

Introduction

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Theme and Background

The 10th JILPT Comparative Labor Law Seminar (Tokyo Seminar) was held in Tokyo on March 8th and 9th, 2010, with the theme of “Labor Policy on Fixed-term Employment Contracts.” Reflecting its purpose of promoting the exchange of views among labor law scholars of Western and Asian countries, national reporters were invited from Australia, China, France, Germany, Japan, Korea, Sweden, Taiwan, and the U.K. As co-organizers involved in the planning of the seminar, we sent the following memo, which was attached to the letter of invitation, to the reporters to explain about the seminar’s theme and its background.

The rise in non-standard or atypical workers, such as part-time, fixed-term, and temporary (dispatched) workers, has become a hot issue in labor law and labor market policy across the world. The focus of the 10th Tokyo Seminar is on the regulation of fixed-term employment contracts.

By definition, fixed-term employment contracts terminate automatically at the expiry of an agreed term. Such a termination falls out of the purview of dismissal regulation. For employers and the wider labor market, fixed-term contracts provide numerical flexibility. However, for workers, concerns arise over employment stability and working conditions (which tend to be inferior to those of standard workers).

In line with developments in case law, during the 1980s several European countries introduced rules regulating the abuse of fixed-term contracts as well as mandating non-discrimination between fixed-term and permanent workers. Under the 1999 Council Directive (1999/70/EC, fixed-term work), all EU member states have adopted national regulations curbing the use of successive fixed-term employment contracts and entrenching non-discrimination principles. However, regulation varies widely depending on the jurisdiction (see SEC(2006)1074).

In Asia, China and Korea have recently moved to regulate fixed-term contracts; Japan is yet to do so. Japanese law imposes a three-year maximum term for a fixed-term contract to ensure the employees are not committed to the one employer for an unduly long period. However, Japanese law does not require objective reasons for the employer to enter into or renew fixed-term contracts. Nor does the law set an upper limit on the cumulative duration of renewed fixed-term contracts or the maximum number of renewals. It is up to the employer and the worker to decide whether or not to renew the contract, although case law has established some protections for workers when the circumstances point to a legitimate

expectation of a contract renewal.

The rapid increase in fixed-term and other non-standard workers in Japan, however, has given rise to a number of employment issues, such as growing employment instability and widening inequality between standard and non-standard workers in terms of working conditions and social protection. Therefore, in January 2009, the Japanese government established a study group on fixed-term employment contracts to deliberate on the introduction of new regulations.

Any policy on fixed-term employment contracts requires a balance between the social protection of workers on the one hand and flexibility of the labor market on the other. Therefore, the purpose of this seminar is not only to enable participants to learn more about the diverse regulatory approaches to fixed-term contracts in jurisdictions across the world, but also to provide an opportunity to explore normative directions for labor law and policy in the age of a diversified workforce.

Proposed Outlines

Based on the foregoing concept, we laid out the following suggested outlines along which the reporters were to compose their national papers.

I. General overview of fixed-term employment in the labor market

- Historic overview of non-standard (atypical, non-regular) employment and/or fixed-term contract workers in your country: ratio of non-standard workers and fixed-term contract workers in the labor force.
- Relationship between fixed-term contract employment and other non-standard employment, such as part-time and temporary (dispatched) workers.
- Characteristics and attributes of fixed-term contract workers.
- What is the most typical fixed-term employment? For what purposes and with whom (young, middle or aged; male or female) are fixed-term contracts concluded?
- Although fixed-term employment is usually characterized as employment with instability and lower working conditions, do you know of any different types of fixed-term workers?

II. Historic developments of fixed-term contract regulations

- Brief history of fixed-term contract regulations and reasons for regulatory changes.
- Impact of the regulations on the labor market

III. Current regulations on fixed-term contracts

- Please describe the current regulations on fixed-term contracts, including the legal consequences of their violation (criminal sanctions, damages, automatic conversion into an open-ended contract, etc.), any exceptions for certain groups of workers (e.g. older workers or those in newly founded companies), and the permissibility of derogation by collective agreements.
- If your country includes regulations on other material matters, please also include them in your paper.
- Does the law in your country require objective reasons for entering to or renewing fixed-term contracts? Are there any items that are broadly interpreted in order to provide labor market flexibility?
- Does the law set any upper limits on the maximum total duration of successive fixed-term contracts and /or the maximum number of contract renewals?

- Does the law require equal treatment between workers on fixed-term contracts and those on open-ended contracts?
- Does the law require employers to help fixed-term workers transition to open-ended (standard) employment, such as offering information on vacant permanent positions, training opportunities, etc?
- Do fixed-term workers face any problems in the social security system, such as limited eligibility for unemployed benefits?

IV. Evaluation of current regulations on fixed-term contracts in labor policy and future prospects

- How do scholars, policy-makers and stakeholders evaluate the current state of regulations on fixed-term contracts in your country? What are the merits and demerits of the current state of regulations?
- Have regulations curbed the exploitation of fixed-term contracts? Are there any side effects of limiting the maximum duration and/or the maximum renewal number of fixed-term contracts? Is there any evidence of liberal interpretation of formally strict rules to meet the needs of market flexibility?
- If the law entrenches principles of non-discrimination, are there any problems concerning the scope of equal treatment and conflicts in interests between fixed-term and permanent workers? How do labor unions representing permanent workers view the non-discrimination principle?
- Are there any proposals to reform current regulations? Are there any discussions to shift regulatory measures from substantive regulations by the state to procedural measures allowing agreement between the parties concerned?
- What is your overall view of regulations for fixed-term work in the context of labor law and policy in your country?

National Papers

The national papers submitted to the seminar are contained in the following pages. They describe and analyze the current conditions of fixed-term employment contracts, including various measures being taken regarding them. While readers will surely appreciate the comprehensive contents of these papers, let us offer a general overview of the legal regulations of each country by way of introduction.

First, as for the four European countries, the 1999 EU Directive mentioned above mandates them to ensure equality between permanent and fixed-term workers, and to prevent abuse arising from successive fixed-term contracts by taking one or more of the following measures: (a) objective reasons justifying the renewal of fixed term contracts, (b) the maximum total period for using successive fixed term employment contracts, (c) the number of renewals. It is interesting to note that there are substantial differences among the four countries concerning the latter aspect.

In the United Kingdom, there is no requirement for objective reasons for concluding or renewing fixed-term contracts, nor for the maximum number of renewal of such contracts. However, the total period of successive fixed-term contracts is limited to four years, beyond which the fixed term loses its effect and the contract is treated as one for an indefinite period. It also should be noted that termination on the expiry of a fixed-term contract is subject to the prohibition of unfair dismissal if the employee has been employed for a year or longer.

In Germany, the labor court established a rule that objective grounds are required for

concluding fixed-term contracts so as to prevent the evasion of dismissal protection. However, statutory exceptions have been developed since 1985. While the current law provides for objective grounds for fixed-term contracts, the parties are allowed to conclude a fixed-term contract without such grounds within the period of two years, and with renewal limited to three times. There is a more generous exception of up to four years for newly established enterprises.

In France, a strong policy against fixed-term contracts is embodied in the legal provisions specifying permissible reasons for fixed-term contracts, such as replacement and variations in the activity of the firm. The use of fixed-term contracts for such purposes is limited to the period of 18 weeks, and they are renewable only once. There is also strict regulation of successive fixed-term contracts. On the other hand, the list of permissible reasons includes those of welfare to expand employment opportunities for the elderly and the youth. In addition, a new scheme of project contract was adopted recently for engineers and managers.

In Sweden, permanent employment contracts were considered to be the rule, and the law specified, like France, objective reasons for concluding fixed-term contracts, such as seasonal work, temporary substitute, and probationary employment. However, as the list became longer and more complex, the system was streamlined in 2007 by introducing a new scheme of general fixed-term employment. The parties are free to conclude this type of fixed-term contract for any reason, provided that the total period of employment under the same employer may not exceed two years within five years.

Second, as for the Asian-Oceanic countries, while the issue of atypical employment is commonly recognized, their legal regulation of fixed-term contracts is more diverse.

In Japan, as mentioned in the memo to the national reporters, the parties are not required to have a good reason for concluding fixed term contracts. Also, no limit is set for the frequency of renewal of such contracts, nor for the total length of employment by such contracts (although each contract must be for a period of 3 years or less). There is no provision to prohibit discrimination against fixed-term workers. Only, when the parties have renewed such contracts repeatedly, the courts may invoke the law of dismissal by analogy and require the employer to have reasonable grounds for refusing to do so.

In Taiwan, conversely, the law provides for a stringent rule of non-fixed term employment, limiting the use of fixed-term contracts to temporary, short-term, seasonal, or specific work for not longer than one year. Moreover, when the total period of employment before and after the renewal of a fixed-term contract exceeds 90 days, it is converted to an open-ended contract unless there are 30 days or more between the two contracts. On the other hand, there is no provision for equal treatment. Also, there are efforts towards allowing the wider use of fixed-term contracts.

In Korea, a law was adopted in 2007 to protect irregular workers including fixed-term employees. The law prohibits discrimination against fixed-term employees in comparison with other employees engaged in the same or similar work. It does not regulate reasons for fixed-term contracts, but limits the total period of employment by such contracts to two years, beyond which the employee is considered to have an open-ended contract. Interestingly, after the law was adopted, 37% of fixed-term employees were converted into regular employees while almost the same number of such employees lost employment.

In China, where all workers used to enjoy permanent employment under the planned economy, fixed-term employment expanded explosively since the 1980s among private enterprises. To alleviate the situation, a comprehensive law on labor contract, which was

enacted in 2007, limited the period of consecutive fixed-term contracts to ten years and the frequency of their renewal to two. When either limit is exceeded, the employee is entitled to lifelong employment. In addition, the same severance pay as dismissal must be paid when the employer refuses to renew a fixed-term contract. There is no regulation of reasons for concluding fix-term contracts.

In Australia, the regulation of fixed-term contracts depends primarily on its awards system. Industry awards may limit the use of fixed-term employment to certain cases or to certain time periods. Collective agreements also may regulate the use of fixed-term contracts. The law of 2009 regarding unfair dismissal basically excludes fixed-term employees. However, when a series of consecutive fixed-term contracts have been concluded coupled with an expectation of further employment, the relationship may be regarded as continuous and warrant application of the law.

Analytical Viewpoints

After presentations of the national papers, there was a general discussion among the participants. It touched on not only the legal framework but also its relationship to the actual use of fixed-term employment in each country, relying on relevant OECD statistics. Unfortunately we are unable to summarize the lively discussion in this paper, but we believe the following points were recognized as crucial in understanding and addressing the issue of fixed-term employment contracts.

First, there is a question of the fundamental value of fixed-term contracts. They are often regarded as “atypical” and “irregular,” or inferior, in comparison with traditional, open-ended employment contracts, justifying legal regulation to suppress their use. However, they may also work positively as a tool to increase flexibility and employment opportunity in society.

Second, the three-prong requirement of the EU Directive offers a good framework in regulating the use of fixed-term contracts. Yet, while some countries limit the grounds for concluding fixed-term contracts, others leave them unregulated and rather limit the maximum duration of employment and/or the maximum number of renewals.

Third, apart from such direct control of fixed-term contracts, the law on dismissal may be applied to the employer’s refusal to renew a fixed-term contract. The U.K. makes it clear in the statute, and Australia and Japan seem to have developed a similar case law when there have been repeated renewals in the past.

Fourth, the principle of equal treatment or prohibition of discrimination against fixed-term employees has been accepted rather commonly. This relates to a wider issue of equal treatment of part-time, dispatched, or other atypical employees as well. Still, it seems we are yet to know how this principle is applied in concrete cases.

Fifth, there is also a question as to who decides the regulation of fixed-term contracts. Naturally, it is the legislator that makes laws to deal with them. However, in some countries such legal provisions may be superseded by collective bargaining agreements. Also, in Australia industrial awards play a principal role.

Finally, although we could not invite a reporter from the U.S., it would be interesting to think about the legal situation there. According to the common law rule of employment at will, the employer is free to dismiss an employee any time for any reason under an indefinite contract. Thus, fixed-term contracts are more advantageous to employees because of their employment security during the term of employment. This reminds us of the fact the issue of fixed-term employment is inextricably connected to the law of dismissal.