’” although these factors emphasize the characteristics of an employee, if factors in the “standards for a subordinate-to-employer relationship,” particularly “direction and supervision” and “reward as remuneration for labor” are denied, the individual is not defined as an employee. Also, while “reinforcing factors” are only “reinforcing,” “direction and supervision” and “reward as remuneration for labor” are the core factors for determining whether an individual is an employee.

(3) Safety and Health (Obligations of Care for Safety)

In four cases a violation of obligations of care for safety (and damages liability) was examined, five cases including different instances of the cases. In each of the five instances, the existence of an employment contract was argued and the court confirmed its presence.

In four cases, barring one where no fact finding occurred in regards to an employment contract, from the “standards for subordinate-to-employer relationship,” “direction and supervision” or “direction and control of work content and performance” and “restrictiveness” were examined and all found to be present. In two cases “reward as remuneration for labor,” was investigated, yet since the court confirmed the presence of “direction and control,” which is similar to an employment contract, it can be assumed that “direction and control” is an important determining factor for the existence of said contract, while “reward as remuneration for labor” is not considered a major factor.

On the other hand, in regards to the “reinforcing factors in defining an ‘employee,’” “income tax deductions from salary” were examined in four cases, and found present in three. In one case where such tax was not deducted (and labor insurance was not applied), the court ruled that an employment contract existed despite the lack of income tax deductions and the presence of “freedom to accept or refuse a work request,” presumably based on the presence of “direction and control of work content and performance” and

“restrictiveness.”

Therefore, it is believed that a violation of security obligations is confirmed when “direction and supervision” and “restrictiveness” are present amongst related parties.

(4) Termination

Termination was examined in 21 cases, 23 cases including different instances of the cases.

In all 23 instances, the presence of an employment contract was argued, and in one case the court also examined whether or not the individuals were employees. The contract was determined to be one of employment in 16 cases, and not so in seven cases. The case in which both the contract and definition of an “employee” were examined falls in the former group.

a. Denial of the Existence of an Employment Contract

Among those cases where the existence of an employment contract was denied by the court, from the “standards for a subordinate-to-employer relationship,” “direction and supervision” or “direction and control of work content and performance,” and “restrictiveness” were examined in six cases and negated in all instances. Therefore, it is assumed that a lack of “direction and supervision or control” and “restrictiveness” is a major factor in negating a subordinate-to-employer relationship.

Among the cases, “reward as remuneration for labor” was absent in one case, “restrictiveness” was absent in another, and in two other cases “alternativeness” was present but “reward as remuneration for labor” was not. These factors are not necessarily examined in all cases. It is therefore believed that, as secondary factors, they diminish the “subordinate-to-employer relationship.”

As for the “reinforcing factors in defining an ‘employee,’” the “freedom to work for others” and the application of “work regulations” were examined in four cases. It was determined that the individuals were permitted to work for others, and “work regulations” were confirmed to be inapplicable in all cases.

b. Acceptance of the Existence of an Employment Contract and Individuals Defined as Employees

Among the 16 cases confirming the existence of an employment contract,

“direction and supervision” or “direction and control of work content and performance” were examined in 13 cases in regards to the “standards for a subordinate-to-employer relationship.” The court found no “direction and supervision” or “direction and control of work content and performance” in three of the cases, and the presence thereof in the remaining 10. In two cases, “direction and supervision” or “direction and control of work content and performance” was not examined, but the court still determined that the contract was one of employment.

Regarding other factors in the “standards for subordinate-to-employer relationship,” in five cases “the freedom to accept or refuse a work request,” was examined, with the court confirming the absence of such freedom in all cases. There were 11 cases that examined “restrictiveness,” of which such control was found present in nine cases and absent in two. There were five cases where “alternativeness” was examined, of which two cases confirmed its presence and three cases denied it. “Reward as remuneration for labor” was examined in 11 cases and found present in all instances.

Thus, when an employment contract is acknowledged, it is believed that “direction and supervision” or “direction and control of work content and performance,” “reward as remuneration for labor,” and “restrictiveness” take relative priority.

III. Conclusion

Public administration provides standards and factors for defining the concept of an employee under Japanese labor protective laws. As we have discussed, factors that take precedence vary according to job pattern. Factors also vary slightly under different labor conditions, although the core factor is the “direction and supervision” of an employer. Furthermore, while some labor conditions have strict standards where many factors are examined in detail (i.e. industrial accident compensation), others have relatively loose standards such as obligations of care for safety (it is the author’s belief that wage/working hours/vacations are somewhere in the middle). Although the concept of an employee is identical in each law/act, various court cases indicate that the notion is relative and varies slightly in accordance with the type of job and labor conditions. Thus, it is possible to arrive at an appropriate solution since proper standards and evaluations can be selected in each case. However, as stated in the beginning of this paper, the current concept of an employee or

subordinate-to-employer relationship raises significant questions: can such a notion give appropriate protection to non-employees such as contract workers; can the involved parties appropriately predict legal conclusions; will defining an individual as an employee put an excessive ex-post facto burden on an employer; and does it lack legal stability? Thus, there is need for further discussion on specific, realistic legal policies regarding what type of protection should be given to what type of workers through which legal means.

Employment Behavior and Transition Process from School to Work in Japan*

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1. Introduction

The purpose of this paper is to grasp the situation of young people's difficult transitions from school to work and related support systems in Japan.

Up until the early 1990s, young people successfully transit from school to work in Japanese society. Since the late 1990s, however, there was an increase in the number of young part-time workers ("*freeters*"), unemployed, and jobless (NEET: Not in Employment, Education or Training).

Japanese corporations, particularly big companies, only hire new graduates. Major corporations most often hire, from among college/high school seniors, the required number of employees as determined by a review of their outlook for the following fiscal year. The hiring is based on the potential ability of the applicants, and job rotation and human resource investment are used to train the new employees. Mid-career recruiting is rare in large companies (Tanaka 1980). Thus students usually begin job search before graduation. There is no interval between school and work in Japan, people's career depend on getting regular job when leaving school.

Issues deriving from failure to get regular job are easily found in economic context as proven by the income disparity between different employment types as displayed in Table 1.

The hourly income gap between these groups grows larger as age increases. The annual number of working days for *freeters* and temporary workers exceeds 200 days per year, and the average number of hours worked per week is relatively less than that of regular employees. Nonetheless, this average exceeds 40 hours during their early 30s, indicating that they work as much as regular employees without overtime. However, their annual incomes, as well as their hourly pay, are lower than those of regular employees. Using an indicator in which the hourly income of regular employees is set at 100, estimating the

* This paper is a revision of *The Situation of Transitions from School to Work and Related Support Systems in Japan*, which was submitted to the JILPT International Workshop.

Table 1. Income disparities among different employment types (status)

	Employment Type (Status)	Work Days Per Year (Unit: Days) ②	Average Work Hours Per Week (Unit: Hours) ②	Annual Income (Unit: 10,000 yen) ②	Hourly Income (Unit: yen) ③	Difference from Regular Employee Income ④
Male	15-19 Years Old Freeters	201.2	36.9	120.2	664.4	80
	Temporary Employees	219.8	43.4	177.2	830.6	100
	Regular Employees	229.6	47.2	197.4	833.2	100
	20-24 Years Old Freeters	208.5	38.3	147.6	780.3	73
	Temporary Employees	221.6	43.8	210.9	979.6	91
	Regular Employees	232.9	47.7	256.2	1072.4	100
	25-29 Years Old Freeters	209.0	39.1	166.7	850.2	62
	Temporary Employees	223.8	44.8	253.4	1134.0	83
	Regular Employees	233.9	48.4	332.4	1367.0	100
	30-34 Years Old Freeters	212.1	40.4	178.1	903.6	53
Female	Temporary Employees	225.0	45.5	297.9	1300.1	77
	Regular Employees	234.2	48.7	415.4	1694.3	100
	15-19 Years Old Freeters	197.5	32.4	106.0	660.1	85
	Temporary Employees	217.5	40.8	141.9	694.6	89
	Regular Employees	230.1	44.7	173.5	778.5	100
	20-24 Years Old Freeters	207.6	35.3	126.4	726.4	72
	Temporary Employees	220.1	40.4	178.9	886.9	87
	Regular Employees	231.3	44.8	227.9	1015.7	100
	25-29 Years Old Freeters	209.1	35.0	135.1	783.8	63
	Temporary Employees	217.2	39.2	199.5	1015.1	82
30-34 Years Old Freeters	Regular Employees	231.9	44.1	275.9	1238.7	100
	Temporary Employees	208.9	34.1	131.9	798.0	55
	Temporary Employees	212.5	37.4	196.9	1054.5	73
	Regular Employees	231.0	43.2	315.0	1445.3	100

Note: ① The survey was conducted on those working 200 days or more or 199 days or less, and claiming to work "regularly in general."

② These figures were obtained by calculating the arithmetic average when the median of the category data (lowest value in largest category) was made the case value.

③ These figures were determined by dividing "Annual Income" by the product of "Work Hours Per Week" multiplied by 52 weeks.

④ The per hour income for freeters and temporary workers were converted to a scale in which the per hour income of regular employees was set at 100.

Source: JILPT (2006).

disparity between *freeter* and regular employee income reveals that the income gap between *freeters* and regular employees grows larger as age increases; it is not significant among teenagers, but it increases among older age groups.

Annual income and employment type correlate closely with family marriage. Among male employees, higher annual salaries are associated with a rising percentage of married employees, and the percentage of married *freeters* is lower than that of regular employees within the same age group (JILPT 2004). Non-regular employee are characterized by limited opportunities for career-related skill development and fewer career prospects. Furthermore, the social network for *freeters* is homogeneous and limited compared to that of regular employees (JILPT 2006).

Of course, being a regular employee can be an excessive burden on one's life, as evinced by in the long work hours. Nonetheless, failure to secure full-time employment is a definitive factor in the formation of difficulties affecting various aspects of one's life in Japan.

This paper examines how young people's transitions to work have changed amidst this social context. Section 2 provides an outline of the education system and the status of transitions in Japan. Section 3 discusses the abandonment of unstable employment. Section 4 summarizes support systems for the transitions witnessed in recent years and Section 5 provides our conclusion.

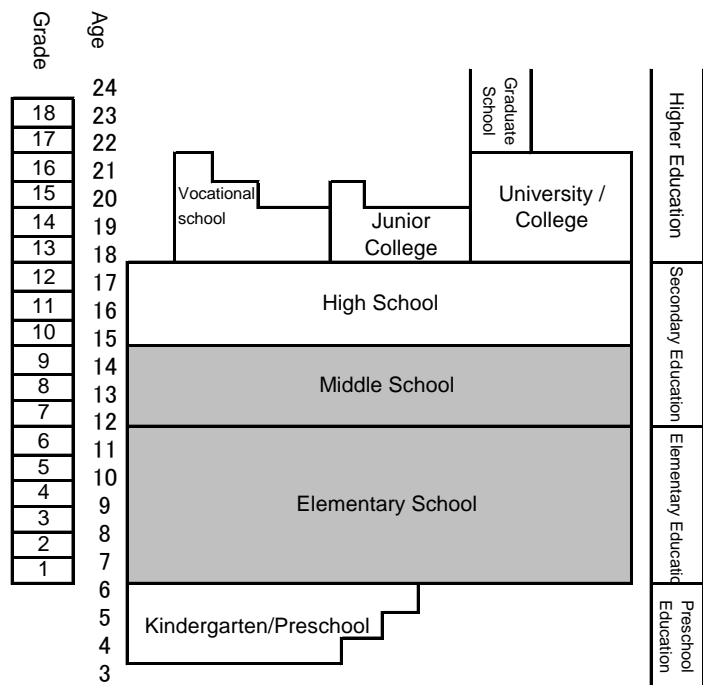
2. Overview of Education System and Transitions

(1) Education System

Figure 1 shows the education system that most Japanese youth experience. Compulsory education lasts for nine years; six years in elementary school and three years in middle school. The future of Japanese youngsters is determined at the age of 15 by high-school entrance exams.

The Japanese education system is single-track, but a young person's future and social status largely depend on the high school to which they gain admittance (Iwaki and Mimizuka, 1981). High schools are ranked in a hierarchy according to the number of students sent to elite universities. While high school is not compulsory, the percentage of students attending high school is more than 96 %, and the drop-out rate is as low as two to three percent. Because research and support systems are still lacking, the true picture of high-school drop-outs is not clear. 70 % of junior high school graduates beginning full-time employment will leave their job within three years by voluntary reason. As there is no further

Figure 1. Japanese education system (partially abbreviated)



Note: This data is based on the School Basic Survey by the Ministry of Education, Culture, Sports, Science and Technology. The author made a partial revision to the original data.

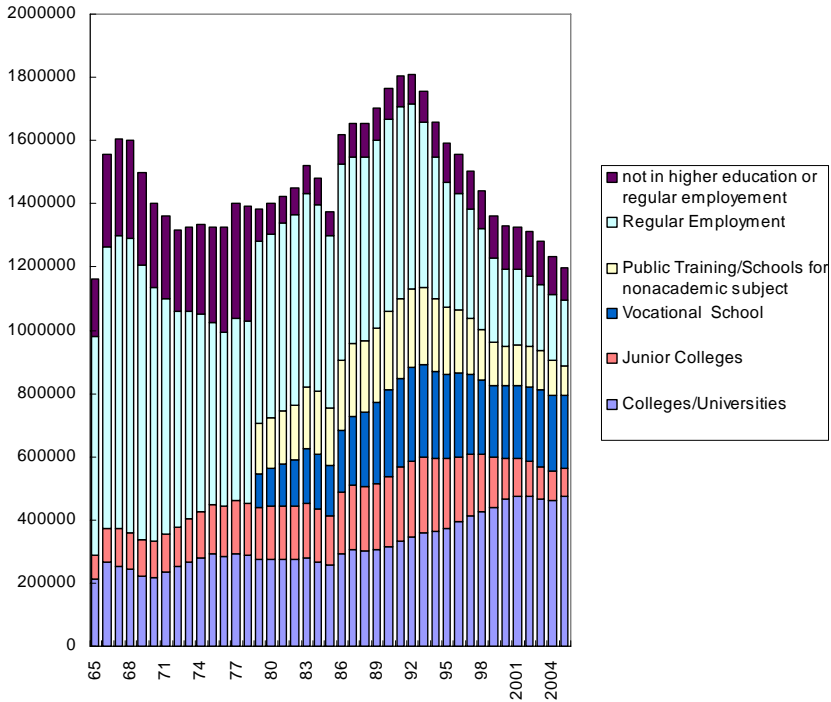
extensive research regarding the career of this population either, this paper will focus mainly on those with a high school diploma.

(2) Transitions from High School to Work

Japanese high school students' school-to-work transitions changed dramatically in the 1990s (Figure 2). The changes can be summarized by the following three points.

The first change is marked by an increase in the percentage of those attending a university/college/junior college/vocational technical school. Presently, 70 % or more of high school graduates pursue higher education.

The percentage of high school graduates attending university, college, or junior college was around 30 % in the mid 1970s to 1980s. Increases appeared in the 1990s and the percentage climbed to approximately 50 % at present.

Figure 2. Transition of high school graduates

Source: School Basic Survey (For Multiple Years).

Note: Before 1980, those who went to public training/miscellaneous schools and technical vocational school special programs were included in jobless and others.

Universities in Japan number more than 700, and most of these are private institutions.

Vocational school is another option for high school graduates. Vocational school is a private school offering a practical education within two to four academic years. Less public support and control is provided for this type of school, thus it is often cited as a “no support, no control” school. The number of such schools expanded in the 1980s when attending college was difficult, and they became popular in the 1990s’ recession since they provided an easier means to obtain employment. Though it has become less difficult to go to college and the number of students attending vocational schools has decreased, the total percentage of high school graduates going to these schools still hovers

20 % or less.

The second change is represented by a dramatic decline in the employment rate of high-school graduates. This rate was 35 % in the 1990s, but is currently less than 20 %. The employers tend to be smaller companies and working condition will be worse.

The third change is evinced by an increase of those not in higher education or regular employment. In the past, high school students decided their career/education path before graduation. Currently, however, the number of high school graduates (mainly in urban areas) choosing neither to study nor work has risen to ten percent.

On the other hand, public training schools are primarily provided by polytechnic schools (established by prefectural and city governments) and polytechnic colleges (established by the Employment and Human Resources Development Organization of Japan). The number of graduates is only 30 thousand. Schools for nonacademic is private schools without certification from the Ministry of Education, Culture, Sports, Science and Technology, presumably account for the majority. Therefore, public vocational training for young people in Japan is extremely limited.

Changes in the transitions of Japanese high school graduates were caused by various factors, but the main reasons were decline in the young labor market, changes in school placement service for high school students, and changes in high-school student culture.

a. Decline in the Young Labor Market

In the 1990s, Japan experienced not only a recession but also corporate personnel management make the best use of non-regular employees. According to the Annual Report on the Labour Economy, the percentage of non-regular employees in the 15-24 age group (only male, excluding students) was 9.2 % in 1995, increased to 19.3 % in 2000 and then to 28.5 % in 2005. In the 25-34 age group, the percentage increased from 2.9 % to 5.6 % and then to 13.2 %, respectively (Ministry of Health, Labour and Welfare 2006).

Non-regular workers did not increase in all of the younger population. Let us first examine *freeters*, which are part-time employees,¹ using the Employment

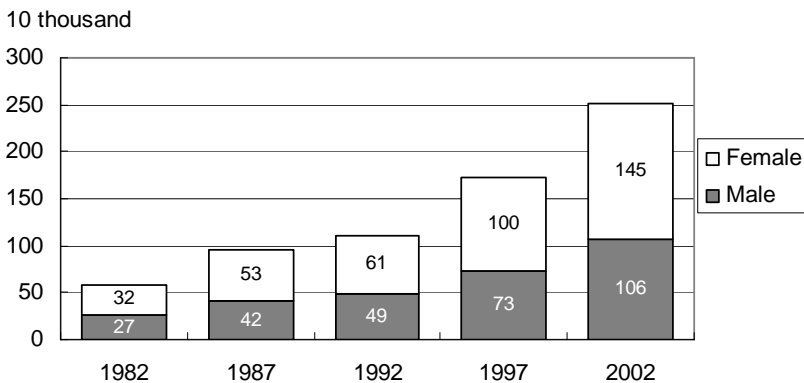
¹ *Freeters* here refers to 15-34 year olds that are not students. In the case of women, they must also be unmarried. Furthermore, they must either be a) working as employees

Status Survey.² The word “*freeters*” is an abbreviated form of “free *albeit* employees.” In Japanese, “*albeit* employees” refers to young part-time employees. The term *freeters* originally was used as a general reference to those young people choosing to follow their dreams and work irregularly during the “bubble” economy, but it now refers generally to those young people working as part-time employees.

Figure 3 illustrates the increase of *freeters* (now employed and want to be employed as part-timers) over time. The number of *freeters* was approximately 590 thousand in 1982, and this figure increased to 2.51 million in 2002. Currently, 2.25 million, or 90 % of them are employed *freeters*.

The percentage of male *freeters* in the population increased from 2.4 % in 1982 to 9.3 % in 2002, and female *freeters* from 7.3 % to 21.9 % in the same time period (Figure 4 and 5).

Figure 3. Number of Freeters



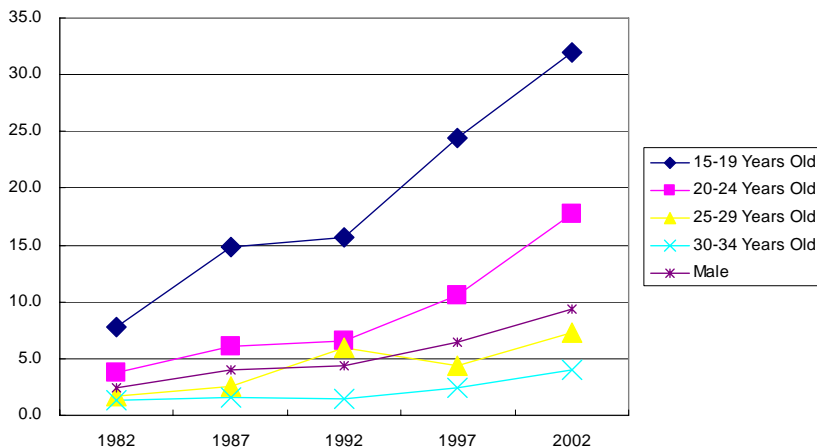
Source: Ministry of Internal and Communications, Employment Status Survey.

Note: 2007 is the next survey year.

called part-time workers or “*albeit* workers,” or b) seeking a job as part-time, *albeit*, or temporary workers but not attending school or helping with housework. Population parameters for calculating the *freeter* percentage is limited to those who are 15-34 years old, non-students, unmarried in the event they are female, and they are a) employees (though not managers), or b) non-employed but seeking a job with income.

² The Employment Status Survey is conducted every 5 years. The latest survey was conducted in 2002, and the data is rather old for examination in 2006. Nonetheless, this survey is a large scale study with abundant information on workers across Japan, thus we will use this data in our discussion.

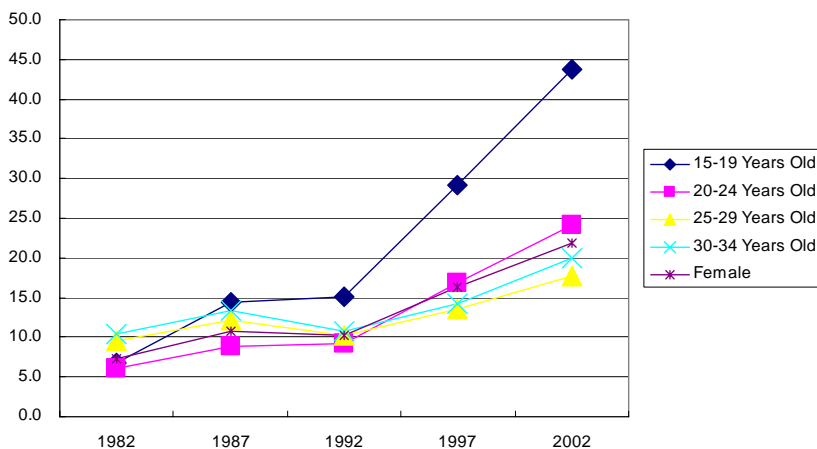
Figure 4. Percentages of male *Freeters* across different age groups



Source: Ministry of Internal and Communications, Employment Status Survey.

Note: 2007 is the next survey year.

Figure 5. Percentages of female *Freeters* across different age groups



Source: Ministry of Internal and Communications, Employment Status Survey.

Note: 2007 is the next survey year.

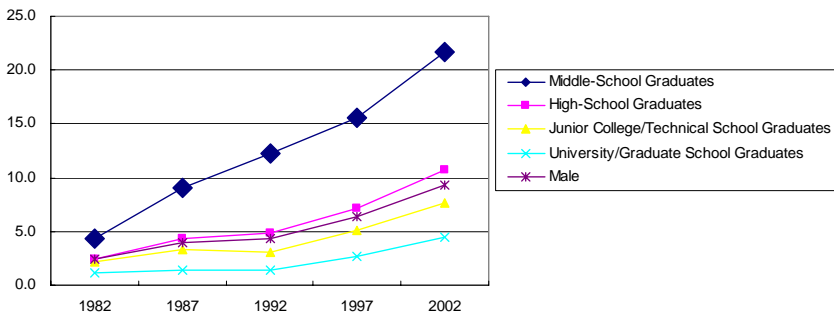
The above figures show that an increase in the percentage of *freeters* is remarkable in those in their teens compared to other age groups.

As for the percentage of *freeters* from different academic backgrounds (Figure 6 and 7), middle school graduates (including high-school drop-outs)

claim the highest percentage of *freeters*, while those with college or graduate level educations account for a lower percentage. In recent years, while the overall percentage of *freeters* has grown, the increase in the latter is not as remarkable as in the former; the gap between these groups is growing larger.

In short, during the 1990s, those who are young and with less education, such as high school graduates, tended to encounter more of the aforementioned issues. As the economy becomes more knowledge-driven, job demand for the less educated declines. This is observable not only in Japan, but in other countries

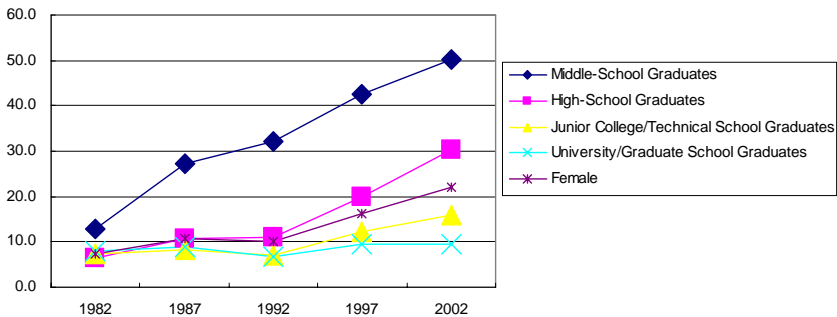
Figure 6. Percentages of male *Freeters* across different academic backgrounds



Source: Ministry of Internal and Communications, Employment Status Survey.

Note: 2007 is the next survey year.

Figure 7. Percentages of female *Freeters* across different academic backgrounds



Source: Ministry of Internal and Communications, Employment Status Survey.

Note: 2007 is the next survey year.

as well. In Japan, however, this is not the only reason why transitions have become difficult. Another factor driving this phenomenon is a change in high school placement service, and changes in high-school student culture.

b. Changes in High School Placement Service and Changes in High-school Student Culture.

High school placement service and high-school student culture. is cited as a major factor of what used to make smooth transitions from school to work possible for high school graduates. The employment system for high school graduates in Japan is very unique and there are no other countries possessing a similar system; most Japanese high school students secure employment by means of a school recommendation.

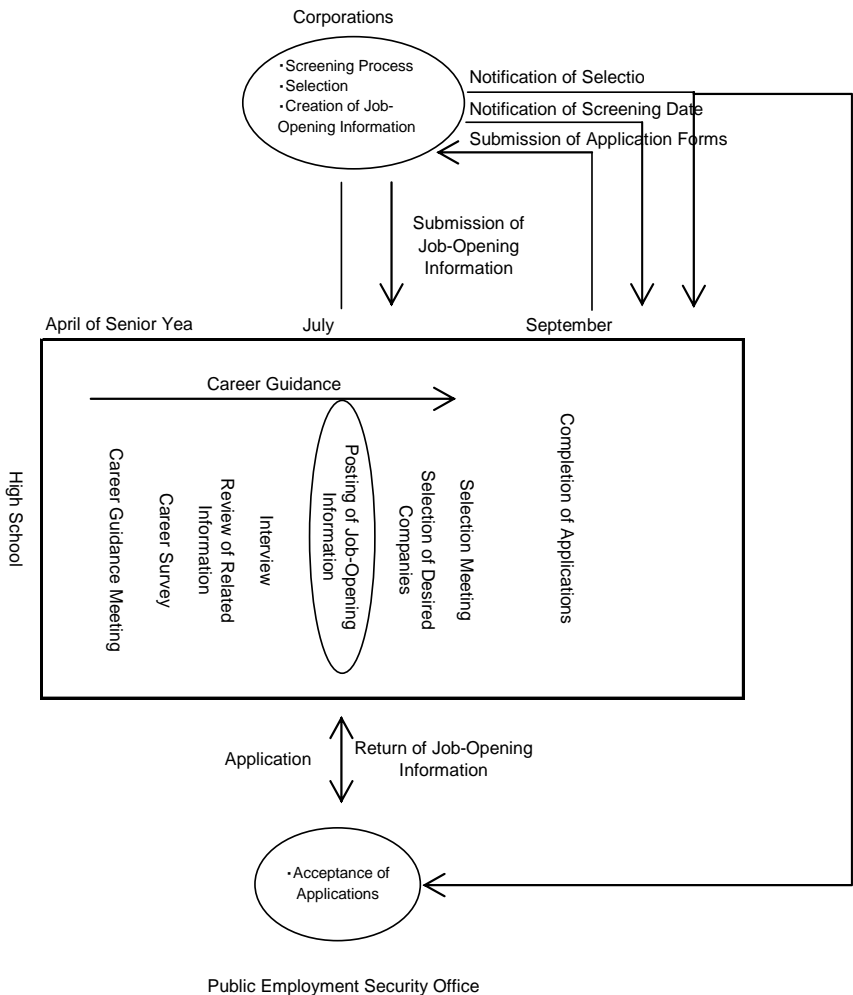
Figure 8 reflects the employment system of Japanese high school students. Employment Security Office first verifies the content of corporation offerings for high school students, and asks high schools that firms offer. Corporations' standards for choosing high schools are based on their past record of employment of students from those schools. Therefore, new high schools or non-technical schools with a lower percentage of employment have fewer job offerings.

Students choose only one company from job offers. If many students applying, their school placement service chooses students based on their grades and the employers accept them accordingly. Thus, high school teachers provide not only career guidance, but also job placement, acting as a liaison between education and employment.

This cooperative relationship between corporations and high schools is called *Jisseki-Kankei* and has afforded high school students with a smooth transition from school to work in Japan.

During the recession in the late 1990s, corporations abandoned the *Jisseki-Kankei* with high schools, and the number of Job Offer to applicant dramatically declined (Figure 9). Student culture also changed, and fewer students participated in job hunting for regular employment. Since high school placement service could not provide sufficient job openings for students, it became difficult to balance job placement and career guidance, thus losing its function. In 2006, due to the improvement in the economy and the retirement of baby boomers, employment for high-school students has drastically improved, but this is expected to last only temporarily.

Figure 8. Employment system for Japanese high school students

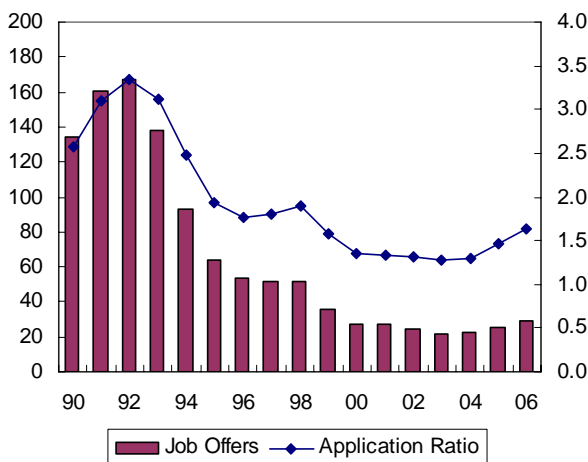


Source: The Japan Institute of Labour (1998).

On the other hand, while admission of higher education has become easier academically due to a decline in the population of 18 year-olds, one still needs to pay one million yen for application fee and first-year tuition. Scholarships are not sufficient to cover all costs, though the scholarship system is improving. Therefore, the number of high school graduates unable to go to higher education or become fully employed that end up “straying” in the labor market as

Figure 9. Job offers and application ratio for high school students

Unit: 10 thousand people



Source: Labor Market for New Graduates By the Ministry of Health, Labour and Welfare.

freeters or the unemployed (Mimizuka 2006).

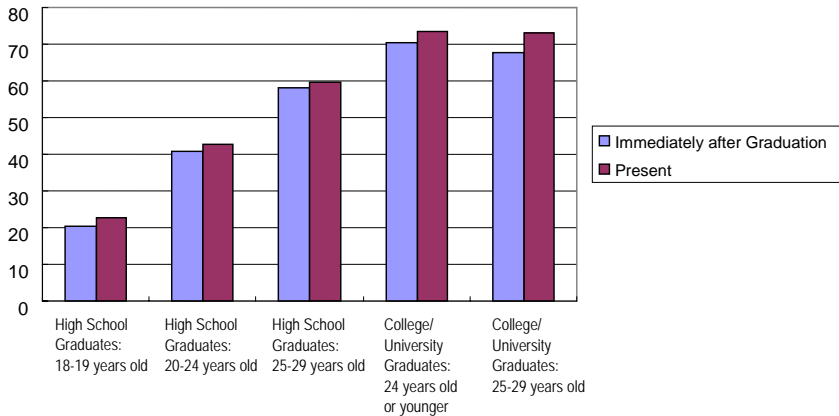
3. Abandonment of Unstable Employment

Let us examine whether young people can transit from *freeters* to regular employees. Our analysis is based on The Second Survey of Youth Work Styles by the JILPT in February 2006, a survey conducted upon two thousand young people in Tokyo Prefecture based on an area sampling.

First, the percentage of regular employees at the time of graduation and that of the survey were compared (Figure 10, female data is abbreviated). Due to space limitations in this paper, only the data for males will be examined and analysis of female data will be discussed in a separate paper. Hereafter, all of the tables and figures in this section will be cited from JILPT 2006.

Figure 10 shows no remarkable change in the percentage of regular employees between graduation and the present. There are a higher percentage of college/university graduates becoming fully employed immediately after graduation, and this trend continues to the present. High school graduates, on the other hand, tend not to secure full-time employment after graduation, and this trend continued till the time of the survey. Situations immediately after the

**Figure 10. Percentage of regular male employees at graduation and present
(across different genders, age, and academic backgrounds)**



Source: JILPT (2006).

graduation still remain the same.

In order to examine in more detail, we added a question to gather data on whether those in non-regular employment became regular employees.³ Thus transition types for males in their late 20s were developed (Table 2).⁴ Data from the survey in 2001 is shown for comparison.⁵

In the high-school graduates group, there is little change in Only Regular Employment (no change job), which refers to those who became regular

³ Non-regular employment in this paper refers to non-fulltime employment (non-fulltime employees including civil servants).

⁴ Career types are determined based on whether respondents became regular employees (including civil servants) immediately after graduation, as well as their current form of employment. *Albeit*, part-time, contracted, and temporary employment are categorized as non-regular employment, and non-regular employment including self-employment and family business is defined as Other Forms of Employment. Non-regular Employment refers to those failing to secure regular employment at the time of graduation and currently doing a job categorized as non-regular employment. This includes those who temporarily worked as regular employees (56 respondents, 8 %) at one time.

⁵ The 2001 survey was conducted on one thousand regular employees and one thousand *freeters*. The data was weighted back according to the Census and the Employment Status Survey. Therefore the percentage of regular employees may be higher than the actual number.

Table 2. Types of transitions of 25-29 years old male

	High School Graduates		College/University Graduates	
	2001	2006	2001	2006
Only Regular Employment (no change job)	21	21.6	61	↓ 47.6
Only Regular Employment (change job)	17	↓ 11.5	12	10.1
Regular to Non-regular Employment	3	8.9	2	4.8
Regular and Non-Regular Employment	13	9.5	6	3.7
Only Non-regular Employment	9	↑ 14.9	7	↑ 13.2
Non-Regular Employment to Regular Employment	24	↓ 16.9	8	11.6
Self-employment/Family Business	11	12.8	3	6.3
Unemployed/NEET	1	3.4	0	2.6
Others	1	0.7	1	0.0
Total	100	100.0	100	100.0
N	—	179	—	339

Note: The 2001 data is weighted back; actual numbers and fractional data are not presented.

Source: JILPT (2006).

employees immediately following graduation, have not changed their jobs since then, and are still employed at the time of the survey.

A dramatic decline was observed in the following types: Only Regular Employment (change Job) directly after graduation and later accepted regular employment elsewhere to present; Non-regular Employment to Regular Employment, or those who worked in other forms of employment after graduation but had transitioned to regular employment at the time of the survey. There was a substantial increase in Only Non-regular Employment, or those who from the point of graduation to the time of the survey were in non-regular employment, unemployed, jobless, self-employed, or working in a family business. In the college graduates group, the percentage of Only Regular Employment (no job change) dropped dramatically, while that of Only Non-regular Employment increased, though the expansion is not as remarkable as it was among the high-school graduates group.

Figure 10 and Table 2 demonstrate that transition patterns are determined at the time of graduation, and the ratio of movement between regular and non-regular employment is small. Not only did the percentage of those who were solely in non-regular employment increased, but also opportunities for high school graduates to become regular employees decreased, if they did not secure regular employment right after graduation.

Let us now examine forms of employment at the time of graduation to see if opportunities for becoming regular employees are limited by social stratification. We will use the parents' academic background and financial affluence as indicators for social stratification.⁶

In a survey conducted in 2001, there was a weak relationship between the respondents' form of employment and each family's financial affluence, though this was not confirmed in the overall data. In the younger group (18-19 years old) with a lower academic background, there was a relationship between the respondents' form of employment and the parents' academic background, the father's job, and the family's financial affluence. This means that young people with a lower academic background were affected more decidedly by social stratification (Mimizuka 2001).

⁶ There is some research regarding *freeter* percentages and those abandoning the *freeter* system. Taroumaru (2006) recently conducted a study on young people in the *Kansai* region. The study points to an influence by social stratification on the *freeter* ratio or remaining a *freeter* when the father's job is factored as a stratification indicator.

In a survey conducted in 2006, influence of social stratification was not observed (Kosugi 2006), but there was a weak relationship between the respondents' form of employment and the family's financial affluence. In the younger population, however, the higher the parents' academic background, the lower the percentage of regular employees became, showing no negative influence from social stratification.⁷ This indicates that the academic background of the respondents themselves has a clear influence on their form of employment.

Based on a survey conducted by the Cabinet Office in 2005, Iwaki (2006) stated that labor markets for regular and non-regular employees are well separated with a very narrow path running between them. The author also discussed that those who will remain in a stable career (i.e. have only worked as regular employees, including at the time of the survey) are already selected before they enter the labor market, indicating that being in a stable career is more readily influenced by factors related to the worker's academic background than factors of social stratification.

If we are to add our findings to this, this trend of "selection" intensified during 2001 to 2006, and workers' academic background became more influential than social stratification. This does not mean that only academic background influences transition. Social stratification is translated into the workers' academic background, determining their forms of employment (Kosugi 2006). In other words, the parents' finances are becoming an effective resource for transition only when it is transformed as the workers' academic background.

Let us look at *freeters*, who account for the majority of non-regular employment.⁸ The percentage of those with experience as a *freeter* (those who have worked as a part-time or *albeit* worker excluding the period in which they were a student) was approximately 35 % in 2001 and increased to 50 % in 2006, particularly in the group with a high school diploma or less (related tables and figures are not shown here).

Let us examine the relationship between experience as a *freeter* and social stratification (Table 3). In those with a high school education diploma or less, the experience of being a *freeter* is high when the father's academic background

⁷ The father's job is not examined since it was not included as a survey item.

⁸ Non-regular employees other than *freeters*, such as contracted and temporary workers, should be discussed separately.

is low.

Among those possessing a certificate, diploma, or academic degree of higher education, when the father's academic background is high, the *freeter* percentage is higher. In the former group, when the mothers have a certificate, diploma, or academic degree of higher education, the *freeter* ratio is high. In the latter group, when the mothers have a high school diploma or less, the ratio is also high. On the other hand, regardless of the respondents' academic background, if their family is not wealthy, the *freeter* ratio becomes high, indicating a relationship to social stratification. Either way, it is clear that the workers' academic background has a significant effect.

The percentage of trying to become a regular employee from Freeters (hereafter called quitting *freeters*) (Table 4) decreased in 2006 regardless of age group.⁹ As for the respondents' academic background, the percentage of quitting *freeters* was high among those with high school diplomas or lower in the 2001 survey, while in the 2006 survey, the percentage was high among those with certificates, diplomas, or academic degrees of higher education in the early 20s group, and also among those with high school diplomas or lower in the late 20s group. This indicates that there is no consistent trend for academic background.

Next, the percentage of those successfully securing regular employment was examined. Though the sample was small, there were no differences resulting from varying academic backgrounds among those in their early 20s. Among those in their late 20s, those with a high school diploma or lower displayed a higher percentage of success in securing regular employment than those with a certificate, diploma, or academic degree of higher education. In short, becoming a *freeter* largely depends on one's academic background; however, once one has become a *freeter*, the effects resulting from low academic background no longer impact on securing regular employment.¹⁰ This is probably due to a unique characteristic of the Japanese labor market in which

⁹ The comments of the respondents show that many wish to become regular employees, in many cases, at the company in which they are employed as *albeit* workers. Such desires, which are not put into action, have been discussed in various studies, but these workers tend not to take any action. Refer to JILPT (2006).

¹⁰ This can be confirmed by logistic regression analysis as well, though charts are abbreviated.

Table 3. Experience of being a *Freeter* (male)

Academic Background of the Respondents	Social Stratification Variable	Percentage of Freeters	N
High School Diploma or Lower	Father's Academic Background: High School Diploma or Lower	59.2	265
	Father's Academic Background: Certificate, diploma, or academic degree of higher education	67.6	136
Certificate, diploma, or academic degree of higher education	Father's Academic Background: High School Diploma or Lower	37.6	197
	Father's Academic Background: Certificate, diploma, or academic degree of higher education	33.8	314
High School Diploma or Lower	Mother's Academic Background: High School Diploma or Lower	60.0	285
	Mother's Academic Background: Certificate, diploma, or academic degree of higher education	66.9	124
Certificate, diploma, or academic degree of higher education	Mother's Academic Background: High School Diploma or Lower	38.8	255
	Mother's Academic Background: Certificate, diploma, or academic degree of higher education	31.1	254
High School Diploma or Lower	Wealthy	64.8	169
	Not Wealthy	61.5	227
Certificate, diploma, or academic degree of higher education	Wealthy	49.0	293
	Not Wealthy	30.0	196

Source: JILPT (2006).

Note: Data for "Not applicable/Unknown" is not shown.

the path to stable employment is limited to the time of graduation.¹¹

Table 4. Percentage of males that have sought regular employment

		2001	2006	N
20-24 Years Old	High School Diploma or Lower	70	43.4	122
	Certificate, diploma, or academic degree of higher education	65	49.4	85
	Total	68	45.9	207
25-29 Years Old	High School Diploma or Lower	88	70.7	92
	Certificate, diploma, or academic degree of higher education	83	65.3	121
	Total	85	67.3	213

Source: JILPT (2006).

Note: The 2001 data is weighted back; N and fractional data are not presented.

Table 5. Percentage of males successfully finding regular employment

		2001	2006	N
20-24 Years Old	High School Diploma or Lower	79	50.9	53
	Certificate, diploma, or academic degree of higher education	59	50.0	42
	Total	71	50.5	95
25-29 Years Old	High School Diploma or Lower	74	72.3	65
	Certificate, diploma, or academic degree of higher education	79	65.8	79
	Total	76	68.8	144

Source: JILPT (2006).

Note: The 2001 data is weighted back; N and fractional data are not presented.

¹¹ Takeuchi (1991) pointed out that academic background has an effect only in initial selection through analysis of promotion within an organization. Hamanaka and Kariya (2000) state that academic background affects not only initial employment but also job changing.

4. Changes in Japanese Selection Pattern

Let us extend our discussion to the selection and distribution system in Japanese society.

It has been pointed out that the Japanese economic success largely depended on the high quality of those with lower academic background. When compared with England and the U.S., where the level of aspiration varies by different class or race, the Japanese selection system has the characteristic of having people warm-up their aspirations to the mainstream of society and having them participate in competition. A system which included non-elites in competition and motivated them functioned well in post-war Japan (Kariya 1991).

The Japanese selection pattern is one of the most important factors of Japanese economic success. Rosenbaum, through empirical analysis, compared selections in the US to a tournament. A loser often does not get the chance to challenge the selections again. On the other hand, Japan is practicing a reshuffling type of selection norm, where tournaments enable a return-match, whether one has lost or won in the past (Takeuchi 1995). Thus, Japan used to be a society with a selection pattern in which non-elite aspiration was hard to be cooled-out.

As we discussed in the previous section, however, young people who did not become regular employees after leaving school now tend to stay in the labor market as *freeters*. This indicates that the system which enabled return-matches no longer function.

In other words, having those who once “lost” or did not become a regular employee challenge return matches, or enable them to win return matches is essential in order to maintain the energy of the Japanese society and the quality of human resources. Japanese society has begun to exclude them, who have mostly lower academic background, from the mainstream.

5. Current Support Systems and Related Issues

Because Japanese society ensured smooth transitions from school to work for its youth, support for these transitions was once limited to the time of graduation. Currently, however, transition issues have called for social attention, and a plan for youth independence and challenge was temporarily established in 2004. The plan includes three main approaches: the Job Café, the Japanese Dual System, and the *Wakamono Jiritsu Juku* (school of youth independence).

Job Café is a one-stop service center which provides employment related

This type of career guidance, however, could no longer function effectively after the recession in the late 1990s. Therefore, high school graduates not pursuing higher education or securing employment enter the job market in an unstable state.

This group will remain in unstable state since full-time stable employment is available only immediately after graduation in Japan. Due to the dramatic differences between full-time and part-time employment, unstable part-time employment makes it difficult for workers to be independent or to have a family, with limited opportunities for career-related skill and career development.

Until recently, the smooth transition from school to work made the transition from adolescence to adulthood easy as well. Since transitions are now more difficult, this might affect not only the young, but also the entire Japanese society.

We cannot yet say that everyone believes in the necessity of supporting young people's transitions in Japan. Support has only just begun, not only at a policy level, but also at the research level. Yet, it is imperative that we continue to provide such support and conduct more research to provide empirical data.

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services to young people in order to help foster skills fulfilling local needs and to promote job-seekers' employment. There are forty-three Job Cafes in Japan. However, young people with a higher level of education tend to use Job Café (JILPT 2005). This is caused by disparities in understanding how to access information and services (Iwata 2006), and by the fact that public support, in particular, is often exclusively focused on those with a higher education. Thus, academic background affects not only the opportunity to become a regular employee, but also accessibility to support systems.

The Japanese Dual System is an training program modeled from a German program. It promotes learning while working; learning technical knowledge at school while doing OJT in corporations. The number of participants in 2004 was approximately 30 thousand people. The future plan and goal is to spread and establish a practical training system as a third option to employment or school. While about half of the participants achieve stable employment, it is difficult to obtain corporate assistance, and the cost to the participants is roughly a few hundred thousand yen.

Wakamono Jiritsu Juku is a three month camp where the participants experience various aspects of life and labor. They are located in 20 different locations in Japan and about 20 participants can join at one time. Current issues for this program include cost (about 300 thousand yen), lack of young participants, and the camps' short cycle.

On the other hand, student support taking the forms of career education or work experience have grown more common, but the effects are still unknown.

In short, though there are more support systems for young people facing unstable situations like employment as a *freeter*, the number of such systems is still small and the cost is high.

6. Conclusion

The diversification in transitions, beginning in the latter half of the 1990s and continuing till today, is mainly observed among those lacking education beyond a high school diploma. While more than 70 % of young people in Japan have a high school education, the buildup of problems for this group continues.

Young people's transition from school to work used to be smooth, since high school placement service, providing both counseling and job placement from an abundance of job offers, made such transitions for the students successful.

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JILPT Research Activities

Publication of Research Results of the First Mid-term Plan

The First Mid-term Plan by the Japan Institute for Labour Policy and Training (JILPT) was completed at the end of March, 2007, three and a half years after its initiation in October, 2003. As a summary of the project research conducted during this period, *Project Research Series* (in Japanese) as listed below, was published in June, in addition to *Research Reports*. A summary of the series is scheduled to be published in English as well.

- No.1 *New Trends in Employment Creation in Regions: Realities of Regions through Statistical Analysis and Survey*
- No.2 *Current Situation and its Direction of System Determining Labor Conditions: Improving and Strengthening the System for Voicing Group Opinion*
- No.3 *Future Employment Strategy*
- No.4 *Current Situation and Challenges of Diversified Work Styles*
- No.5 *Japanese Corporations and Employment*
- No.6 *Improvement in Career Skill Development and Education and Training Infrastructure in Japan*
- No.7 *Work and Life*
- No.8 *Support for Reemployment for the Mid-career Age Group*

Research Topics of the Second Mid-term Plan

The JILPT initiated the Second Mid-term Plan for the next five years, beginning April, 2007 and ending on March, 2012. The core of this plan is seven project researches described below, which were established by the results of research conducted in the First Mid-term Plan.

1. Study and Research of a Society in Which All Demographics Could Participate in an Age of Population Decline
 - This research focuses on the development of the environment in which the elderly, women, and youth can maximize their morale and ability in order to control the declining labor population and maintain and improve the vitality of the economic society.

- In fiscal 2007, we will examine measures to promote employment of the elderly by investigating and analyzing the current situation of elderly employment, and by comparing it to that of other countries. A general research framework will be also developed.
2. Research on Factors Changing the Regional Structure for Employment/Unemployment
 - This multifaceted research analyzes the success and failure factors of local employment measures on the municipal level; develops and provides local economic indicators and their analysis methods, and examines support systems for imaginative creation of employment in the regions.
 - In fiscal 2007, we will reexamine measures for employment creation in regions on the municipal level, and analyze their success and failure factors.
 3. Research on the Improvement of the Quality of Life in Diversified Work Styles
 - This research examines support measures, such as decreasing long labor hours, promotion of telecommuting such as working from home, and using annual paid vacations, in order to improve the quality of life for workers of diversified work styles.
 - In fiscal 2007, we will investigate and analyze the reality of telecommuting such as working from home.
 4. Study and Research of the Development of Social Systems and Employment Environments for Work - Life Balance
 - This research examines the conditions for both men and women to fulfill their careers through balance of family and community life from a long-term career perspective.
 - In fiscal 2007, we will survey and analyze the current situation of continued employment during pregnancy and child-rearing.
 5. Comprehensive Research for building Stable Labor and Management Relations in Individualized Labor Relations
 - With ever more individualized labor and management relations, this research promotes studies of system solutions for labor and management conflicts inside and outside of corporations, and on efforts for improving worker morale.
 - In fiscal 2007, we will gain an understanding of conflict solution

systems outside of corporations and survey and analyze new trends in human resources and labor management.

6. Research on Skill Development and Career Support in the New Economic Society

- This research examines support for skill and career development for employees at medium and small sized companies and non-regular employees who tend to receive less career development in this changing economic society.
- In fiscal 2007, we will identify the challenges of skill development for small and medium sized companies and non-regular employees and will build a framework for the study.

7. Research and Development on the Strengthening Supply and Demand Control Function and Career Support Function in the Labor Market

- In order to effectively connect needs of individuals and industrial society in the labor market, this study involves research and development on the fulfillment of services for those who seek jobs or employees, improvement of workers' professional skills, and the development and fulfillment of comprehensive career information providing system and related tools including appropriate labor market information.
- In fiscal 2007, we will study, clarify and analyze the actual situation of current issues such as matching and career guidance; we will also examine necessary research and development of issues requiring improvement for policy implementation.

International Workshop

The JILPT held a research workshop under the theme “Work-Life Balance: Issues and Policies in Korea and Japan” in cooperation with the Korea Labor Institute (KLI) on May 25, 2007 in Jeju, Korea. The submitted reports are on the JILPT website.

Research Report

The findings of research activities undertaken by JILPT are compiled into Research Reports (in Japanese). Below is a list of the reports published from December 2006 to May 2007. The complete text in Japanese of these reports can be accessed from the JILPT website. We are

currently working on uploading abstract of the report in English onto the JILPT website as well.

- No.76 *Labor and Management Relation and International Competitiveness of the Automotive Industry: On Manufacturing, Manufacturing Technology, and Research and Development* (December, 2006)
- No.77 *Current Situation and Challenges of Job Classification in Public and Private Sectors* (March, 2007)
- No.78 *College Students and Employment: Discussion of Transition to Career Support and Human Resource Development* (April, 2007)
- No.79 *Effort and Direction of Supporting Youth Employment: Support Model and Expected Support Figure* (April, 2007)
- No.80 *Current Status and Challenges of Education and Training Services* (April, 2007)
- No.81 *Accepting System and Reality of Foreign Workers in Asia* (April, 2007)
- No.82 *A Road to Development of NPO Employment: Discussion of Human Resources, Finance, and Legal Systems* (April, 2007)
- No.83 *Current Status and Challenges of Management of Human Resources and Labor Affairs for Continuing Employment of the Elderly* (June, 2007)
- No.84 *Labor and Employment Policies and Social Security in Germany and France* (April, 2007)
- No.85 *Survey and Research Report on Employment and Life of the Baby-Boomers: Data Analysis of 'Baby-Boomers' Employment and Life Vision Survey'* (April, 2007)
- No.86 *Interim Report of 'Study and Research on the Support of Development of Intra-Corporate Conflict Settlement'* (May, 2007)
- No.87 *Development of Career Readiness for Junior High and High School Students: Analysis of Career Readiness Test Standardization Survey* (May, 2007)

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