

Japan Labor Review

Volume 6, Number 2, Spring 2009

Special Edition

The Labor Contract Act of 2007 and Other Legislative Developments

Articles

The Enactment of the Labor Contract Act: Its Significance and Future Issues

Ryuichi Yamakawa

A New Departure in the Japanese Minimum Wage Legislation

Hiroya Nakakubo

Balanced Treatment and Bans on Discrimination—Significance and Issues of
the Revised Part-Time Work Act—

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The Amendment of the Employment Measure Act: Japanese Anti-Age
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The Process of Formulating Policy in Labor Matters: Derailment? Or
Transformation?

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Article Based on Research Report

Employment Promotion Programs for Single Mothers in Japan: 2003-2008

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JILPT Research Activities



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NEXT ISSUE (Summer 2009)

The Summer 2009 issue of the Review will be a special edition devoted to **A Reexamination of Japanese Career Systems**

Introduction

The Labor Contract Act of 2007 and Other Legislative Developments

The year 2007 witnessed several developments in Japanese labor legislation, most notable being the enactment of the Labor Contract Act. This Spring 2009 issue includes five articles that cover these developments.

In Japan, the term labor contract (*rodo-keiyaku*) does not mean a collective bargaining agreement; rather, it refers to the individual contract of hire between an employer and employee. It was in fact called an employment contract (*koyo-keiyaku*) under the Civil Code of 1896; however, for some reason the Labor Standards Act and other post-war labor laws chose a different name when they addressed it. These laws left many aspects of the contract untouched, and as such there existed a complicated set of legal rules including basic rules of employment by the Civil Code, provisions of the Labor Standards Act and others modifying the Civil Code rules, and judicially-made special rules on such matters as dismissal, discipline, transfer, work rules, and so forth. Calls for a general law integrating and clarifying the rules on labor contracts have become markedly stronger in recent years, the culmination of this being the 2007 legislation. However, the Labor Contract Act is by no means without criticism. The provisions are limited in scope and hardly ambitious in content (apart from the incorporation of an established but controversial judicial doctrine on the change of work rules). Still, the adoption of the Labor Contract Act itself represented an important step in the history of Japanese labor legislation. In the first article (*The Enactment of the Labor Contract Act: Its Significance and Future Issues*), Yamakawa presents a thoughtful analysis of the Act, including its background, significance, points of interpretation, and future directions.

In addition to the Labor Contract Act, there were also substantial revisions of existing laws carried out in 2007. Firstly, the Minimum Wage Act was totally overhauled; this was the first major revision of the Act in almost forty years. Minimum wages have become the center of attention in recent years, thanks to intensive media coverage of the “working poor”; this revision was a part of efforts to boost the function of the system. Secondly, the so-called Short-Time Work Act, which deals with part-time workers, was strengthened considerably. In addition to obliging employers to adopt a number of new duties for the improved treatment of part-time workers, the revised Act introduced the prohibition of “discrimination” against short-time workers who are indistinguishable in certain aspects from full-time workers. Thirdly, the Employment Measure Act was amended to mandate employers, among others, to provide equal opportunity regardless of a worker’s age at the stage of recruitment and hiring. This is a step forward from the former duty-to-endeavor provision, and together with the above-mentioned provision of the Short-Time Work Act perhaps marks a new era of employment equality in Japan. These laws are explored respectively by Nakakubo (*A New Departure in the Japanese Minimum Wage Legislation*), Morozumi (*Balanced Treatment and Bans on Discrimination—Significance and Issues of the Revised Part-Time Work Act—*), and Sakuraba (*The Amendment of the Employment*

Measure Act: Japanese Anti-Age Discrimination Law).

Lastly, the article by Nakamura (*The Process of Formulating Policy in Labor Matters: Derailment? Or Transformation?*) focuses on the process leading up to such legislative actions. In the past, the contents of Japanese labor laws were essentially decided by the tripartite Labor Policy Council after it engaged in substantial deliberation and compromises. However, the Council was undermined by “regulatory reform” (deregulation) measures, which essentially bypassed it; there are signs of malfunction in the process and doubts have been raised as to legitimacy of the Council itself. The author examines the legislative process of the Labor Contract Act, and through this also offers insight into Japanese labor policies.

For the information of our readers, the issue of working hours was discussed along with labor contracts in the same subcommittee of the Labor Policy Council in 2006. The most controversial subject regarding working hours was whether to introduce a new system of white-collar exemption. The Council reported favorably, but the exemption proposal was met by such a strong criticism in early 2007 that the government dropped it from the bill to amend the Labor Standards Act. The bill, which contained relatively small changes for overtime premiums and annual paid leave, was deliberated in the Diet, in conjunction with the Labor Contract Bill and the Minimum Wage Amendment Bill; however, it was put back to the next session. The bill was finally passed by the Diet in December 2008, to be enforced from April 2010. This will be covered by a future issue of Japan Labor Review.

Hiroya Nakakubo
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The Enactment of the Labor Contract Act: Its Significance and Future Issues

Ryuichi Yamakawa

Keio University

The Labor Contract Act of Japan, enacted in November 28, 2007, and effective from March 1, 2008, sets forth rules on basic rights and obligations in relation to labor contracts. This article examines the significance of this act and future issues that it raises. It begins with a review of the background to its enactment, including the increasing role of individual labor contracts and the rise in number of individual labor disputes, and a summary of events leading up to its enactment. This is followed by an explanation of the significance of the act's enactment. I then proceed to demonstrate how the Labor Contract Act differs in character from other labor legislation, such as the Labor Standards Act, before turning to look at interpretive issues focusing on the provisions on rules of employment. I conclude by identifying issues of future interest, including enhancement of the act's content.

I. Enactment of the Labor Contract Act

1. Background and Need for Enactment¹

(1) Increase in Role of Individual Labor Contracts

One of the most important developments that led to consideration of enactment of the Labor Contract Act was the rise in importance of individual labor contracts against the backdrop of diversifying employment conditions. Whereas the emphasis used to be on establishing working conditions uniformly on the basis of collective labor agreements and rules of employment, factors such as the introduction in recent years of performance-based personnel and wage systems (e.g., annual salary determination systems) and the diversification of forms of employment have reduced the relative importance of uniformly determined working conditions. Instead, the content of agreements and working conditions agreed through individual labor contracts has grown more important. Rules on such individual labor contracts have thus assumed important significance, necessitating the statutory clarification of legal rules regarding labor contracts.

(2) Increase in Individual Labor Disputes and Increasing Importance of Law

Another factor behind the enactment of the Labor Contract Act was the increase in individual labor disputes (“individual disputes”) between individual workers and employers. For example, the statistics on civil cases brought before district courts show that the number

¹ Regarding the background and significance of enactment of the Labor Contract Act, see Takashi Araki, Kazuo Sugeno & Ryuichi Yamakawa, *Shokai Rodo Keiyakuho* [The labor contract act in detail] ch. 1 (Kobundo 2008).

of labor-related cases in Japan in 1991 at the end of the “bubble” period was 1,054 (662 ordinary suits and 392 provisional dispositions). In 2005, this number had risen to 3,082 (2,446 ordinary suits and 636 preliminary injunctions). There was thus an approximately threefold increase in the space of little over a decade.² The number of general labor consultations under the administrative individual labor dispute resolution system established under the Act Regarding the Promotion of the Resolution of Individual Labor Disputes in 2001 far exceeded this number, reaching 997,237 in fiscal 2007 (though this number does also include legislation-related inquiries), and even the number of consultations concerning only civil individual disputes (excluding cases such as those handled by labor standards offices) came to 197,904.³

The first response to the rise in individual disputes was to enhance the resolution system. In addition to the above individual labor dispute resolution system established in 2001 as an administrative solution, a labor tribunal system was established under the Labor Tribunal Act in 2004 to require the courts to hear individual labor cases, propose settlements and render determinations over a maximum of three sessions. With this increase in individual disputes and enhancement of resolution systems, the development of clear and substantive legal rules contributing to the resolution and prevention of individual disputes emerged as the next priority.

This increase in individual disputes and the corresponding response may be regarded as forming part of the increase in the role of law in Japanese society and the economy against the background of the growing emphasis on after-the-fact regulation and compliance. It is also possible to see the demand for clarification of rules on labor contracts as a reflection of the emphasis that has come to be placed on the administration of workplace and employment relations in accordance with legal rules in employment society.

(3) Absence of Legislation

While the Labor Standards Act is obviously one piece of legislation concerning individual labor relations, this act is essentially classified as administrative and criminal law, and contains few provisions concerning the relationship of rights and obligations under labor contracts. Thus it does not specify, for example, under what circumstances dismissals

² See Saiko Saibansho Jimu Sokyoku [Administrative Affairs Bureau, Supreme Court], *Rodo Kankei Minji-Gyosei Jiken no Gaikyo* [Outline of Labor Relations Civil and Administrative Cases for 1991], 44 *Hoso Jiho* (Lawyers Association Journal) 121 (No. 7, 1992) and Saiko Saibansho Jimu Sokyoku [Administrative Affairs Bureau, Supreme Court], *Rodo Kankei Minji-Gyosei Jiken no Gaikyo* [Outline of Labor Relations Civil and Administrative Cases for 2005], 58 *Hoso Jiho* (Lawyers Association Journal) 103 (No. 8, 2006). Subsequently, the Labor Tribunal System entered operation in April 2006, and in 2007, when this system had been in operation for one year, the number of individual labor cases filed before district courts consisted of 2,174 ordinary suits, 387 provisional dispositions, and 1,494 labor tribunal cases.

³ For details of the operation of the individual labor dispute resolution system in fiscal 2007, see <http://www.mhlw.go.jp/houdou/2008/05/h0523-3.html>.

and farming-outs (secondments or temporary external transfers) ordered by employers are lawful, or whether disadvantageous changes can be made to the content of labor contracts through the employer's unilateral revision of rules of employment or work rules. Regarding these issues, rules have been created by precedent (i.e., the establishment of principles of case law).⁴

However, many of these principles of case law were expressed in light of specific cases, making them unclear or difficult to apply in some instances. In this respect, it was desirable that clear rules be established by statute in order to resolve disputes surrounding labor contracts in a simple, swift, and stable manner. The establishment of clear rules by statute could also be expected to serve in an expanded role as providing standards of conduct to be followed in personnel management and labor-management relations, thereby helping to prevent disputes from arising. Thus there arose a need to establish legislation providing private-law rules separately from the Labor Standards Act in the form of a statute that set forth rules on the relationship of rights and obligations under labor contracts.

2. Immediate Background to Enactment⁵

(1) Report of the Labor Contract Legislation Study Group

Proposals had long been made that a comprehensive law on labor contracts should be enacted.⁶ However, it was the following supplementary resolution added by both houses of the Diet to the bill to amend the Labor Standards Act in 2003 that set in train work on concrete legislation. This stated that "a forum for expert investigation and research should be established to actively consider formulation of a comprehensive law on labor contracts, including matters such as changes in labor conditions, external assignments, and employment transfers, and necessary measures, including the enactment of statute, should be taken based on the results."

In response to this Diet resolution, the Study Group on Future Labor Contract Legislation was established in the Ministry of Health, Labour and Welfare in April 2004 (chaired

⁴ For example, the *Nippon Shokuen Seizo* case (Supreme Court, Apr. 25, 1975, Minshu 29-4-456) concerning abuse of the right of dismissal, the *Toa Paint* case (Supreme Court, Second Petty Bench, Jul. 14, 1986, Hanji 1198-149) concerning temporary transfers, and the *Shuhoku Bus* case (Supreme Court, Grand Bench, Dec. 25, 1968, Minshu 22-13-3459) concerning the amendment of labor conditions by amendment of rules of employment. Note that the principle of abuse of right of dismissal was expressly stated in Article 18-2 of the amended Labor Standards Act of 2003, and transferred to Article 16 of Labor Contract Act as a result of the latter's enactment.

⁵ Regarding the immediate background to enactment of the Labor Contract Act (including the state of deliberations in council), see, among others, Araki et al., above n. 1, ch. 2, and Shinobu Nogawa, *Wakariyasui Rodo Keiyakuho* [A simple introduction to the Labor Contract Act] 31ff (Shoji Homu 2007).

⁶ See, for example, Labor Standards Act Study Group Report, *Kongo no Rodo Keiyakuho-to Hosei no Arikata ni tsuite* [Future of legislation on labor contracts, etc] (Labour Ministry, Labour Standards Inspection Division ed., Japan Institute of Labour 1983).

by Professor Kazuo Sugeno of Meiji University Law School). This investigated the current situation and areas of concern regarding rules on labor contracts, and, in its final report issued in September 2005, presented its recommendations regarding the need for a labor contract law and the content of such a law. The recommendations in the report were quite detailed, and covered almost all the issues concerning rules on labor contracts.⁷

(2) Discussion by Deliberative Council and Amendment in the Diet

The locus of discussion subsequently moved to a tripartite deliberative council consisting of public members and representatives of workers and employers (specifically, the Labour Conditions Subcommittee of the Labour Policy Council). Wary of the above report, however, workers and employers entered discussion unfettered by it. In the content of discussion as well, there were substantial differences of opinion between workers and employers. At the same time, the Subcommittee considered a new framework for exemption from working hour restrictions under the Labor Standards Act, and opinion on this, too, was divided.

Although a certain agreement of opinion was ultimately reached between workers and employers in the deliberative council, the areas in which a consensus was reached consisted mainly of giving statutory form to existing case law, and the various new recommendations raised by the above Study Group Report were not incorporated in the council's proposals. The resulting Labor Contract Act consequently consisted of just 19 articles. (Changes were also made in the Diet to the bill for the Labor Contract Act bill put forward by the Government. These included the addition of provisions on the underlying principles governing labor contracts in the form of "giving consideration to the balance of treatment" (Article 3, Paragraph 2) and "harmony between work and private life" (Article 3, Paragraph 3).

3. Significance of Enactment

The matters governed by the Labor Contract Act were dramatically narrower than those proposed in the Study Group Report. In this sense, therefore, the act represented a small-scale departure. Nevertheless, the passage of the Labor Contract Act was highly significant.⁸ This is because, as previously observed, it was the first piece of legislation to set forth private-law rules on labor contracts and to provide a separate mechanism of application from the Labor Standards Act. In this sense, the Labor Contract Act may be regarded as forming one of the basic statutes of labor law in Japan.

⁷ A press release on the above report can be found at the Ministry of Health, Labour and Welfare's website (<http://www.mhlw.go.jp/shingi/2005/09/s0915-4.html>). For a simple commentary, see Ryuichi Yamakawa, *Atarashii Rodo Keiyaku Hosei wo Kangaeru* [Consideration of new labor contract legislation], *Gekkan Hogaku Kyoshitsu* [Monthly law workshop] 6 (No. 309, 2005).

⁸ See, for example, Araki et al., above n. 1, ch. 1, and Takashi Muranaka, *Rodo Keiyakuho Seitei no Igi to Kadai* [Significance of enactment of the Labor Contract Act and issues raised], *Jurist* 43 (No. 1351, 2008).

II. Character of the Labor Contract Act and Interpretive Issues

1. Character of the Labor Contract Act

The Labor Contract Act provides for basic matters concerning labor contracts to facilitate the determination and modification of reasonable working conditions (Article 1). These concern mainly rights and obligations relating to labor contracts. In this respect, the Labor Contract Act is a “private law,” and so differs in character from the Labor Standards Act, which establishes minimum standards for working conditions and is enforced through administrative inspection and criminal sanction. The Labor Contract Act, by contrast, contains no punitive provisions, and also does not provide for inspection or guidance by labor standard inspectors.⁹

Instead, the Labor Contract Act is enforced by way of resolving civil disputes between parties through the use of the administrative individual labor dispute resolution system, labor tribunals, and litigation system. Naturally, as the existence of such rules for after-the-fact dispute resolution implies that disputes that arise are to be resolved in accordance with them, the Labor Contract Act may simultaneously be anticipated to function as a standard of conduct for the parties involved.

However, the Labor Contract Act presently contains provisions on principles (such as Paragraphs 1-3 of Article 3 and Paragraphs 1 and 2 of Article 4) which do not set forth enforceable rights and obligations in the sense of providing for claims through the courts for breaches; in other words, they establish a form of obligation merely “to endeavor.” The inclusion of provisions of this nature in the Labor Contract Act is thought to be an outcome of the bill’s drafting being defined by the limits of the consensus reached between workers and employers in the deliberative council, and from the point of view of the establishment of civil rules, the act contains halfway measures that are likely to be subject to revision in the future.

2. Interpretive Issues

(1) Summary

A. General Provisions

The Labor Contract Act consists of five chapters. The first chapter (General Provisions) describes the purpose of the act (Article 1), definitions of “workers” and “employers” (Article 2), the basic principles of labor contracts in general (Article 3), provisions on promoting understanding of the content of labor contracts (Article 4), and provisions on the obligation to care about worker safety (Article 5).

Of the above, Article 3, Paragraph 1 (agreement on an equal basis), Paragraph 2 (consideration of balance of treatment), and Paragraph 3 (consideration of harmony between

⁹ See Jan. 23, 2008, Kihatsu (Labor Standards Bureau Notice) No. 0123004.

work and private life) all establish the basic principles to be followed when entering and amending labor contracts. Owing to the abstract nature of the content of the provisions, they are not themselves considered to provide direct grounds for contractual rights and obligations. Rather, they affect the interpretation and application of other provisions. For example, Paragraph 2 and Paragraph 3 affect the interpretation and application of the provisions on the abuse of rights concerning temporary transfers, disciplinary action, and dismissals (Articles 14 through 16), and Paragraph 1 can also serve as the ideological underpinnings for a narrow interpretation of rules of employment that can be unilaterally established by employers.

Article 4, which concerns promotion of the understanding of the content of labor contracts, could similarly allow for infringements of it to be taken into consideration when applying general provisions, despite the fact that its wording makes it hard to interpret as directly affecting the relationship of rights and obligations. For example, if a worker suffers an unforeseen loss owing to the employer's insufficient explanation of changes to working conditions, there may be a basis for the employer's tort liability because of the infringement of the principle of faith and trust in light of the purpose of this article.

Article 5 concerning the employer's obligation to care about workers' safety confirms the existing principle of case law,¹⁰ and the phrase "by a labor contract" under the original bill was changed to "in association with a labor contract" through amendment in the Diet, clarifying that this obligation would not require supporting provisions in contracts, rules of employment, or similar sources in order to arise.

B. Establishment and Changing of Labor Contracts

Next, Chapter 2 provides for the establishment and changing of labor contracts. Article 6 describes the principle of agreement at the stage of conclusion of a labor contract, Article 8 establishes the principle of agreement at the stage when changes are made, and Articles 7, 9, and 10 establish provisions concerning the validity of rules of employment at each stage. (Articles 11 to 13 contain other provisions on rules of employment.) Articles regarding rules of employment will be examined below.

C. Continuation and Termination of Labor Contracts

While various issues can potentially arise in relation to the continuation and termination of labor contracts, Chapter 3, in Articles 14 through 16, provides only for farming-outs, disciplinary action, and dismissals. These provisions give statutory form to the principle of abuse of right established by precedent,¹¹ and do not establish any specifically new rules.

¹⁰ For example, the Rikujo Jieitai Hachinohe Sharyo Seibi Kojo case (Supreme Court, Third Petty Bench, Feb. 25, 1975, Minshu 29-2-143).

¹¹ Regarding farming-outs, see the *Shin Nippon Seitetsu* case (Supreme Court, Second Petty Bench, Apr. 18, 2003, Rohan 747-14); regarding disciplinary action, see the *Daihatsu Kogyo* case (Supreme Court, Second Petty Bench, Sep. 16, 1983, Hanji 1093-135); regarding dismissal, see the *Nippon*

Articles 14 and 15 are significant in their identification of the factors to be taken into consideration when determining whether an abuse of rights has occurred: circumstances pertaining to the need for farming-outs and the selection of workers in the case of abuses of the right to order farming-outs, and the characteristics and mode of the act committed by the worker in the case of abuse of the right to take disciplinary action. However, both articles also provide for “other circumstances,” which in the future will probably have to be identified more clearly.

D. Fixed-Term Labor Contracts

Chapter 4 concerns labor contracts for established terms, and consists solely of Article 17. Paragraph 1 of this article specifies that an employer may not dismiss a worker during the term of the contract unless there are unavoidable circumstances. Individual agreements and provisions under rules of employment that allow for mid-term dismissal in the absence of unavoidable circumstances are also considered to be invalid insofar that they conflict with Article 17.

Paragraph 2 of Article 17, on the other hand, specifies that an employer must give consideration to not renewing a labor contract repeatedly by prescribing a term that is shorter than necessary in light of the purpose of employing the worker based on such a labor contract. This provision is regarded as being intended to require that consideration be given to establishing a necessary term in light of the purpose of individual contracts with regard to fixed-term contracts. Hence if a worker is taken on for a given period to perform a certain job and that work is expected to continue for one year, consideration must be given to entering a one-year contract from the start, rather than repeatedly renewing a two-month contract five times.

However, this provision does no more than require the employer to give consideration, and is not thought to have the effect of amending a labor contract to specify a necessary term. Where a two-month contract has been renewed as in the above scenario, however, it is considered reasonable, in view of the import of this article, for workers to expect the continuation of employment through renewals. Consequently, if renewal of the contract is refused before the passage of one year, then the principle of abuse of right of dismissal (Article 16 of the Labor Contract Act) may be applied by analogy.¹²

Shokuen Seizo case, above n. 4.

¹² Ryuichi Yamakawa, *Rodo Keiyakuho Nyumon* [An introduction to the Labor Contract Act] 191 (Nihon Keizai Shinbun Shuppansha 2008).

(2) Rules of Employment

A. Validity at Time of Establishment of Labor Contract (Article 7)

a. Purpose

The main clause of Article 7 of the Labor Contract Act specifies that when a worker and an employer enter a labor contract and the employer has “informed” him/her and other workers of rules of employment providing for reasonable working conditions, the content of the labor contract shall be based on the working conditions provided by such rules of employment. Thus where working conditions are not agreed upon in detail between individual workers and their employers, which is often the case, the working conditions provided for in labor contracts are complemented by the conditions provided for under the rules of employment.

Regarding the legal character of rules of employment, there is a division of opinion between legal norm theorists, who argue that rules of employment themselves have the effect of a legal norm, and contract theorists, who argue that rules of employment serve simply as a template that enters into the content of a labor contract when consented to by a worker. However, the Supreme Court has held that the working conditions set forth by rules of employment constitute the content of labor contracts provided that they are reasonable in content.¹³ This interpretation is close to the contract theory, and especially the theory of fixed form contract. The main clause of Article 7 of the Labor Contract Act gives statutory form to this principle of case law alongside the case law principle of requiring that workers be “informed” of the rules of employment for such rules to become binding.¹⁴ While the establishment of provisions by statute is seen as having reduced the practical significance of discussing the legal character of rules of employment, there appears to remain some scope for consideration of whether the practical benefits of discussion have been completely eliminated.

The proviso to Article 7 states that this shall not apply to any portion of a labor contract in which a worker and employer have agreed on working conditions that differ from the content of the rules of employment, except in cases that fall under Article 12. Article 12 specifies that any working conditions that do not meet the minimum standards established by the rules of employment, even if agreed by the worker and employer, are invalid. This proviso means that where working conditions that are at least equivalent to those stipulated in the rules of employment have been individually agreed by a worker and an employer, these conditions constitute the content of the contract.

¹³ *Nippon Denshin Denwa Kosha Obihiro Kyoku* case, Supreme Court, First Petty Bench, Mar. 13, 1986, Rohan 470-6.

¹⁴ *Fuji Kosan* case, Supreme Court, Second Petty Bench, Oct. 10, 2003, Rohan 861-5.

b. What Are “Working Conditions”?

Under Article 7, the content of labor contracts is governable by the provisions on “working conditions” under rules of employment. In the case that this article is applied, matters thus provided for can potentially govern the content of contracts and be binding on workers. This is so even if not agreed to by workers as long as they are reasonable and workers have been “informed” of them. The term “inform” means, as stated below, that rules of employment should be provided in a state in which they can be easily known by workers, regardless of whether they actually recognize them.

Consequently, the meaning of “working conditions” is a potentially important question. As the term “working conditions” is also used in Article 10 concerning changes in working conditions by rules of employment, a similar problem arises. If, for example, a worker receives a loan to cover the cost of overseas study or other such training and he/she leaves the company within a certain period of time after returning to Japan, it becomes necessary to consider the question of whether that worker is under an obligation to return this loan if the rules of employment provides for such obligation. It is also necessary to consider whether a worker’s duty not to compete against his/her former employer after leaving a company also falls under the “working conditions” referred to in this article, thus binding workers by the provisions of their rules of employment.¹⁵

A judgment has to be made on this question taking into consideration a variety of factors, including the relationship with other obligations under the labor contract, whether the effect of the provision at issue extends beyond the termination of a labor contract, and the extent of constraints on the rights, interests, and freedom of the worker. Arriving at a conclusion deduced from a general definition of the term “working conditions” is, therefore, not easy. Given that this article could serve to bind a worker who is unaware of the content of the rules of employment, a definition that included all matters constitutive of agreement between the parties would be too broad. The term should perhaps, therefore, be qualified to limit its scope to those elements of treatment of a worker that may be regarded as constituents of a labor contract.

Working on this basis, the agreement to return study costs would comprise a separate consumption loan contract rather than a component of the labor contract (if such plan is equivalent to a pre-dispute agreement to pay damages for violation of a labor contract, it is invalid due to infringement of Article 16 of the Labor Standards Act), and so would not fall within the scope of the working conditions referred to in this article. In this case, therefore, an agreement with the worker would become necessary. Regarding the duty not to compete after retirement, on the other hand, it is possible to argue that it is included under “working conditions” due to its being a form of incidental obligation under a labor contract. As this

¹⁵ See the *Shin Nihon Shoken* case (Tokyo District Court, Sep. 25, 1998, Rohan 746-7) for a case affirming provisions on the return of study costs. See the *Tokyo Legal Mind* case (Tokyo District Court, Oct. 16, 1995, Rohan 690-75) for an affirmation of the duty not to compete.

would severely restrict a worker's freedom of choice of occupation, however, it is open to some doubt whether a worker is bound by clauses that he/she did not recognize.

c. "Informing" of Workers of the Rules of Employment

For rules of employment to constitute the content of a labor contract, Article 7 of the Labor Contract Act requires as a condition that the worker be "informed" of them. As the being "informed" referred to here is also required in Article 106, Paragraph 1 of the Labor Standards Act, this should be interpreted as meaning that the rules of employment should be provided in a state in which they can be easily known by workers, although it is not necessary for workers to actually recognize their contents.¹⁶ Regarding the method of informing under the Labor Standards Act, Article 52-2 of the Labor Standards Act Enforcement Ordinance specifies that workers must be informed by such methods as permanent display in an easily visible location in the workplace, issuance in writing, or publication by electronic means. While the methods of "informing" referred to in the Labor Contract Act may be regarded as being largely the same as those specified in the Labor Standards Act Enforcement Ordinance, they are not necessarily limited to these methods, and it is persuasively argued that other substantive methods of informing are also allowed.¹⁷

B. Binding Effect under Changes in Rules of Employment (Article 10)

a. Purpose

Regarding disadvantageous changes made to working conditions through the revision of rules of employment, the Labor Contract Act makes it clear as a contractual principle, firstly, in Article 9, that an employer may not, unless agreement has been reached with a worker, change any of the working conditions that constitute the content of a labor contract in a manner disadvantageous to the worker by changing the rules of employment. It then proceeds, in the main clause of Article 10, to state that if an employer "informs" a worker of changed rules of employment, and if the change to the rules of employment is reasonable in view of the extent of the disadvantage incurred by the worker, the need for changing the working conditions, the appropriateness of the contents of the changed employment conditions, the status of negotiations with a labor union or the like, and any other circumstances pertaining to the change to the rules of employment, the working conditions that constitute the contents of a labor contract shall be in accordance with such changed rules of employment.

Variously discussed by legal scholars, the position expressed by the Supreme Court is that, while disadvantageous changes to working conditions by rules of employment are not in principle permitted, changes deemed to be reasonable are binding even on workers who

¹⁶ See, for example, above n. 9, Kihatsu No. 0123004, and Kazuo Sugeno, *Rodoho* [Labor law] 111 (8th ed., Kobundo 2008).

¹⁷ Above n. 9, Kihatsu No. 0123004.

opposed such changes.¹⁸ Theoretically as well, the dominant scholarly view supports the principle of case law in order to achieve a balance between the need to change working conditions and the restriction of dismissals, as use of dismissal as a means of lowering personnel costs for management reasons is restricted in Japan in line with the practice of long-term employment and the principle of the abuse of right of dismissal that has grown out of this background.¹⁹

The main body of Article 10 gives statutory form to this principle of case law (the doctrine of reasonable changes of rules of employment), including the requirements for determining whether a change is “reasonable,” in addition to the requirement of “informing” workers as described in Article 7. The Study Group Report contained (i) a proposal having an affinity with the contractual principle that recommended that, provided that the changes to the rules of employment are reasonable, agreement should be presumed to have been reached between the parties to a labor contract that working conditions should be in accordance with the changed regulations, and (ii) the proposal that, provided that the changes to the rules of employment are reasonable, the regulations themselves should be binding on the worker (proposing, in other words, a clear recognition of an employer’s authority to make such changes). However, as the approach adopted was to import the principle of case law without modification, the provisions of the Labor Contract Act do not provide any clear indication as to their legal character. However, the wording of this article should probably be interpreted as signifying that the legal technique of presumption expressed in proposal (i) has not been adopted, and that employers are given the power under this article itself to change working conditions under certain conditions.

b. Significance of Disadvantageous Changes and Changes That Are Not Considered “Disadvantageous”

As the main clause of Article 10 of the Labor Contract Act does not itself use the term “disadvantageous,” it is possible to argue that the question of what is “disadvantageous” does not even arise when applying the provisions of this article. However, these same provisions are regarded as providing an exception to Article 9 of the Labor Contract Act, which does not in principle allow disadvantageous changes to be made to working conditions by rules of employment, and the application of Article 10 is considered to be premised on “disadvantageous” changes.

The next question to consider thus concerns what cases qualify as “disadvantageous.” Judicially, changes are considered, as a rule, to fall into the category of disadvantageous changes if a defendant submits changes as a defense against a plaintiff’s claim and argues

¹⁸ Above n. 4, *Shuhoku Bus* case, etc.

¹⁹ Regarding the state of discussion, see Tokyo Daigaku Rodo Ho Kenkyu Kai [University of Tokyo Labor Law Study Group], *Chushaku Rodo Kijunho* [Annotated Labor Standards Act] vol. 2, at 969 (Yuhikaku 2003).

that the right claimed by the plaintiff does not arise or is reduced.²⁰ In other words, whether or not something is “disadvantageous” is something that needs to be considered in the context of the working conditions that are litigated, and circumstances such as improvements made to other working conditions may be regarded as being taken into consideration in judging whether changes are “reasonable.”

This, however, raises the question of what to make of changes that are not “disadvantageous.” Regarding this point, differences are possible depending on what changes have been made to working conditions. However, if, for example, the retirement age is extended and working conditions beyond the former retirement age are lowered (in which case, although it may not be possible to describe the change as “disadvantageous” as the opportunity for employment after the former retirement age did not even exist before its extension, the working conditions themselves are comparatively lower than previously), the main clause of Article 10 is applied by analogy, and the “reasonableness” of the change is judged more leniently than it would be in the case of a disadvantageous change.²¹

c. Cases of Changes Agreed to by Workers

If a worker agrees individually to a change to the rules of employment, there also arises the question of whether the requirement that such changes be reasonable is rendered redundant. Article 9 of the Labor Contract Act may be interpreted as recognizing the binding force of the changed rules on condition that the requirements specified in Article 10 regarding disadvantageous changes that have not been agreed to are met. Thus, the premise of Article 9 is that working conditions may be changed disadvantageously by changing the rules of employment if so agreed to by a worker. Where a change has been agreed to (naturally giving careful consideration to whether agreement is the worker’s true intent), therefore, the requirement that changes be reasonable may be regarded as redundant.²²

d. Changes under Rules of Employment to Conditions Prescribed by Individual Contracts

The main clause of Article 10 of the Labor Contract Act applies to “cases where an employer changes the working conditions by changing the rules of employment,” and is not limited to cases of changes in working conditions specified in the rules of employment by the rules of employment. Application of the main clause of Article 10 is consequently not limited to cases of changes in working conditions provided for by rules of employment by the amendment of said rules of employment; it also includes cases where, although rules of employment already exist, the working conditions specified in individual labor contracts rather than the rules of employment are changed by the addition of provisions in those rules

²⁰ Ryuichi Yamakawa, *Koyo Kankeiho* [Employment relations law] 38 (4th ed., Shinseisha 2008).

²¹ The ruling in the JR Kamotsu case (Nagoya District Court, Dec. 27, 1999, Rohan 780-45) requires “reasonableness equivalent to that in the case of disadvantageous changes.”

²² One ruling that shows it to be redundant is that in the *Iseki Koki* case (Tokyo District Court, Dec. 12, 2003, Rohan 869-35).

of employment (excluding, however, cases where the proviso to Article 10 examined below applies; the same hereinafter).

In the case of changes to working conditions established by customary labor practices as a result of the fresh establishment of provisions in the rules of employment as well, the fact that labor practices can create a relationship of rights and obligations through their constitution of the content of a labor contract means that, ultimately, the content of labor contracts can be changed by rules of employment, and so the main clause of Article 10 would apply.

On the other hand, had working conditions been established hitherto by individual labor contracts at business establishments without rules of employment (due, for example, to their having fewer than 10 regularly employed workers) and had the existing working conditions been changed as a result of the fresh establishment of rules of employment, the rules of employment could not be described as being “changed” and so the main clause of Article 10 would not, in itself, apply. As the situation is the same in terms of a change being made in the content of individual labor contracts, however, the provisions of this article could appropriately be applied by analogy.²³

e. Judgment of Reasonableness

The main clause of Article 10 specifies the following factors as criteria for judging whether the changes made to rules of employment are reasonable: (i) the extent of the disadvantage incurred by the worker, (ii) the need for changing working conditions, (iii) the appropriateness of the content of the changed rules of employment, (iv) the status of negotiations with a labor union or the like, and (v) any other circumstances pertaining to the change to the rules of employment. The reasonableness of changes to rules of employment is judged taking into all-round consideration a variety of factors, and these factors, having been to a large extent clarified by past court cases, are made explicit in this article.

Of these, the factor that leaves the greatest scope for consideration is (iv) the status of negotiations with a labor union or the like. More generally, this factor may be regarded as concerning the appropriateness of the procedure followed when changes are made. On this point, the Supreme Court has ruled that it may be tentatively assumed that, if a labor union comprising the great majority of workers in the workplace consents to a change to the rules of employment, the content of the changed rules of employment is reasonable on the grounds that it is the outcome of a reconciliation of interests by management and workers.²⁴

In the case that the working conditions of young and middle-aged workers are improved while lowering the wages of older employees by some 40 percent in order to remedy an imbalance in personnel expenditures on older employees, the Supreme Court has, while recognizing the need for such change, stated that such a change would cause only some em-

²³ Regarding the above, see Sugeno, above n. 16, at 114-15, 121.

²⁴ *Daishi Ginko* case, Supreme Court, Second Petty Bench, Feb. 28, 1997, Minshu 51-2-705.

ployees to incur a major disadvantage, and so is difficult to accept as reasonable unless interim measures are taken to alleviate the disadvantage experienced by the minority of employees. Its ruling was thus that even if a labor union consisting of the great majority of employees agrees to a change, this cannot be accepted as a major factor to be taken into consideration in such cases.²⁵

It is thus not necessarily clear from precedent how the consent of labor unions comprising a majority of workers to changes to rules of employment regulation is to be viewed, and the matter has been the subject of some theoretical discussion.²⁶ Regarding the principle of case law that relies on the general provision of “reasonableness,” there exists a problem of a lack of predictability, and the Study Group Report proposed that changed rules of employment be assumed to be reasonable provided that such a change has been agreed to by a majority of workers after appropriate consolidation of workers’ opinion or have been recognized by a resolution passed by at least four fifths of the members of the labor-management committee, except in the case that it would cause major disadvantage to only some workers. However, this proposal was not adopted, and the principle of case law was put into statutory form in the Labor Contract Act without modification. The question of what weight should be given to the agreement to changes by labor unions comprising a majority of workers therefore remains an issue for interpretation and legislative consideration.

f. Significance of Procedural Compliance with the Labor Standards Act

In judging whether or not disadvantageous changes in rules of employment are binding on workers, there emerges the question of what position to assign to whether the procedures prescribed by the Labor Standards Act (Articles 89 and 90) were followed when the changes were made. Although the Labor Contract Act appears not to evidence a clear stance on this question, the absence of any reference to the procedures for changes to rules of employment in Article 10 and the separate provision (in Article 11) that the provisions of the Labor Standards Act are to be followed indicates that it does not adopt the position that such compliance is necessary for changes to be binding.

Insofar as provisions on procedures for changing of rules of employment were deliberately included in the Labor Contract Act, however, it may reasonably be argued that whether or not the procedures prescribed by the Labor Standards Act have been followed should be taken into consideration in judging whether changes are reasonable (“other circumstances pertaining to the change to the rules of employment”).²⁷ In this case, moreover, whether or not the representatives of a majority of the workers have been appropriately selected (see Article 6. 2 of the Labor Standards Act Enforcement Ordinance) may also be regarded as lying within the scope of consideration as a premise for application of Article

²⁵ *Michinoku Ginko* case, Supreme Court, First Petty Bench, Sep. 7, 2000, Minshu 54-7-2075.

²⁶ See Tokyo Daigaku Rodo Ho Kenkyukai, above n. 19, at 977ff.

²⁷ Sugeno, above n. 16, at 119.

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g. Individual Agreements Not to Be Changed by Rules of Employment

The proviso to Article 10 of the Labor Contract Act specifies that the principle described in the main clause of Article 10 shall not apply to any portion of a labor contract agreed upon by a worker and employer as establishing working conditions that are not to be changed by any change to the rules of employment, except in cases that fall under Article 12 due to the minimum standards established by the rules of employment not being met. Prior also to enactment of the Labor Contract Act, lower trial court rulings established that the amount of yearly pay determined by individual negotiation cannot be reduced by changes to the rules of employment.²⁸

However, it is often not clear whether it has been agreed that a given working condition is one that is not to be changed by changes in employment conditions. In such cases, therefore, there is ultimately no alternative but to make a judgment on each individual case taking into account factors such as whether the working conditions at issue conform in character to uniform collective decisions, and the process leading up to the agreement.²⁹

III. Future Issues

1. Enhancement of Content

As we have thus seen, the enactment of the Labor Contract Act is highly significant. At present, however, the matters that it covers are quite limited. A key issue for the future will therefore be to enhance the act's content and develop it into a law that establishes literally comprehensive rules on labor contracts. Given the existence of principles of case law on such matters as temporary hiring decisions, internal transfers including job rotations, and non-renewal of employment contracts, there is a particular need for legislation that incorporates these principles.³⁰ At the same time, however, it will be worth considering questions such as whether these principles of case law can simply be put into statute form without modification, or whether new content should be incorporated to reflect conditions in contemporary society.

On the subject of internal transfers, for example, the inclusion of the principle of harmonizing work and private life in Article 3, Paragraph 3 of the Labor Contract Act, the content of Article 26 of the Child and Family Care Leave Act, which requires that consideration be shown by employers when assigning workers to different positions requiring a

²⁸ *CAI* case, Tokyo District Court, Feb. 8, 2000, Rohan 787-58.

²⁹ Yamakawa, above n. 12, at 75.

³⁰ Regarding temporary hiring decisions, see the *Dai Nippon Insatsu* case (Supreme Court, Second Petty Bench Jul. 20, 1979, Minshu 33-5-582); regarding internal transfers, see the *Toa Paint* case, above n. 4; regarding non-renewal of employment contracts, see the *Tokyo Shibaura Denki Yanagicho Kojo* case (Supreme Court, First Petty Bench, Jul. 22, 1974, Minshu 28-5-927).

change of residence, and the growing importance assigned to harmonization of work and private life in an aging society in demographic decline, as reflected by the enactment of a “Work-life Balance Charter,” make it worth considering also the adoption of an approach that brings the principles of case law up to date with the needs of contemporary society.

In addition, the Labor Contract Act Study Group Report made proposals on issues such as a system for enabling workers who have rejected an offer of a reduction in working conditions and have been dismissed to submit objections and temporarily continue working under the new working conditions while negotiations on these conditions continue, as well as the clarification of case law regarding four requirements (factors) for economic dismissal. Since these proposals did not find their way into the bill in the subsequent consideration process, they could be placed on the agenda for discussion again (while still bearing in mind the importance of reaching a consensus between workers and employers). Regarding so-called labor-management committees, the Study Group Report did not go so far as recommending that such a system itself be enshrined in law. In the future, however, such a move could be considered head on as a part of collective labor-related legislation from the point of view of the future shape of worker representation systems.

2. Rearrangement of Relationship with Civil Code

While not an issue that directly concerns the Labor Contract Act, moves are afoot to amend the portion of the Civil Code concerning the law of obligations. As a part of this process, it is possible that rearrangement of the relationship between the provisions on employment contracts in the Civil Code and the Labor Contract Act may become an issue for consideration.

The fact that the Civil Code uses the term “employment contract” while the Labor Contract Act uses the term “labor contract” means that the first issue to arise will be the relationship between the two. It has long been disputed whether the “labor contracts” referred to in the Labor Standards Act are the same thing as “employment contracts.”³¹ (As this comes down to a question of how “employment contracts” are conceived of under the Civil Code, the enactment of the Labor Contract Act is considered not to express a conclusion.)

If employment contracts and labor contracts are considered to be the same thing, there arises the problem of not only the propriety of using differing terms to describe the same type of contract, but also the advisability of establishing provisions in two different laws concerning the same matter (for example, Article 623 of the Civil Code and Article 6 of the Labor Contract Act concerning the establishment of a contract). When amendment of the law of obligations comes up for consideration, therefore, it will become necessary to con-

³¹ For a summary of the debate, see Tokyo Daigaku Rodo Ho Kenkyukai [University of Tokyo Labor Law Study Group], *Chushaku Rodo Kijunho* [Annotated Labor Standards Act] vol. 1, at 185 (Yuhikaku 2003).

sider whether the provisions on employment (labor) contracts should be consolidated into one or the other.³²

This point will necessitate consideration of fundamental issues including how to reconcile the purpose of enactment of the (chapter on employment in the) Civil Code and the purpose of enactment of the Labor Contract Act, the nature of the process of enactment and amendment (whether this should be tasked to the Legislative Council in the Ministry of Justice or the Labour Policy Council), and, as we consider next, the role of government in the enactment of civil labor legislation. Another important factor to consider, however, will be the Labor Contract Act's present lack of comprehensiveness.

Thus, at present, simply responding by transplanting the provisions of the employment chapter of the Civil Code into the Labor Contract Act, or vice versa, will not result in integrated private-law rules on labor (employment) contracts. In order to deal with this problem, therefore, the Labor Contract Act will ultimately have to be further developed, and simple consolidation will need to be considered with caution.³³

3. Future Shape of Civil Labor Legislation

(1) Need for Rights and Obligations Perspective

As we have seen, the Labor Contract Act is, unlike the Labor Standards Act, a law that establishes private-law rules on labor contracts. No penalties or mechanisms for administrative enforcement are established, and the main methods of realization are expected to be the court system (including labor tribunals) and administrative individual labor dispute resolution promotion system.

Legislation and regulations setting forth civil rights and obligations are likely to expand in the future through, among other things, development of the content of the Labor Contract Act. A lot of labor legislation to date has, with the exception of criminal sanctions, been expected to be implemented mainly through administrative enforcement. As the emphasis has in this sense been on establishing standards of conduct, there has been a relatively weaker focus on how provisions change the relationship of rights and obligations under civil law and what specific remedies are available through the courts and administrative ADR (Alternative Dispute Resolution). For example, Article 8 of the Part-time Labor Act prohibits discriminatory treatment of part-time workers regarded as the same as regular full-time workers, but it is unclear whether juristic acts in contravention of this article are immediately invalidated.

³² Shinobu Nogawa argues in his *Rodoho* [Labor law] at 31(Shoji Homu 2007) that an "Employment Contract Act" should be newly enacted as a separate piece of legislation.

³³ See Ryuichi Yamakawa, *Koyo no Kitei wo Nokosu Hitsuyo wa Aruka* [Do provisions on employment need to be retained under the Civil Code?] in *Minpo Kaisei wo Kangaeru* [Views on amendment of the Civil Code] 311 (Horitsu Jiho Zokan [Special Edition of The Law Journal], Nihon Hyoronsha 2008).

When considering future legislation and amendments, therefore, it will be necessary to consider, assuming the enhancement of systems for individual labor dispute resolution, what impact is exerted on the relationship of rights and obligations under civil law and how civil remedies can be used in implementing the law.

(2) Civil Labor Legislation and Administrative Support

Adopting quite the opposite perspective from the above, on the other hand, it will need to be considered when devising civil labor legislation whether it is sufficient to purely develop the relationship of rights and obligations. This leads back to the question of whether civil labor legislation should be characterized simply and purely as a civil law like the Civil Code, or whether it should be seen as more of a “soft law” that is expected to be backed up by administrative measures intended to achieve a given policy objective.

Possible administrative measures of this kind may include, for example, the provision as guidelines of standards of conduct for interested parties in order to improve predictability, and advice on compliance with the law. (The Labor Contract Act Study Group Report proposed that guidelines should be provided on the measures that should be taken by employers further to establishment of provisions that expressly set forth the contents of case law concerning abusive dismissals and economic dismissals, but this recommendation was not incorporated in the Labor Contract Act.)

Although this issue does not appear to have been consciously discussed to date, labor law cannot be properly implemented only by resolving disputes after they have arisen. Rather, it is also important for labor law to control the day-to-day behavior of parties to employment and labor relations. Also, there are a number of labor statutes that are intended to achieve certain governmental policies. Thus, it is worth considering the adoption of administrative assistance in the field of labor contract law, on the condition that party autonomy is respected. However, since the contents of such assistance might depend on the purpose of each piece of legislation as well as the measures of assistance, deeper consideration will be required when enacting and amending individual laws.

A New Departure in the Japanese Minimum Wage Legislation

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The Minimum Wages Act underwent a major revision in 2007 as the issue of the working poor heightened public interest in the theme. The revision streamlined the entire minimum wage system, placing the regional minimum wages established by the prefectures clearly at the core. It also required that the amounts of these minimum wages be consistent with public assistance policies. Under the revised act, the new regional minimum wages were set and entered effect in each prefecture from autumn 2008. This article explores the significance of this new minimum wage legislation.

I. Introduction

In 2007, the Minimum Wage Act of Japan underwent its first major revision in four decades. This act used to have a comparatively low profile even within the field of labor law, but the growing focus on the issue of the working poor in the past few years has generated considerable public interest in the minimum wage system as a way of dealing with this problem. The revision of 2007 overhauled the entire minimum wage system. Most notably, it put the regional minimum wages established by the prefectures clearly at the system's core and ordered that the amounts of these minimum wages be determined giving consideration to their consistency with public assistance policies. In addition, a new system of "specified minimum wage" was adopted as a distinctive measure without criminal sanction. Under the revised act, the minimum wages for fiscal 2008 were determined and went into effect in each prefecture from autumn 2008. This marked the first step in the new era of Japanese minimum wage legislation. This article will explore the significance of the 2007 revision after reviewing the historical development of the minimum wage system.¹

II. Development of the Minimum Wage System in Japan

1. Enactment of the Minimum Wage Act and the Revision of 1968

The Minimum Wage Act of Japan was enacted in 1959, exactly half a century ago. Prior to this act, the Labor Standards Act of 1947 contained provisions that allowed the

¹ Regarding the minimum wage system prior to revision, see Kazuo Sugeno, *Japanese Employment and Labor Law* 242-47 (Carolina Academic Press 2002); The Japan Institute for Labor Policy and Training (JILPT), *Labor Situation in Japan and Analysis: General Overview 2006/2007* 101-102 (JILPT 2006). For an example of press coverage of the 2007 revision, see Japan Times, *Labor Laws Passed; Better Terms Hoped*, November 29, 2007, <http://search.japantimes.co.jp/cgi-bin/nn20071129a3.html>. For an article describing the guideline increases recommended for regional minimum wages in fiscal 2008, see Japan Times, *Minimum Wage May Rise ¥15 on Average*, August 7, 2008, <http://search.japantimes.co.jp/cgi-bin/nb20080807a7.html>.

administrative authorities, where deemed necessary, to establish minimum wages for workers employed in certain industries and occupations after having requested an investigation by and the opinion of the central or local wage council. However, in the harsh economic conditions of the postwar years, it was feared that the establishment of a minimum wage would put excessive pressure on business. Despite persistent calls from the labor side, the mechanism of the Labor Standards Act was not utilized in practice.

As the economy moved into gear in the mid-1950s, the Minimum Wage Act of 1959 was enacted, after heated debate, to deal with the issue squarely. The creation of the Minimum Wage Act independent of the Labor Standards Act, as well as the establishment of actual minimum wages under this Act, represented a major advance. The principal method adopted for establishing a minimum wage, however, was the so-called “trade-agreement method” (i.e., based on mutual agreements among business entities of a particular industry and region), which was unheard of in other countries.

The 1959 Act did provide for two other methods, that is, regional minimum wages based on locally predominant collective bargaining agreements (collective-agreement extension method), and minimum wages based on investigation and deliberation by a tripartite minimum wages council (council method). However, the collective-agreement extension method was rarely used because most labor unions in Japan are formed at individual enterprises and there are few industry-wide agreements upon which to set regional minimum wages. As for the council method, it was given only an auxiliary role by the Act. Minimum wage councils could determine minimum wages only where determination of minimum wages based on either trade agreement or collective bargaining agreement was unfeasible or inappropriate.

In any event, the minimum wages under the 1959 Act, established mostly through the trade-agreement method, covered only a fraction of the total labor force. Moreover, because workers’ representatives were not involved in the making of trade agreements, there was strong criticism that this arrangement contravened ILO Convention No. 26 on Minimum Wage-Fixing Machinery (1928). To address these problems, the Minimum Wage Act was substantially revised in 1968. Japanese minimum wage legislation thus evolved into the third phase, counting the unused mechanism of the Labor Standards Act.

The 1968 revision eliminated the trade-agreement method and expanded the provisions for the council method, completing the framework of the Minimum Wage Act as it existed prior to the 2007 revision. The system was founded on two pillars: (i) regional minimum wages established by the collective-agreement extension method (specified in Article 11 of the 1968 act) and (ii) minimum wages established by the council method (specified in Article 16 of the same act).

2. Developments under the 1968 Revised Act

The first of the above two pillars—the collective-agreement extension method—was modeled on the European system and, as noted above, unrealistic in the Japanese setting. It

was inevitable that the council method became the principal method used.

The minimum wages councils under the 1968 Act were the same as they are today, consisting of the “Central Minimum Wages Council” at the national level and the Regional Minimum Wages Councils established in each prefecture. These councils are a tripartite body comprising of the same number of members representing workers, employers, and the public, respectively. The Central Minimum Wages Council has the authority to decide minimum wages spanning more than one prefecture, but it seldom does so in reality. Most minimum wages have been determined in each prefecture based on the investigation and deliberation of the Regional Minimum Wages Council.

The foremost priority at the time of the 1968 revision was to expand the coverage of the system so that all workers may enjoy the legal protection of minimum wage. The existence of prefecture-wide regional minimum wage seems so natural today, but that was not the case until mid-1970s. Using the council method, minimum wages were established one after another in various industries and regions. The two spread to create a complementary patchwork, and it was hoped that the gaps would be filled in eventually. Then, from 1971, the establishment of regional minimum wages in particular was pursued in a planned manner in accordance with government policy, and minimums had been established for all prefectures by January 1976.

Thus the goal of giving the protection of the minimum wage to all workers was attained. In response to this, there were two subsequent developments.

The first was the system of “guideline” of the Central Minimum Wages Council for revision of regional minimum wages. This system was adopted in 1978 to seek national consistency among regional minimum wages while still allowing them to be determined in each prefecture according to the judgment of the Regional Minimum Wages Council. The Central Minimum Wages Council study various economic factors and draw up suggested change to minimum wages for the year concerned, which are then presented as “guidelines” to the Regional Minimum Wages Councils. The prefectures are divided into four ranks—A, B, C, and D—and a guideline increase is recommended for each of the ranks. Guidelines are of course not binding on the Regional Minimum Wages Councils. Moreover, in practice, the division between representatives of workers and employers is so fierce every year that the Central Minimum Wage Council only issues the “opinion of public members” on guideline increases, rather than its unanimous and official recommendations. Still, the guidelines wield substantial influence over the decision of Regional Minimum Wages Councils. This is a modest mechanism designed to compensate for the lack of a uniform national minimum wage in Japan’s decentralized system.

The second development was the reorganization of industrial minimum wages. Formerly, they were set rather aggressively in competition with regional minimum wages to expand the total coverage of minimum wage system. Now that all the prefectures had the regional minimum wage, however, it became necessary to create a division of roles between the two. From 1982, the scope of industries covered was defined more narrowly than before,

and the requirements for establishment of such minimum wages were streamlined. Industrial minimum wages were to be established only where deemed necessary, and their amounts should be higher than the applicable regional minimum wage.

III. Minimum Wage Situation

1. Number of Minimum Wages Determined

The number of minimum wages established in Japan as of the end of February 2008 was 299,² of which only two—one in Shiga Prefecture and the other in Hiroshima Prefecture—were established by the collective-agreement extension method (affecting approximately 500 workers).³ The remaining 297 were determined by the council method. Of the minimum wages determined by the council method, 47 were regional (prefectural) minimum wages and 250 were industrial (industry-specific) minimum wages. The number of workers affected by the former (50,240,000 workers) was far greater than the latter (3,730,000 workers). Of the industrial minimum wages, 247 were so-called “new” industrial minimums established after the shift to the narrow classification system, and three were “old” ones determined under the previous system.

All of the regional minimum wages were determined on a prefectural basis, as were the great majority of the industrial minimum wages. These minimum wages were established by the Director of the Prefectural Labor Bureau based on the investigation and deliberation of the Regional Minimum Wages Council. While a national minimum wage can be established by the Minister of Health, Labor and Welfare based on the investigation and deliberation of the Central Minimum Wage Council, only one industrial minimum wage was determined in this manner.

2. Regional Minimum Wages and Guideline Increases

Regional minimum wage rates per hour ranged from a maximum of 739 yen (Tokyo) to a minimum of 618 yen (Okinawa and Akita) at the stage prior to revision in 2008. The national weighted average was 687 yen. Regional minimum wages used to contain both daily and hourly rates, but in accordance with the recommendation of the Central Minimum Wages Council all prefectures have established only hourly rates since 2002.

Trends in the guideline increases of the Central Minimum Wages Council and the actual regional minimum wage rates in terms of the national weighted average are shown in Tables 1 and 2. From 2002 to 2004, when deflation was at its worst, the guideline recommended no increase of minimum wage rates for three consecutive years, and actual increases among individual prefectures, if any, were very small.

² *Heisei 20-nendoban Saitei Chingin Kettei Yoin* [2008 Directory of Minimum Wage Decisions] (Rodo Chosakai 2008). Other figures cited below are from the same source.

³ The Director of the Prefectural Labor Bureau established these minimum wages based on application from the parties to regionally dominant collective agreements.

Table 1. Trends in Guideline Increases for Revision of Regional Minimum Wage Rates

(Unit: Yen)

	Guideline increases in daily rate					Guideline increases in hourly rate					
	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
Rank A	116	97	49	44	38		0		3	4	19
Rank B	110	92	47	42	36	Note 3	0	Note 3	3	4	14
Rank C	106	89	45	40	35		0		3	3	9-10
Rank D	100	84	43	38	33		0		2	2	6-7

Source: Ministry of Health, Labour and Welfare data.

- Notes: 1. The guideline increase for the revision of each rank indicates the amount to be added to the minimum wage (in terms of the daily rate up to 2001 and the hourly rate from 2002).
 2. Ranks A to D are classified based on the actual economic conditions in each prefecture.
 3. In 2002 and 2004, it was recommended that minimum wages should be maintained at their current levels, and no specific guideline increases were proposed.

Table 2. Trends in Regional Minimum Wage Rates (National Weighted Average)

Year of revision	Minimum wage (yen)	Increase from previous year (yen)
1978	315	-
1979	334	19
1980	357	23
1981	379	22
1982	399	20
1983	411	12
1984	423	12
1985	438	15
1986	451	13
1987	461	10
1988	474	13
1989	492	18
1990	516	24
1991	541	25
1992	565	24
1993	583	18
1994	597	14
1995	611	14
1996	623	12
1997	637	14
1998	649	12
1999	654	5
2000	659	5
2001	663	4
2002	663	0
2003	664	1
2004	665	1
2005	668	3
2006	673	5
2007	687	14

Source: Ministry of Health, Labor and Welfare data.

In 2007, on the other hand, a bill for revision of the Minimum Wages Act was submitted to the Diet, and the Roundtable to Promote Strategy to Enhance Growth Potential, which included representatives of business and labor, was formed at the initiative of the Government, in an effort to boost the function of minimum wages. Against this background, the Central Minimum Wage Council recommended considerably greater guideline increases than in the past (19 yen for rank A, 14 yen for rank B, 9-10 yen for rank C, and 6-7 yen for rank D), and revisions by the prefectures, in line with these guidelines, resulted in a substantial 14 yen rise in the national weighted average.

While a variety of economic indicators are taken into consideration during the Council's deliberations on guideline increases, one particular important source is the "Survey of Wage Revisions," which indicates the growth in wage rates of workers as a whole compared with the previous year after. This survey reflects the results of annual spring wage negotiations (*shunto*).

As a whole, minimum wages are set so low that they are not an issue for most regular employees. However, it is not unusual for non-regular employees such as part-time and temporary workers to experience wages that barely meet the minimum.

3. Industrial Minimum Wages

Industrial minimum wages vary widely according to prefecture. In the case of Tokyo, for example, where the hourly regional minimum wage rate was 739 yen as of February 2008, industrial minimum wages were set in six industries, including iron and steel (822 yen), general industrial machinery and equipment manufacturing (810 yen), publishing (805 yen), and general retailing (779 yen). Industrial minimum wages have also been established as an hourly rate since fiscal 2002, except some residual cases of daily-and-hourly indication.

Industrial minimum wages are normally discussed each year by the Regional Minimum Wages Council in each prefecture after determination of the regional minimum wage. Revised rates are adopted where deemed necessary, usually taking effect in December.

4. Effects of Minimum Wages

Like the Labor Standards Act, the Minimum Wages Act is equipped with three mechanisms for ensuring compliance: (i) mandatory effect upon the contract between the parties, (ii) penalties for violation, and (iii) administrative supervision. Labor contracts that do not provide for a wage that meets the minimum wage rate (even if so desired by a worker) are therefore null and void, and the contract is treated as providing for a wage that is equal to the minimum wage. Employers that do not pay the minimum wage are fined, and are also subject to supervisory administration by the labor standards inspection office. According to statistics on supervision by the Ministry of Health, Labor and Welfare in June 2007, infringements of the Minimum Wage Act were found in 6.4% of all business

establishments inspected.

A relatively recent ruling that attracted attention in the press was the Supreme Court's decision on the *Kansai Medical University* case (Supreme Court, June 3, 2005, *Minshu* 59-5-938), which found that treatment of medical interns at a private university hospital violated the Minimum Wages Act. A monthly "scholarship" of 60,000 yen was paid to intern doctors who worked daily from 7:30 a.m. to 10:00 p.m. under the hospital's direction, an amount far below the regional minimum wage. The Supreme Court found that such doctors, too, were "workers" protected by the Minimum Wages Act and ordered the employer to pay the shortfall.⁴

In order to determine whether the minimum wage has been observed, the hourly wage (where there is one) is compared with the minimum wage per hour. Where the employee is paid a daily wage, the hourly wage is calculated by dividing the daily amount by the normal working hours per day. This amount is compared with the hourly minimum wage rate. In Japan, almost all regular employees receive a monthly salary, in which case the monthly pay is compared with the hourly minimum wage rate by multiplying it by 12 and dividing the product by the number of normal working hours per year to arrive at the hourly wage rate. Commuting allowances, allowances for dependents, and overtime allowances are excluded from the calculations. Semi-annual bonuses, usually paid in June and December, are also not taken into consideration.

IV. Revision of the Act in 2007

1. Background to Revision

Except for minor revisions, the Minimum Wages Act had not undergone a major overhaul since 1968. During that time, as observed above, progress had been made in establishing regional minimum wages. The economic and social conditions surrounding the system had also changed considerably. In this sense, there was plenty of scope for revision of the Minimum Wages Act. The direct impetus for its revision, however, came from the trend toward "regulatory reform" (or deregulation). A particular concern at this time was the industrial minimum wage.

It had long been argued, principally in business circles, that the industrial minimum wage was completely redundant, and that it should be abolished and rolled into the regional minimum wage. This was taken up as part of the Government's series of deregulatory policies from the 1990s and became an issue of concern in this process. The third report of the Council for Comprehensive Regulatory Reform released in December 2003 squarely recommended the abolition of the industrial minimum wage system, and the "Three-year Plan for Promoting Deregulation and Regulatory Reform and Private Opening" endorsed by

⁴ Regarding this judgment, see *Kansai Medical University. v. Mori et al.*, in *International Labour Law Reports* vol. 25, at 45-48 (Alan Gladstone ed., Martinus Nijhoff 2006).

the Cabinet in March 2004 also called for the system to be critically reviewed. As the ministry responsible, the Ministry of Health, Labor and Welfare therefore formed a committee of academics, called the “Panel on the Future of the Minimum Wage System,” to conduct a comprehensive study of the minimum wage system. This panel’s report, released in March 2005, noted regarding industrial minimum wages the “need for a radical review, including the possible abolition of the system.”

In response, a study was conducted by the Minimum Wage Subcommittee of the Working Conditions Committee of the Labor Policy Council, a tripartite deliberative body for labor legislation, from June of the same year. However, the gulf in opinion between employers, who demanded the total abolition of the industrial minimum wage, and workers, who sought continuance of the system, was so wide that deliberations soon became deadlocked. To overcome this situation, a public members’ proposal was put forward in November, which suggested that the provisions on the industrial minimum wage be deleted from the Minimum Wages Act and that a new system of “occupational minimum wage” be established by separate legislation. However, both worker and employer members took a negative attitude toward the brand-new concept of an “occupational” system, and the proposal was not adopted. After a year of further deliberation, it was finally agreed that a “specified minimum wage” system should be established under the Minimum Wages Act itself as an alternative to the industrial minimum wage. This consisted of the de facto maintenance of the framework of establishing minimum wages by industry, while giving these minimums the effect of civil aspect only and removing the penalties for their infringement. On other points as well, agreement was reached and a report produced, and on December 27, 2006, the Labor Policy Council released its recommendations for a complete overhaul of the Minimum Wages Act.

These recommendations formed the basis for a reform bill, which was drawn up by the Government and submitted to the Diet in March 2007. Interestingly, in the interim, the problem of the working poor attracted considerable attention in Japanese society and, instead of voices for deregulation, it became strongly argued that the functions of minimum wages be enhanced. The Minimum Wages Act reform bill was portrayed in the media as a bill to raise the minimum wage, and few people cared about the issue of industrial minimum wage. The reform bill was carried over from the ordinary session to an extraordinary session of the Diet, and during this process an opposing bill was also put forward by the Democratic Party of Japan. However, the government bill was ultimately passed by both houses of the Diet after slight amendment, and was promulgated in early December.

2. Contents of Reform

The 2007 reform was extensive in its content, but the main focus was on streamlining the existing framework of overlapping minimum wages and establishing the regional minimum wage system at its center. The regional minimum wage was enhanced as a safety net for all workers, while the industrial minimum wage was recast into a new system to play

a different role from it.

(1) Regional Minimum Wages

Regional minimum wages were previously no more than one of various minimum wages, which were to be established according to “industries, occupations or regions” (Article 1 of the old act). In contrast, the revised act provided a whole section dedicated to the regional minimum wage (Chapter 2, Section 2), which, it was specified, “must be determined in each region of the nation without exception” (Article 9, Paragraph 1). The government was thus mandated clearly to provide this essential safety net guaranteeing a minimum floor of wages for all workers.

Secondly, the revised act provided that regional minimum wages must be established taking into consideration “the cost of living and the wages of workers and the capacity of normal industries to pay wages in the region” (Article 9, Paragraph 2). This restated the three factors specified under the old act as a general principle for determination of minimum wages—the cost of living of workers, wages of similar workers, and the capacity of normal industries to pay wages (old Article 3)—while narrowing them down to focus on the region in question.

Thirdly, the revised act added that, in considering the “cost of living of workers” factor, “consideration shall be given for consistency with measures pertaining to public assistance so that workers may maintain the minimum standards of wholesome and cultured living” (Article 9, Paragraph 3). This provision reflects an awareness of the criticism that existing minimum wage rates were so low that they were below the public assistance level even when working full-time. Public assistance and the minimum wage naturally serve different purposes and cannot be directly compared. Nevertheless, at least they should be designed to avoid creating a moral hazard that impedes the willingness to work. This point was clarified in the revised act. The phrase “so that workers may maintain the minimum standards of wholesome and cultured living” derives from Article 25 of the Japanese Constitution, which guarantees the people’s right to life, and was inserted by the Diet at the insistence of the Democratic Party of Japan (the only amendment that was made to the government bill).

Criminal penalties are applicable for infringement of regional minimal wages (Article 40), which was also true under the old act. However, as the maximum penalties had not been raised for many years and were demonstrably too low, the 2007 revision raised the maximum from 10,000 yen to 500,000 yen.

(2) Specified Minimum Wages

Arrangements concerning industrial minimum wages were substantially altered, with the safety net function being transferred to regional minimum wages as described above. They were reorganized for a new purpose under the name of “specified minimum wage” (Article 15 and following).

The setup itself is the same as that for industrial minimum wages in the past: a minimum wage is set for certain industries or occupations by the Minister of Health, Labor and Welfare or the Director of the Prefectural Labor Bureau based on investigation and deliberation by the minimum wage council in response to a request from the workers or employers concerned. However, the criminal penalties for infringement of specified minimum wages established in this manner have been eliminated, and they now only have the effect of a civil minimum standard. The new specified minimum wage is expected to “complement efforts of workers and employers when setting the wage level in an enterprise and promote fair wage determination” (as stated in the Government’s reasons for the reform bill), as opposed to the safety net function of the regional minimum wage, and its force was limited to the extent as it was considered necessary and proper to fulfill this purpose. Regarding amounts, it was explicitly stated that the specified minimum wage must exceed the regional minimum wage (Article 16).

On the other hand, regional minimum wages by the collective-agreement extension method (Article 11 of the old act) was abolished by the 2007 revision. As a result, minimum wages in Japan were sorted into two types—(i) the mandatory regional minimum wage, and (ii) the specified minimum wage—both set by the council method. The structure of the act was also changed to make it more coherent, with Chapter 2 (“Minimum Wages”) being divided into three sections concerning, respectively, general provisions, regional minimum wages, and specified minimum wages.

(3) Other Points of Revision

The other main changes introduced by the 2007 revision were as follows.

Firstly, the hourly rate was adopted as the standard method of expression of the minimum wage (Article 3). The old act allowed the minimum wage to be expressed as an hourly, daily, weekly, or monthly rate, but this was changed in view of the rise in the number of workers paid an hourly wage due to the increase in contingent employment, and also to ease calculation and public understanding. In practice, as was observed above, the minimum wage was already being expressed as an hourly rate in most cases.

Secondly, the exemption of certain categories of workers (incapably handicapped, probationary, etc.) where authorized by the Director of the Prefectural Labor Bureau (Article 8 of the old act) was revised to allow instead for a reduction in the minimum wage rate by a proportion determined taking into consideration capacity for work and other circumstances (Article 7). This revision also institutionalized what was already used in practice, which was that a reduced amount would be specified by the Director rather than simply allowing employers a total exemption from paying the minimum wage.

Thirdly, regarding dispatched workers, the regional minimum wage and specified minimum wage covering the business to which workers are dispatched were made applicable to such workers (Articles 13 and 18). Previously, the minimum wage had been determined based on the dispatching business on the grounds that the dispatcher was the

“employer” responsible for paying the worker’s wages. However, because a dispatched worker is placed under the orders and instructions of the user-company and work side by side with its own employees, it was decided to be more appropriate to use the actual workplace as the basis for determining the minimum wage.

Fourthly, fresh provisions were introduced regarding violation of the act to give workers the right to report infringements to the labor standards inspection office and to prohibit disadvantageous treatment by employers of workers who exercise this right (Article 34, Paragraphs 1 and 2). Though a familiar part of the Labor Standards Act and Industrial Safety and Health Act, these provisions had been lacking from the Minimum Wages Act, and so were introduced to ensure its effective implementation.

V. Entry into Effect of the Revised Act and Revision of Regional Minimum Wages in 2008

1. Entry into Effect of the Revised Act

The above revisions to the Minimum Wages Act in 2007 entered effect on July 1, 2008. New regulations were adopted to implement the revised act, and a comprehensive enforcement notice was issued by the Ministry of Health, Labor and Welfare (Jul. 1, 2008, *Kihatsu* 0701001).

As for Article 9, Paragraph 3, which specifies the factors to be taken into consideration in setting regional minimum wages, this notice stated as follows: “Of the three criteria to be taken into consideration by Regional Minimum Wages Councils in their deliberations on determining the minimum wage, consistency with measures relating to public assistance pertains to the cost of living. Although the text simply provides for consideration for such consistency, in view of the fact that consistency with measures relating to public assistance is singled out particularly for consideration under the Act, this should be interpreted as meaning that consideration should be made for ensuring that the minimum wage is set at a level that is not less than public assistance.”

A similar explanation was given during deliberations in the Diet, but it is nevertheless significant that this notice, rephrasing the vague words of the law, explicitly mentioned “a level that is not less than public assistance.”

2. Deliberation of Guideline Increases for 2008

The deliberation of guideline increases for 2008 by the Central Minimum Wage Council commenced on June 30. Normally, a request for advice is given to the Council from the Minister of Health, Labor and Welfare in May, and a report of the Council submitted in response toward the end of July. In 2008, however, events proceeded somewhat behind this schedule due to the entry into effect of the revised act.

In 2008, the Minister of Health, Labor and Welfare specifically requested that the Council make investigation and deliberation “in light of recent circumstances concerning

Table 3. Guideline Increases for 2008 (Part 1)

Rank	Prefecture	Amount
A	<u>Chiba</u> , <u>Tokyo</u> , <u>Kanagawa</u> , Aichi, <u>Osaka</u>	15 yen
B	Tochigi, <u>Saitama</u> , Toyama, Nagano, Shizuoka, Mie, Shiga, <u>Kyoto</u> , <u>Hyogo</u> , <u>Hiroshima</u>	11 yen
C	<u>Hokkaido</u> , <u>Miyagi</u> , Fukushima, Ibaraki, Gunma, Niigata, Ishikawa, Fukui, Yamanashi, Gifu, Nara, Wakayama, Okayama, Yamaguchi, Kagawa, Fukuoka	10 yen
D	<u>Aomori</u> , Iwate, <u>Akita</u> , Yamagata, Tottori, Shimane, Tokushima, Ehime, Kochi, Saga, Nagasaki, Kumamoto, Oita, Miyazaki, Kagoshima, Okinawa	7 yen

the minimum wage and the purpose of the revised Minimum Wages Act, entering effect on July 1 of this year, and also giving consideration to discussion on raising wages in the Roundtable to Promote Strategy to Enhance Growth Potential.” On June 20, the Roundtable endorsed a document entitled “Basic Policy (Roundtable Agreement) on Increasing Small and Medium Enterprise Productivity and Mid- and Long-term Raising of Minimum Wages.” This document stated that the level of minimum wages should be “raised over around the next five years taking into consideration consistency with public assistance standards and the balance with the lowest starting pay of high-school graduates at small business establishments.” However, opinion was divided among the members as to how “small business establishments” should be defined.

In any event, according to the established practice, a tripartite “Committee on Guideline Increases” was set up in the Central Minimum Wage Council to consider specific proposal of guideline increases. This committee is known for intense negotiations, continued through the night each year at the crucial stage. Deliberations ran into difficulties in 2008, too, and no agreement could be reached between representatives of workers and employers. Ultimately, however, it was agreed that a “public members’ opinion” on guideline increases should be presented to the regions, and the committee’s final report was endorsed by the Central Minimum Wage Council on August 6.

3. Details of Guideline Increases

The guideline increases recommended for 2008 consisted of basic increases larger than the previous year, resulting in a nationwide weighted average increase of 15 yen. In addition, reflecting the revision to the act in 2007, they specifically called for measures to eliminate the gap in prefectures where the minimum wage was lower than the public assistance level.

Firstly, the amounts shown in Table 3—15 yen for rank A, 11 yen for rank B, 10 yen for rank C, and 7 yen for rank D—were recommended for basic increases in the regional minimum wage. These amounts were determined based on the data sources used in other years, most notably the Survey of Wage Revisions, but were set somewhat higher than usual

Table 4. Guideline Increases for 2008 (Part 2)

Prefecture	Difference based on 2006 data (A) (yen)	2007 increase in regional minimum wage (B) (yen)	Remaining difference (A - B) (yen)
Hokkaido	63	10	53
Aomori	20	9	11
Miyagi	31	11	20
Akita	17	8	9
Saitama	56	15	41
Chiba	35	19	16
Tokyo	100	20	80
Kanagawa	108	19	89
Kyoto	47	14	33
Osaka	53	19	34
Hyogo	36	14	22
Hiroshima	37	15	22

in line with the aim of raising the level of minimum wages. The prefectures shown in Table 3 that are not underlined were advised to revise their minimum wages by the guideline amounts.

Secondly, however, it was observed that the regional minimum wages in the 12 underlined prefectures in Table 3 would still be below the public assistance level according to the most recently available data (for 2006), even counting the hikes of minimum wages hikes in 2007. This is shown in Table 4. The recommendations for 2008 note that this “residual difference” needs to be eliminated within a certain period of time.

The question is how long should be allowed for this elimination. While differences in the size of the difference and the varying economic conditions in each prefecture rule out specification of a uniform period, the recommendations stated that “the difference should, in principle, be eliminated within two years, or three years where the increase required in this fiscal year to eliminate the difference would be unprecedentedly high.” A period of two to three years was thus suggested as a benchmark. However, it was also stated that “in cases where following this approach could still have a marked impact on the regional economy and employment, the difference may reasonably be eliminated over a period of five years.” In any case, the Regional Minimum Wages Councils are to determine the specific periods and amounts by which to eliminate the difference for themselves, taking into account the conditions in their own regions.

As a result, in the case of the 12 prefectures indicated in Table 4, the greater of the increase shown in Table 3 and the amount obtained by dividing the difference in Table 4 by the above number of years was to be adopted as the guideline increase.

The comparison of the minimum wage and public assistance is not a simple task, as the public assistance level in fact varies according to the location, age, and scope of benefits of the recipients used for comparison. Whereas the regional minimum wage is determined at the prefectural level, public assistance is determined by dividing municipalities into six ranks. The base amounts of public assistance also differ according to age and household composition, together with various additions such as housing benefits and other allowances according to need. Addressing this problem, the guideline recommendations state that comparisons should be made between the minimum wage rate in terms of take-home pay and the value of public assistance received by a single young person to cover food, clothing, and housing costs according to the most recently available figures. This latter amount is to be calculated by adding the actual housing allowance to the average, weighted by prefectural population, of the public assistance standard. This judgment is likely to form a basis for future guideline increases too.

Because the standards of assistance are reviewed from time to time under the Public Assistance Act, fresh differences may arise in subsequent years. In such case, special increases will be required again to eliminate them. A concrete change engendered by the 2007 revision is the initiation of this form of cycle and regular checking to ensure that the minimum wage does not fall below the public assistance level.

4. Revision by Prefectures

In response to the above guideline increases, revisions to the regional minimum wage were conducted by each prefecture's Regional Minimum Wages Council. These deliberations had all been completed by mid-September 2008, and the results are summarized in Table 5. The hourly rate was raised by between 7 yen and 30 yen, and by a national weighted average of 16 yen. The highest minimum wage after revision was 766 yen in Tokyo, and the lowest was 627 yen in the prefectures of Kagoshima, Miyazaki, and Okinawa (all in southernmost part of Japan).

Many of the 12 prefectures that were required by the guideline increases to eliminate the difference between the minimum wage and public assistance decided to do so over a period of two or three years, and the increases to the minimum wage in these prefectures were topped up appropriately. Hokkaido, however, decided it would take five years to eliminate the difference in order to avoid an excessively rapid rise in the minimum wage rate.

Normally, revisions to the regional minimum wage rate enter effect on September 30 or October 1. As deliberation of the guideline increases had fallen behind schedule in 2008, as noted earlier, however, deliberations in the prefectures were also delayed, and the new regional minimum wages did not enter effect until mid to late October in most cases, and not until November in some prefectures.

Table 5. Revisions to Regional Minimum Wages in 2008

Prefecture (from north to south)	Minimum wage hourly rate (yen)	Increase (yen)	Date of entry into effect
Hokkaido*	667 (654)	13	October 19, 2008
Aomori*	630 (619)	11	October 29, 2008
Iwate	628 (619)	9	October 30, 2008
Miyagi*	653 (639)	14	October 24, 2008
Akita*	629 (618)	11	November 2, 2008
Yamagata	629 (620)	9	October 30, 2008
Fukushima	641 (629)	12	October 22, 2008
Ibaraki	676 (665)	11	October 19, 2008
Tochigi	683 (671)	12	October 20, 2008
Gunma	675 (664)	11	October 16, 2008
Saitama*	722 (702)	20	October 17, 2008
Chiba*	723 (706)	17	October 31, 2008
Tokyo*	766 (739)	27	October 19, 2008
Kanagawa	766 (736)	30	October 25, 2008
Niigata	669 (657)	12	October 26, 2008
Toyama	677 (666)	11	October 25, 2008
Ishikawa	673 (662)	11	October 19, 2008
Fukui	670 (659)	11	October 22, 2008
Yamanashi	676 (665)	11	October 25, 2008
Nagano	680 (669)	11	October 16, 2008
Gifu	696 (685)	11	October 19, 2008
Shizuoka	711 (697)	14	October 26, 2008
Aichi	731 (714)	17	October 24, 2008
Mie	701 (689)	12	October 26, 2008
Shiga	691 (677)	14	October 18, 2008
Kyoto*	717 (700)	17	October 25, 2008
Osaka*	748 (731)	17	October 18, 2008
Hyogo*	712 (697)	15	October 22, 2008
Nara	678 (667)	11	October 25, 2008
Wakayama	673 (662)	11	October 30, 2008
Tottori	629 (621)	8	October 26, 2008
Shimane	629 (621)	8	October 19, 2008
Okayama	669 (658)	11	October 18, 2008
Hiroshima*	683 (669)	14	October 26, 2008
Yamaguchi	668 (657)	11	October 26, 2008
Tokushima	632 (625)	7	November 6, 2008
Kagawa	651 (640)	11	October 19, 2008
Ehime	631 (623)	8	October 24, 2008
Kochi	630 (622)	8	October 26, 2008
Fukuoka	675 (663)	12	October 5, 2008
Saga	628 (619)	9	October 25, 2008
Nagasaki	628 (619)	9	October 30, 2008
Kumamoto	628 (620)	8	October 17, 2008
Oita	630 (620)	10	October 29, 2008
Miyazaki	627 (619)	8	October 25, 2008
Kagoshima	627 (619)	8	October 18, 2008
Okinawa	627 (618)	9	October 31, 2008
National weighted average	703 (687)	16	

Notes: 1. Prefectures needing to take steps to eliminate the difference from public assistance under the guideline increases for 2008 are marked by an asterisk.

2. The figures enclosed in parentheses in the “Minimum wage hourly rate” column indicate the regional minimal wage rates in 2007.

VI. Concluding Remarks

That concludes our review of the 2007 revision to the Minimum Wages Act. The Minimum Wages Act, seemingly long neglected, was overhauled and the arrangements put in place to enable minimum wages to function under present-day conditions. In this respect, the revised act may be called a “new departure” of Japanese minimum wage legislation.

The focus of interest looking ahead will, first and foremost, be on trends in regional minimum wages. While the specific amounts are determined by minimum wages councils taking into consideration various economic and social conditions, it is impossible to rule out the possibility of narrow-sightedness of the parties involved who are absorbed in heated discussions between labor and management. There has been widespread criticism in recent years that the level of the minimum wage in Japan is too low by international standards, and the fact that, in some parts of the country, it was actually below the public assistance level will no doubt force a rethink of this past approach to the minimum wage. While the adoption of the revised act has set in motion rises in the minimum wage toward a more effective level, there is considerable division of opinion between workers and employers regarding what constitutes an appropriate level. Moreover, the rapid deterioration of the global economy from the autumn of 2008 is anticipated to heighten opposition to increases in the minimum wage. The fierce debate thus looks set to continue.

Another issue to be considered is the variation in the regional minimum wage according to prefecture. Unlike in other developed countries, the minimum wage in Japan is set “regionally” at the level of each prefecture. It has long been argued even in Japan that a uniform national minimum wage should be established. In fact, when the present revision was passing through the Diet, the alternative bill proposed by the Democratic Party of Japan put forward a mechanism whereby a “national minimum wage” applicable to all workers would be established (envisaged to be set at 800 yen), based on which a “regional minimum wage” of an amount in excess of this would be set by each region. On the other hand, it is a stark reality is that there are considerable differences in prices and wage levels between urban and rural areas; whereas the actual wage level in the former is much higher than the minimum wage, there are many workers in the latter who are paid the minimum wage or only slightly more. The minimum wage gap between regions will not narrow but widen further in the years to come. Still, it would be possible to argue that for this very reason a uniform minimum wage is needed to provide a national minimum. This question will remain an issue for consideration in future legislation.

Finally, it will be worth watching to see what use is made of the specified minimum wages. The existing industrial minimum wages remain effective for two years and thereafter will be treated as specified minimum wages under the revised act. Thus, industrial minimum wages absorbed into the new system will therefore probably make up the bulk of specified minimum wages for the time being, but they will be freshly established under the new framework. Regional minimum wages cannot be so high because they are the bare

minimum across the board. It is hoped that specified minimum wages are utilized, at the initiative of the employers and workers of the particular industry and occupation, to function as a tool for establishing more desirable, decent working conditions.

Balanced Treatment and Bans on Discrimination —Significance and Issues of the Revised Part-Time Work Act—

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In Japan, the Part-Time Work Act was enacted in 1993 with the purpose of promoting improvements in the treatment of persons engaged in part-time labor. While this act was not meant to impose legal restrictions on employers, it underwent major revision with the legislation approved in May 2007, against a backdrop of the quantitative increases and qualitative changes in part-time workers in recent years (the revised version of the Act has been in force since April 1, 2008). The Revised Part-Time Work Act represents a step forward in furnishing essential legal regulation relating to the treatment of part-time workers. It strengthens the obligations of business operators with regard to the elucidation of labor conditions, the provision of balanced treatment and the conversion of part-time workers to full-time workers, with penal provisions introduced in connection with certain stipulations. The Act notably bans the discrimination against part-time workers who fulfill certain conditions in comparison to full-time workers.

Parts I and II of this article introduce the background and contents of the revised Act. Part III examines the proper approach to rules banning discrimination on grounds of being a part-time worker, and Part IV examines the revised Act from the perspective of legislative policy.

I. The Revised Part-Time Work Act: Background and Circumstances

The Part-Time Work Act (Act on Improvement, etc. of Employment Management for Part-Time Workers) was enacted in 1993. Although the Act stipulated measures to be adopted by employers in the interest of improving the treatment afforded to part-time workers, all such stipulations consisted of duties to make sincere efforts in that direction, with no binding legal constraints imposed upon the employers in case of the breach thereof.

However, when the court rendered a judgment on the *Maruko Keihoki Co., Ltd. case* in 1996 (See Part III. 1), the question of how to legally deal with disparities in treatment between regular employees and part-time workers began to attract attention. As a result, the Japanese government also embarked upon the studies of improvements in legal rules from the perspective of how to provide “balanced treatment” in Japan. The final report issued by the Part-Time Work Workshop in 2002¹ emphasized the importance of comprehensive approaches aimed at realizing “equitable treatment based on the ways and kinds of work,” including the legislation of Japanese-type balanced treatment rules. However, based on the view that the formation of a social consensus is prerequisite for this legislation, the report limited itself to recommending that, for the time being, some guidelines be shown to the

¹ The final report, *Pato Rodo no Kadai to Taio no Hokosei* [Theme of part-time work and courses of action], issued by the Part-Time Work Workshop chaired by Hiroki Sato (2002).

business operators such as: (i) In cases when part-time workers perform the same duties with regular employees and there is no clear difference observable in the actual career management between them, the methods for determining treatment should be the same for both of them. (ii) Even in cases when the different methods can be rationally applied, if the current duties and responsibilities are the same, the balanced treatment should be considered.²

As shown above, the Japanese legal policies so far preferred the autonomous schemes by the business operators and workers and abstained from setting up coercive legal rules. However, the recent revision of the Part-Time Work Act has taken a new step, with imposing certain penalties on the nonfulfillment of the obligations on the part of the business operators and banning some disparities in the treatment against the part-time workers as illegal discriminations. It is believed that this has raised the effectiveness of the Act to a considerable degree.

It is already indicated³ that the factors behind the recent revision are the increase of part-time workers in number and the changes in their characters. According to the Labor Force Survey (issued by the Ministry of Internal Affairs and Communications), in 2006, the number of employees working less than 35 hours per week (excluding agriculture and forestry) had climbed to 12.05 million persons, thereby accounting for over 20% of all workers. In addition to this, within the worsened employment situation, from the latter half of the 1990's, the companies tended to refrain from hiring regular employees in order to reduce labor costs, and allot the posts previously held by the regular employees to the part-time or temporary workers. This led to the so-called "shift of part-timers to core positions," that is, an increase of part-time workers entrusted with work duties equivalent to those of regular employees, and this in turn sparked a heightened sense of inequity toward the treatment disparities afforded to these part-timers compared to their regular employee counterparts.

Around the same time, the worsening in employment opportunities raised the number of jobseekers, especially among younger people, who are forced to become part-time workers due to their inability to obtain jobs as regular employees. Their low wages are not enough to support themselves financially and there emerged the issue of earning gaps, a situation that has generated strong social demands for improvements in such treatment disparity. Furthermore, amidst prospects of imminent labor shortages due to Japan's declining birthrate and aging population, there was increasing awareness of the need, as national employment policy, for improvements in favorable work opportunities geared to take ample

² Based on this, the Part-Time Work Guideline was revised in August 2003.

³ Regarding the circumstances leading up to revision, refer to Hironobu Chin, *Rodogawa kara Mita Kaisei Pato Taimu Rodoho no Hyoka to Mondaiten* [Evaluation and problematical points of the Revised Part-Time Work Act viewed from the labor side], *Kikan Rodoho* (Quarterly Labor Law), no. 220, 76-77; and Hiroyuki Matsui, *Kaisei Pato Taimu Rodoho no Igi to Kadai* [Significance and issues of the Revised Part-Time Work Act], *Kikan Rodoho* (Quarterly Labor Law), no. 220, 84-85. Concerning the background details, see the final report issued by the Part-Time Work Workshop (see n.1 above).

advantage of the labor (skills) of women, senior citizens and others desiring flexible working conditions characterized by low levels of workplace restraints. This too can be considered a key factor behind the decision to retool this Act.

II. Contents of the Revised Part-Time Work Act

1. Applicability

Generally speaking, while the term “part-time workers” is used to refer to persons who work fewer hours than regular employees do, in Japan, there are also instances in which this expression is used as a generic term to indicate “non-regular employees” (workers other than regular employees). The latter term also includes persons who, although referred to under “part-time employees” or other names, actually work the same number of prescribed working hours for the regular employees (“pseudo-part-timers,” “full-time part-timers”). Therefore, when engaging in discussions of so-called “part-time workers,” there is a need to clarify which category is actually being referred to.⁴

The Part-Time Work Act is applied to the “part-time workers” in the former meaning, that is, “short-time workers.” In more specific terms, “short-time workers” are defined as “workers whose prescribed weekly working hours are shorter than those of ordinary workers employed at the same place of business” (Article 2). When falling under this “short-time worker” definition, the Act will be applied regardless of whether these workers are named “part-timers,” “non-regular workers,” “temporary workers,” “contract employees” or other names (from here on, in the absence of special indication, “part-time workers” shall refer to “short-time workers”).⁵ In contrast, “full-time part-timers” who work the same number of prescribed working hours as regular workers do not correspond to the category of “short-time workers,” so the Act is not applicable. However, under the Guidelines Referring to Measures Pertaining to Improvement in the Employment Management and Other Areas of Short-time Workers to be Devised by Business Operators (Ministry of Health, Labour and Welfare Notice No. 326, October 1, 2007), it is stated that consideration should be devoted to the spirit of the Act with regard to this genre of workers as well (see Part III).

There has been no change in this definition of “short-time workers” itself since the original enactment of the act. As for their counterparts, the “regular workers,” a new interpretation thereof has been expressed through a notification accompanying the recent revision (Circular Notice No. 1001002 issued by the Equal Employment, Children and Families

⁴ Mari Osawa, “*Pato Taimu*” *Rodo to Kinto Taigu Gensoku: Keizaigaku-teki Apurochi* [“Part-time” work and the equal treatment principle: An economic approach], *Nippon Rodoho Gakkaishi* [Japan labor law association magazine], no. 90, 95-97 (1997).

⁵ Regular employees with temporarily shortened working hours due to child care or other reasons (see Articles 23 and 26 of the Child and Family Care Leave Act) are considered to be “regular workers” in light of the employment system and wage structure, and are thus not subject to application under the Part-Time Work Act.

Bureau, Ministry of Health, Labour and Welfare, October 1, 2007, hereinafter referred to as the “Circular Notice”). According to the Circular Notice, the “regular workers” provided in Article 2 shall refer to workers who are ruled to be “regular” in accordance with the social common sense, and will generally pertain to the regular type of workers engaged in the same type of duties at the places of business in question. In cases when no such regular-type workers are present, workers engaged in the same type of duties on a full-time basis shall be considered to be “regular workers,” and if no workers in that category are present either, persons who are prescribed the longest weekly working hours (for example, 35 hours per week) shall be considered to be “regular workers.” In cases when there are no so-called “regular workers” engaged in the same type of duties, “regular workers” whose prescribed working hours at the said places of business are longest shall be the basis of comparison (No. 1-3[3] of the Circular Notice).

The Circular Notice insists that the aforementioned definition of the “regular workers” is not limited to “full employees” so that the Act should be applied to as many places of business as possible (No. 1-1[2]), and the consistency be achieved with the revised Act’s categorization of short-time workers by the types of duties they perform (No. 1-3[3]). It is true that, according to these standards, the applicability of the Act definitely expands, but the methods for ruling are extremely technical and complex, a situation that actually creates concerns of undermining the Act’s effectiveness.⁶ There is actually no necessity to classify according to the types of duties when determining the applicability of the Act, because some of its provisions are applicable regardless of whether or not persons are engaged in the same type of duties as those of “regular workers” (Articles 6 and 7, Articles 11-13). Thus, it should be sufficient to compare the types of duties when applying individual provisions (for example, Article 8, Article 10, etc.). It should be better to consider regular-type workers at the place of business in question as “regular workers,” regardless of the types of duties they perform.

2. Obligations to Clearly Express and Explain Working Conditions

As for the key points of this legal revision, the first one is the strengthening of the obligations of employers to clearly express and furnish explanations of the specific working conditions involved.

In contrast to the working conditions for regular employees, which are normally determined uniformly on the basis of formal work regulations or other means, the treatment of part-time workers is in most cases determined individually. This makes their working conditions vague and their situations highly prone to confusion. Under the former Act, therefore, employers are obliged to make efforts to issue documents pertaining to working conditions upon hiring part-time workers. With the recent legislative revision, however, the issuing of

⁶ Hajime Wada, *Pato Rodoho Kaisei no Igi to Kongo no Kadai* [Significance and future issues of the Revised Part-Time Work Act], *Kikan Rodoho* (Quarterly Labor Law), no. 220, 73 (2008).

such documents has been rendered a mandatory obligation as far as certain working conditions are concerned (presence or absence of wage increases, retirement benefits and bonuses—Article 6, Part-Time Work Act). Upon violations, fines are imposed to a maximum of 100,000 yen (Article 47 of the act). As a result, when the business operators hire short-time workers, they are bound to perform not only the obligation to clearly indicate the general working conditions in accordance with Article 15 of the Labor Standards Act (term of contract, place of work and duties to be performed, work starting and finishing times, presence or absence of prescribed overtime work, break times, holidays, vacations, methods for determining wage and for its payment, retirement and dismissal), but also the obligation to issue documents in accordance with the Part-Time Work Act.

Newly established, furthermore, has been the obligation of accountability with regard to working conditions. Upon request from the part-time workers, the business operators are required to furnish those workers with the explanations of the matters taken into consideration when determining their treatment (Article 13) concerning the matters regulated under Article 6 through Article 12 of the Act (issuing of work condition documents, procedures for preparing work regulations, bans on discriminatory treatment, wage determination methods, education and training, social service facilities, and measures for the sake of promoting conversion to regular worker status). For example, in cases when workers request explanations of the methods used to determine the wages (Article 9, Paragraph 1), the business operator is required to detail what types of factors have been taken into consideration in determining the wages of the short-time workers as a whole, and how those factors have been evaluated with regard to the particular worker in question (No. 3-9 of the Circular Notice).

3. Bans on Discriminatory Treatment (Balanced Treatment)

As the second key point of the revised Act, with regard to “short-time workers who deserve to be treated equally with regular workers,” the treatment that places such workers at disadvantages compared to “regular workers” is banned as illegal discrimination (Article 8, Paragraph 1). Prohibited is the discriminatory treatment relating to a broad sphere of matters, such as “wage determination, implementation of education and training, use of social service facilities and other treatment,” excluding, however, working hours and matters concerning recruitment and hiring, because the ground for the ban of discrimination lies in the short-time employment form. Furthermore, if the disparities in wages and other matters are based on differences in personal volition, ability, experience, work results and so on, the practice does not constitute violations of this article, because it is not “discrimination on the grounds of being a short-time worker,” as long as the assessments and evaluations are implemented objectively.

The category of “short-time workers who deserve to be treated equally with regular workers” and the discrimination against whom is banned by the Act refers to persons who satisfy all of the following three requirements: (i) Their “job contents” are the same as those

of regular workers. (ii) Their work contracts concluded with the business operators are without determined period of time, or their contract can be properly regarded as having no settled period of time for the reasons of repetitive renewal of fixed-term work contracts (Article 8, Paragraph 2). (iii) Their job contents and allocations are presumably subject to change to the same extent as that of the regular workers throughout the entire period of the employment contract with the business operator in question.

In the Circular Notice, detailed mention is made of the specific standards used to decide the appropriateness of these conditions (No. 1-4[2]) and No. 3-3[3]). According to these standards, the requirement (i) refers to cases when the core contents of the work are the same (as those of regular workers), and there are no conspicuous differences in the responsibilities accompanying the duties. With regard to (ii), the Circular Notice states that judgments on whether or not the work contracts will be treated as contracts for which no terms are determined will be made on the basis of integrated consideration of the constancy of the duties of the worker in question, the job contents, the basic nature of his position, the words and acts on the part of the business operator that generate expectations for sustained employment, the number of renewals, the renewal procedures, the renewal conditions of other workers, etc. Condition (iii), meanwhile, refers to the short-time workers for whom the presence/absence or the extent of the possibility of changes in the job contents and allocations is effectively the same as that of the regular workers.

Part-time workers meeting these conditions are able to dispute the disparities in the treatment between the “regular workers” and themselves as illegal discrimination. Article 8 of the revised Act is a mandatory provision under private law, so the acts of the business operators in violation of this provision (including failure to grant promotions or other omissions) corresponds to illegal acts (Article 709 of the Civil Code). Their acts such as dismissals and relocation orders against this provision are null and void, and so is the part of the contracts and work regulations that is violating this article. There is a view that this article may be interpreted as a stipulation that directly governs the contents of work contracts, thereby recognizing the right to demand rectification of discrimination⁷ (the right to claim wage differentials, promotion, etc.). However, considering that the Part-Time Work Act does not contain a provision with uncontestable force such as that in Article 13 of the Labor Standards Act and that the Act’s ban on discrimination differs in nature from gender discrimination or racial discrimination (see Part III. 3 below), it should be understood that the range of recognition will not extend to these types of claim rights.⁸

4. Balanced Treatment

The third key point of the revised Act is that for the benefit of the overwhelming ma-

⁷ *Id.* at 71-72.

⁸ Kazuo Sugano, *Rodoho* [Labor laws] 190 (8th ed., Kobundo 2008) denies the rights to claim rectification of discrimination on the grounds that the contents of the said rights are unclear.

majority of part-time workers who fail to correspond to so-called category of “short-time workers who deserve to be treated equally with regular workers,” the Act stipulates specific duties to endeavor or to adopt measures for the purpose of providing balanced treatment (equal treatment) in regard to some matters.

(1) Wage Determination

The business operators should make their endeavors to maintain a balance between the regular workers and the short-time workers, when deciding the wages of the latter, taking into account their job contents, the results of their duties, their volition, abilities, experience and other factors (Article 9, Paragraph 1). The “wages” mentioned here are limited to compensation closely linked to the actual duties (basic salary, bonuses, service allowances, etc.), and, as a general rule, do not include commuting allowances, retirement allowances, family allowances and other benefits.

In addition, if the part-time workers whose job contents are the same as those of regular workers (“short-time workers with the same job contents,” see Article 8) undergo changes, for a certain period of time, in their job contents and allocations to the same extent as that of the regular workers, their wages for that period should be decided through the same methods as are applied to the regular workers (Article 9, Paragraph 2).⁹

(2) Implementation of Education and Training

When business owners provide education and training for regular workers with the purpose of bestowing those workers with the abilities necessary for their job contents (for example, arranging for workers involved in accounting operations to undergo training in bookkeeping practices necessary for performing their duties, etc.), they shall also be obligated to offer the same education and training programs to part-time workers performing duties consisting of the same job contents (Article 10, Paragraph 1). This does not apply, however, when the said part-time workers already possess those abilities. This obligation is a so-called “duty to adopt measures,” therefore, it is interpreted that, in case of the violations of this article, the workers can demand only damage compensation based on illegal acts within the context of private law, and have no right to claim implementation of the actual education and training.¹⁰

With regard to other kinds of training and education (for example, training and overseas study necessary for career development), the business operators shall endeavor to im-

⁹ According to the Circular Notice, in cases, for example, when regular workers are promoted from “Section leader” to “Chief,” “Unit Chief (subject to transfer)” and “Deputy Store Manager,” and part-time workers are promoted from “Person in Charge” to “Section leader,” “Chief” and “Unit Chief (not subject to transfer),” the business operators are required, on account of their duty to endeavor, to determine the wages to be paid during the period in which those part-time workers serve as Section leaders or Chiefs through the same methods as are applied to the regular workers (No. 3-4[4]).

¹⁰ Sugano, above n. 8, at 191.

plement programs consistent with the job contents, motivation, abilities and other aspects of the part-time workers, regardless of whether or not their job contents are the same as those of the regular workers (Article 10, Paragraph 2).

(3) Use of Social Service Facilities

With regard to the opportunities to utilize service facilities (dining facilities, lounges, dressing rooms), business operators must make considerations to provide all part-time workers (regardless of their job contents) with the same opportunities as those provided for regular workers (Article 11).¹¹ According to the Circular Notice, while such considerations do not include the enlargement of facilities in cases when the opportunities are limited due to the capacity of the said facilities or other factors, it is required that use not be limited to regular employees and that specific measures be taken to expand the opportunities of the part-time workers, such as the flexible utilization of the facilities in terms of time (No 3-6[2]).

5. Conversion to “Regular Worker” Status

The fourth key point of the revised Act is the obligation of business owners to devise certain measures for the sake of furnishing part-time workers with opportunities to convert to the status of regular workers. Business owners must adopt, at least, one of the following measures: (i) Upon recruiting regular workers, the part-time workers already employed shall be informed of the content of that recruitment. (ii) In case of in-house recruiting for the regular workers’ posts, the part-time workers already employed shall have an opportunity to apply for those posts. (iii) Establishment of an examination system for the conversion of part-time workers to regular worker status. (iv) Other measures for the purpose of promoting conversion to regular worker status (for example, providing assistance necessary to receive the education and training needed to attain the abilities required for regular employees, etc.) (Article 12). As these measures should be implemented for the benefit of all part-time workers, the business operators cannot be exempted from this duty by personally offering regular employee positions to some part-time workers favorable for them. Additionally, the purpose of this article is not to grant the part-time workers already employed a privilege to be hired, but to furnish them with an opportunity for conversion to regular worker status (No. 3-8 of the Circular Notice).

6. Dispute Resolution

As the fifth key point in this context, the revised Act establishes new dispute resolution procedures relating to the treatment of part-time workers regulated by the Act (the is-

¹¹ Although the legal nature of the obligation to make considerations mentioned here is vague, it is effectively positioned to be stronger than the duty to endeavor and weaker than the duty to adopt measures.

suing of documents pertaining to working conditions, the duty to explain decisions on treatment, bans on discrimination, education and training, social services, measures for conversion to regular worker status).

As initial recourse, when receiving complaints from workers with regard to the aforementioned matters, business operators shall strive to achieve independent resolutions, for example, by consigning the matters in question to a complaint arbitration body (Article 19). In cases when independent resolutions prove difficult, the following alternative dispute procedures are available: (i) Advice, guidance and recommendations from prefectural labor bureau directors (Article 21). (ii) Arbitration by a grievance mediation committee (“Equal Treatment Arbitration Council”) in accordance with the Act on Promoting the Resolution of Individual Labor-Related Disputes (Article 22).¹²

III. Regulations on Disadvantageous Treatment Due to Part-Time Worker Status

1. Part-Time Worker Treatment Disparities and Legal Regulation

Over the years to date, theoretical discussions concerning the balanced treatment of part-time workers have largely concentrated on the pros and cons of legal redress for wage disparities. While there are numerous different views of this subject, they may be generally classified into the following two categories: (i) Approval of legal redress on the basis of the breach of public policy (Article 90 of the Civil Code) in certain cases, while also adopting a generally positive stance with regard to legislation of balanced treatment for part-time workers (redress affirmation theory). (ii) The stance of basically consigning the rectification of wage disparities to the market (redress denial theory).

Even among those who affirm the use of redress, however, opinions were divided into some variations as to the contents of the principle of balanced treatment that effectively forms public policy. The variations are: (i) The theory asserting application of the principle of equal pay for equal (value) work.¹³ (ii) The theory of recognizing violations of public policy on the condition that the part-time workers assume responsibilities identical to those of regular employees in terms not only of the contents of the work but also of the overtime work and reallocation (the principle of equal pay for equal responsibility).¹⁴ (iii) The theory which, taking the purpose of Article 3 of the former Part-Time Work Act into consideration, recognizes violations of public policy when the business operators are neglectful about

¹² Applied for these arbitration procedures are the stipulations pertaining to arbitration under the Equality Act (Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment) (Article 23).

¹³ Junryo Honda, *Pato Taimu Rodosha no Genjo to Kinto Taigu no Gensoku* [The current state of part-time workers and the principle of equal treatment], Osaka University of Economics and Law Institute of Legal Studies Bulletin, no. 13, 134-35 (1991).

¹⁴ Yuichiro Mizumachi, *Pato Taimu Rodo no Horitsu Seisaku* [Part-time labor legal policy] 237 (Yuhikaku 1997).

conspicuous disparities lacking “balance” with the regular employees, and asserts that the proportional redress based on “balance” should be afforded (the balancing principle),¹⁵ etc.

On the other hand, those who deny the redress have also made various assertions to date: (i) The view that no wage system using duties as the standard has been established in Japan, rendering it difficult to approve the principle of equal pay for equal work as public policy.¹⁶ (ii) Viewed from the perspective of comparative law, the balanced treatment of part-time workers is not a universal principle like that of prohibition of gender discrimination, but rather an issue of labor market policy. From a policy standpoint, there is a threat that mandatory legal regulation would produce negative effects (reduced job opportunities, job segregation, etc.).¹⁷ (iii) As for the “part-time workers in its proper sense” whose working hours are shorter, a balance with the regular employees should be acquired not through balanced treatment, but rather by limiting the obligations of overtime work, reallocation and other matters when interpreting the said labor contracts.¹⁸

In terms of judicial precedents as well, with regard to wage disparities between regular employees and part-time workers performing the same type of work, disputes have been carried over the question whether public policy violations can be confirmed. In the ruling on *the Maruko Keihoki Co., Ltd. case* in 1996,¹⁹ the wage disparities between regular employees and temporary employees (whose working time was 15 minutes shorter than the prescribed working hours) engaging in the same work at the plant were declared to be partially in violation of public policy. This judgment gained attention for its approval of damage compensation demands based on illegal acts. However, a lower court ruled that wage disparities between regular employees and temporary employees (whose working time was slightly shorter than prescribed working hours) engaged in the same shipping duties were within the sphere of contractual freedom and did not comprise violation of public policy.²⁰ In this way, no solid legal principle has been formed on the basis of established judicial precedent.

As the recent legal revision expressly banned the discriminatory treatment of

¹⁵ Michio Tsuchida, *Pato Taimu Rodo to “Kinko no Rinen”* [Part-time labor and the principle of balance], 119 *Minshoho Zasshi* [The Journal of Civil Code and Commercial Code], no. 4-5, 555-57, 563-73 (1999).

¹⁶ Takashi Shimoi, *Pato Taimu Rodosha no Hoteki Hogo* [Legal protection of part-time workers], *Nippon Rodoho Gakkaishi* [Japan labor law association magazine], no. 64, 18-19 (1984); Susumu Noda, *Pato Taimu Rodosha no Rodo Joken* [Working conditions of part-time workers], *Rodoho Gakkaishi* [Japan labor law association magazine], no. 64, 71 (1984); Kazuo Sugano & Yasuo Suwa, *Pato Taimu Rodoho to Kinto Taigu Gensoku* [The Part-Time Work Act and the principle of balanced treatment], in *Gendai Yoroppaho no Tenbo* [Overview of contemporary European law] 131 (Ichiro Kitamura ed., University of Tokyo Press 1998), etc.

¹⁷ Sugano & Suwa, *id.* at 122, 130, 132; Shimoi, *id.* at 14.

¹⁸ Noda, above n. 16, at 50-52.

¹⁹ *Maruko Keihoki case* ruling, Nagano District Court, Ueda Branch, Judgment, March 15, 1996, Rohan 690-32.

²⁰ *Nihon Yubin Teiso case*, Osaka District Court, Judgment, May 22, 2002, Rohan 830-22.

“short-time workers who deserve to be treated equally with regular workers,” the traditional need to devote studies to the presence or absence of violations of public policy has been eliminated.²¹ However, the stipulations applied to the other category of the workers (Articles 9 through 11) provide no guarantee of balanced treatment as a legal right, and the ground for the legal redress remains the violation of public policy (Article 90 of the Civil Code). Accordingly, the conventional types of discussions are still meaningful.

2. Characteristics of Bans on Discrimination under the Part-Time Work Act

As the rules of non-discrimination in labor relations to date, bans have been placed on discrimination on grounds of nationality (including race), beliefs or social position pursuant to Article 3 of the Labor Standards Act, on gender discrimination pursuant to Article 4 of that Act and the Equality Act (Act on Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment). Under the Labor Union Act, meanwhile, disadvantageous treatment on the grounds of membership in a labor union or similar reasons has been banned as unfair labor practices (Article 7, No. 1). In addition to these, Article 10 of Employment Measures Act recently added a ban in principle on discriminatory recruitment and hiring customs based on age. Finally, with the present Part-Time Work Act, the prohibition of discrimination against part-time workers has been legislated.

Compared to the rules on banning discrimination based on the Labor Standards Act, the Equality Act and other conventional legislation, the bans on discriminatory practices in accordance with the Part-Time Work Act may be said to have the following three major distinguishing characteristics.

First, the requirements for establishing discriminatory bans are rigid and technical in nature. This is due to the fact that the scope of the “regular workers” used as the counterpart in this context is extremely limited. For example, in the case of gender discrimination, no provision of the related acts requires that the workers in question are engaged in the same type of work (Article 4 of the Labor Standards Act, Article 6 of the Equality Act, etc.), and the judicial precedents also confirm the presence of discrimination if gender discrimination can be demonstrated to exist by comparing the female worker in question with the male worker engaging in *similar* (not necessarily the *same*) work or by comparing collectively the groups of female and male workers with the same age and academic backgrounds, except when the employer proves the rationality of the disparities.²² In contrast, in the case of discrimination against part-timers, even if the job contents (including the levels of responsibility) are the same as those of the regular employees, when differences exist in the term of contracts, the presence/absence or extent of reallocation and other points, comparisons with

²¹ Under the present conditions, it is said that the plaintiffs in the *Maruko Keihoki* case would be subject to application under Article 8 of the revised act.

²² Recent examples include the *Showa Shell Sekiyu* case, Tokyo District Court, Judgment, January 29, 2003, Rohan 846-10 (wage discrimination); the *Shiba Shinkin Bank* case, Tokyo High Court, Judgment, December 22, 2000, Rohan 796-5 (promotion discrimination), etc.

the said regular employees will not be recognized at all, thereby rendering it impossible to establish the case for discrimination.²³ Moreover, each of the three requirements for comparison (job contents, term of contract and the possibilities of changes in the job contents and of reallocation) cannot be clearly established and is open to interpretation, and the methods of comparison with the “regular workers” described in the Circular Notice become extremely complex.

The second distinguishing characteristic of discrimination bans under the Part-Time Work Act is that the rules of non-discrimination are treated as one aspect of the principle of balanced treatment (“maintaining treatment in balance with that of regular workers” [Article 3]), which is the original purpose of the Act. The revised version of the Act classifies the part-time workers into the following three (or four) categories:

- (i) Persons who should be treated as the same as the “regular workers.”
- (ii) Persons with the same job contents as the “regular workers” (short-time workers with identical job contents).
 - (ii)-1 Persons whose schemes of human resource utilization are the same as those of “regular workers” over set periods of time.
 - (ii)-2 Persons other than those cited above.
- (iii) Persons whose job contents differ from those of the “regular workers.”

Of these categories, only disparities in treatment against the category (i) are banned as discrimination. For those who belong to the categories (ii) and (iii), which constitute overwhelming majority statistically, mere duty to endeavor or to adopt measures is stipulated pertaining to wages, education and training, and social services (Articles 9 through 11). Therefore, it is not the same treatment as that afforded to general workers (equal treatment) that is required for the latter categories, but rather treatment considered to be in equilibrium with that afforded to regular workers (balanced treatment), that is, fair treatment in accordance with the differences in the ways and kinds of work. Accordingly, while not all differences with regular employees are denied, conspicuous disparities in treatment that cannot be rationally justified by the differences in the job contents or the ways and kinds of work may be regarded as incompatible with the spirit of the Act or possibly even considered to be violating public policy.

Bans on discrimination based on the Part-Time Work Act are in an inseparable relationship with this principle of balanced treatment. Examining the overall content of the revised Act, it can be stated that the basic idea pertaining to the treatment of part-time workers is balanced treatment (see Articles 1 and 3 of the Act), while it is embodied in the form of ban on the discrimination with regard to certain workers.

Thirdly, the ban on the discrimination in the Act is complemented by the stipulations

²³ Accordingly, while the so-called gender-specific career course system is considered to be in violation of the Equality Act, the practice of clearly differentiating between part-time workers and regular employees within employment management for recruitment, hiring and assignment is considered lawful, with treatment disparity in this case failing to correspond to violations of Article 8.

that require the business operators to promote the transition of part-time workers to regular employee status (Article 12). As the status of being a part-time worker is a position in contractual terms, different from gender, race and other natural categories, a fundamental solution for persons working as part-timers desiring to secure jobs as regular employees is the transitions to such regular employee status. Consequently, if the possibility to become regular employees is effectively open to these workers, the need for mandatory regulation of treatment disparities would be lowered to a proportional degree.

3. Why Regulate Part-Time Worker Discrimination?

As noted above, the Part-Time Work Act can be said to introduce a new type of discrimination banning rules that differs on many different points from the bans on racial discrimination, gender discrimination and other types of prejudice. The difference emerged from the very fact that discrimination on the grounds of being part-time workers differs in character from discrimination based on race, gender or other grounds.

Employers must always use some sort of standards to differentiate between workers. While, in principle, the employers are free to adopt whatever standards they please, they are not permitted to make use of certain standards as they constitute illegal discrimination. The previous rules which prohibit discrimination (based on gender, nationality or race, beliefs, social position, membership in or forming of labor unions, etc.) are justified persuasively in the following manner.²⁴ (i) Attributes that cannot be chosen through one's own will (gender, race, social position) and (ii) Execution of constitutionally guaranteed basic personal rights (beliefs, labor union membership) cannot be used as the grounds for excluding the individuals with these attributes from employment opportunities or work advantages, for the exclusion corresponds to fundamental infringements of the personal respect and freedom that comprise the ideal of law. The laws that ban such discrimination can be seen as guaranteeing the basic human rights, and are characterized from the perspective of comparative law by the common features of the comprehensive and double-sided bans on discrimination and the limitation of the exceptions to this ban.²⁵ Existing at the base of these rules is the premise that disparities on the grounds of difference in personal job performance abilities²⁶ are rational and not illegal discrimination (while gender, race and other attributes do not exert

²⁴ Keisuke Abe, *Sabetsu wa Naze Kinjirarenakereba Naranainoka* [Why must discrimination be banned?], in *Sabetsu Kinshiho no Shin-Tenkai: Daibashiti no Genjitsu wo Mezashite* [New developments of the laws of banning discrimination: Striving to realize diversity] 28-29 (Hideyuki Morito & Yuichiro Mizumachi ed., Nippon Hyoronsha 2008).

²⁵ Ryoko Sakuraba, *Nenrei Sabetsu Kinshi no Hori* [The legal principles of bans on age discrimination] 5-7, 309-10 (Shinzansha 2007).

²⁶ The term "job performance abilities" used here does not refer merely to the specific job contents and performance, but rather is used in a broader sense encompassing the particular individual's character, motivation and experience, the ability to mount flexible responses to reallocation and overtime work, the degree of time and energy which can be devoted to work and other pertinent factors.

an impact on job performance abilities)²⁷.

In contrast to this, the very fact of being a part-time worker is a position based on a contract concluded on the basis of the will of the parties involved, and fails to correspond to either (i) or (ii) above. In addition, because the Act of becoming a part-time worker comprises the choice of ways and kinds of working that differ from those of regular employees (at the very least, in terms of working hours), it will normally have some influence on job performance skills in the broad sense of the word. Accordingly, disadvantageous treatment for reasons of being part-time workers does not violate individual respect or freedom directly, and should not be prohibited uniformly regardless of the socioeconomic conditions at hand, which, in contrast, is the case with the racial or gender discrimination.

This leads us to the question of why there is a need to ban as discrimination disadvantageous treatment implemented for the reason of being a part-time worker. In the first place, within the free market, it is simply impossible for everyone wishing to become a regular employee to be hired in that status, even though they possess the abilities, motivation and other attributes needed to become regular employees, and some of them are inevitably forced to become part-time workers against their wills. As noted at the outset, there has been an increase in such persons under the employment conditions emerging in recent years, leading to no small number of cases in which contracts for the part-time workers cannot essentially be said to represent choices based on the wills of the parties involved.²⁸ Moreover, approximately 70% of all part-time workers are women, the majority of whom choose to work part time in order to achieve balance between the work and the home. Behind this choice, however, can be found the influence of the division of labor between men and women, which has served to amplify and solidify gender discrimination at the workplace. For these reasons, under the current socioeconomic conditions in Japan, the disadvantageous treatment of the part-time workers (particularly, in cases of performing the same duties as regular employees do or conspicuous treatment disparities) should be evaluated as socially inequitable, thereby leading to demands for regulation by the law.

Taking into account the socioeconomic conditions in Japan, the rules of non-discrimination in the revised Act have been introduced as one means of achieving balanced treatment between the regular and the part-time employees, under a policy objective that seeks to rectify such social inequities and move to more positive utilization of part-time workers (see Article 1 of the act). In other words, the rules are based on the policy considerations rather than aiming at ensuring universal human rights.

²⁷ Abe, above n. 24, at 30.

²⁸ According to the *Comprehensive Fact-Finding Survey Relating to Diversification of Employment Patterns* (Ministry of Health, Labour and Welfare 2003), the ratio of persons becoming part-time workers as a result of failing to gain employment as regular employees was 21.6% (for all non-regular employees, the figure rose to 25.8%).

IV. Legislative Policy-Oriented Studies of the Revised Act

If bans on discrimination against part-time workers are considered to be rules developed from a policy standpoint, then there is no necessity to adopt comprehensive or double-sided bans such as those established against racial or gender discrimination. Rather, it should be preferable to establish non-discrimination rules with a certain degree of flexibility that are consistent with the goals to be achieved.²⁹ How, then, should the revised Act be evaluated from this type of legislative policy perspective?

Although the revised Act is quite significant insofar as it provides for the first time the ban on discrimination based on the “part-time” employment form, it is also said that only several percent of all part-time workers fulfill the conditions under Article 8 of the revised Act. In view of this, I would like to address the question of whether the workers to be legally protected are being excluded or not from the aforementioned policy perspective.

First, as was already pointed out, with regard to the “full-time part-timers” whose prescribed working hours are the same as those of regular employees, the demands for equal treatment are the strongest from the perspective of social equity. However, because this category of worker fails to correspond to the “short-time workers” as defined by law, the ban on discrimination does not extend to this group. Under the present law, taking into account the guiding principle of the revised Act and the purpose of Article 3, Paragraph 2 of the Labor Contract Act (“Labor contracts shall be concluded between workers and employers and changed based on considerations for balances responding to work conditions”), redress should be carried out in accordance with public policy (Article 90 of the Civil Code).³⁰

Secondly, while the types of part-time workers are diversifying, many of them choose part-time work for the sake of achieving a balance between the work and the responsibilities of family life (child care, nursing care, housework, etc.). It is difficult for such persons to comply with demands for work transfers (especially moves to faraway locations) or constant overtime work,³¹ which is exactly the reason why they choose the form of part-time work. It would be hard for such workers to fulfill the requirements stipulated in Article 8 of the revised Act.³²

The need to introduce mandatory regulation for this category of part-time workers, whose choice is seemingly voluntary, would be evaluated lower than that for the so-called involuntary part-time workers. From a policy perspective, however, against the backdrop of

²⁹ Regarding age discrimination, see Sakuraba, above n. 25, at 5.

³⁰ See comments by Tsuchida in Panel discussion, *Shin-Rodo Rippo to Koyo Shakai no Yukue* [Whither new labor legislation and employment society?], Jurist, no. 1347, 29.

³¹ Within the Circular Notice, the presence/absence and degree of prescribed overtime work are mentioned as essential elements in rendering judgments on “degree of responsibility” regarding “job contents” requirements (No. 1-4[2] B).

³² This can also be considered to apply widely to workers who choose part-time employment due to their own personal disabilities or illnesses.

Japan's declining birthrate and aging of its population, it is extremely important that part-time employment be expanded as a favorable job mode facilitating normally a balance between the work and the family responsibilities. Furthermore, in view of the fact that the majority of such workers have no desire to become regular employees, measures designed to promote transition to regular employee status will fail to correct treatment disparities. This will justify the high necessity for the legal regulation of the unbalanced treatment.

Furthermore, the majority of workers choosing part-time employment for the sake of achieving balance with their family responsibilities are women. As noted above, while disadvantageous treatment for the reason of being part-time workers does not directly comprise gender discrimination, it does possess the effect of amplifying and solidifying gender gaps in the workplace. In the European Union this reality was perceived from early on, with regulations in force against even indirect discrimination against women prior to the issuing of the directive stipulating balanced treatment for part-time workers (EC Directive 81, 1997).³³ As such, while at first glance distinctions between part-timers and full-timers do not appear to have any linkage to gender, they are in effect standards that put women at a disadvantage. Because of this, in the absence of demonstration on the part of the employers that such distinctions are based on true need and are both appropriate and necessary as means of achieving the goals in question, they are banned as illegal gender discrimination.

It is a question of legislative policy how the law will deal with disadvantages at the workplace caused by the fact that women primarily bear the burdens of family responsibilities. In the EU, active efforts are made to rectify and alleviate gender gaps through the legal principles of discrimination prohibition and the balance-support measures. In the United States, meanwhile, the stress is placed on the importance of formal equality, with part-time worker treatment disparities also not treated as illegal discrimination.³⁴ In Japan, amidst the nation's sinking birthrate, support for the balance between work and home is advanced through the Child and Family Care Leave Act (Act on the Welfare of Workers Who Take Care of Children or Other Family Members Including Child Care and Family Care Leave) and other measures. Under the Equality Act as well, the Act of including the ability to comply with demands for transfer accompanied by physical reallocation within the requirements for being hired in managerial track positions is regulated as indirect discrimination (Article 7 of the Act and Article 2 of the Enforcement Regulation of the Act). According to the above examples, Japan can be said to select the former (European) approach as the basic direction of legislative policy.

In light of the points mentioned above, when considering the regulation of disadvantageous treatment of part-time workers in Japan as legal policy, a need may be identified for

³³ Earlier rulings include Case 96/80 *Jenkins v. Kingsgate* (1981) ECR911; Case 170/84 *Bilka-Kaufhaus v. Karin Weber von Hartz* (1986) ECR1607, etc. At present, indirect discrimination based upon gender is banned under EC Directive 207 in 1976 (revised through EC Directive 73 in 2002). Barnerd, C., *EC Employment Act* 472-74(3rd ed., Oxford University Press 2006).

³⁴ Sugano & Suwa, above n.16, at 120-22.

ample consideration of the interests of persons who work part-time with the goal of achieving a balance between the work and the family responsibilities.³⁵ It is true that the presence/absence and the extent of transfers and overtime work (that is, the degree of actual restraint by the company) is widely used as essential elements in determining wages and other treatment, with a certain level of rationality recognized to exist under Japan's employment system. Accordingly, although the use of the degree of such restraint as a standard for determining treatment should not be banned in itself, in cases when conspicuous treatment disparities are established despite the fact that the work contents, contract period and other factors are the same, it would appear reasonable to require the employers to concretely demonstrate that the disparities can be explained rationally, for the above mentioned standards result in a disadvantage for workers shouldering family responsibilities.

As legislative theory, therefore, it would appear desirable to render as illegal the irrational and conspicuous treatment disparities, either by alleviating the requirements for placing bans on discrimination, or by obliging balanced treatment in cases when job contents, contract period or other factors are the same. In view of the policy-based character of bans on discrimination against part-time workers, it should be feasible to move first to the introduction of mandatory rules relating to wages, where inequitable disparities are most contested.³⁶ The adoption of mandatory rules for non-discrimination or balanced treatment in such a manner is also likely to concur with the spirit of the revised Act which demands the business operators to establish objective and transparent standards in order to realize fair treatment for the part-time workers (see Articles 6, 9, and 13, etc.).³⁷

³⁵ While bans on disadvantageous treatment of part-time workers as indirect discrimination against women, as is the practice in the European Union, are conceivable, in light of the fact that balancing work and family responsibilities is essentially an issue relevant to both men and women, it would be preferable to establish rules within the *Part-Time Work Act* based on consideration of the interests of all workers in this category.

³⁶ Under the current act, in view of the spirit of Articles 1 and 3 of the revised Act and Article 3 Paragraph 2 of the Labor Contract Act, it is conceivable that this type of conspicuous disparity could constitute redress as violations of public policy. With regard to balanced treatment as public policy, see Michio Tsuchida, above n.15, at 563-73.

³⁷ As opinions in support of compulsory balanced treatment as upcoming legislative policy, see comments by Miyazato and Tsuchida in the panel discussion mentioned above, n.30, at 30, 32.

The Amendment of the Employment Measure Act: Japanese Anti-Age Discrimination Law

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The Employment Measure Act, which was enacted in 1966 and proclaimed the general principles of Japan's labor market policies, was revised in 2007. This paper sheds light on the meaning and effect of Article 10, to which much attention was paid as Japan's first anti-age discrimination regulation. Article 10 stipulates that firms must provide equal opportunities to workers in relation to recruitment and hiring irrespective of age, thereby making a former 'duty to endeavor' into a 'legal duty.' As a result, job offers with age limits may be rejected by employment placement organizations and discriminated workers may claim damages in tort suits.

However, there are some doubts as to the effectiveness of Article 10 due to its broad exemptions, including hiring only 'new graduates.' Therefore, in view of its constitutional basis and policy objectives as well as limited outreach, this paper observes that anti-age discrimination regulations in Japan still indicate the nature of the employment policy approach rather than the human rights approach. Regulations on age-based treatment appear to be merely a patchwork rather than a conclusive anti-age discrimination law.

Apart from the anti-age discrimination provision, in order to improve the employment management of youth and foreigners, the 2007 revision added an obligation of employers to report to Public Employment Security Offices in the event of the employment and separation of foreign workers. It also adopted 'duty to endeavor' provisions and guidelines, both of which recommended employers to take various measures, such as the introduction of a recruitment process for old graduates, employment of youth as regular workers, support of foreign workers in claiming for workers' compensation benefits, and so forth. This paper provides an analysis that though these measures based on 'duty to endeavor' have only weak legal effects, they seem an appropriate means to attain their policy objectives while not giving rise to the issues of 'reverse discrimination' or 'intrusion into freedom of contracts.'

I. Introduction

The Employment Measure Act (hereinafter, the EMA), which was first enacted in 1966 and proclaimed the general principles of Japan's labor market policies, was revised in 2007 with the amendments taking effect as of October 2007. Among the changed and newly introduced articles, the 'anti-age discrimination in relation to recruitment and hiring' provision (Article 10) attracted special attention.¹ In addition, this amendment created a

¹ Regarding the developments of the EMA, see: Noboru Yamashita, *Boshu Saiyo ni okeru Nenrei Seigen Kanwa to Chukonenreisha no Saishushoku*, Rodo Horitsu Junpo 21 (No. 1525, 2002); Keiichiro Hamaguchi, *Nenrei Sabetsu*, 79 Horitsu Jiho 53 (No.3, 2007); Takeshi Yanagisawa, *Atarashii Koyo Taisaku Hosei*, Kikan Rodo Ho 110 (No.218, 2007). Regarding the regulations on

duty of employers to endeavor to improve the employment management of youth and foreign workers. Furthermore, the system of mandatory notification was introduced, in which employers are obligated to notify the Public Employment Security Offices in the event of the employment or separation of foreign workers.

This paper begins with an explanation of the major features of the amended EMA (Section II). In particular, it sheds light on the meaning and effect of the ‘anti-age discrimination in relation to recruitment and hiring’ provision. Section III is devoted to the analysis of the provision’s nature from the perspective whether it deals with an age equality issue or an employment policy issue. Finally, issues remaining after the amended EMA and the possibility of its future developments are addressed in Section IV.

II. Features of the EMA 2007 Revision

1. Anti-Age Discrimination in Relation to Recruitment and Hiring

(1) Backgrounds and Contents of the EMA 2001 Revision

Regulations against age limits for recruitment and hiring have been gradually reinforced in Japan in recent years. The first step was the revision of the EMA made in 2001.

After the collapse of the bubble economy in the 1990s, persons above the age of 40 and once unemployed as a result of their company’s restructuring found it difficult to obtain new jobs for the following two reasons. First, the typical recruiting practices in Japanese firms had an adverse impact on unemployed middle-aged or older workers. In the case of long-term regular workers, recruitment activities customarily began during the spring of the year prior to graduation of high schools, colleges or universities. New recruits entered their companies immediately following graduation and started working without specification of the jobs in which they would engage. They were expected to acquire occupational skills through on-the-job training and work reassignments over a long time, and would gain promotion from within. Thus, persons above the age of 40 and who had graduated from school many years ago found it quite difficult to obtain new jobs. Second, mid-career hiring, which refers to hiring those who have worked elsewhere, is becoming prevalent recently; however, even those companies that have opened their doors to mid-career hiring often set age limits for recruitment and hiring, such as “No one above 40 admitted.”²

setting mandatory retirement age, see: Hideyuki Morito, *Graying Japan, Swaying the Policymaker*, 16 *The International Journal of Comparative Labour Law and Industrial Relations* 25 (No. 1, 2000); Noboru Yamashita, *Act Concerning Stabilization of Employment of Older Persons*, 4 *Japan Labor Review* 71 (No. 3, 2007); Makoto Fujimoto, *Employment of Older People after the Amendment of the Act Concerning Stabilization of Employment of Older Persons: Current State of Affairs and Challenges*, 5 *Japan Labor Review* 59 (No.2, 2008).

² According to the white paper of the Ministry of Labor in 2000, the average age limit for recruitment was 41.1 years of age.

Under these circumstances, labor economists and trade unions began to contend that Japan should introduce anti-age discrimination laws to abolish the practice of imposing such age limits. Accordingly, the EMA was first revised in 2001 to provide that proprietors must, when regarded as necessary in order for workers to effectively display their abilities, ‘endeavor to provide equal opportunity’ to workers in relation to recruitment and hiring irrespective of age (Former Article 7); also, ten allowable reasons for age limits were set out by the guidelines of the Ministry of Health, Labor and Welfare. Therefore, without any of those allowable reasons, firms were required to make an effort not to impose age limits on recruitment or hiring.

The allowable reasons could be divided into three types. First, age limits for recruitment and hiring were considered justifiable as occupational qualifications in cases where:

- a-1. There is a requirement for smooth business with customers in the particular age brackets whom the proprietor targets in selling goods and providing services.
- a-2. There is a requirement for authenticity in the arts or entertainment.
- a-3. There is a requirement for the prevention of accidents and ensuring safety at work in view of the frequency of accidents at that workplace.
- a-4. A certain level of physical functions including strength or eyesight, which generally deteriorates as a result of aging, need to be maintained to perform job duties smoothly.

Second, age limits could be set in order to comply with statutes. Firms could set age limits when:

- b-1. They employ only persons aged 60 years or older, or persons in certain age brackets, the employment of which is encouraged by employment policies including the provision of subsidies.
- b-2. There is a statutory age limit for that particular work.

Third, even in the following cases where age was not relevant as an occupational qualification, age limits were allowed to be set in order to maintain typical Japanese employment practices, namely recruitment from new graduates, long-term employment until the mandatory retirement age³ and age-based pay systems, where:

- c-1. Proprietors recruit and hire persons in particular age brackets, such as ‘new graduates,’ in order to provide them with skills development over a long period of service.
- c-2. Proprietors recruit and hire persons in particular under-represented age brackets in order to restore and maintain the workforce’s age balance, and thus maintain their continued business and succession of skills and knowledge.
- c-3. Proprietors recruit and hire persons in particular age brackets in consideration of their

³ A ‘mandatory retirement age’ signifies a system that causes employment contract relations to terminate automatically, regardless of the worker’s wishes, when the worker reaches a certain age.

mandatory retirement age and necessary periods between hiring and retirement, in order for workers to display their ability effectively or develop the ability to perform their work duties.

- c-4. Proprietors recruit and hire persons in particular age brackets where wage systems for existing workers would have to be modified due to age-related pay systems in the establishments being not suitable for hiring middle-aged or older persons.

These guidelines were criticized for putting in place too many allowable reasons.⁴

(2) Legal Effects of the Duty to Endeavor under the EMA 2001 Revision

In addition, the legal effects derived from the ‘duty to endeavor’ were considered weak for the following reasons. Where a firm offered Public Employment Security Offices, which provided free employment placement under the Employment Security Act (hereinafter, the ESA), to post their job offerings while imposing an age limit on job seekers, officials could ask the firm to repeal the age limit; or where the firm did not repeal it, to give one of the ten allowable reasons for the maintenance of the age limit. However, offers for posting job offers setting age limits without any of the allowable reasons may not be rejected under the ‘duty to endeavor’ provision of the EMA in 2002. Article 5-5 of the ESA provides that “Public Employment Security Offices and employment placement business providers shall accept all offers for the posting of job offerings; this is provided, however, that such offers may be rejected if their contents violate any laws or regulations.” Meanwhile, offers setting age limits without any of the allowable reasons, which violate not a legal duty but only a ‘duty to endeavor,’ should be accepted.

Moreover, in the case of firms refusing to employ workers on the grounds of their age without any allowable reasons, these refused workers were not interpreted to have rights to claim for employment or damages. Article 3 of the Labor Standards Act (hereinafter, the LSA) of 1947, which states the principles of equal treatment applicable to labor contracts, prohibits only discrimination by reasons of the nationality, social status and creed of workers. The Japanese constitution promulgated in 1946 contains the guarantee of equality under the law, but prohibition of discrimination is limited to that on the grounds of race, creed, sex, social status or family origin (Article 14, Paragraph1). Age discrimination, which is not clearly prohibited by these laws, nevertheless could be arguably interpreted to be unlawful as an unreasonable and differentiating treatment violating the general principle of equality derived from these provisions, and in the spirit of the former Article 7 of the EMA. However, this interpretation was not adopted by labor law scholars in light of the Supreme Court decision in the *Mitsubishi Jushi* case.⁵

The *Mitsubishi Jushi* case involved denial of employment to a worker who did not

⁴ Hideyuki Morito, *Koyo Seisaku to shite no Nenrei Sabetsu Kinshi*, in *Shogai Geneki Jidai no Koyo Seisaku* 85, 126 (Atsushi Seike ed., Nippon Hyoronsha 2001). Thus, the 2004 revision of the OPESA also obliged proprietors to explain their reasons for imposing age limits on applicants.

⁵ The *Mitsubishi Jushi* Case, Supreme Court, Dec. 12, 1973, Minshu 27-11-1536.

disclose his history of campus activism at a job interview. The firm refused to formally hire him because it emerged that he had told a lie at the interview. Denial of employment for such reasons was alleged to run counter to the principle of equal treatment in the LSA, as well as the constitutional guarantee of freedom of beliefs (Article 19) and the equality clause (Article 14). However, the Supreme Court stated that the fundamental human rights prescribed by the constitution did not directly apply to the acts of private persons. Moreover, the court held that the principle of equal treatment in the LSA was limited to post-hiring working conditions and was not applicable to the process of hiring. The Court stressed that the principle of freedom of contracts should be applied to cases where there was no contravention of statutory or other special restrictions on hiring practices.

As such, age discrimination, which was not explicitly enumerated as prohibited grounds under the Constitution or the LSA and had just started to be regulated by the ‘duty to endeavor,’ was not interpreted to be unlawful.⁶ Thus, former Article 7 and the guidelines were criticized for being in its nature a ‘duty to endeavor’ and setting forth too many allowable reasons.

(3) Reinforcement of Regulations by the EMA 2007 Revision

Apart from unemployed older workers, youth unemployment⁷ had begun to be recognized as a social challenge at the time of the amendment made in 2007. Normal recruitment practices based on age barred persons in their 20s or 30s from stable jobs, including those who had received a higher level of education. Some persons in their late 20s or 30s—so-called ‘older-younger persons,’—who had graduated from school following the burst of the economic bubble and found it quite difficult to secure work of their choice at that time, had been looking for a stable job while working at a temporary job. Some of them had not been able to obtain stable employment since their graduation. In addition, movement between jobs is not rare among the younger generation these days. It was reported in the 1990s that 50% of high school graduates and 30% of university graduates leave their first jobs within 3 years.⁸

Older-younger workers and youth unemployment were recognized as urgent social issues, with increasing concerns about the enlarged income gap among nations and rapid progress of the aging population.⁹ Therefore, in June 2007 the following provision of the EMA was made compulsory:

⁶ Yamashita, above n.1 (concerning the EMA), at 25.

⁷ According to the OECD report published in 2008 (*Jobs for Youth: Japan*), the unemployment rate of persons 15 to 24 years of age was 7.7% (twice that of those 25 to 54 years of age) in Japan in 2007 and below the OECD average of 13.4%. However, the long-term unemployment rate rose to 21% among those 15 to 24 years of age and was over the OECD average of 19.6%.

⁸ Regarding youth employment, see Yuki Honda, “*Freeters*”: *Young Atypical Workers in Japan*, 2 *Japan Labor Review* 5 (No.3, 2005).

⁹ According to the white paper of the Ministry of Welfare, Labour and Health in 2006, the population aging rate (the percentage of persons aged 65 or over) was 20.8 % in 2006.

Article 10: Proprietors must, when it is regarded as necessary under the Ordinance of the Ministry of Health, Labour, and Welfare, in order for workers to effectively display their abilities, provide equal opportunity to workers in relation to recruitment and employment irrespective of age, in accordance with the Ordinance of the Ministry of Health, Labour and Welfare.

This provision has the following legal effects. First, the Minister of Health, Labour and Welfare may give advice, guidance or recommendations to firms violating this Article (Article 32). Second, when a worker is treated unfavorably on the grounds of age in relation to hiring, he or she may follow the procedures of the Act on Promoting the Resolution of Individual Labor-Related Disputes to solve her or his dispute, asking for assistance (advice and guidance) from the Prefectural Labor Bureau (Articles 1 and 4).¹⁰

These two enforcement systems are not totally new, since they could be taken under the former ‘soft-law approach.’ However, under the new ‘hard-law approach’ there are two additional routes to rectify age limits. Where firms provide job offers setting age limits to employment placement organizations (Public Employment Security Offices or private employment placement providers), in light of the provision’s strengthened mandatory character, they may decline to post their offers under Article of 5-5 of the ESA, which stipulates that job offers violating statutes may be rejected.

When a firm fails to employ a person on the grounds of age and as a result that person files a lawsuit, the court will not order the firm to hire that person in consideration of the principle of freedom of contracts. This provision merely obliges employers to give equal opportunity, and does not give individuals the right to demand employment.¹¹ However, the court may order the firm to pay some consolation money for non-economic damages to the discriminated worker in tort suits (Civil Code, Article 709) where appropriate, as in the case of violation of the Act on Securing, etc. of Equal Opportunity and Treatment between Men and Women in Employment (hereinafter, the EEOA) comprehensively prohibiting sex discrimination in employment.¹²

(4) Justifiable Reasons for Age Limits under the 2007 Revision

It should be noted that the Ordinance issued on this article maintained some of the former exemptions while also deleting other exemptions, in accordance with the decision accompanying the bill that the exemptions should be reduced as much as possible. In the following six cases, proprietors can:

- a. Set age limits for hiring workers in accordance with mandatory retirement age.
- b. Set age limits for hiring workers where there is a statutory age limit for the

¹⁰ They cannot ask for mediation by the Dispute Adjustment Commission, since the act excludes disputes in relation to hiring from mediation process (Article 5).

¹¹ See, Yanagisawa, above n. 1, at 116.

¹² Discriminated workers are not considered entitled to claim for employment; however, failure to hire by reason of sex is interpreted to constitute a cause of action under the tort provision.

- particular work.
- c. Recruit only new graduates who are youth, or below certain ages, in order to give them the opportunity to develop and improve their occupational abilities over a long period of service.
 - d. Hire persons in particular under-represented age brackets in order to maintain the succession of occupational skills and knowledge.
 - e. Set age limits for hiring where there is a requirement for authenticity in the arts or entertainment.
 - f. Employ only persons aged 60 years or older, or persons in certain age brackets, the employment of which is encouraged by the state's employment policies.

As a result, the following four reasons under the former Article 7 were not included in the new Ordinance, that is smooth business with customers, prevention of accidents at work, maintenance of workers' physical functions, and maintenance of age-based wage systems.

The remaining six justifiable reasons have the following meaning. According to exemption (a), for example, where companies have a mandatory retirement age at 60 years and they want to hire workers under contracts for an indefinite period, they can set limits for hiring at age 60 in accordance with the mandatory retirement age. In order to understand this exemption, one should know the regulations against setting a mandatory retirement age under the Act Concerning Stabilization of Employment of Older Persons, which was enacted in 1971 and amended in 2004 (hereinafter, the OPESA). The OPESA stipulates that when an employer sets a mandatory retirement age, it cannot be below the age of 60 (Article 8). In light of this, companies can maintain the mandatory retirement age at 60 years or over to the extent that they comply with the regulations for workers over the age of 60; according to Article 9 of the act, when an employer fixes the retirement age it shall conduct any one of the measures listed in the items below in order to secure stable employment for older workers until the age of 65:

- a. Raising the mandatory retirement age;
- b. Introduction of a continuous employment system (refers to the system of continuing to employ an older person who wishes to keep working following their mandatory retirement); or
- c. Abolition of the mandatory retirement age.

'Continuous employment systems' include the system under which employees meeting certain objective requirements, such as a certain level of physical strength,¹³ following the employee's mandatory retirement, are given the opportunities to conclude fixed term contracts with their employers again. Against this legal background, many companies maintain the mandatory retirement age at 60 years and provide workers between the ages of

¹³ The selection criteria can be set forth by a labor-management agreement, which is concluded between an employer and a union organizing a majority of the workers at an establishment or, in its absence, a person representing a majority of the workers.

60 -65 years opportunities to work under fixed term contracts.¹⁴ In such cases companies can set limits for hiring at the age of 60 years, in accordance with the mandatory retirement age.¹⁵

According to exemption (b), when persons in a particular age bracket are prohibited from engaging in certain jobs by statutory provisions, firms can set age limits for hiring based on the provisions. ‘Minors,’ which refers to persons under the age of 18, are considered, when compared to adults, physically and mentally immature and technically unskilled to require special safety and health protections. Based on that idea, an employer is not permitted to employ a person under the age of 18 between 10:00 p.m. and 5:00 a.m (Article 61 of the LSA), to have persons under the age of 18 work underground (Article 63 of the LSA), and to engage such persons in hazardous and harmful duties (Article 62).¹⁶ The Security Service Act also prohibits persons under the age of 18 from working as a security guard and prohibits security service companies from engaging such persons in security service (Article 14). The Explosives Handling Act prohibits persons under the age of 18 from handling explosives and stipulates that any individual shall not engage such persons in handling explosives (Article 23).

According to exemption (c), when a firm hires workers under indefinite contracts, it is permitted to set age limits for hiring on the grounds that the firm requires workers to develop their job skills through long-term employment.¹⁷

The meaning of exemption (d) is somehow complex and would be better understood

¹⁴ In the survey conducted by the JILPT in 2006 on firms with 300 workers or more, more than 90% of them introduced the continuous employment system rather than elimination or extension of the mandatory retirement age. Also, around 70% of these firms established selection criteria. More than 80% of these firms use fixed term contracts to employ older people beyond the mandatory retirement age. See Fujimoto, above n. 1.

¹⁵ This exemption is applied in the case of employment under indefinite terms. In the case of employment under fixed term contracts, age limits for hiring cannot be set in accordance with the mandatory retirement age. The age limits must coincide with the mandatory retirement age. For example, where firms set the mandatory retirement age at 60 years, they cannot set the age limits for hiring at 55, on the grounds that a 5 year period is necessary for workers to develop occupational skills until the mandatory retirement age is reached.

¹⁶ Hazardous duties include cleaning, oiling, inspecting or repairing the dangerous parts of any machinery or power transmission apparatus while in operation, putting on or taking off the driving belts or ropes of any machinery or power transmission apparatus, operating a crane driven by power, engaging in any other dangerous work as specified by the ordinances, or handling heavy materials as specified by the ordinances. Harmful duties include the handling of poisons, powerful drugs or other injurious substances, or the handling of explosive, combustible or inflammable substances, or in places where dust, powder, harmful gas or radiation is generated or where there are high temperatures or pressure levels, or other places which are dangerous or injurious to the safety, health, or welfare of workers.

¹⁷ It is to be noted that an employer is not permitted, when attempting to justify setting age limits on the grounds of this exemption, to require workers to have job experiences or satisfy the upper age limits, such as ‘persons between the ages of 20 and 30 years,’ and ‘persons below the ages of 30 years with 5 years experience in similar jobs.’

through the use of some illustrations. For example, firms wishing to hire system engineers under indefinite contracts are permitted to set age limits for recruitment as ‘persons aged between 30-34 years.’ This is in the case where firms currently employ only 20 system engineers between the ages of 30-34 years, while also employing 50 system engineers between the ages of 25-29 and 45 system engineers between the ages of 35-39 years; thus, system engineers aged between 30-34 years can be considered underrepresented for the job. The age range, which is used to decide whether workers at certain ages are underrepresented, must be 5-10 years between the ages of 30-49 years. The job category is to be specified in accordance with the small occupational category provided by the Ministry of Health, Labour and Welfare, such as ‘system engineers,’ rather than the general term ‘engineers.’ If the number of workers belonging to certain age brackets in certain jobs is less than half the number of persons belonging to the upper and lower age brackets in that undertaking, they are deemed to be ‘underrepresented.’ Accordingly, the new guidelines made it more difficult for firms to meet the requirements of this exemption.

According to exemption (e), firms can set age limits when they want to hire an actor who is to play a child’s part. However, they cannot set age limits for clothes salespersons on the grounds that their shops target customers in certain age brackets, since this reason does not constitute ‘requirements for authenticity in the arts or entertainment.’

The exemption (f) allows firms to employ only persons aged 60 years or older, or persons in certain age brackets, the employment of which is encouraged by employment policies. One example of ‘the employment encouraged by employment policies’ is ‘Trial Employment,’ under which the Public Employment Security Offices refer persons who experience considerably difficulty in finding new jobs because of their experience, knowledge and their personal categorizations such as ‘younger persons’ (persons under the age of 40 years) or ‘older persons’ (persons over the age of 45 years). Firms can employ these workers temporarily, and they can receive certain wage subsidies for three months; when the firms finally decide to hire those workers after three months, they can receive other subsidies in certain cases.

(5) Effectiveness of the Anti-Age Discrimination Provision

There is a survey showing that recruitment practices with age limits are being reduced.¹⁸ Despite this, some labor law scholars doubt the effectiveness of the new anti-age discrimination provision. The Ordinance maintains still broad exemptions, such as hiring only ‘new graduates.’¹⁹ In the case of denial of employment on the grounds of age without any of justifiable reasons, the remedy for discriminated workers will be nominal, such as the provision of consolation money or compensation for some transportation expenses. No

¹⁸ According to the survey conducted by Zenkoku Kyujin Joho Kyokai in the fall of 2008, the rate of job offerings without age limits on job seekers increased from 55.3% to 76.3% after amendment of the EMA. http://www.zenkyukyo.or.jp/pdf/age_release.pdf

¹⁹ Yanagisawa, above n.1, at 116.

doubt it would be quite difficult to adduce sufficient evidence to establish that age motivated a firm's failure to hire, where they do not at face value set age limits for recruitment and there are no direct effects. Moreover, Article 10 does not clearly cover indirect age discrimination. For example, age-neutral practices with discriminatory effects on youth or seniors, such as imposing the requirements of certain periods of occupational experience on job applicants, would not, per se, be construed as being unlawful.

2. Measures to Promote Youth Employment

As seen before, while normal recruitment practices targeting new graduates have had positive effects on the smooth transition from school to employment, they have also presented a high hurdle for those who once deviated from the normal hiring tracks. A series of reforms have been introduced in recent years to combat youth unemployment, including setting up a one-stop service center for young job seekers (so-called job cafés), 'Trial Employment' and so on. One measure included in the EMA to combat youth unemployment is the prohibition of age limits in relation to recruitment and hiring (Article 10) as discussed above. Another measure is the creation of a new provision imposing the following 'duty to endeavor,' and setting guidelines titled 'the guidelines for proprietors to take appropriate measures for securing employment opportunities for younger workers.'

According to Article 7 of the revised EMA, proprietors must endeavor to ensure employment opportunities for youth in consideration of their roles in the future industry and society. To this end, proprietors are expected to take measures for the improvement of employment management. These include a change in their methods of recruitment and hiring as follows. According to the guidelines, first, in order to legitimately make the hiring decisions of firms depending on an individual's ability and experiences, firms are expected to clarify the information of job contents, working conditions, required occupational abilities and skills development. Second, firms are also required to give job opportunities to those who have already graduated from school (hereinafter, 'old graduates'), and set forth year-round recruitment procedures or recruitment procedures in fall as well as normal recruitment procedures in spring. These measures would enable job opportunities to be provided to those who did not follow the typical spring recruitment processes.

In order to prevent youth unemployment, firms must also endeavor to take necessary measures to improve the stability of the workforce among the younger generation. According to the guidelines, firms are required to clarify the information of job contents, working conditions, and so forth, thereby preventing disappointed young persons from leaving their jobs. Employers are also required to give younger persons in non-regular work, such as temporary or part-time jobs, opportunities to move into regular work. In order to facilitate the development and improvement of practical occupational abilities, employers are required to conduct both on-the-job and off-the-job training.

In short, this 'duty to endeavor' provision (Article 7) was expected to improve the youth employment situation by rectifying traditional employment practices, such as hiring

only new graduates on a voluntary basis. Based on a soft-law approach, the legal effect of this provision is weak from one perspective; firms not performing the duty may merely have advice or guidance from the Minister of Health, Labor and Welfare. These firms are subject to neither criminal penalties nor civil liability. However, from another perspective, this provision and the guidelines recommend recruitment with specified job contents, year-round or fall recruitment procedures, and extension of job opportunities to old graduates, thereby inevitably intervening in the freedom of companies to determine recruitment methods, that is the 'principle of freedom of contracts.' Furthermore, where employers give only youth opportunities to move from non-regular work into regular work, it might arguably constitute 'age discrimination' against seniors. Presumably because of these concerns, legislators took a soft-law approach in calling for an improvement in recruitment and hiring methods.

3. Measures for Foreign Workers

(1) Findings Surrounding Foreign Workers

According to a survey on the employment situation of foreign workers conducted by the Ministry of Health, Labor and Welfare in June 2006, one fourth of 223,000 foreign workers in Japan are in precarious employment situations, such as dispatched workers or contract-based workers.²⁰ As for compulsory state-run insurance programs,²¹ the rate of coverage was not high among foreign workers.²² Under these situations, the 2007 revision of the EMA introduced two measures; one is the system of mandatory notification of the employment and termination of foreigner workers, and the other is the duty to endeavor to improve the employment management of foreigner workers.

(2) Notification of the Employment and Termination of Foreign Workers

When a firm hires a worker whose nationality is not Japanese, or when such a worker leaves them, they bear an obligation to confirm the worker's name, status and terms of residence as specified by the Immigration Control and Refugee Act, as well as their date of birth, sex and nationality by checking their passports or any other identification materials, and submit a written form on these matters to the Chief of the competent Public Employment Security Office (Article 28, Paragraph 1). Foreigners who are already employed on October 1, 2007 are also covered. Any proprietor who has violated this article shall be punished by way of a fine not exceeding 300,000 yen (Article 38).

²⁰ Regarding measures for foreign workers, see Kazuaki Tezuka, *Foreign Workers in Japan: Reality and Challenges*, 2 *Japan Labor Review* 48 (No.4, 2005); Chizuko Hayakawa, *Gaikokujin Rodo no Hoseisaku* (Shinzansha 2008).

²¹ Employees meeting certain requirements must enroll in employee health insurance and employee pension insurance. Employers must pay insurance premiums for the employees.

²² According to the employment management survey on foreign workers conducted by Nomura Soken in 2002, around half of workers were not covered by social insurance programs in companies with 50 or more workers who are mostly of Japanese ancestry.

On receipt of the preceding notification, the State shall endeavor to improve the employment management of the foreign workers concerned, and also promote the re-employment of terminated foreign workers by taking the following measures (Article 28, Paragraph 2). The Public Employment Security Offices shall provide firms with necessary guidance and advice to facilitate the proper employment management of foreign workers. In order to promote the re-employment of separated foreign workers, the Offices shall provide the foreigners with employment information and placement, and search for job offers for these workers. Occupational training shall be implemented for them through public vocational training agencies.

The notification system is also intended to be used for immigration control. The Minister of Health, Labor and Welfare shall, when the Minister of Justice makes a request in order to confirm certain matters with respect to the residence of a particular foreigner and take some measures specified by the Immigration Control and Refugee Act, shall submit the information on the foreign workers provided by their employers (Article 29).

Until the amendment made in 2007, notification of the employment of foreign workers was operated on a voluntary basis once a year in June at companies with 50 or more employees. The new notification system was made compulsory for all employers with one or more foreign workers, and a notification duty is imposed each time one or more foreigners enter or leave employment at their workplaces. The reinforced notification duty is expected to contribute to the improvement of the employment management of foreigner workers, as is discussed below.²³

(3) Improvement of the Employment Management of Foreigner Workers

According to the newly introduced Article 8, proprietors are imposed with a ‘duty to endeavor’ to improve the employment management of foreign workers employed by them. It includes measures to facilitate adaptation to their occupation, thereby enabling them to effectively display their abilities. In addition, when foreign workers leave firms as a result of dismissals or other reasons and wish for reemployment, firms must endeavor to take necessary measures to support their reemployment. In order to put this ‘duty to endeavor’ into effect, ‘the guidelines for proprietors to take appropriate measures with respect to the improvement of employment management of foreign workers’ has been issued by the Ministry of Health, Labor and Welfare.²⁴ The contents are as follows.

²³ By contrast, in the legislative process it was feared that the mandate of notification, which possibly requires employers to investigate the nationality of employees, might be taken as an infringement upon the right of privacy for employees and discrimination against foreigners. The guideline explained below emphasizes that such discrimination would not be allowed.

²⁴ As for foreign workers, ‘the guidelines with respect to the terms and conditions of employment of foreign workers’ has already been put in place since 1993 as a circular notice for labour inspectors and officials of Public Employment Security Offices. The meaning of Article 8 of the EMA and the new guidelines, therefore, is the introduction of a clear statutory base for both the regulations of foreign workers as well as the addition of new contents.

Firms must comply with labor laws and social insurance laws equally applied to foreign workers. It should be repeated here again that proprietors shall not engage in discriminatory treatment prohibited under Article 3 of the LSA,²⁵ that is discrimination by reason of nationality in relation to the terms and conditions of employment. In addition, proprietors shall not impose a worker's nationality as a condition on recruitment when they post job offerings to Public Employment Security Offices and private employment placement service providers (Article 3 of the ESA). Apart from these legal duties, according to the guidelines, proprietors must 'endeavor' to hire workers through 'fair selection' within their residence status. Failure to hire foreigners on the grounds of their nationality, as mentioned above, has not been construed unlawful under Article 3 of the LSA; however, the guidelines implicitly recommend firms to conduct the selection of workers without special consideration of their nationality.

Second, proprietors are required to treat foreign workers appropriately in consideration of their limited knowledge about language, culture, employment and job seeking practices in Japan, and any other special circumstances as follows. In relation to recruitment, proprietors are required to present the terms and conditions of employment of foreign workers in written forms or e-mails where appropriate, and for workers living foreign countries, a share of the travel expenses and arrangement of residence in addition to these items. Proprietors shall not hire foreign workers who cannot engage in work legally under immigration control. Special recruitment and hiring processes for foreign students are also recommended.

In regards to working conditions, in order to secure health and safety at work, firms are required to teach foreigners the Industrial Safety and Health Act, machineries and equipments used by them, safety devices and protective equipment, verbal instructions and body signs for the prevention of accidents and the firm's safety regulations, through methods that can be easily understood by foreign workers including illustrated postings or signs. With respect to social insurance systems, firms shall let foreign workers know the relevant acts and their procedures, and enroll them in these systems. When foreign workers leave workplaces, firms shall go through the legitimate procedures and inform them of Public Employment Security Offices through which workers can obtain unemployment benefits, as well as provide them with any other support as required. It is also necessary for firms to support a foreign worker's claim for benefits from Industrial Accidents Insurance.

In relation to the prevention of dismissals and promotion of reemployment, employers are required to refrain from dismissals and in cases of redundancy they are required to support the reemployment of foreign workers, such as the introduction of any other group companies, implementation of occupational training and provision of information on job

²⁵ It provides that "An employer shall not engage in discriminatory treatment with respect to wages, working hours or other working conditions by reason of the nationality, creed or social status of any worker."

offerings.

These regulations have no mandatory effect on labor contracts between employers and employees. Firms violating these regulations, however, might receive advice, guidance, or recommendations from the Minister of Health, Labor and Welfare (Article 32). Moreover, in cases where a foreign worker meets with an industrial accident and the employer's instructions on safety were insufficient or difficult for them to understand, the worker may file a lawsuit to the court. In this case, the court might order the employer to compensate the worker for damages not covered by the benefits from Industrial Accidents Insurance, on the grounds that violating the guidelines constitutes negligence under the tort (Civil Code, Article 709).

III. Age Discrimination: Equality Issue or Employment Policy?

Are the regulations on setting age limits for recruitment and hiring and the treatment of youth, to which much attention was drawn as the first step toward Japan's anti-age discrimination law, based on a human rights approach?²⁶ Or perhaps on an employment policy approach?²⁷ The human rights approach regards differences of treatment based on prohibited grounds, such as sex and race, as a violation of the human rights of the individual to equal treatment. Any exception to this principle is strictly construed so as to interfere with the rights of individuals as little as possible. In contrast, the 'employment policy approach' uses a variety of policy instruments to support individual workers, paying attention to their different attributes. When certain treatments based on certain grounds are regulated to attain policy objectives, those regulations take on a patchwork aspect.

The anti-age discrimination provision included in the revised EMA can be deemed to be based on the employment policy approach rather than the human rights approach. This conclusion is obtained in light of the EMA legal basis, policy objectives, ways of regulations and comparison with sex discrimination law, as follows.

²⁶ See Kazuo Sugeno, *Discrimination in Employment: Dynamism and the Limits of Harmonization in Law*, in *Discrimination in Employment XV World Congress of Labour Law and Social Security* 5, (Roger Blanpain ed., Peeters 1998); Takashi Araki, *The Impact of Fundamental Social Rights on Japanese Law*, in *Social and Labour Rights in a Global Context: International and Comparative Perspectives* 215 (Bob Hepple ed., Cambridge University 2002).

²⁷ Regarding the analysis of age discrimination law from this perspective, see Colm O'Conneide, *Comparative European Perspectives on Age Discrimination Legislation*, in *Age as an Equality Issue* 195 (Sandra Fredman and Sarah Spencer eds., Harts 2003); Bob Hepple, *Legislation against Age Discrimination in Employment: Some Comparative Perspectives*, JILL Forum Special Series (No. 19, 2004); Ryoko Sakuraba, *Nenrei Sabetsu Kinshi no Hori* (Shinzansha 2008); Ryoko Sakuraba, *Employment Discrimination Law in Japan: Human Rights or Employment Policy?*, in *New Developments in Employment Discrimination Law* 233 (Roger Blanpain, Hiroya Nakakubo, Takashi Araki eds., Wolters Kluwer Law & Business 2008).

1. Constitutional Basis

First, the statute prohibiting age discrimination in respect to recruitment and hiring was the EMA, a statute categorized under the ‘Labor Market Law’; this fact itself shows that the new provision for rectifying age limits is based on the employment policy approach rather than being treated as an equality issue. The basis for the development of Japanese employment law after World War II was the constitutional provisions.²⁸ In addition to human rights, the Constitution also prescribes fundamental social rights. Article 27, Paragraph 1 proclaims that all people shall have the right to work and thus obliged the State to give workers suitable employment opportunities. This obligation of the State is fulfilled through the ‘Labor Market Law,’ which consists of the ESA that regulates employment placement services, recruitment and labor supply businesses, the OPESA and other acts including the EMA.

2. Policy Objectives

The second feature is the policy objectives of the revision. The ‘anti-age discrimination in relation to recruitment and hiring’ provision was first introduced in 2001 as a ‘duty to endeavor’ as explained above. The then act’s title, which including the phrase ‘cope with economic and social changes by ensuring smooth reemployment’, was reflective of its policy objective. To this objective, the relaxation of age limits on hiring was considered necessary to promote job matching depending on the ability of workers. The policy objective was extended to efforts to combat youth unemployment in the 2007 revision. The employment of youth and elderly is promoted by the revised EMA as well as that of women, persons with disabilities and foreigners. All of them are expected to participate in the labor market and contribute to the reinforcement of the State’s financial foundation in the midst of a progressing aging society.

It is noteworthy that the EMA as of 2007 can be characterized as the symbol of transformation of employment policies in Japan. The development of ‘Labor Market Law’ in Japan can be divided into three stages; first, right after World War II, where the main objective of employment policies was to facilitate the function of external labor markets and a smooth labor transition; second, following the oil shock of the 1970s, when employment security within a company was given priority; and third, in the post-bubble economy, during which Japan’s employment policy shifted its emphasis to flexible labor movement once again in the midst of rising unemployment rates. The subsequent revisions of the EMA, therefore, were part of the measures to diversify employment policies in order to cope with changing economic and social conditions.

²⁸ Regarding the Constitutional basis of Japanese employment and labour law, see Araki, above n. 26.

3. Methods of Regulations

Third, regulations on age-based treatment appear to be merely a patchwork rather than a conclusive anti-discrimination law. Since the EMA regulates only age limits for recruitment and hiring, a mandatory retirement system at the age of 60 years remains lawful. Setting such a mandatory retirement age is lawful if it satisfies the requirement of the OPESA as seen above. Apart from age limits for recruitment and hiring and the mandatory retirement age, employers have the possibility of maintaining age-based practices as follows.

Is redundancy targeting older workers unlawful? It depends on the application of the adjustment dismissals doctrine. The ‘abuse of dismissal rights’ doctrine was codified in the Labor Contract Act (Article 16) in 2007.²⁹ With regards to employment adjustment dismissals, judicial decisions have been handed down stating that any adjustment dismissal is an abuse of the right to dismiss unless it meets the following four requirements: there must be a business necessity, the employer is obliged to take various measures to avoid adjustment dismissals such as the implementation of transfers, the selection of those workers to be dismissed must be made according to reasonable criteria, and proper procedures must be taken.

Redundancy targeting older workers triggered a discussion on whether or not the selection criterion of ‘older workers’ was reasonable, and if it satisfied the third requirement. In one case, the court refuted the dismissal on the grounds that older workers usually found it difficult to secure new jobs, their ability did not deteriorate as a result of aging, and their disadvantages should at least be compensated by special early retirement allowances.³⁰ On the other hand, there have been several cases where the reasonableness of dismissal was affirmed. The judges ruled that the dismissal of older workers was necessary to save money as the wages of such workers were relatively high.

Another example of disadvantageous age-based practices is the wage-cut system for the elderly.³¹ In recent years, traditional age or length of service-based wage systems are being transformed into performance-based pay through changes of work rules or the conclusion of collective agreements. The ‘Daishi Ginko Case’ was the first instance where the Supreme Court decided on this issue.³² The wages of those between the ages of 55-60 years were reduced in exchange for an extension of the retirement age from 58 to 60 years. The court considered the advantages of employment extension and consequently viewed the reduction of wages as a reasonable modification having a binding effect on workers. On the

²⁹ Regarding the development of this doctrine, see Takashi Araki, *Labor and Employment Law in Japan 17ff* (The Japan Institute of Labour 2002).

³⁰ The *Varig Nihon Shisha* case, Tokyo District Court, Dec. 19, 2001, Rohan 817-5.

³¹ Regarding the work rules doctrine, see Araki, above n.29, at 51ff; Shinya Ouchi, *Restructuring of Enterprises and Protection of Working Conditions of Middle-Aged and Elderly Employees in Japan*, Kobe University Law Review 29 (No. 30, 1996). This doctrine was codified in Articles 7, 9 and 10 of the Labor Contracts Act, which was adopted in November 2007.

³² The *Daishi Ginko* case, Supreme Court, Feb. 28, 1997, Minshu 51-2-705.

other hand, in the second Supreme Court case³³ in which the wages of the elderly were cut by 30%-40% of those paid under the former system while the wages of younger workers were increased, a decision was reached that the disadvantages were too great and unfair in that only older employees were disadvantaged.

Thus, in cases of redundancy or reduction in wages targeting older employees, since there are no statutes explicitly prohibiting these practices and the tests applied here are no more than reasonable tests, some age practices have remained lawful.

4. Comparison with Sex Discrimination Law

Fourth, its character as an employment policy is made clear if it is compared to the EEOA prohibiting sex discrimination in employment in Japan. The EEOA states its aim as securing equal opportunity and treatment between men and women in employment 'in accordance with the principle in the Constitution of Japan of ensuring equality under law' (Article 1), and thus clearly indicates that it deals with the issue of equality.

The EEOA enacted in 1985³⁴ still indicated its character of the employment policy approach, since employers were merely obliged to 'endeavor' to treat men and women equally during the processes of recruitment, hiring, assignment and promotion while provisions with respect to training and education, fringe benefits, and retirement and dismissals were mandatory. However, the 'duty to endeavor' clauses were effective in changing workplace culture and building a social consensus that women should be given equal employment opportunities. Accordingly, the EEOA was strengthened in 1997 with the addition of a mandate of equal treatment at the time of recruitment and hiring, assignment and promotion. In June 2006, the material scope of regulations was extended to 'placement' including the 'allocation of duties' and 'granting of authority,' the 'demotion' of workers, 'change in job type or employment status,' 'encouragement of retirement' and 'renewal of the labor contract' (Article 6), as well as recruiting and hiring (Article 5), promotion, education and training, fringe benefits, and retirement and dismissal (Article 6). Therefore, employers should not discriminate on the grounds of sex at almost all stages of employment unless they can demonstrate legitimate reasons justifying differential treatment.

The guideliness issued by the Ministry of Health, Labor and Welfare allow only narrow justifications. The following acts are permitted as positive actions and occupational requirements:

- a. Favorable treatment for women in employment categories where women are substantially under-represented (positive action).
- b. Unfavorable treatment against men or women if:

³³ The *Michinoku Ginko* case, Supreme Court, Sep. 7, 2000, Minshu 54-7-2075.

³⁴ Regarding the development of the EEOA, see Takashi Araki, *Equal Employment and Harmonization of Work and Family Life: Japan's Soft-Law Approach*, 21 *Comparative Labor Law & Policy Journal* 451 (No. 3, 2000); Hiroya Nakakubo, "Phase III" of the Japanese Equal Employment Opportunity Act, 4 *Japan Labor Review* 9 (No. 3, 2007).

- b-1-1. requirements of authenticity call for the assignment of a man or woman only in the arts or entertainment;
- b-1-2. requirements of security call for the assignment of a man only in a guarding role;
- b-1-3. any other occupational characteristics, such as those of a religious or moral nature, or work in a sports competition, calls for the assignment of a man or woman only and where there is the same degree of necessity as in the aforementioned items.
- b-2. statutes prohibit employers from assigning a man or woman to particular work.³⁵
- b-3. a job requires work in a particular foreign country whose manners and customs are so different that a man or a woman could not exercise his or her ability.

In summary, it can be analyzed that revisions of the Act brought a shift from the employment policy approach to the human rights approach, in that its application was extended to all aspects of employment in order to effectuate ‘the principle in the Constitution of Japan of ensuring equality under law.’

By contrast, the EMA merely prohibits recruitment and hiring discrimination. Moreover, age limits for hiring can be set when they fall under the listed exemptions; (a) in accordance with a mandatory retirement age; (b) there is a statutory age limit for a particular work; (c) recruiting only young persons to give them skills development over a long period of service; (d) hiring persons in a particular under-represented age bracket; (e) there is a requirement for authenticity in the arts or entertainment; (f) employing only persons in certain age brackets, the employment of which is encouraged by employment policies.

Among these, (b), (d) and (e) are recognized as justifiable reasons even under the EEOA. On the other hand, there are special justifiable reasons for age limits (a), (c) and (f). The exemptions (a) and (c) can be explained as those included to respect traditional employment practices in Japan. Exemption (f) was added to put into effect the EMA objective of promoting the employment of youth and the elderly. Thus, in light of its limited outreach, age discrimination regulations contained in the EMA are far from being based on the human rights approach derived from the equality principle.

IV. Conclusion: Current State of Affairs and Future Issues

1. Anti-Age Discrimination and Promotion of Youth and the Elderly

As the foregoing indicates, it can be said that the revised EMA took the employment policy approach by allowing relatively broad exemptions. Also, it might be criticized for taking only lukewarm measures. It seems, however, a suitable means to attain its objective of promoting the employment of older and younger persons in a gradual process while

³⁵ The LSA provides that an employer may not have a woman engaged in underground work, work involving lifting heavy materials and work in places where harmful gas or dust such as lead is generated (Article 64 (2) and 64 (3), Paragraph 2); furthermore, only women could be licensed to perform as midwives (Health Nurses, Midwives and Nurses Act, Article 3).

considering the possible impacts of strengthened regulations on employment practices. Setting a mandatory retirement age and hiring only new graduates have been considered an integral part of the Japanese long-term employment system. It is feared that prohibiting these practices as unlawful age discrimination would result in the collapse of Japanese employment management. Attempts to rectify the practice of hiring only new graduates would inevitably curtail the ‘freedom of contracts’ of employers to some extent; firms would be required to take pro-active measures for the improvement of employment management. As such, the practice of hiring of only new graduates is expected to be modified through the firms ‘duty to endeavor’ to introduce an all-year-round process of recruitment or recruitment covering old graduates.

In regards to the treatment of age, the employment policy approach, which allows for flexibility in selecting policies in view of built-in employment practices, would be suitable. Generally, age discrimination can be seen as an area in which employers should enjoy a relatively broad margin of discretion, since age-based treatment affects everyone in society and is reasonable in some cases. Matters relating to age equality in Japan are therefore addressed through the employment policy approach rather than the human rights approach. Seemingly weak regulations, such as the ‘duty to endeavor,’ have played an important role in the development of Japanese anti-discrimination law, as shown in the case of the EEOA. As such, in the future there is the possibility that administrative efforts based on such clauses will contribute to consensus building among labor, management and citizens for the reinforcement of regulations on setting age limits for hiring.

Another controversial future issue would be whether or not Japan should introduce comprehensive anti-age discrimination law beyond the current regulations on age limits for hiring. With the influence of the anti-age discrimination laws both in the US and the EU, there is an increasing number of theorists arguing in favor of this.³⁶ Careful deliberation of the possible impacts on Japanese employment practices would be necessary, in view of the special character of age discrimination.

2. Improvement of the Employment Management of Foreign Workers

Subsequently, the question would arise as to whether or not measures for foreign workers, which are also addressed through the ‘duty to endeavor,’ are legitimate. Is the protection given to foreigners not sufficient, in spite of the character of nationality, which relates to the identity of workers and cannot be chosen freely by their own will? Or on the contrary, is there too much protection that constitutes ‘reverse discrimination’ against domestic workers?

In regards to the first question, emphasis should be put on the contents of the ‘duty to endeavor.’ They include namely proactive measures such as a special recruitment process for foreign students, explanation of Japanese labor laws for foreign workers, and support of

³⁶ See, Takeshi Yanagisawa, *Koyo ni okeru Nenrei Sabetsu no Hori 241ff* (Seibundo 2006).

foreign workers claiming for workers' accident compensation benefits. In a sense, recommending these measures would invade the freedom of the employment management of firms. Therefore, here again, a soft-law approach based on Article 8 and the guidelines seems appropriate. It is expected that the employment management of foreign workers would be improved, and they would be more integrated into the labor force through administrative efforts based on this Article.

As for the second concern, it is certain that the special treatment of foreigners as recommended by the guidelines, in which domestic workers could not be included, can be seen as reverse discrimination against Japanese workers. However, attention should be paid to the different attributes of foreigners, such as their limited knowledge about the language, culture and employment practices in Japan. Legislators presumably thought that the special treatment of foreigner workers by employers in accordance with the guidelines would be allowed as a positive action; this would compensate for their real difficulties in employment while at the same time being not so disadvantageous for domestic workers, and would not constitute unlawful nationality-based discrimination.

The most serious current legal issue would be whether or not discrimination by reason of a worker's nationality in relation to hiring, which has been interpreted to not violate Article 3 of the LSA on the basis of the Supreme Court's decision, should be banned. With the increasing labor mobility and strengthened regulations on hiring practices such as prohibition of age or sex discrimination, it would not be surprising that nationality-based discrimination in relation to hiring may be prohibited by revision of the EMA or LSA, or adoption of comprehensive anti-discrimination laws in the future.

The Process of Formulating Policy in Labor Matters: Derailment? Or Transformation?

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In this paper, I discuss the fact that a gradual change may be occurring in the way in which labor policy is formulated in Japan. The Labour Policy Council, a tripartite body established by the Ministry of Health, Labour and Welfare (MHLW), has played a central role in the formation of labor policy in Japan. However, reading through the minutes of 2005-2006 meetings of the Council's Work Conditions Subcommittee has led me to the conclusion that there is a possibility the Council's function might be weakening from the inside. The survey conducted revealed four developments at these meetings: an expressed concern about the establishment of a Study Group consisting of experts, shelving of the Study Group's report, opposition expressed by both union and employer group representatives to a draft of a Response made by the MHLW, and the Response with objections from both groups. It seems that these developments show that both unions and employers lose faith in the experts, and moreover do not engage in serious and substantive debate with each other. As a result, both groups may have come to down-grade the importance of the Policy Council and up-grade that of parliamentary lobbying.

I. Introduction

In this paper I argue that there may be occurring a gradual change in the way in which labor policy is formulated in Japan. The change I have in mind is a weakening of the function of the Labour Policy Council,¹ the tripartite body established by the Ministry of Health, Labour and Welfare, which hitherto had played a central role in the formulation of labor policy. It is only in gathering together and analyzing the material in preparation for this conference paper² that I came to entertain this hypothesis. Testing it would require interviews with participants and analysis of more documents, but unfortunately I have not been able to reach the stage of definitive judgment. The paper, remains, therefore, an elaboration

¹ Such policy councils are an important part of the Japanese bureaucratic/legislative process. Their composition is determined by law. The Ministry of Health, Labour and Welfare currently has thirteen such councils. The Labour Policy Council consists of ten "representatives of the public interest" (in the 2007 appointments, one lawyer and the rest from universities and research institutes, two of them ex-bureaucrats now directing semi-public research agencies), ten union representatives, and ten employer representatives. Most of its work is done in subcommittees of which there are 18—employment exchanges, equal opportunities, work conditions (with two sub-subcommittees on accident insurance and minimum wages), etc. Of these, the most important in recent years, dealing with the most controversial issues, is the Subcommittee on Work Conditions.

² The paper was originally written for a panel discussion at the Conference on Change in the Employment System and the Reorganization of Labor Law, held in Tokyo on June 23rd, 2007. Pressure of work has prevented me from following up with interviews with the participants, or further analysis of documents. Consequently the paper remains primarily a statement of the problems to be addressed.

of the questions to be answered, and I hope it will be read in that light.

I begin by outlining how I came to take up the question of how labor policy is decided, what discoveries I made and how I made sense of them. I then examine the deliberations in the Labour Policy Council of the proposals for legislation on the Labor Contract and Working Hours and explain why I came to hold the hypothesis that the deliberation process was undergoing “transformation.” Finally I would like to speculate concerning the background factors which might explain that transformation.

II. The Labor Policy Formulation Process and the Deregulation Subcommittee

What set me off on the study of the process of policy formation for labor issues was interest in a naively simple question. One of the purposes for the formation of *Rengo* (Japan Trade Union Confederation)³ as a national labor union center in 1989 was to become more deeply involved in policy-making at the central and local government level. What had it actually done to achieve that and what results had it obtained? Those questions were my starting point, and to answer them I took three amendments of labor law carried out in the 1990s, and tried to examine the process by which they were carried through, the role that *Rengo* had played and what it had achieved. The results were summarized in Nakamura and Miura (2001).

In the course of doing this research I became aware of circumstances that I had not originally expected. When I started I had quite simply assumed that the process of formulating policy was carried out in the Labour Policy Council, set up as a tripartite deliberative council in what was then the Ministry of Labour and subsequently the Ministry of Health, Labour and Welfare (Hereafter MHLW). I assumed that what I had to do was to follow closely the debates in the Council, find out what *Rengo* had done and in what manner, and assess whether or not *Rengo* had succeeded in getting its ideas embodied in policy. However, I discovered that from the latter half of the 1990s an organization of great political power was beginning to have an exceedingly strong influence on the making of policy. This was the Deregulation Subcommittee, created within the Administrative Reform Committee in April 1995. This committee, subsequently transforming itself into the Regulatory Reform Committee, the Council for Regulatory Reform, and the Council for the Promotion of

³ *Nihon Rodo Kumiai Sorengokai* (the formal nomenclature of *Rengo*). *Rengo* was formed in 1989 as an amalgam of four existing national union centers, distinguished chiefly by their political stance and connections, particularly the two main centers, *Sohyo* supporting the Socialist Party and *Domei* the Social Democrats. At its inception *Rengo* had some 8 million affiliated members, today 6.8 million. Two other smaller national centers are the *Zenroren*, with close connections to the Japan Communist Party with nearly a million affiliated members and the *Zenrokyo*, linked to the remnant socialist parties with some three hundred thousand.

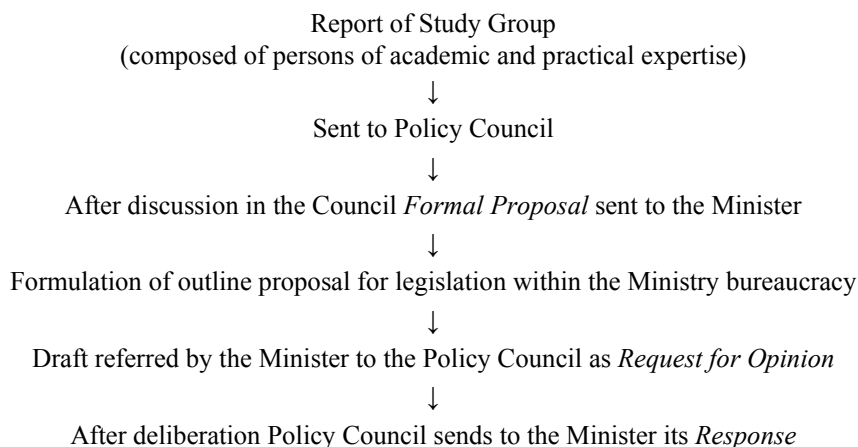
Regulatory Reform,⁴ has exercised and continues to exercise considerable influence on policy decisions.

Plans drawn up in these bodies for the relaxation or reform of regulations are put up for Cabinet approval, and then subsequently, in the case of labor regulations, sent down to the Ministry of Health, Labour and Welfare's Labour Policy Council. In the case of plans which have already received Cabinet approval, it is difficult for that Council to do any substantive deliberation, with the result that they simply pass through the Council intact. For example, in the case of the revision of the Labor Standards Act, work on which started in 1997 and included the introduction of the Discretionary Hours Labor Contract system, it was, to quote the account of it in a *Rengo* document, a matter of our being told "relaxation of Labor Standards Act-related regulations was also included in the *Plans for the Promotion of Relaxed Regulation* which has already had Cabinet approval," and so the subsequent discussions in the Labor Standards Committee of the Policy Council had to be confined within the framework of that cabinet decision and were left to concentrate solely on the technical question of which particular regulation to relax—an anomalous situation which we have never experienced before (Japanese Trade Union Confederation 1999, 3). The same situation recurred in the case of the 1999 revision of the Dispatched Workers Act (the introduction of the negative list system of industries and occupations in which worker dispatching was not permitted, replacing the previous system of listing the industries in which it was acceptable.)

The meaning of the word "anomalous" there is defined in contrast to what had until then, been the normal course of events in the process of policy formation. According to Yasueda (1998, 36) "It is quite commonly the case that before a proposal is put before one of the Policy Councils, the main outlines of the argument for new legislation have been worked out in study groups of academic and practitioner experts. The report of such a study group then goes to a Policy Council, and on that basis the Council presents a *Formal Proposal* to the Minister of Labour. The officials of the Ministry of Labour then draw up draft

⁴ The sequence of birth and rebirth of these bodies is as follows.

Date	Name	Official Translation (Literal Translation)
1995	Kisei kanwa sho-iinkai	Deregulation Subcommittee (Regulatory relaxation subcommittee)
1999	Kisei kaikaku iinkai	Regulatory Reform Committee
2001	Sogo kisei kaikaku kaigi	Council for Regulatory Reform (Comprehensive regulatory reform council)
2004	Kisei kaikaku, minkan kaiho suishin kaigi	Council for the Promotion of Regulatory Reform (Council for the promotion of regulatory reform and privatization)
2007	Kisei kaikaku kaigi	Council for the Promotion of Regulatory Reform (Council for regulatory reform)



Source: Compiled from Yasueda (1998, 35-46).

Figure 1. The Formulation of Labor Policy and the Policy Councils

legislation which is then consigned to the Policy Council by the Minister with a formal *Request for an Opinion* to which the Policy Council gives its *Response*.” Figure 1 diagrams this procedure.

After the response is delivered, the bureaucrats in the Ministry complete the drafting, negotiations are held with other ministries where necessary and the law then goes through the screening process of the Cabinet Legislation Bureau, Cabinet approval and submission to the Diet (Hatanaka 2000, 17-18).

In this normal scheme of policy formation the Deregulation Subcommittee and Councils play no part. But in the revision of the Labor Standards Act of 1998 and of the Dispatched Workers Act of 1999, the Deregulation Subcommittee wrote the scenario from outside that scheme and were able, having got Cabinet approval, to exercise a powerful control over the legislative process.

Rengo, of course did not take this lying down. It concentrated on its Diet strategy lobbying sympathetically disposed parties, and succeeded in getting a number of amendments and accompanying resolutions which blunted the intended effect of the law (See Nakamura and Miura [2001]).

III. Deviation

Political scientists describe these circumstances as “a transformation of the labor policy formulation process” (Kume 2000) or as “the rise of a new labor politics” (Miura 2002a, 2002b), I, for my part, have called it a deviation (Nakamura 2006).

I use the word in two senses. First, in the sense that it is a way of making labor policy

which effectively by-passes the Labour Policy Council—a deviation from the conventional policy formulation process, and secondly the effect is that the policy measures instituted end up burdened with considerable restrictions which defeat the original purpose so that it is also a deviation from the principle that law should be effective. The reason why I deliberately chose the word “deviation” was because at the time it seemed to me to be, neither a transformation of the policy formulation process nor a new kind of labor politics, but what you might call simply an outlier event in the normal distribution of events.

My reason for thinking that was that I believed there to be a general consensus that the Labour Policy Council had played and would in the future continue to play an extremely important role in policy-making. Like Yasueda (1998) I believed that “particularly in the field of legislation affecting labor relations, there can be no meaningful legislation without some reconciliation of the views of the unions and of the employers,” and that for the purpose of such reconciliation, the Policy Council had hitherto played, and should continue to play, an exceedingly important role. It seemed to me generally to be a bad thing to reduce that role, both for labor and management, and more generally for society as a whole. And that is why I concluded by calling such deviations a direct challenge to industrial democracy (Nakamura and Miura 2001, Nakamura 2006).

IV. Four Novel Features

In order to write this paper I read through the minutes of the 2005-2006 meetings of the Work Conditions Subcommittee of the Labour Policy Council when it was discussing Employment Contract Legislation and Work Hours Legislation. As I read them I became aware of four features which seemed to me cause for concern, features which seemed to me evidence that the functions of the Council were being eroded from the inside. The deviations of the 1990s were caused by a powerful body, the Deregulation Subcommittee using its political power from the outside. But this was different, leading me to the hypothesis that an internal transformation within the Council was lowering its functional effectiveness. Let us examine these four features.

1. Concern over the Establishment of a Study Group

At its 34th meeting on March 23rd, 2004, the Work Conditions Subcommittee of the Labour Policy Council was told the following by the Ministry representative regarding the establishment of a study group concerning legislation on employment contracts.⁵

“In the Formal Proposal made by the Labour Policy Council in December 2002, it indicated that it would be appropriate to continue the consideration of legislation covering the whole field of employment contracts, including ex-

⁵ These minutes are to be found at <http://www.mhlw.go.jp/shingi/2004/03/txt/s0323-2.txt> (Accessed May 17, 2007).

tensions thereto such as changes in conditions of employment, posting outside the firm, shifting to another firm's payroll, change of job within the firm, etc. Also, in the Diet debates on the revision of the Labor Standards Act, an accompanying resolution was passed in identical terms by both Chambers which says in part that there should be created an organ to carry out expert study and investigation on the matter, and that on the basis of its findings necessary action, including legislative action, should be undertaken."

"The Ministry's proposal is, first of all to explain today the Ministry's basic thinking on the matter and hear your opinions on that, and then, as a concrete step to further deliberations, to set up a Study Group to begin work from April which will have the remit of doing the basic groundwork from an expert point of view, concentrating particularly on the legal issues."

This was the establishment of a Study Group which in Figure 1 is the start of the whole process. However, a union representative responded in the following terms.

"[On the matter of creating a law to govern employment contracts] the difference of opinion between the union side and the employers' side is very great. Given that, instead of setting up a group exclusively of so-called "persons of knowledge and experience," as the formula has it, basically academics, how would it be to have representatives of employers and workers already in the Study Group."

And again

"I think this committee should make it clear that if there are no union or employer representatives on the Study Group, this Council will not be bound [by] its recommendations, but what is your opinion on that?"

The authority to set up a Study Group and commission its members rests with the MHLW Minister, and its report is a report to him or her. Consequently the Council has no power over Study Group appointments. And, while the Study Group provides material for debate in the Council, there is no question of its report itself determining the content of the law.

The same concern with the set up and membership of a Study Group surfaced at the 40th meeting of the same Subcommittee on April 12th, 2005 when the Ministry set out its plans for "a study of the legislation governing work hours."

In short, criticism or concern has come from within the Subcommittee from the very beginning over the process by which a Study Group is set up and discusses what should be the basic principles of the legislation to be drafted. The whole process of policy formation has not got off smoothly.

2. Shelving the Study Group Report

Subsequently, on September 15th, 2005, the report of the “Study Group on the nature of legislation to be enacted to govern employment contracts,” was finalized and submitted to the Minister. It was severely criticized by both union and employer representatives (from different points of view, naturally), but the point to note is that both sides expressed the view that the report and discussions in the Subcommittee were two different things.

Rengo said “The Study Group Report is a report by scholars, it is not the starting point for our discussions in the Subcommittee.”⁶ And Keidanren⁷ said “This is quite simply the summary conclusions of the Study Group and we should not be bound by it; the important thing is that we should have an open debate directed at making the legislation as good as it can be.”⁸

At the 43rd Subcommittee meeting on October 21st, 2005, following on these statements by the two organizations, both the union representatives and the employers’ representatives made their views on the Study Group Report known.⁹ First, from the employers’ side:

“Our basic stance is that if it be a law of content such as that, we would certainly not oppose it. But, specifically with regard to Item 2, the treatment of the Study Group Report, exactly how its status is defined becomes a considerable problem. My view is that it should be considered as a systematization of the points at issue, contributing material for the debates of this Subcommittee. Certainly, as far as its content goes, I see a lot which looks highly restrictive of employers’ powers. Not in everything, but it seems to me in a very great deal. I certainly could not agree to a law being enacted in this form.”

In other words, an Employment Contract Law with the sort of content outlined in the Study Group Report was acceptable, but he would not want it to be translated straight into law; the Report should be treated as material, a systematization of the issues. His position seems somewhat more favorable towards the report than the official Keidanren statement. By contrast the union side is more sharply critical.

“I would like to have it confirmed that this Report in itself is not going to be

⁶ Rengo, *Statement regarding the “Report of the Study Group on the Nature of Legislation to be enacted to govern employment contracts,”* September 13th, 2005.

⁷ Keidanren, the Japan Business Federation was until 2002 known in English as the Japan Federation of Economic Organizations but changed its official English name in that year when it absorbed the former *Nikkeiren*, the Japan Federation of Employers’ Associations, which had until then been the union counterpart as the major employers’ negotiating body. Membership is by company, industrial association and regional associations.

⁸ Keidanren, Special Committee on Labor Law, *Statement on the Interim Report of the Study Group on the Nature of Legislation to be enacted to govern employment contracts*, June 20th, 2005.

⁹ All citations from this 43rd meeting are at <http://www.mhlw.go.jp/shingi/2005/10/txt/s1021-1.txt> (Accessed May 28, 2007).

the basis for our discussions in this Council, and if there really is going to be a Labor Contract Law it should be tackled as a problem on the nature of which unions and employers are in agreement.”

It seems to me that one of the independent members got it right when he said that he thought the report should be treated as material for the Council’s deliberations.

The Report, he said,

“It seems to me should be considered as something which is an aid to our deliberations in the broadest sense, as data, you might say, or raw material, as a systematization of the points at issue.”

In saying that the Report should be seen as material, as a discussion agenda for the Council, the independent member and the employer representative seem to take a similar position. What the union member meant by the Report not being “the basis” for the Council is not very clear, but if he meant that the Report should be excluded from consideration and that the discussion should proceed only on those issues “on the nature of which unions and employers are in agreement” then clearly the union position and the position of the employers and the independent representatives are a long way apart. At any rate, discussion finally began without any agreed conclusion as to whether the Report should or should not be treated as raw material for the Council’s deliberations.

3. The Objections of Both Unions and Employers and Suspension of the Discussions

Starting from the Subcommittee’s 44th meeting on November 11th, 2008, it began discussion of the current labor situation and whether or not a law governing employment contracts was necessary. Discussions continued through the 46th (November 29th, 2005), 47th (December 6th), 48th (December 20th), 49th (January 7th) and 51st (February 23rd). As far as one can judge from the minutes, it is hard to resist the impression that both sides were simply stating their own positions, without any attempt to engage with each other’s arguments.

Meanwhile, as for legislation on the work hours regime, the Report of the “Study Group on the appropriate future shape of the work-hours regime” was presented at the Subcommittee’s 50th meeting (February 9th, 2006). The two salient issues were an increase in the overtime premium to discourage over-lengthy work hours and the so-called White Collar Exemption, excluding from maximum work-hour regulations, certain classes of white collar workers assumed to be self-motivated and not in need of work-hour regulation. The discussions continued at a fast pace through the 52nd (March 15th) and 53rd (March 29th) meetings and on this subject, particularly at the 53rd meeting the union and the employer representatives seem really to have been addressing each other’s arguments.

Both of these issues—employment contracts and work hours were contentious issues

on which it was difficult for unions and employers to agree. Why both issues had to be discussed in the same forum and at the same time I do not understand, though it may well be that MHLW felt itself under pressure because of the Council for the Promotion of Regulatory Reform and Privatization whose second report was issued on December 21st. That report, which bore the title *Towards the Realization of Small and Efficient Government: Competition plus consumer/user choice in both public and private sectors*,¹⁰ proposed that discussion of an expansion and systematization of the exceptions to work-hours regulation and employment contract law should be considered during fiscal 2005 and decisions taken in fiscal 2006.

After five sessions on contracts and three on work hours, at the 54th meeting of the Subcommittee, the Ministry produced a document entitled *Points for discussion concerning the legal regulation of employment contracts and work hours*. Both union and employer representatives voiced their opposition.¹¹

The union representatives made a fundamental criticism, opposing the basic idea of the *Points* (which was also the stance taken in the Study Group Report) that employment contract law should be based on case law, on the legal doctrines developed by the courts concerning employers' work rules.

"I do not deny that work rules have hitherto, in practice, played a large part in establishing and in clarifying the content of the contract between worker and employer. But when we start talking about what an employment contract should be and immediately jump into work rules I wonder what is going on. It seems to me that the fact that all sorts of questions about the employment contract have been resolved by reference to work rules has hitherto acted as an impediment to the healthy development of employment contract doctrine. According to the law of contracts, a contract is something arrived at with the agreement of both parties which becomes invalid if there is not agreement, but the doctrine derived from precedents concerning work rules holds that even if an employee does not individually give his consent, he is bound by any work rules that the employer makes or changes, but the basis for that has never been made clear."

This argument from the principle of freedom of contract seems on the face of it quite reasonable, but is nevertheless, it seems to me, somewhat inappropriate. To reject a basic approach adopted by experts such as those on the Study Group with a deep knowledge of Japanese judicial practice, and the interpretation of statutory and case law, is, for someone who has no expert knowledge of such things, hardly reasonable. It is as if a researcher with

¹⁰ http://www8.cao.go.jp/kisei-kaikaku/old/publication/2005/1221/item051221_02.pdf (Accessed May 1, 2007).

¹¹ For the 54th meeting, see <http://www.mhlw.go.jp/shingi/2006/04/txt/s0411-1.txt> (Accessed May 29, 2007).

no intimate knowledge of actual workplaces should propound his views on policies and law regarding work. Union officials and employers who have such intimate knowledge would surely be fiercely critical. The fact that in the end the union representatives came round to accepting that basic approach suggests that they did in the end acknowledge that.

One of the employer representatives offered the following idea, or criticism, of the direction of the proceedings

“One thing that I think is of great importance is the relative weight to be given to the two issues of contracts and work hours, or the sequence in which we discuss them. This is just my personal opinion, but may I remind you that we have got other unfinished business, there is the matter of allowing the payment of cash compensation instead of reinstatement in findings of unfair dismissal and the business of work hours. I personally would like to see us deal with those first and then get on to contracts, but would that change of procedure be acceptable?”

The suggestion betrayed this member’s lukewarm attitude to the idea of a law governing employment contracts, but his proposal was rejected by other employer representatives and the union and independent members.

Subsequently discussion at the 55th (April 25th, 2006), 56th (May 16th) and 57th (May 23th) meetings revolved around the *Points for Discussion*. The 54th, 55th and 56th meetings were largely taken up with exchanges between the union members and the independent members concerning the relation of employment contracts to work rule case law and there was not a great deal of discussion of specific issues. Then, at the 57th meeting, the employers’ representatives expressed their opposition on a number of points. Throughout it did not seem to me, from a reading of the minutes, that the two sides were engaged in a serious dialogue.

But nevertheless at the 58th meeting (June 13th, 2006), the MHLW officials produced a document entitled *Concerning the appropriate legislation to govern employment contracts and work hours (Draft)*, explaining that they hoped to produce an Interim Report in July, and this was a draft for what might go into it. This certainly seems to me to have been a distinctly abrupt action, and it must have appeared so to both the union and employer representatives concerned. At the 59th meeting (June 27th) criticism of the draft came from both union and employer representatives. One of the employer representatives spoke as follows:

“We have been conducting our discussions on the points which were suggested there [in the Points for Discussion], but if one asks whether we have had a full and comprehensive discussion going into the real issues in detail, the answer is, I don’t think so.

As for the idea of going ahead on the basis of this draft and arriving at

an interim report by July before we have had full discussions of such content as to go into a report of our findings, I can say from the employers' side that we are firmly opposed to it."

The union members were equally critical:

"The Secretariat gave us in April the Points for Discussion which contained a great variety of issues, but I don't think we have had anything like a satisfactory degree of detailed substantive discussion of those issues."

"Without adequate discussion, for the Secretariat to take the lead in producing an interim report which pretends to be the way forward and which does not reflect the views of the unions or the employers, is no way to get an Employment Contract Act of the kind that we are proposing, namely one which is helpful to workers. Consequently, I would like to propose to the Subcommittee that we temporarily suspend consideration of the employment contract issue."

And so the discussions were broken off. They resumed some two months later, on August 31st, during which interval the Ministry and the independent members doubtless held informal talks to reconcile opinions.

One of the reasons which produced this situation was certainly, in my view, the ineptness of the Ministry in trying to get an interim report before there had been really substantive discussion, but I think there was a more important reason which is as follows.

Were the union and employer representatives really trying to have a "substantive discussion"? They were agreed on the need for legislation. But the employers' representatives were always lukewarm on the issue, and the union representatives, stopped, as it were, at the gateway to such discussions with their preoccupation with the question of the relation of employment contracts to work rules. As far as work hour questions were concerned, on the introduction of some form of "White collar exemption" from work rule restrictions, the employers were in favor and the unions were against, while on raising the legal overtime premium the unions simply repeated their support and the employers their opposition. I cannot see that either really engaged in genuine debate.

4. A Response Qualified by Objections from Unions and Employers

Subsequently, after much toing and froing, the Work Conditions Subcommittee of the Labour Policy Council at its 72nd meeting (December 27th, 2006) resolved to send to the Minister a document entitled *Recommendations for Future Legislation on Employment Contracts and Work Hours* as its *Response* to his referral. Thereafter draft outline legislation was sent for comment to the Subcommittee at its 73rd meeting (January 25th, 2007) and at its 74th meeting the Subcommittee reported to the Minister that it was "in general agreement" with that outline. I do not intend to give my opinions here on the substance of

the Employment Contract Act or the revision of the working hours provisions in the Labor Standards Act. I wish to concentrate solely on the policy formation process.

What I do not understand is the attitudes of both labor and management to the revision of the Labor Standards Act concerning hours of work.¹² One of the employers' representatives said the following:

"I think we are seeing a gradual understanding of the new self-regulated work hours system. Simply raising the overtime premium will do nothing by itself to cure the problem of long work hours or over-working, and I don't see it as having any effect. Nor does it seem that working people themselves want higher premiums. So, in that sense I am very strongly opposed to that part of the draft."

The "self-regulated work hours system" means the so-called White Collar Exemption, as explained earlier would put white collar workers with the most responsible jobs in a similar position to managers in being outside of the restriction of maximum work hours beyond which overtime premiums have legally to be paid. The employers were in favor of that but on the other hand "strongly opposed" to raising overtime premiums for other workers. By contrast the union representatives were in favor of raising premiums, but opposed to the self-regulated hours system, and the relaxed definition of the eligible scope for discretionary work-hour contracts (i.e., payment by the job not by the hours worked in doing it).

"As I have said many times, I simply cannot accept the self-regulated hours system, nor the relaxation of restrictions on discretionary work contracts for planning-type jobs in small and medium firms."

In short there is a clear clash of opposing views between unions and employers. Usually in such a case, in collective bargaining or in an enterprise Union-Management Consultation Committee within a firm, one would expect some kind of trade-off, concession on one issue in order to gain a corresponding concession on another. In drafting legislation, such compromise might not be normal. In my view the employer member representing the Chambers of Commerce was quite correct when he said:

"As I said just now, I disagree with the proposal to send a report of discussions and a formal Response on the revision of the Labor Standards Act. As it is clear from the draft of the report, there are sections of the law to which unions and employers have made strong objections. That, nevertheless, it is proposed to send a report and a Response endorsing the draft law seems to me inexplicable."

¹² These debates in the 74th meeting are to be found at <http://www.mhlw.go.jp/shingi/2007/02/txt/s0202-2.txt> (Accessed June 2, 2007).

Nevertheless a *Response* indicating “general agreement” endorsing the draft law was sent. Why? One malicious interpretation is that there was some kind of bargained collusion between the union and employer representatives, but that is not the explanation I favor.

It is much more likely that both sides were counting on being able to amend the Bill to alter the provisions they disagreed with during the Diet discussions. Both sides already had experience of being able to alter drafts they disapproved of by stepping up their parliamentary lobbying activities. The employers for their part managed, when Article 131 of the Attached Regulations to the Labor Standards Act was revised in 1993, making the legal statutory work week 40 hours, to get an extension of the deferment exemption allowing 46 hours (Nakamura and Miura 2001). On the union side, *Rengo* achieved a certain degree of success from its intensified lobbying over the 1998 revision of the Labor Standards Act to introduce the discretionary work contract system, and the 1999 revision of the Worker Dispatching Act, which switched to the negative list of excluded industries and occupations, from the positive list of those permitted. Quite recently there was also the amendment of Article 18-2 of the Labor Standards Act, the so-called “Dismissal rules” defining what constituted an abuse of the employer’s right to terminate employment—in effect a definition of “unfair dismissal” (on the latter, see Miura [2005, 188-90]).

If that interpretation is correct, it means that on the part of either both, or of one of, the parties, union and management, have come to attach lesser value to the Labour Policy Council.

5. The Down-Grading of the Function of the Labour Policy Council

In this survey of the discussions in the Work Conditions Subcommittee of the Labour Policy Council debating legislation on employment contracts and hours of work over the years 2005 to 2006, I have concentrated on four developments: the expressed concern about the establishment of a Study Group, the shelving of the Study Group’s report, the opposition expressed by both union and employee representatives, and the report appended to the *Response*, making clear the opposition of both unions and employers to certain sections of the proposed legislation. It is, of course, perfectly true to say that both bits of legislation were formally approved and that the Council had therefore done its job.

I, however, take the view that these four developments are signs of a transformation in the process of formulating labor policy, and that what is driving that transformation is not external forces such as Deregulation Subcommittee, but the internal members.

Faith in the process by which experts develop the arguments which form the basis of proposed legislation, and, basically the same thing, faith in the experts themselves, has been shaken. This was obvious from the concerns about the establishment of the Study Group, and from the shelving of the Study Group’s report. It does not appear that at any time there was serious and substantive debate between the unions and the employers. As a result, although the ineptness of the MHLW officials may also have been a contributing factor, a *Response* indicating “general approval” of the draft law was sent in spite of complete oppo-

sition from both sides. And the background to that seems to be a down-grading of the importance of the Policy Council and an up-grading of that of parliamentary lobbying. And as a result the function of the Policy Council is gradually diminishing.

V. The Background

If my hypothesis interpreting these events is true, what explains them? I can only answer with further hypotheses, but it seems to me that the following points are important.

The first point, clearly, must be the existence of the series of committees and councils dedicated to deregulation. These have great political power and in effect control the labor policy formulation process from outside. Both for the MHLW itself and for the Policy Councils it sets up, it is difficult to resist the Government-led push that results. And the implications of this control from outside, do not stop there; they are, surely, bringing about a transformation of the Labour Policy Council.

For the employers, if they want a relaxation or reform of the labor laws, it is much more effective for them to ask it of the Council for the Promotion of Regulatory Reform and Privatization than to argue their case out in the Policy Council. And for the union side, if the Policy Council is going to be by-passed, intensifying their lobbying of the Diet is the best way to get what they want. And in fact it is of great significance that this has allowed them to achieve some notable victories in securing amendments, most particularly their success in altering the provisions of the draft law on unfair dismissal, Article 18-2 of the Labor Standards Act. Thus, for both sides there are good reasons for treating the Policy Council as of little consequence.

In addition, for the labor side, they probably see little difference between the Regulatory Reform Council and an experts' Study Group, as far as the stance likely to be taken by their individual members is concerned. It may well be that they see the Study Group, established before the Policy Council begins its deliberations, as similar to the Regulatory Reform Council in trying to control the Policy Council from outside, and that this explains why they have come increasingly to distrust the experts who are appointed to it.

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Employment Promotion Programs for Single Mothers in Japan: 2003-2008

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This paper introduces and evaluates the five employment promotion programs for single mothers enacted from 2003 in Japan. These programs are designed to grant job training to mothers (Programs 1 and 2), to help job-seekers to find a good job match more quickly (Program 3), to meet comprehensive needs (Program 4), or to motivate employers through subsidies (Program 5). Through this research, I found that Program 4 excelled in terms of the coverage rate and number of job placements. Program 1 (grants for highly-skilled job training), however, is the only program that proved to be effective in promoting secure and well-paid jobs. Despite this, the degree of awareness and the utilization rate of the programs are quite low. The estimation results show that the probability of not knowing about the programs is especially high among mothers who work part-time, the less-educated and non-working mothers. The probability of utilizing the programs is relatively low among older mothers, the less-educated, newly single mothers and those with young children.

I. Introduction

The employment rate of single mothers in Japan is one of the highest among the advanced countries. According to the 2006 Nationwide Single Mother Survey (NSMS) by the Ministry of Health, Labour and Welfare (MHLW), the employment rate of single mothers in Japan is as high as 84.5%, which is the second highest among the OECD countries and is notably higher than many other advanced countries such as the United States (73.8%) and the United Kingdom (56.3%) (OECD 2007, 16).

In spite of this high employment rate, the economic situation for single mothers in Japan as a whole is very severe, as has been shown by many existing surveys and empirical studies (JIL 2003, Abe and Oishi 2005, etc). For example, according to the 2005 National Livelihood Survey (NLS), the average annual household income of independent single mother families¹ is 2.33 million yen, which is only 30% of the average amount of all households with children (7.15 million yen). This gap did not narrow very much even after allowing for household size. The income per household member capita for single mother families is 0.83 million yen, which is only about half the amount of all households with children (1.62 million yen).

Despite their high rate of employment, because of the economic hardships experienced by single mother households, quite a large number of single mothers in Japan still

¹ 60-70% of the single mother households in Japan are independent ones (not co-habiting with the mother's parents) (JILPT 2008).

depend on some form of welfare assistance. During the 2006 fiscal year,² 11.8% of single mother households were receiving public assistance (*seikatsu hogo*).³ The probability of using public assistance for single mother households is nearly five times higher than that of all households overall. Meanwhile, nearly 70% of single mother households are recipients of the child-rearing allowance (*jido fuyo teate*),⁴ a cash payment targeted at low-income single mother households (Zhou 2008).

Due to the increasing number of single mother households, public expenditure on them surged over the last few decades. This has definitely placed huge pressure on the financial sustainability of welfare programs. Specifically, the number of single mother households rose from 954,900 to 1,225,400 during the period from 1998 to 2003. Meanwhile, the public assistance rate for single mother households rose from 10.9% to 14.5%. Since the standard payment of public assistance was almost unchanged, we can easily calculate that the total expenditure of public assistance on single mother household rose more than 60% within just five years. Although expenditure on the child-rearing allowance did not rise as fast as that of public assistance, it did increase nearly 50% between 1995 and 2005.⁵

In addition to the problem of financial sustainability, low income and welfare dependency can also have a negative impact on the well-being of children of single mother families. Shinotsuka (1992) and Kanbara (2006) found that, compared to children of two-parent households, children of single mother households generally have fewer opportunities to get a college degree and to obtain a well-paid job as adults. They also indicate that the relatively strong liquidity constraints on education expenditures faced by single mother households could be one of the most important reasons. In other words, poverty and dependence on welfare is likely to be reproduced from one generation to another.

Mainly because of the above two reasons, a number of new employment promotion programs aimed at single mothers have been established since 2003, following the amendment of “Single Mother and Widow Welfare Act (*Boshikafu Fukushi-ho*).” All of these programs are designated to promote employment opportunities for single mothers, either by providing professional training, by enhancing job matching quality, or by subsidizing firms

² In Japan, a fiscal year runs from April 1 to March 31. For instance, the 2005 fiscal year ran from April 1, 2005 to March 31, 2006.

³ The amount of public assistance for a typical single mother household is as much as 132,880 to 166,160 yen per month, which covers almost all living expenses.

⁴ The amount of child-rearing allowance depends on the household income. Households with annual income of less than 1.3 million yen are eligible for the highest amount, and households with annual income over 3.65 million yen do not qualify for the allowance. 5,000 yen/month is added for the first additional child, and 3,000 yen/month is added for each additional child. In the 2004 budget year, the average monthly amount of child-rearing allowance per household was 50,966 yen. Source: National Institute of Population and Social Security Research (NIPSSR) “Annual Report on Social Security Expenditures.”

⁵ Source: National Institute of Population and Social Security Research (NIPSSR) “Annual Report on Social Security Expenditures.”

Table 1. Features of the Five Major Employment Promotion Programs

Features	Name of the Programs
Improving employability	Program1: Grants for highly-skilled job training (GHT)
	Program2: Subsidy for basic or medium-level job training (SPT)
Enhancing job matches	Program3: Intensive assistance for job matching (AJM)
Comprehensive support	Program4: Center for Work Resources and Life Support (CWR)
Motivating employers	Program5: Subsidy to employers for providing full-time jobs (SE)

that are providing full-time jobs for single mothers.

After nearly five years of implementation of these employment promotion programs, much concern has arisen about their performances and about whether these programs should be aborted, continued or expanded. Are any of the programs notably better than others, or are there any programs that are not as useful as they were supposed to be? This paper will firstly provide a brief description of the basic features of the employment promotion programs, and then present an evaluation of their performance either by using recent official statistics or by employing a recent survey on single mothers and interviews with municipality offices and single mothers.

II. Overview of the Major Employment Promotion Programs

Since fiscal year 2003, the following five employment promotion programs targeted at single mothers have been introduced across the nation; they are all either fully or partially financed by the central government (Table 1).

In brief, Programs 1 and 2 are designated to improve the employability of single mothers by supporting them financially in obtaining qualifications or professional training. Program 3, however, is mainly targeted at job-seekers and aims to achieve a better-fitting and faster job match by providing intensive assistance to each user. Program 4 aims to provide all-round support to single-parent households in general, as well as to function as a local center of accessible public resources for single mother households. Finally, Program 5 is a subsidy for enterprises that have switched their single mother employees from a part time contract base to a full time one. Specifically,

- (i) Program 1 (GHT) is to support single mothers in obtaining high-level professional skills and qualifications (e.g. nursing). Eligible applicants must be enrolled in a training institution with no less than a two-year curriculum, and must have finished the first two-thirds of the curriculum work. This program provides a grant of 103 thousand Yen per month for the last third of the curriculum period. In the case of a two-year curriculum nursing school, an applicant must be able to pay the first 16 months' tuition and living expenses herself, and will then be eligible for a grant from the 17th month through to the 24th month.

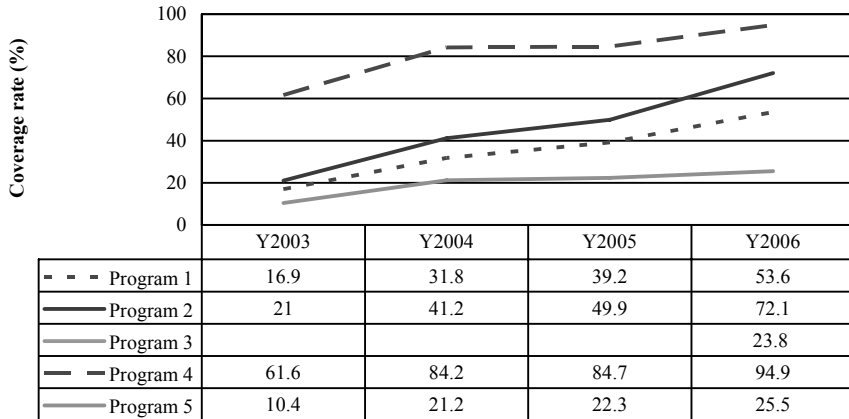
- (ii) Program 2 (SPT) provides subsidies for obtaining basic or medium-level professional skills which require a relatively lower investment in time and money. Specifically, eligible single mothers are permitted to freely choose a training course from a wide range, such as cooking, accounting work, or home-helper skills. Under Program 2, the government will refund 20% of the tuition fees (up to 100,000 yen).⁶
- (iii) Program 3 (AJM) is a free one-on-one job matching consulting service. A consultant is to interview the user one-on-one and advise her on how to start her job search, what kind of job to apply for and, if necessary, what kind of professional training is available for her in order to realize a better job match. Compared to regular public job match services, the AJM's services are more intensive and tailored for the users. It should be noted that the AJM is the only program that was introduced in April 2006, not in April 2003 with the rest. The AJM is also the only program that was 100% subsidized by the central government.⁷
- (iv) Program 4 (CWR) facilitates the building of all-round support bases for single parent households, known as "Centers of Work Resource and Life Support for Single Parent Households (*Boshikatei-nado Shugyo Jiritsu Shien Senta*).” These centers typically provide free services for job consulting and work skill seminars, as well mental health consulting, child care information, child support advice, etc.
- (v) Program 5 (SE) subsidizes enterprises which have switched their single mother employees from a part-time-contract base to a full-time one. To receive the subsidy (300,000 yen per case), the enterprise must submit a training plan to the local government and must give their part-time employees who are single mothers some on-the-job-training (OJT) or off-JT, based on this plan. The subsidy will then be paid to the enterprise when it employs the trainees as full time workers for at least six consecutive months.

III. Performance of the Five Programs (2003-2006)

There are two comparable performance indexes that are released annually for each program by the government. One is the coverage rate of the program (*jisshiritsu*), while the other is the number of job placements (*shushoku kensu*). Coverage rate is defined as the ratio of the number of municipalities that have implemented the programs to the total number of municipalities. Hence, the bigger the coverage rate, the more widely spread the program is. On the other hand, the number of job placements is calculated as the total number of

⁶ During the period from April 2003 to October 2007, the cash back rate was 40% (up to 200,000 yen). As employment insurance provides a similar plan, it is those who are not covered by employment insurance that can use Program 2.

⁷ Other programs require the local government to contribute half (Program 4) or a quarter of the total expenditure (Programs 1, 2 and 5).



Source: MHLW (2006), *White Book on Single Mother Households 2006*.

Figure 1. Coverage Rates of the Five Programs (2003-2006)

job turnovers and job placements realized through using the programs either directly or indirectly. These figures, however, must be interpreted with caution because the definition may differ sharply according to region and to programs.⁸

To sum up, among the five programs, Program 4 (Center of Work Resource and Life Support, CWR) showed an excellent performance, not only in the coverage rate but also in the number of job placements. Specifically, the overall coverage of CWR was as high as 94.9% in 2006, with 100% coverage rate within the 47 prefectures and 13 major metropolitan areas (Figure 1). Two of the work skill training programs (Programs 1 and 2) also showed a rise in coverage rates in the last four years. Program 5 (Subsidy to employers for providing a full-time job), on the other hand, has problems expanding its coverage.

Program 4 also showed a good performance in the number of job placements. For example, in year 2005, this program has helped realize 1,682 job placements through work skill seminars and 4,372 job placements through job consulting (Table 2). Although we are rather hesitant to compare this number directly with those of the other programs due to their definition variations, an obvious gap exists in the absolute numbers (Figure 2). Program 5, again, has the worst performance among the five programs (only 28 job placements in 2006).

Program 4, however, is not the most effective way to help single mothers to escape poverty. Nearly 60% of the job placements through program 4 are part-time jobs, which generally lack job security and pay salaries that are far from sufficient to cover living costs.

⁸ For example, for the program 4 (CWR), some municipalities count a job that finally settled by using other means (e.g. newspaper) as their performance if only the job-seeker once ever used their services. Other municipalities, however, may exclude those indirect job placements from their performance.

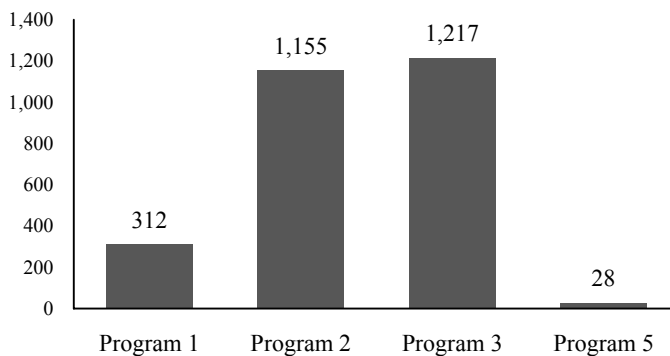
Table 2. Number of Job Placements through Program 4 (2003-2006)

	2003	2004	2005	2006
<i>Job consulting</i>				
Total number of caseloads	14,585	32,385	46,442	46,972
Number of job settlement	1,262	3,251	4,372	3,918
Full-time job ratio (%)	33.3	42.8	37.8	39.4
<i>Work skill seminar</i>				
Total number of participants	15,504	18,396	47,210	38,978
Number of job settlement	757	896	1,682	1,111
Full-time job ratio (%)	28.5	38.2	30.0	38.1
<i>Provision of Job information</i>				
Total number of caseloads	7,256	22,798	29,097	29,627
Number of job settlement	653	2,099	2,757	2,544
Full-time job ratio (%)	31.7	43.6	40.1	37.0
<i>Life support consulting</i>				
Total number of caseloads	2,585	5,068	7,224	7,242
Caseloads of child support consulting	577	872	2,210	1,075
Caseloads of child-rearing/life consulting	263	1,108	1,924	2,364

Source: MHLW (2006), *White Book on Single Mother Households 2006*.

Notes: 1. Statistics for 2006 are limited from April to December. Statistics for other years are from April till March.

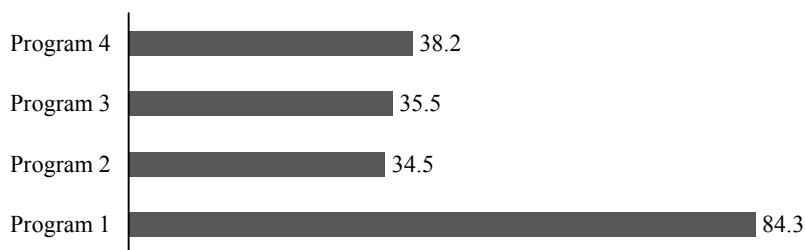
2. The number of job placements may be double-counted across the four categories of services.



Source: JILPT (2008).

Note: The number for Program 1 is the average number between 2005 and 2006.

Figure 2. Number of Job Placements through Other Four Programs (2006)



Source: JILPT(2008).

Figure 3. Share of Full-Time Job Placements across the Five Programs (by %, for 2005)

In that sense, Program 1 (grants for high-level skill training) should be considered as the most successful program. As we can easily tell from Figure 3, the share of full-time jobs attained through Program 1 is as high as 84.3%, which is significantly higher than the performances of the other programs—with the exception of Program 5. (Program 5 is, by definition, providing 100% full-time jobs).

IV. Evaluation of the Employment Promotion Programs

In order to evaluate the performance of the programs, in 2007 a research board organized by the Japan Institute for Labour Policy and Training (JILPT) conducted a random survey of 1,311 single mothers, as well as holding intensive interviews with nine mothers and the relevant departments at eight municipalities.⁹ The survey and interviews reveal some basic problems hidden beneath the five employment promotion programs that are not apparent from the preceding information on performances.

1. Utilization Rate and Awareness Degree of the Programs

Although all programs, with the exception of Program 3, have been introduced for more than five years, they are far from being widely recognized and utilized among single mothers. The survey results (Table 3) reveals that among every 100 single mothers, only 37 knew Program 1, 50 knew Program 2, 34 knew Program 3 and 63 knew Program 4.¹⁰ Considering the proportion of single mothers who are currently using or have ever used the programs, the numbers are even more disappointing. The share of previous or current users for Program 1 hits the lowest rate at 2.3%, while even the best-known Program 4 has a utilization rate of less than 20%.

⁹ See JILPT (2008) for detailed descriptions about the survey and interviews. The 1,311 single mothers in the sample were randomly drawn from 20 districts, either through a users list from CWR or a recipients list for the child-rearing allowance.

¹⁰ Awareness degree and utilization rate of Program 4 might be overestimated because of our sampling method.

Table 3. Utilization Rate and Degree of Program Awareness

	(%)			
	Program 1	Program 2	Program 3	Program 4
Share of previous or current users (a)	2.3	11.8	15.0	19.1
No use due to unawareness (b)	64.7	57.3	78.0	45.8
Degree of program awareness	36.8	49.5	33.7	62.9

Source: JILPT (2008), ch.3.

Notes: 1. (Degree of Program awareness) = 1 - (1-a)*b.

2. Program 5 is not evaluated by respondents of the JILPT survey because Program 5 is mainly concerned with employers.

The interview results tell a similar story to the survey results. Among the nine interviewees, five mothers have never used any of the programs¹¹. Besides the problem of low utilization rate, use of the program services is uneven among some of the well-informed mothers. One well-informed mother, on the other hand, has used three of the five programs and is prepared to use more if needed. Whether mothers are well-informed or not, however, depends largely on their education level. All three of the interviewees who have a junior college degree were aware of the programs and were using some of the programs. The six other interviewees, who have a high school degree or less, have poor awareness of the programs and only one of them has used the employment promotion program. Furthermore, only one high-school graduate was a public assistance recipient, and she used the program on the advice of her caseworker, and not on her own initiative.

2. Who Are More Likely to Use or Know about the Programs?

Due to the low utilization rate and awareness degree of the programs, there is no doubt that there is an urgent need for the programs to be advertised. In order to use ads efficiently, however, it is extremely important to clearly identify who are most likely to be unaware or non-users of these programs. Using the JILPT survey from 2007, therefore, we investigate how personal and household characteristics, including the mother's educational level, are affecting the utilization probability and awareness degree of the programs.

Table 4-1 presents the estimation results for the probability of using the employment promotion programs. First, we find that older mothers are less likely than younger ones to use the two work skill training programs (Programs 1 and 2). This result seems to be natural because younger people, in general, have greater advantages in learning new things and benefit more from the training in the long-run than older people. Second, the mother's educational level does affect the use of programs as we found in the interviews. Compared to single mothers with only high school or middle school education, those who graduated from

¹¹ Since most of the interviewees are introduced to interviewers through the local government or CWR, it is no surprise to see that they show a higher utilization rate of the programs than the survey results showed.

Table 4-1. Probability of Using the Programs (Logit Model)

	Program 1	Program 2	Program 3	Program 4	Any Program	Mean
Age of mother	-0.1155 ** (0.0539)	-0.0575 *** (0.0194)	0.0247 (0.0182)	0.0349 (0.0269)	0.0210 (0.0251)	39.1
Education- Junior college	1.7453 ** (0.7504)	0.0587 (0.2141)	-0.2377 (0.1731)	-0.3741 *** (0.1275)	-0.2317 (0.1693)	36.9%
Education- College plus	1.1041 (0.7593)	-0.3714 (0.3753)	-0.0018 (0.3742)	-0.0637 (0.2757)	0.1433 (0.2336)	8.4%
Work status 2 - Part-time worker	-1.6469 *** (0.3556)	0.1435 (0.3148)	0.4264 ** (0.2314)	0.0959 (0.1583)	0.0681 (0.1412)	35.8%
Work status 3 - Full-time nonregular workers	-1.6257 *** (0.6444)	0.1130 (0.3541)	0.3173 (0.2835)	0.4735 **** (0.1935)	0.3280 * (0.1806)	23.6%
Work status 4 - Not working	-0.9852 (0.8777)	-0.1119 (0.4153)	0.6383 *** (0.2402)	0.2317 (0.2935)	0.2638 (0.3636)	13.2%
Career path 2 - Continuous working experience (part-time job counted as experience)	17.6744 *** (1.1912)	0.6220 ** (0.2837)	0.2980 (0.4925)	-0.0179 (0.3978)	0.1691 (0.4036)	14.8%
Career path 3 - Rejoined workforce after a blank	17.2944 *** (1.0890)	0.3309 (0.3024)	0.0568 (0.4364)	0.3235 (0.3250)	0.3134 (0.3264)	32.0%
Career path 4 - Never rejoined after leaving work	16.9861 *** (1.2284)	0.4425 (0.4477)	0.1059 (0.4643)	0.2587 (0.3068)	0.2964 (0.2856)	39.7%
Career path 5- No work experience at all	17.8992 *** (1.3613)	-0.2435 (0.3654)	-0.6424 (0.6527)	-0.0899 (0.2790)	0.1551 (0.3503)	7.5%
Reduced recipient of child-rearing allowance	-0.4920 (0.4989)	-0.2365 (0.3002)	0.2193 (0.2166)	-0.2932 (0.1887)	-0.3310 (0.2061)	36.3%
Non-recipient of child-rearing allowance	-0.5517 (0.4883)	0.0470 (0.2643)	-0.7375 *** (0.2750)	-0.0296 (0.2564)	-0.1428 (0.2362)	15.2%
Number of years as a single mother household	0.0219 (0.0544)	-0.0294 (0.0311)	-0.0894 *** (0.0231)	-0.0668 ** (0.0290)	-0.0765 *** (0.0233)	5.4
Number of children	0.0604 (0.3383)	0.0888 (0.1338)	-0.0408 (0.1400)	-0.3276 *** (0.0734)	-0.2488 *** (0.0795)	1.7
Age of youngest child	0.2128 *** (0.0732)	0.0664 *** (0.0218)	0.0044 (0.0252)	-0.0065 (0.0396)	0.0173 (0.0367)	9.5
Co-residence with mother's parent	0.5816 ** (0.2852)	-0.1176 (0.3320)	-0.2022 (0.2099)	-0.0300 (0.0810)	-0.0033 (0.1024)	23.1%
Receiving child support from ex-husband	0.1697 (0.5037)	-0.1543 (0.1774)	-0.1471 (0.1838)	0.4297 *** (0.1433)	0.4058 *** (0.1336)	23.3%
Constant	-18.9896 (0.0000)	-0.7497 (0.5948)	-2.4363 *** (0.8122)	0.0053 (1.0405)	0.4019 (0.9957)	
N	1,097	1,107	1,100	1,150	1,152	1,152

Notes: 1. *, **, *** indicate statistical significance at the 10%, 5% and 1% levels, respectively.

2. Standard errors (numbers in the parentheses) are corrected using generalized estimating equations (Huber correction), with clustering at the district level.

3. Baseline groups for education, work status, and career path are high school or junior high school graduate, full time regular worker, and continuous working experience as regular worker, respectively.

junior college have a higher probability of receiving grants for high-level skill training (Program 1). However, junior college graduates are less likely to use the Center for Working Resources (Program 4). Third, the mother's work status and career path also have a significant impact on the probability of program using. Full-time regular workers are more likely to use the two skill training programs, while part-time workers and non-workers have higher probabilities of using the job matching consultant service (Program 3). Mothers who had a continuous career path as a regular worker single motherhood status (unfortunately only 6.1% of single mothers have such a solid career) are less likely to use the skill training programs. Fourth, the number of children and age of the youngest child matter, too. Specifically, the probability of using Program 4 decreases as the number of children rises. The probability of using the skill training programs rises as the age of the youngest child rises. Finally,

Table 4-2. Probability of Knowing about the Programs (Logit Model)

	Program 1	Program 2	Program 3	Program 4	Any Program
Age of mother	0.0156 (0.0189)	-0.0082 (0.0141)	0.0157 (0.0136)	0.0428 *** (0.0174)	0.0470 ** (0.0223)
Education- Junior college	0.3846 ** (0.1881)	0.2564 (0.1589)	0.0966 (0.1562)	-0.1112 (0.1624)	0.0640 (0.2037)
Education- College plus	0.2095 (0.1501)	0.1477 (0.2598)	0.2443 (0.2550)	-0.1939 (0.3908)	0.5022 (0.4776)
Work status 2 - Part-time worker	-0.5277 *** (0.1640)	-0.2294 (0.1677)	0.0162 (0.1833)	-0.1998 (0.2754)	-0.4862 ** (0.2364)
Work status 3 - Full-time nonregular workers	-0.1047 (0.1596)	0.1515 (0.2167)	0.1118 (0.1718)	0.2833 (0.2293)	-0.0692 (0.2133)
Work status 4 - Not working	-0.6671 *** (0.2370)	-0.6558 ** (0.2786)	0.0703 (0.2163)	-0.4271 * (0.2636)	-0.6713 ** (0.3103)
Career path 2 - Continuous working experience (part-time job counted as experience)	0.4977 * (0.3040)	0.6598 ** (0.2704)	0.6495 *** (0.2027)	-0.2602 (0.3487)	0.0186 (0.4104)
Career path 3 - Rejoined workforce after a blank	0.1372 (0.2775)	0.1963 (0.2814)	-0.1071 (0.2133)	-0.0317 (0.3440)	-0.0683 (0.4748)
Career path 4 - Never rejoined after leaving work	0.1075 (0.2343)	0.3315 (0.2810)	0.0657 (0.2134)	-0.0450 (0.2883)	-0.1015 (0.3766)
Career path 5- No work experience at all	0.3785 (0.3834)	0.2545 (0.3618)	0.0353 (0.2886)	-0.6604 ** (0.3132)	-0.2117 (0.5682)
Reduced recipient of child-rearing allowance	0.0492 (0.1308)	0.2053 (0.1858)	0.3881 ** (0.1695)	-0.1818 (0.2373)	-0.1333 (0.2739)
Non-recipient of child-rearing allowance	-0.1197 (0.1505)	0.0870 (0.1622)	0.1767 (0.2433)	0.0441 (0.3136)	-0.1465 (0.3339)
Number of years as a single mother household	0.0004 (0.0248)	0.0005 (0.0183)	-0.0217 (0.0193)	-0.0338 (0.0215)	-0.0242 (0.0179)
Number of children	-0.0737 (0.0876)	0.0250 (0.0706)	0.0479 (0.0984)	-0.2470 *** (0.0934)	-0.1696 (0.1347)
Age of youngest child	-0.0237 (0.0290)	-0.0354 (0.0243)	-0.0160 (0.0231)	-0.0457 * (0.0253)	-0.0556 ** (0.0242)
Co-residence with mother's parents	0.0351 (0.1447)	-0.0097 (0.1364)	-0.1509 (0.1594)	-0.0684 (0.1503)	-0.0834 (0.1494)
Receiving child support from ex-husband	0.4011 *** (0.1169)	0.3014 *** (0.1127)	0.1843 (0.1843)	0.6178 ** (0.2125)	0.8720 *** (0.2141)
Constant	-0.8104 (0.6135)	0.2695 (0.4074)	-1.3469 *** (0.4411)	1.2873 (0.8068)	1.3999 (1.2125)
N	1,097	1,107	1,100	1,150	1,152

Notes: 1. *, **, *** indicate statistical significance at the 10%, 5% and 1% levels, respectively.

- Standard errors are corrected using generalized estimating equations (Huber correction), with clustering at the district level.
- Baseline groups for education, work status, and career path are high school or middle school graduate, full time regular worker, and continuous working experience as regular worker, respectively.

co-residence with parents improves the possibility of using Program 1. Additionally, receiving child support from the ex-husband boosts the utilization probability of the Center for Working Resource (Program 4).

Before using the programs, however, mothers must know about the programs. Knowing the existence of the employment promotion programs is an imperative step for use. Table 4-2 summarizes factors responsible for the probability of recognizing the programs. In short, we see that the mother's age, educational attainment, continuous working experience and child support from ex-husband are positively related with the probability of program awareness. On the other hand, mothers with less resources (doing a part-time job, not working or no work experience at all, less educated), mothers with more children are less

likely to know about the programs, as are those whose youngest child is relatively older.

It is interesting to find that some of the personal and household characteristics affect the use and awareness of the programs in opposing directions. For example, older mothers are more likely to know about the programs but less likely to use them; co-residence with parent improves the probability of using the programs but has no effect on program awareness; age of the youngest child is positively related with program use but negatively associated with program recognition, etc. Child-support from the ex-husband, however, is positively related with both utilization and recognition of the programs. Although less than a quarter of single mothers are receiving some child-support, it could be a critical factor in determining the mother's ability to collect program information and to benefit from the programs.

3. Does Usage of the Programs Improve the Employability of Single Mothers?

Although letting more mothers know about and use the programs is an important task for the program developers, it is not the final goal of the policy designers. The final goal is not met until we can say "yes" to at least one of the following questions: Did usage of the programs shorten the job search period for single mothers? Did utilization of the programs result in more secure or better-paid jobs for single mothers?

A simple way to test the above hypotheses is to regress a mother's employability on whether the programs were used or not, holding other conditions constant. The JILPT survey includes three applicable measurements for a mother's employability: (i) length of most recent job search during single mother status, (ii) whether she presently works as a full-time regular worker or not, and (iii) the mother's income earned from work in the last year. To evaluate the programs effect correctly and efficiently, however, some advanced statistical tools must be employed. First, due to the potential endogeneity risk concerning the key variable of "program usage," we avoid using its real values but instead employ its predicted values which we can obtain from the estimations of Table 4-1. Second, since there are a significant number of mothers who are not working, estimation of labor income has to be restricted to the working mothers, and this will definitely lead to a sample selection bias. This problem, however, can be levitated largely by employing a classic two-step Heckman estimation approach.

Table 5 presents estimation results on the length of job search. Only the usage of the Center for Work Resource (Program 4) has significantly shortened the length of the job search period. Although usage of Programs 2 and 3 has shortened the job search period, their effects are not statistically significant. Usage of Program 1, on the other hand, seems to lead to a longer job search period, although the magnitude of its effect is not significant. Additionally, we find that the job search period increases as the mother's age rises. Other personal and household characteristics (education, career path, number of children, etc.) have no significant effect on the job search period.

Table 6, on the other hand, presents the determinants for the probability of full-time

Table 5. Determinants of Job Search Period (In terms of months)

	Program 1	Program 2	Program 3	Program 4	Any Program
Age of mother	0.0735 *	0.0361	0.0841 **	0.0737 **	0.0752 *
	(0.0381)	(0.0485)	(0.0372)	(0.0337)	(0.0427)
No children unhealthy	-0.2965	0.1027	0.0907	-0.2523	-0.3880
	(0.4546)	(0.2937)	(0.3121)	(0.4370)	(0.4399)
Number of children	0.1995	0.3037	0.2497	-0.1388	-0.0320
	(0.3546)	(0.3332)	(0.3329)	(0.3597)	(0.3624)
Age of youngest child	-0.0233	-0.0005	-0.0453	-0.0163	-0.0161
	(0.0835)	(0.0641)	(0.0740)	(0.0745)	(0.0854)
Co-residence with mother's parents	-0.0321	0.1306	0.1278	0.3109	0.3049
	(0.5419)	(0.4020)	(0.4018)	(0.5126)	(0.5120)
Receiving child support from ex-husband	-0.4339	-0.4510	-0.3009	-0.0336	-0.1458
	(0.4527)	(0.4606)	(0.4363)	(0.4443)	(0.4520)
Using Program 1 (predicted values)	3.9751				
	(6.4863)				
Using Program 2 (predicted values)		-7.7725			
		(6.6558)			
Using Program 3 (predicted values)			-2.4597		
			(2.1609)		
Using Program 4 (predicted values)				-3.9963 **	
				(1.7520)	
Using any of the programs (predicted values)					-4.0213 **
					(1.8587)
Constant	2.4745	4.0066	2.3292	5.1495 **	5.1274 **
	(1.7905)	(2.4255)	(1.6232)	(2.1619)	(2.2285)
Work status dummies, career path dummies	Yes	Yes	Yes	Yes	Yes
Education, child-rearing allowance	Yes	Yes	Yes	Yes	Yes
N	600	608	600	627	628

Notes: 1. *, **, *** indicate statistical significance at the 10%, 5% and 1% levels, respectively.

2. Standard errors are corrected using generalized estimating equations (Huber correction), with clustering at the district level.

regular employment. First of all, utilization of Program 1 (grant for high-level skill training) is positively associated with full-time employment probability. This result confirms our finding in an earlier section that Program 1 is most successful in realizing a full-time regular job for single mothers. Second, the effect of the other three programs on full-time employment, nevertheless, is somewhat unexpected. Contrary to our expectations, the estimation results indicate that these programs significantly lowered the probability of full-time employment. That is, compared to those who are not using the programs, program users are suffering from a lower probability of full-employment. The result, however, should not be directly interpreted as proof of the failure of the programs. Since we could not observe the ability of each person, the mothers who are using these programs may be less skilled or have weaker motivation than the non-users, and hence have a lower probability of fulltime employment from the very beginning. Hence, the impact of the other three programs on full time employment probability is unclear.

Table 6. Determinants of Full-Time Regular Employment (Logit Model)

	Program 1	Program 2	Program 3	Program 4	Any Program
Age of mother	0.1813 *** (0.0245)	-0.1878 *** (0.0243)	-0.0021 (0.0210)	0.0582 ** (0.0246)	0.0029 (0.0232)
Education- Junior college	-4.3891 *** (0.8240)	0.1955 (0.1468)	-0.4199 *** (0.1562)	-0.8729 *** (0.1861)	-0.3975 ** (0.1880)
Education- College plus	-1.6141 *** (0.4090)	-0.6038 * (0.3231)	0.0574 (0.3343)	0.2557 (0.2553)	0.7056 *** (0.2656)
No unhealthy children	0.3911 * (0.2210)	0.1061 (0.1671)	0.2577 ** (0.1305)	0.3029 ** (0.1514)	0.2603 * (0.1437)
Number of children	-0.3052 *** (0.0851)	0.2142 (0.1327)	-0.1162 (0.1033)	-0.9227 *** (0.0942)	-0.5411 *** (0.0891)
Age of youngest child	-0.3338 *** (0.0454)	0.1983 *** (0.0294)	0.0098 (0.0255)	-0.0483 * (0.0296)	0.0101 (0.0268)
Co-residence with mother's parents	-0.6176 *** (0.1889)	-0.0668 (0.1367)	-0.4713 *** (0.1289)	-0.0263 (0.1168)	0.0056 (0.1147)
Receiving child support from ex-husband	-0.1082 (0.1640)	-0.5431 *** (0.1881)	-0.1503 (0.1982)	1.2779 *** (0.2209)	0.9842 *** (0.2085)
Using Program 1 (predicted values)	151.8691 *** (27.5184)				
Using Program 2 (predicted values)		-28.1730 *** (3.4994)			
Using Program 3 (predicted values)			-16.2937 *** (1.8525)		
Using Program 4 (predicted values)				-13.2603 *** (0.7452)	
Using any of the programs (predicted values)					-11.4853 *** (0.8075)
Constant	-5.8816 *** (0.8423)	7.5280 *** (0.9714)	1.7667 ** (0.7303)	6.9953 *** (0.8891)	7.2921 *** (0.9057)
N	951	962	953	998	1000

Notes: 1. *, **, *** indicate statistical significance at the 10%, 5% and 1% levels, respectively.

2. Standard errors are corrected using generalized estimating equations (Huber correction), with clustering at the district level.

The results of Table 7 are quite similar to those of Table 6. Among the four employment promotion programs, only Program 1 is found to be positively associated with mother's wage. Thus, program 1, through providing grants for highly skilled job training, not only boosts the chance of a secured job (full-time regular job) but also significantly led to better-paid jobs. Users of the other three programs, however, are making less money than the non-users. For the same reason as we mentioned above, these results do not necessarily indicate that the programs, other than Program 1, have failed. Programs 2, 3 and 4 may not be effective in improving a mother's earning ability, but at least they should not have a very likely caused by the initial unobservable ability gap between the treatment group (program users) and the control groups (non-users).

V. Discussion

It is very impressive that Program 1 (grants for high-level skill training) is overwhelmingly more useful in helping single mothers obtaining secured and well-paid jobs

Table 7. Estimates of Mother's Wage Function (Heckit Model)

Dependent var= ln(annual wage)	Program 1	Program 2	Program 3	Program 4	Any Program	Mean
Weekly working hours	0.0181 *** (0.0030)	0.0169 *** (0.0036)	0.0212 *** (0.0037)	0.0205 *** (0.0034)	0.0205 *** (0.0033)	37.0
Age of mother	0.0148 (0.0276)	-0.0338 * (0.0203)	0.0514 * (0.0310)	0.0283 (0.0227)	0.0261 (0.0224)	39.4
Age square	-0.0003 (0.0003)	-0.0001 (0.0003)	-0.0008 ** (0.0004)	-0.0005 (0.0003)	-0.0005 (0.0003)	
Tenure	0.0355 *** (0.0039)	0.0298 *** (0.0048)	0.0385 *** (0.0057)	0.0367 *** (0.0054)	0.0346 *** (0.0051)	2.9
Education- Junior college	-0.1340 ** (0.0635)	-0.0249 (0.0569)	-0.0061 (0.0485)	-0.0501 (0.0565)	-0.0240 (0.0557)	38.3%
Education- College plus	0.1382 ** (0.0711)	0.0347 (0.0910)	0.2452 *** (0.0594)	0.2443 *** (0.0637)	0.3017 *** (0.0692)	8.3%
No unhealthy children	-0.0339 (0.0512)	-0.0333 (0.0500)	0.0190 (0.0594)	0.0049 (0.0587)	0.0152 (0.0575)	78.9%
Number of children	-0.0021 (0.0387)	0.0743 * (0.0408)	0.0227 (0.0404)	-0.0427 (0.0405)	-0.0254 (0.0402)	1.7
Age of youngest child	0.0126 (0.0088)	0.0491 *** (0.0076)	0.0242 *** (0.0067)	0.0195 *** (0.0071)	0.0237 *** (0.0068)	9.6
Co-residence with mother's parents	-0.0432 (0.0587)	-0.0521 (0.0661)	-0.0818 (0.0647)	-0.0183 (0.0624)	-0.0189 (0.0624)	22.6%
Using Program 1 (predicted values)	1.9468 *** (0.7342)					
Using Program 2 (predicted values)		-5.5355 *** (0.8481)				
Using Program 3 (predicted values)			-1.3919 *** (0.5040)			
Using Program 4 (predicted values)				-1.1056 *** (0.2734)		
Using any of the programs (predicted values)					-1.3132 *** (0.2568)	
Constant	4.0936 *** (0.5717)	5.8928 *** (0.3789)	3.1153 *** (0.5152)	4.1157 *** (0.4078)	4.3350 *** (0.3981)	
Career path dummy, size of the employer, profession dummies, industry dummies	Yes	Yes	Yes	Yes	Yes	
Wald test of indep. eqns. (rho = 0) Chi2 (1) =	120.37 ***	5.42 **	0.22	2.38	5.71 **	
N (N of the first step estimation)	721 (875)	729 (883)	721 (875)	758 (912)	760 (914)	

Notes: 1. *, **, *** indicate statistical significance at the 10%, 5% and 1% levels, respectively.

2. Standard errors are corrected using generalized estimating equations (Huber correction), with clustering at the district level.

3. Estimation results of the first-stage sample selection are abbreviated. Child-support from the ex-husband, which is likely to affect labor participation choice but has little effect on a mother's wage, is used as identification variable.

than the other programs. Unfortunately, Program 1 also has several serious shortcomings: (i) its coverage rate is still low compared to other programs (nearly half municipalities are not covered); (ii) its awareness degree (only 36.8%) is low relative to other programs; (iii) its utilization rate is the worst (only 2.3%). Here we address these shortcomings one by one:

The coverage rate issue is not really a big problem because it has been improving year by year, as we can see from Figure 2. To expand the coverage of Program 1 even faster, the central government could either strengthen administrative guidance to the uncovered municipalities or introduce some new economic incentives (e.g., lessen the expense contribution of local governments). On the other hand, the problems of low awareness degree and

utilization rate can be addressed more efficiently by using our estimation results. For example, promotion of Program 1 should be especially intensive for the less-educated, part-time workers and non-working mothers because these groups are most likely to be unaware of Program 1. To boost the utilization rate of program 1, particular attention should be paid to the groups that are least likely to use the program: older, less-educated, those with younger children, and those not cohabitating with parents. Independent-living single mothers with young children generally find it more difficult to use Program 1 because it is harder for them to find a balance among full-time curriculum studies, work, and child-rearing. Older and less-educated mothers are less likely to be users of Program 1 either because investment in high-level training is less attractive for them (as is a return to education lower for older people) or because they found it harder to enroll or graduate from the assigned two or three years curriculum. Whether we should actively encourage older and less-educated mothers to use Program 1, despite the expected low return of investment, however, remains unclear. What is easier to agree on is that we may help those single mothers with young children, who do not cohabite with their parents, to meet their professional training goal by providing some free or inexpensive practical help with childcare and housework.

To improve the utilization rate and awareness degree for all the programs, Nakazono (2008) argues that local government should first of all construct a one-stop-service system for single-parent households. Under the present system, welfare offices, municipality offices and public job placement agencies are each responsible for part of the five programs and the burden of responsibility differs from region to region. Users may get confused about where to seek services, and it could be difficult to promote the five programs together when each one is managed by a different agent. Among the seven municipalities that we interviewed in 2007, only the city of Kaitsuka has an almost one-stop-service system. As a small city with roughly 900,000 residents, Kaitsuka concentrated four of the five programs (excluding Program 4¹²) at the municipality office, and arranged for two job consultants to be in charge of all single mothers' affairs. Awareness degree of the programs may also be improved by a regular correspondence between the office-in-charge and the mothers. Kaitsuka, for example, mailed each household an annual hand-made brochure, titled "Single Mother News," in which the main content of the programs and how to use them is explained clearly and concisely.

The above analysis also indicates that although some of the programs (Program 4) are effective in shortening the length of the job search period, programs other than Program 1 are basically ineffective in leading single mothers to secured and well-paid jobs. In the case of Program 2, for example, many respondents of the JILPT survey noted that they failed to find a full-time job even after they used this program and obtained some supposedly useful qualifications (computer skills, bookkeeping, etc). For Program 3 (intensive assistance for

¹² Kaitsuka shares Program 4 with other small and medium-sized cities within Osaka prefecture. The Center for Work Resource and Life Support of Osaka prefecture is located in the city of Osaka.

job matching), as many respondents of the survey noted, it sometimes take more than one or two weeks to schedule a meeting with the job consultant. For those who are seriously and urgently seeking a job, Program 3 is just not helpful. However, Programs 2, 3 and 4 are considered worth continuing because they might contribute in other areas, as some of the respondents noted: faster job searches, giving job-search tips to beginners, providing necessary life support as needed, and serving as a networking channel for mothers, etc.

Program 5, however, was already been abolished in 2008 because of its extremely low coverage rate and the stagnant number of job placements. Since Program 5 is targeted at the employers instead of single mothers themselves, the majority of single mothers did not even notice its existence. In the end, Program 5 just disappeared very quietly after five years of implementation.

VI. Concluding Remarks

This paper gives a brief introduction to the five employment promotion programs for single mother enacted after 2003 in Japan. These programs are designed with specific features: grants for professional skill training (Programs 1 and 2) to boost a mother's employability, job consulting for job-seekers to find a well-matching job faster (Program 3), accessible centers for work and life resources to cover comprehensive needs (Program 4), and subsidies for employers to encourage more full-time employment of single mothers (Program 5).

We employed two methods to evaluate the performance of the programs. One is to use the official data published annually on the coverage rate and number of job placements by program. Another one is to use a recent survey of single mothers and interviews with municipal offices to investigate and compare the outcomes of programs.

When using the criteria of coverage rate and number of job placements, we found that Program 4 performed the best among the five. For instance, the overall coverage of Program 4 was as high as 94.9% in 2006, with 100% coverage rate within the 47 prefectures and 13 major metropolitans. In 2005, Program 4 has helped in realizing 1,682 job placements through work skills seminar and 4,372 job placements through job consulting, which is a big lead over the other programs.

However, while looking at whether the programs have led to more secured or well-paid jobs, we found that only Program 1 (grants for high-level skill training) was effective. More than 80% of the job placements in Program 1 are full-time jobs, and users of Program 1 are more likely working as full-time regular workers and earning higher income than the non-users. Utilization of Programs 2, 3 and 4, however, is associated with less likelihood of full-time and well-paid jobs. Since these programs are not likely to undermine a mother's employability, these surprising results are possibly caused by the initial unobservable ability gap between the treatment group (program users) and the control groups (non-users).

The survey also disclosed the low awareness degree and utilization rate of the programs. Among every 100 single mothers, only 37 knew Program 1, 50 knew Program 2, 34 knew Program 3, and 63 knew Program 4. The share of previous or current users for Program 1 hits the lowest rate of 2.3%, and even the best-known Program 4 has a utilization rate of less than 20%. The estimation results show that probability of not knowing about the programs is especially high among the less-educated, part-time workers or non-working mothers. The probability of utilizing the programs is relatively low among the older, less-educated, newly single mothers and those who have younger children.

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JILPT Research Activities

International Workshop

The JILPT held an international research workshop under the theme “Working Time” in January 25 in Tokyo. In order to engage in cross-national discussion and comparative analyses on the above theme, we invited researchers from six countries: France, Germany, Sweden, U.K. and U.S. as well as from Japan. We discussed the issue of working time, focusing on flexible working hours. The submitted papers will be published and are scheduled to be posted on the JILPT website.

The speakers and submitted papers were as follows:

Gerhard Bosch, University of Duisburg-Essen (Germany), *Working Time and Working Time Policy in Germany*.

François Michon, Centre National de la Recherche Scientifique (France), *From “Working Less for More Jobs” to “Working More for More Money”: Recent Development and Issues on Working Time in France*.

Dominique Anxo, Växjö University (Sweden), *Working Time Policy in Sweden*.

Colette Fagan, University of Manchester (UK), *Working Time in the UK—Developments and Debates*.

Samuel Rosenberg, Roosevelt University (USA), *Long Work Hours for Some, Short Work Hours for Others: Working Time in the United States*.

Kazuya Ogura, JILPT (Japan), *Long Working Time and Flexibility of Working Time Management and Work Place in Japan*.

Research Reports

The findings of research activities undertaken by JILPT are compiled into Research Reports (in Japanese). Below is a list of the reports published from December 2008 to February 2009. The complete text in Japanese of these reports can be accessed from the JILPT website*. We are currently working on uploading abstracts of reports in English onto the JILPT website as well.

Research Material Series

No. 51 *Development of Active and Systematic Human Resource Markets (Labor Markets): Seventh Northeast Asia Labour Forum* (January 2009)

No. 50 *Minimum Wage Systems in Europe and North America* (January 2009)

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