

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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