

Research notes

New Rules of Conversion from Fixed-term to Open-ended Contracts: Companies' Approaches to Compliance and the Subsequent Policy Developments

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The Amendment to the Labor Contracts Act and Its Background

The Labor Contracts Act (LCA) was amended in August 2012 to prescribe the following three new rules regarding workers employed on contracts with fixed terms:

1. In the event that a fixed-term contract concluded on or after the day the amendment came into effect has been repeatedly renewed for more than 5 years in total, the worker in question is entitled to have their contract converted to an open-ended contract, should the worker request it¹ (Article 18).
2. In the event that a fixed-term contract has been repeatedly renewed, and is in effect what can be regarded as an open-ended employment arrangement, or the fixed-term contract worker has reasonable grounds to expect the contract to be renewed, refusal to renew the contract is not permitted when the refusal is deemed lacking reasonable grounds and socially inappropriate (the fixed-term

contract is deemed to have been renewed) (Article 19).

3. It is prohibited for an employer to subject a worker whose contract has a fixed term to unreasonable differences in labor conditions between said worker and the open-ended contract workers employed by the same employer (Article 20).

Article 19 took effect as soon as it was promulgated on August 10, 2012, due to the fact that it was not the introduction of a new rule but simply the reconfirmation and incorporation of the already established case law known as “refusal to renew rule (Yatoi-dome hōri)” into LCA. Articles 18 and 20, which introduced totally new regulations, came into effect on April 1, 2013.

The development that prompted such amendments was the all-round reduction in fixed-term contract workers that resulted from the onset of the global recession that followed the collapse of Lehman Brothers in 2008.² In December 2008, fixed-term contract factory workers and other such staff working on the production lines of automobile

1. The right to apply for conversion to open-ended term status is a formative right (*keisei-ken*), namely, a right that assumes effect with the unilateral manifestation of intent by the fixed-term contract worker alone, and does not require the consent of the employer. Moreover, “unless otherwise provided,” the conditions applied under the fixed-term contract directly before the conversion are carried over to the open-ended contract. For details, see Kazuo Sugeno, *Rōdōhō* (dai 11 han) [Labor Law (11th ed.)] p. 314 (Koubundou 2016).

2. A rapid succession of deregulations were introduced as part of the structural reform that followed the slump that hit Japan's finance and securities sector in 1997 and collapse of the IT bubble in the early 2000s, such as the 1998 amendment to the Labor Standards Act extending the general maximum limit on fixed-term contract term from 1 year to 3 years, the conversion of worker dispatch to a “negative list” system (1999), and the lifting of the ban on dispatched workers in manufacturing duties (2003). As a result, the number of non-regular workers increased rapidly from the late 1990s onward, reaching more than one-third of the total number of workers in 2007. Amid this rise, social issues developed, such as wage gaps and unequal treatment between fixed-term contract workers and regular workers engaged in the same work or pursuing the same way of working, and the existence of a certain group of workers unwillingly kept in non-regular employment and unable to secure opportunities to develop their vocational abilities.

manufacturers and other such companies had their contracts discontinued, were evicted from company accommodation without unemployment insurance payouts, and subsequently gathered in makeshift shelters set up in a park near the National Diet building. Media coverage of these workers seeing out the year in these shelters strongly impressed upon the public the need for legal regulation to limit the abusive use of fixed-term contracts. February 2009 saw the launch of discussions to investigate the possibility for amending LCA. In the process of these considerations, discussions also addressed the possibility of “entrance regulations” that place limitations on entering into fixed-term contracts, but this was met with fierce opposition from industry representatives who feared it would lead to inflexibility in the labor market. As a result, it was concluded that regulations such as the aforementioned Article 18 and Article 20 should be established.

Articles 18 to 20 of LCA are civil norms that do not involve criminal penalties or other such punishments. And yet, they are applied to all kinds of fixed-term contract workers (around 14.85 million workers), including workers in part-time or side jobs, contract employees, and workers dispatched from temporary staffing agencies.³ Moreover, according to estimates by the Ministry of Health, Labour and Welfare (MHLW), around 30% of fixed-term contract workers have been in continuous employment with their employer for a total period exceeding 5 years. Judging from such circumstances, it seemed not easy for the business community to comply with the rules. In response to a request from

MHLW, the Japan Institute for Labour Policy and Training (JILPT) has therefore sought to ascertain how companies are complying with the rules by implementing a questionnaire survey for three times, and an interview survey⁴ conducted on an ongoing basis. This paper provides an overview of the results of these surveys that relate to the rule regarding conversions from fixed-term to open-ended contracts (“open-ended conversion rule”), which has a particularly large impact on industry.

How are companies approaching compliance with the open-ended conversion rule?

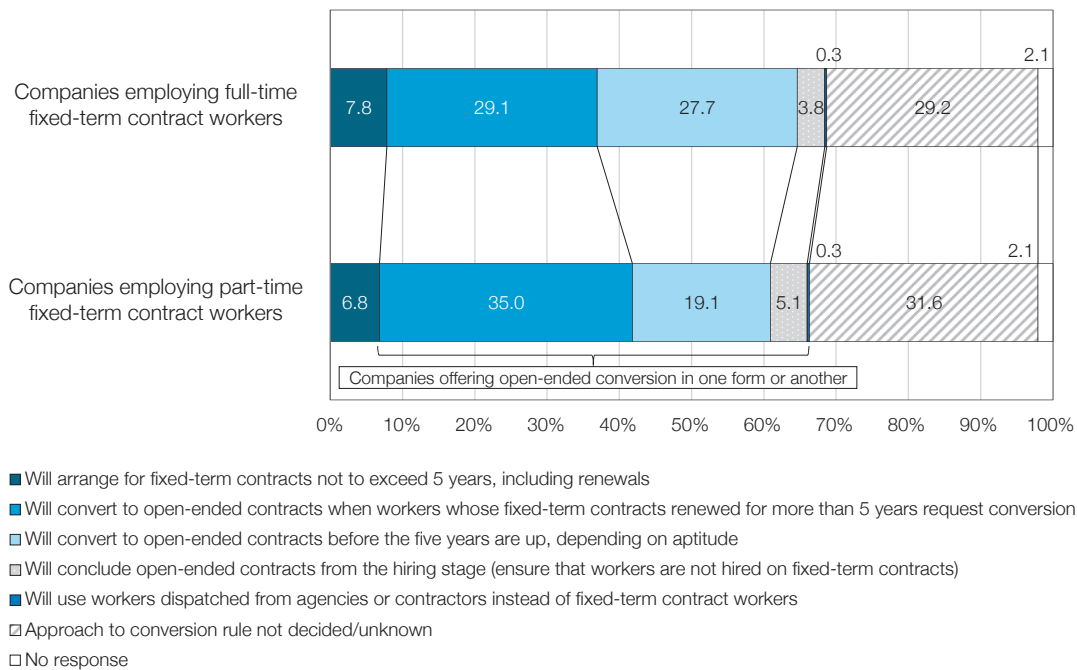
Companies seem to be positive taking steps to comply with the open-ended conversion rule. The number of companies that responded that they are “converting employees to open-ended contracts in one form or another,” significantly exceeds the number of companies that responded that they try to avoid such conversions. This trend that has remained consistent since the first questionnaire survey conducted in 2013 shortly after the amendment took effect.

How are smaller-sized companies to cope with the rule? JILPT conducted a survey in 2016⁵ with the scope expanded to include smaller-sized companies. It shows that companies that follow the legally-prescribed approach of “converting to open-ended contracts when workers whose fixed-term contracts renewed for more than 5 years request conversion” account for around 30% of companies employing full-time fixed-term contract workers, and also over one third of companies employing part-time fixed-term contract workers (Figure 1). The results also

3. A special case (effective April 1, 2014) was subsequently introduced to extend the period for 5 more years (a total exceeding 10 years), until researchers, faculty members, and other such staff at universities and other such institutions and research and development corporations are eligible for the right to apply for conversion to open-ended term status. Furthermore, a special case (effective April 1, 2015) was also established regarding high-income fixed-term contract workers with advanced specialist knowledge, etc. and older workers on fixed-term contracts for continued employment after mandatory retirement age, such that as long as the employer is providing employment management that takes into account the special nature of those workers, the worker’s right to apply for conversion does not arise for a certain period of time.

4. See JILPT research series no.122 (2014), no.151 (2016), no.171 (2017), and JILPT research material series no.195 (2017). [All are only available in Japanese.]

5. The questionnaire survey was aimed at 30,000 companies across Japan that employ 10 or more full-time workers. Valid responses were received from 9,639 companies (a response rate of 32.1%). This paper shows the results reorganized according to the distribution of the industry and company size in Japan, based on the results of a complete survey of Japan (the Economic Census). For details, see *Results of the survey on the approaches to compliance with the Amended Labor Contracts Act and special cases, and the utilization of diverse regular employees*, JILPT research series no.171 (JILPT 2017). [Only available in Japanese.]



Source: JILPT, 2017.

Figure 1. Companies' intentions to comply with the open-ended conversion rule

revealed there are companies that are prepared for open-ended conversions at an earlier stage than that demanded by the law. Around 30% of companies that employ full-time fixed-term contract workers and around a quarter of companies that employ part-time fixed-term contract workers selected the response “will convert to open-ended contracts before the five years are up, depending on aptitude.” In contrast, companies that selected the response “will arrange for fixed-term contracts not to exceed 5 years, including renewals” (in other words, they will terminate fixed-term contract before exceeding 5 year continuous employment) accounted for less than 10% of both companies employing full-time fixed-term contract workers and companies employing part-time fixed-term contract workers respectively.

Why are companies showing a positive stance toward compliance?

This brings us to the question of why companies are showing such an unexpectedly positive stance

toward the open-ended conversion rule. From the 2013 survey to the 2015 survey, the percentage of companies that responded that they would “convert employees to open-ended contracts in one form or another” rose from 42.9% to 66.7% for companies employing full-time fixed-term contract workers and from 36.0% to 63.7% for companies employing part-time contract workers. Alongside these increases, there were also growing percentages of companies noting the advantages of open-ended conversion, such as “can expect employees to stay longer and establish themselves” (from 60.9% to 71.9%) and “will lead to greater stability in securing personnel” (from 37.1% to 48.1%, multiple responses). The factors behind such a positive stance from companies include the fact that the rule was put into effect during the period of gradual economic recovery that has been in progress since December 2012 (the second longest since the Second World War). Another key factor is thought to be companies' rapidly growing fears of a potential shortage of human resources⁶ (an irreversible shortage accompanying the decreasing

6. The effective ratio of job openings to applicants (seasonally adjusted value) is 1.59 as of December 2017. This is the highest level it has been for 43 years and 11 months, since the period of high economic growth.

birth rate and aging population), prompted by the fact that the enactment of the rule also coincided with the period in which the generation born in Japan's first postwar baby boom (1947-1949) reached the age at which they completed their period of reemployment following mandatory retirement age and retired permanently (2012-2014).

Moreover, responses gathered in the interview survey in 2013 also showed companies' awareness that "while workers may be employed on fixed-term contracts, no maximum limit on contract renewals was set in the first place, and there has been a stable employment relationship with such workers over the years" as an explanation for companies' positive stance toward open-ended conversion. It was noted that "once such workers have been in employment for more than 5 years, the stance is that they are, in effect, in open-ended employment, and that their employment cannot be simply terminated (nor would there be any intention of that)."⁷ As Japan plunged into a deflationary economy from the late 1990s onward, the number of regular workers (regularly, workers employed on full-time, open-ended contracts) was reduced to its lowest recorded levels.⁸ Along with this drop in the number of regular workers, the term "fixed-term contracts" lost its true meaning, as such contracts were not always backed up a necessity for a contract period to be specified, and they came to represent one element of the employment conditions that distinguish regular employees from other types of workers.

Amid such developments, Article 18 simply sought to do away with the provision of contract periods, as opposed to demanding companies to make fixed-term contract workers into regular employees (namely, doing away with the provision of

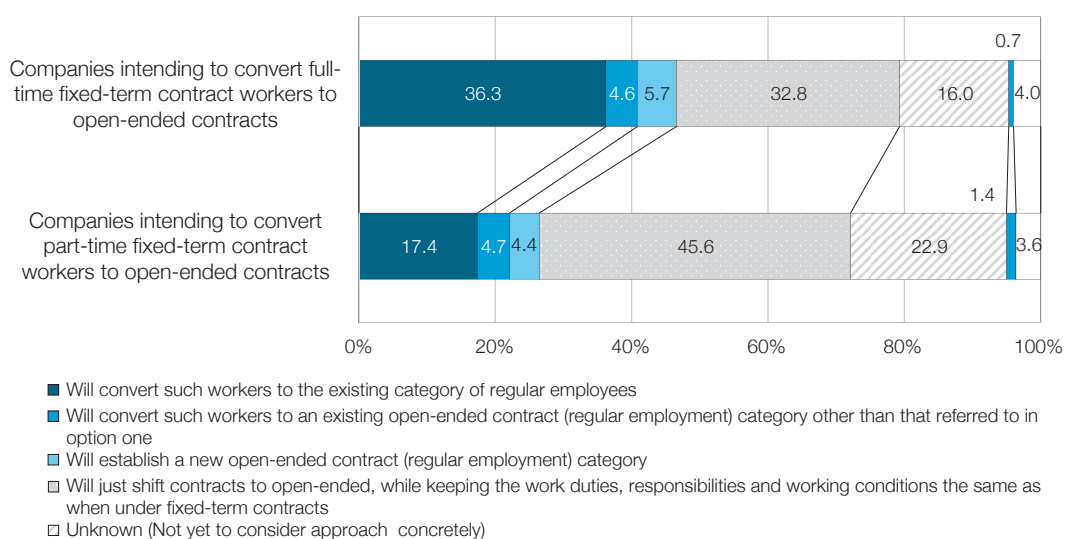
contract periods, and in addition steadily entrusting such workers with tasks demanding responsibility over the course of long-term employment, and providing such workers with treatment fitting for a core member of the employing company, rather than highly restrictive labor conditions). As such an approach does not directly result in increased personnel costs for companies, it could be noted as a possible reason for their positive stance toward open-ended conversion. In fact, looking at what forms of employment are provided to workers converted to open-ended employment in one form or another, the results of the questionnaire survey conducted by the JILPT in 2016 show that over 30% of companies intending to convert full-time fixed-term contract workers, and over 40% of companies intending to convert part-time fixed-term contract workers planned to "just shift contracts to open-ended, while keeping the work duties, responsibilities and working conditions the same as when under fixed-term contracts" (Figure 2).

What specific approaches are companies taking to compliance?

Now, let us look at the specific approaches that companies are taking to pursue compliance with the open-ended conversion rule. The 2016 interview survey revealed that some companies were establishing specific systems and other such initiatives for complying with the rule. With some companies also applying the rule to fixed-term contract workers employed prior to the enactment of the rule ahead of schedule, the survey results confirmed that moves were steadily starting to be made to convert fixed-term contract workers to open-ended contracts.

7. Looking at the situation prior to the amendment to the Act on the basis of MHLW's "2011 Survey on Fixed-Term Labor Contracts," only 12% of the businesses employing fixed-term contract workers had a maximum limit on contract renewals, and over 40% responded that they wished such workers to remain in their employment "as long as possible." Furthermore, JILPT's questionnaire survey conducted in 2016 also shows that the percentages of companies who responded that they "had set" maximum limits on the renewal of contracts was still only 16.5% among companies employing full-time fixed-term contract workers, and 8.9% among those employing part-time fixed-term contract workers.

8. *Labour Force Survey (Detailed Tabulation)* by the Ministry of Internal Affairs and Communications shows that number of regular workers was at 33.02 million people in 2013, the lowest recorded level since 2002, the period for which figures are available for comparison. However, this number subsequently rose for the first time in 8 years in 2015 to 33.17 million people, an increase of 290,000 people from the previous year, and rose further in 2016 with an increase of 500,000 people.



Source: JILPT, 2017.

Figure 2. Forms of employment in the event of open-ended conversion

Company A, a company with around 440,000 employees, for example, had as many as 197,000 fixed-term contract employees, and around half of such employees had already been in employment with Company A for a total of over 5 years. With personnel shortage gradually becoming severe, and a consequent need to secure human resources, the result of repeated deliberations between labor and management was that open-conversion would be adopted as legally prescribed and also be applied ahead of schedule for employment from October 2016 onward. In the case of fixed-term contract employees engaged in duties at post offices, etc. (with repeated contract renewal once a year for full-time employees and once every 6 months for part-time employees), it was decided that all those workers in continuous employment for over 5 years requesting conversion would successively receive the right to apply for conversion to open-ended term status, and be switched to a newly-established open-

ended contract category⁹ (mandatory retirement at age 60, reemployment until age 65 possible).¹⁰ Applications were subsequently received from around 80,000 fixed-term contract employees, and work began in April 2017 to successively switch them to open-ended contracts.

Another example is the case of food service chain Company B, a company with around 13,000 employees. While under pressure to comply with the open-ended conversion rule and expansion of the application of social insurance, Company B was pursuing efforts to expand its chain of restaurants while at the same time beginning to face a serious shortage of personnel. In April 2016, it therefore set about work to introduce a “career enhancement conversion system” to allow those fixed-term contract employees who request it the flexibility to select their way of working from a total of six types. Under the previous system, the ways of working had been polarized, with regular employees (full-

9. The basic salary and other such conditions are essentially the same as those received during employment as a fixed-term contract employee, but the following steps were introduced to cover labor conditions that are more necessary when workers convert to open-ended employment: (1) new establishment of sick leave, (2) new establishment of a system of leave of absence for injury or illness, and (3) increased flexibility with regard to the units in which annual paid leave can be taken.

10. It was also decided to introduce a system for stricter judgment for decisions regarding contract renewals after exceeding a total of four and a half years of employment for part-time fixed-term contract employees newly hired from October 1, 2016, onward (to be applied from October 2021 onward). There is a case that even companies like Company A, which seem to be adopting a positive approach toward compliance with the open-ended conversion rule, may shift to a cautious stance in the future with regard to the fixed-term contract workers they newly recruit.

time employment, can be transferred to different restaurants across Japan, including transfers requiring relocation of place of residence) on the one hand, and fixed-term contract employees (employment restricted to a specific restaurant) on the other. Company B established new categories between those two options, such as “diverse regular employees” for whom there are limitations on aspects of employment such as the scope of personnel transfers, the length of prescribed working hours (20 or 30 hours a week), and promotions to managerial positions, and “employees for whom only the contract period is switched to open-ended,” for whom it is possible to convert to open-ended employment without waiting for a total of 5 years of employment.¹¹ Since then, around 80 fixed-term contract employees have converted to regular employment, and a total of around 75 fixed-term contract employees have converted to employment as diverse regular employees. There are still no employees who have converted to the category “employees for whom only the contract period is switched to open-ended.”

As this shows, steps are gradually being made toward ensuring the clear stability of employment, as fixed-term contract workers are receiving appropriate contracts, freeing them from arrangements where they rely on repeated contract renewal (arrangements that are only open-ended employment in effect). Moreover, as this has prompted such developments as the establishment “diverse regular employment”

and other such new employment categories, it is also starting to contribute to expanding the options for ways of working between regular employment and other types of employment.

Subsequent policy developments

The right to apply for conversion to open-ended term status will start to take effect on a full scale from April 1, 2018 onward. At present, there does not seem to have been any rapid increases in cases of employers refusing contract renewals shortly before fixed-term contract workers reach a total of 5 years of employment, or other such developments that were feared when LCA was amended.¹² However, major automobile manufacturers were criticized by the press for seeking to adopt means of avoiding the open-ended conversion rule by using the loophole offered by “vacant term” (blank periods between contracts of 6 months or more, after which the total number of years in continuous employment is reset to zero).¹³ Although those means were not illegal, Prime Minister Abe was pushed for answers in the Diet and referred to the fact that the system will be reviewed 8 years after its enforcement, which is a provision set out alongside the open-ended conversion rule.

At the same time, the “Work Style Reform Bills” (an en bloc proposal for eight legal amendments) were presented to the 196th ordinary Diet Session opened in January 2018. These bills include the abolishment of Article 20 of LCA¹⁴ and the

11. When converting from fixed-term contract employment to regular employment or diverse regular employment, employees submit a recommendation letter from their manager and a resume, and undergo a screening process, which involves writing a short essay and attending an interview. To apply to switch to employment as an “employee for whom only the contract period is switched to open-ended,” employees submit an application form and other such documents.

12. The simultaneous enactment of Article 19 has also contributed to the fact that there have not been developments such as a rapid increase in cases of employers refusing to renew contracts shortly before the 5 year in total, or other such trends. Furthermore, a campaign pursued by MHLW—which sought to raise awareness of the unacceptable nature of refusing contract renewal in order to avoid open-ended conversions—also seems to have had an effect.

13. According to MHLW’s “Survey on the Open-Ended Conversion of Fixed-Term Contract Employees” (released in December 2017), all 10 major automobile manufacturers had maximum limits on fixed-term contract renewals, 7 companies had prescribed a set period between the end of contract and reemployment, 5 companies had set such a period to 6 months in line with the “vacant term” rule (LCA, Article 18), and one company had newly established such a period. Furthermore, 7 companies had introduced systems for conversion of fixed-term contract employees to regular employment, and the remaining 3 companies had converted some fixed-term contract employees to regular employment.

14. In JILPT’s questionnaire survey conducted in 2016, a question regarding the rule prohibiting unreasonable differences in labor conditions between fixed-term and open-ended contract workers showed that around 40% of companies had “no plans to review the circumstances (no problems with the current circumstances)” and over 40% were “yet to decide on an approach, including whether or not to review the circumstances.” Such responses suggest that companies have been sluggish to respond to Article 20 of LCA.

legislation of the “equal pay for equal work” principle, which is prescribed in the regulations such as Article 8 of the Act on Improvement, etc. of Employment Management for Fixed-Term/Part-Time Workers. Improvement of working conditions in the application of the equal pay for equal work principle will progress alongside workers gaining the right to apply for conversion to open-ended term status.¹⁵ Bearing that in mind, to what extent will fixed-term contract workers exercise their right to apply for conversion to open-ended term status,

and how will companies change their attitude in response to shifts in the environment resulting from amendments to the law? Attention must be paid to the ongoing developments.

As of June 29, the “Work Style Reform Bills” were enacted in the extended Diet session.

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15. MHLW’s “General Survey on Diversified Types of Employment” (2014) shows that around 40% of fixed-term contract workers “wish” to change to open-ended contracts (regardless of the total number of years they have been in continuous employment).