Legal Concept of "Employee" in Labor Protective Laws of Japan[1] —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

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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 complied 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, Rosaihosho-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.

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[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 Types[7]

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

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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/

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[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.