

Introduction

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The Theme and Its Background

The Japan Institute for Labor Policy and Training (JILPT) hosted its 12th Comparative Labor Law Seminar, or the "Tokyo Seminar," on March 3rd and 4th, 2014. As the organizers of the seminar, we chose the theme of "Protection of Employees' Personal Information and Privacy" and invited distinguished scholars from Australia, China, France, Germany, Japan, Korea (ROK), Spain, Taiwan, the U.K. and the U.S. The following memo was sent to these participants to explain the theme.

Protection of employees' personal information and privacy has become a keen legal issue among developed countries in recent years. Rapid developments in information technologies and the spread of their use in the society are giving rise to many new issues in the workplace, such as electronic monitoring, searches of work computer drives and email, and leakage of personal data to outsiders. There should be effective legal rules to protect employees from improper collection and/or use of their personal information while still paying due consideration to employers' valid business necessities.

In European countries, the EU Directive on the protection of personal data (95/46/EC) was adopted in 1995, and the EU member states have developed legislation and held ongoing discussions on personal data protection at workplaces in accordance with the Directive. A new proposal was made by the European Commission in 2012 to replace the existing framework of data protection legislation, which further stimulated discussion on the subject.

In the United States, where there is no comprehensive legislation on this matter, problems regarding employees' personal information and privacy are being addressed by a variety of statutes and tort theories. Such statutes include the Genetic Information Notification Act of 2008 (GINA), which specifically bans acquisition of, and discrimination because of, employees' genetic information. In addition, most states have laws concerning data security and notification, and this growing body of law is becoming increasingly important to employers.

Asian countries are also facing similar new legal issues related to employees' personal information. In Japan, damages have been awarded under tort in cases of improper blood testing of an employee without his consent. And the Act on the Protection of Personal Information, enacted in 2005, mandates many employers to take appropriate measures concerning employees' personal information.

It is true that this is a relatively new area to many labor and employment law scholars. Legal tools are still developing as new problems emerge in real workplaces. Some issues are regulated by specific legislation to protect employees' data or personal information. Others may be regulated by legislation on employment discrimination. Even where no relevant legislation exists, employer actions can be challenged under the traditional framework of tort liability, such as illegal infringement of privacy.

We anticipate that it will be exciting and rewarding to tackle this vibrant subject. We encourage you to take this opportunity to share the experiences and insights among various countries, in the hope that we will find better policy directions for the future.

Suggested Discussion Points

Together with the explanation of the theme, we provided the following discussion points to the participants as a general guideline for their country papers. It was noted at the outset that we were planning to focus on employment relations in the private sector, though it would be all right to mention the matters in the public sector that are especially relevant from a comparative viewpoint.

1. Introduction

- *General overview of the current situation concerning employees' personal information and privacy protection in your country: Are there many lawsuits? New legislation? Potential legal disputes covered by media? How are they related to developments of new information technologies such as e-mail, internet, global positioning systems, etc.?*

2. Regulatory schemes for protection of employees' personal information and privacy

- *Does your country have a constitution, international instruments, or national legislation which provide legal basis to protect employees' personal information and privacy? Do these regulatory tools specifically address employees? Or do they provide a general framework applicable to both employment and non-employment relationships?*
- *What are the remedies against the violation of these regulations?*

3. Employer's legitimate business purposes?

- *Employers seek to obtain employees' personal information for a variety of purposes. These purposes may include matters of recruitment, disciplinary actions, effective human resource management such as job allocation, transfer of employees, health and safety compliance, work-related injuries and their compensation disputes, preventing the leakage of trade secrets etc. When should these purposes be regarded as proper and reasonable?*
- *If the purpose is regarded as proper and reasonable, how does your country's legal system strike a balance between business necessity and employees' privacy protection?*

4. Personal information and privacy protection in the hiring process

- *Is there any personal information (address, telephone, e-mail address, password of social networking, marital status, family structure, pregnancy, health and medical condition, sexual orientation, religion, political affiliation or activities, union membership, credit information, criminal convictions, litigation history, etc.) that an employer is prohibited from requesting or obtaining? Do those prohibitions stem*

from regulations on discrimination? Or from those on personal information protection?

- *Is there any personal information that an employer is entitled to obtain regarding its employees?*

5. Personal information and privacy protection during the employment relations

- *Under what conditions (if at all) is an employer entitled to obtain the personal information of its employees? Is there any difference between on-duty conduct and off-duty conduct?*
- *How about monitoring employee conduct by video surveillance, or electronic monitoring such as inspection of web-browsing, e-mail, social networking, etc. Is there any difference between on-duty conduct and off-duty conduct?*
- *Is there any discussion on the disclosure of a disciplined employee's name or other work-related information within the firm or outside the firm?*
- *Does an employee have a right to access and confirm his/her personal information retained by the employer and to request correction if it is inaccurate?*

6. Personal information and privacy protection after the employment relations

- *Are there any legal issues for a prior employer to provide information concerning the former employee at the request of a prospective employer?*

7. Evaluation and future directions

- *How do you evaluate the regulations protecting personal information and privacy in the labor and employment law in your country?*
- *Does the current regulatory scheme in your country provide effective regulations and remedies? Are there any side effects caused by the protective regulations such as hindering or distorting labor market function?*
- *Any idea about future policy directions?*

Some Observations

At the seminar the participants made presentations based on their papers and lively discussions followed. The papers are contained in the following chapters, with some revisions to reflect those discussions. They are simply too rich in substance to be summarized here, but we would like to make several points in the hope that readers will have some kind of analytical guidance when going through this volume.

First of all, it was agreed at the seminar that the issue of employees' personal information and privacy has become extremely important. It is essential to keep in mind that in terms of information technology we are living in a totally different society from, say, 30 years ago. It is very easy today--and it will be much more so in the future--to acquire, store, and transfer personal information through electronic devices, and this inevitably affects the scope and the nature of legal problems. There are some classic issues of privacy in the workplace that have been discussed for quite a while, but others are novel and may well require new regulatory frameworks.

Secondly, there is a trend toward protection of personal information by special legislation. Most notable in this regard is the EU Directive on the protection of personal data (95/46/EC) of 1995, which prompted Germany and France to revise their preexisting statutes and Spain and the U.K. to adopt new laws. Meanwhile, it seems that Korea, Taiwan, Japan, and Australia are headed in the same direction, legislating their own version

of data protection. These statutes are comprehensive and not specifically targeted at employment relations, but they are in fact an important element of today's employment law.

Thirdly, as the initial stage of employment, the hiring process requires special attention. Certain types of information are usually classified as "sensitive" and given more protection at the time of recruitment and hiring under the personal information legislation. In addition, the law of employment discrimination is becoming increasingly relevant, in effect deterring potential employers from asking about those traits of the applicant. Some countries have specific regulation regarding the applicant's health conditions, criminal record, or even social media passwords. However, employers also have legitimate interests in obtaining information about the applicants, and there are different ways of striking a balance among the counties.

Fourthly, at the later stages of employment, we are all facing a variety of legal issues such as video monitoring in the workplace, interception of e-mails, drug and alcohol testing, and surveillance of employees' off-duty conducts. Efforts are being made in each country to protect the realm of privacy, and in so doing some countries rely on special statutes regulating electric devices or telecommunication.

Fifthly, in order to understand the significance of statutory regulation, it would be beneficial to identify the default rules of the country regarding employees' personal information and privacy. Even prior to a specific statute, some countries were providing a considerable degree of protection through the constitution and/or civil laws including torts, while other countries had less aggressive default rules. Of course legislation should be valuable in the former countries, too, because it can clarify, expand, or streamline the rules with necessary adjustments.

Sixthly, the employee's consent plays a critical role in many aspects of personal information and privacy, and it would be essential for us to look into this notion more deeply. For instance, the protection of personal information or privacy might be deemed waived by the employee's consent. However, employees are often compelled to give consent to the employer due to the nature of employment relationship, and there should be safeguards to secure "consent" in the true sense. Perhaps it will help to have a labor union or employees' representative get involved. However, personal information and privacy are peculiarly personal by nature. Thus the role of employee representatives would be not to replace individual's consent by their collective agreement with the employer but to provide procedural regulations for securing individual's bona fide consent.

Finally, after studying the various measures taken in respective countries from a comparative viewpoint, it would be necessary to ponder exactly what they are designed to protect. It seems that the realm of private life is more clearly demarcated and detached from the workplace in Western countries. On the other hand, Japan and other Asian countries may be allowing employers to obtain and utilize employees' personal information more widely to accommodate their needs in various aspects of the employment relationship. In these countries, the purpose for obtaining employees' personal information is not only to control and discipline employees, but also to implement measures for their employees' benefit such as to care for employees' health and safety and to consider family situations in ordering transfers. This will lead us to review the employment system of each country before identifying the common and essential standards of protection regarding employees' personal information and privacy.