The Regulation of Fixed-term Employment in Japan

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I. Introduction

Fixed-term employees and, more generally, atypical employees have been provided less employment security and employment protection than regular, permanent employees. The limited security and protection of atypical employees has become one of the most important issues of present-day Japanese labor and employment law, given that more than one-third of Japan's employees today are atypical employees. This article discusses the current state of fixed-term employees in the Japanese labor market and the legal regulations that affect them.

First, the position of fixed-term employees in the Japanese labor market and their characteristics are analyzed (section II). Then, the development and current state of legal regulations *vis-à-vis* fixed-term employment will be discussed, with the focus on limitations on the maximum allowable period for a single contract term and refusals to renew a fixed-term contract (sections III and IV). The article concludes with an evaluation of current regulations of fixed-term employment, as well as future prospects (section V).

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

1. Structure of the Japanese labor market, and the increased prevalence of atypical and fixed-term employment

(1) Positions of regular and atypical employees in the Japanese labor market

For years, Japan has been known for its long-term employment practices (or "lifetime employment," though this term is now seldom used). Under this practice, regular employees (*Sei-syain* in Japanese), who are regarded as core members of a company, are typically hired just after they have graduated from school, under indefinite-term employment contracts[1] and as full-time employees; from there, they tend to enjoy secure and stable employment until retirement age. Law has also endorsed this practice and provided considerable employment security to regular employees.[2] Under the Civil Code, an indefinite-term employment contract may be terminated by either party at any time, with two weeks' prior notice (Article 627,

[1] Japanese labor and employment statutes generally use the term "labor" instead of "employment" (*e.g.*, "labor contract" rather than "employment contract"), while the Civil Code utilizes the word "employment." These two contracts are identical in substance (*see* Nakakubo, *infra* note 20 at 4). In this paper, except in reference to the titles and provisions of labor and employment statutes, the term "employment" is generally used, for the convenience of international readers.

[2] For further English-language details on the development of employment securities given to regular employees, *see* Takashi Araki, *Labor and Employment Law in Japan* (2002), 18–30.

Paragraph 1 of the Civil Code), and until recently, there has been no statutory provision that generally restricts dismissal. Nonetheless, case law[3] has set relatively severe limits on employers' ability to exercise the right to dismiss, under the doctrine of "abuse of the right to dismiss"—where a dismissal shall be null and void if it lacks objectively reasonable grounds or if it is not recognized as socially acceptable—thus *virtually* requiring just cause for dismissal. The case law is now codified[4] into Article 16 of the *Labor Contract Act* of 2006.[5]

Nonregular and otherwise atypical employees—such as part-time employees or temporary agency workers—on the other hand, have experienced different employment practices. These employees are typically employed under a fixed-term employment contract[6] and are guaranteed limited employment security; an employer can simply allow the employment contract to expire at the end of its term if it no longer wishes to continue the employment relationship. As will be discussed, although case law has provided employment security to some types of fixed-term employees, the extent of the protection is rather limited.[7] Atypical employees are considered, both practically and legally, "buffers" against economic downturns as they allow an employer to flexibly adjust its workforce in response to changing economic situations against a background of rather severe limitations *vis-à-vis* the dismissal of regular employees with indefinite-term employment contracts. In addition, atypical employees are in most cases paid less than regular employees, enabling employers to save labor costs. In other words, atypical employment—and typically fixed-term employment as well—has functioned as an indispensable complement to the long-term employment practice of regular employees.

(2) Increases in atypical and fixed-term employment since the mid-1990s

Both the long-term employment practice and the prevalence of atypical-employment positions in the Japanese labor market have experienced major changes since the mid-1990s.

Until 1995, employees undertaking atypical employment had been approximately 20% of all employees. Although the percentage of atypical employees had increased from 16.4% in 1985 to 20.9% in 1995—an increase of roughly 27.4%—this period also saw an increase in the absolute number of regular employees. However, the percentage of atypical employees has risen relatively sharply since then, reaching 34.1% in 2008—in other words, more than one-third of all Japanese employees are now nonregular employees. On the other hand, the number of regular employees has decreased since 1995, reaching in 2008 a level not seen since the late 1980s. It seems that the long depression in the 1990s, following the collapse of the bubble economy and the intensification of the global competition led employers to increase their use of atypical employees while limiting the number of regular employees, in order to cut costs. While long-term employment is still a fundamental characteristic of the Japanese employment system,[8] its prevalence is diminishing; the number of employees not

[3] *Shioda v. Kochi Hoso Co.*, 268 *Rodo Hanrei* 17 (S. Ct., Jan. 31, 1977). For an English translation of the summary of this decision, *see* Kenneth L. Port & Gerald Paul McAlinn eds., Comparative Law: Law and the Legal Process in Japan (2003), 566–568.

[4] Case law of the doctrine of abusive dismissal was first written into Article 18-2 of the *Labor Standards Act* in 2003. This provision was transferred into Article 16 of the *Labor Contract Act*, when it was legislated in 2006, without modifying its content.

[5] *See* generally Ryuichi Yamakawa, "The Enactment of the Labor Contract Act: Its Significance and Future Issues," Vol. 6, No. 2 *Japan Labor Review* 4 (2009) for the legislative history and the content of the *Labor Contract Act*.

[6] Araki, *supra* note 2, at 19.

[7] *See infra* III. 2.

[8] *See* Araki, *supra* note 2, at 18–23.

participating in this practice has been increasing since the mid-1990s, in terms of both absolute numbers and as a percentage of the total workforce.

As the number and percentage of atypical employees have increased since the mid-1990s, so too has the percentage of employees with fixed-term employment contracts. Although it is difficult to ascertain the precise numbers involved—due to differences in methodological procedures[9]—the following surveys provide one with a general idea of the percentage of fixed-term employees.

According to the Labor Force Survey,[10] the ratio of employees with fixed-term contracts[11] to all employees had long remained at around 10%, until the mid-1990s; since then, the percentage of atypical employees has begun to surge, and so the percentage of fixed-term employees also began to rise, albeit relatively gradually. It reached 14% in 2005 and has remained virtually unchanged since then. Another survey—namely, the 2009 Survey on the Current Situation of Fixed-Term Employment Contracts (hereinafter, the "2009 Survey")[12] reports that the ratio of employees with fixed-term employment contracts to all regular employees (*Jo-yatoi* in Japanese) is 22.2%. In reality, the percentage of Japanese employees with fixed-term employment contracts is thought to be somewhere between these two figures. On the one hand, since the Labor Force Survey data regard only those employed on a temporary or daily basis as employees with fixed-term contracts and exclude employees under a fixed-term contract of more than one year, the 14% figure may be overly conservative. On the other hand, because the 2009 Survey excludes from the total population establishments with fewer than five employees—establishments in which the use of fixed-term employment contracts is less prevalent than in larger establishments—it seems that the 22.2% figure would be slightly higher than the reality.

2. Characteristics and attributes of fixed-term employees

To understand the characteristics and attributes of fixed-term contract workers, Japan's Ministry of Health, Labor, and Welfare intermittently conducts surveys on the current state of fixed-term employment contracts. In the following, several features of fixed-term employment are discussed; the discussion relies mainly on two recent surveys that examine the current state of fixed-term employment contracts: the 2005 Survey on the Current Situation of Fixed-term Employment Contracts (hereinafter, the "2005 Survey")[13] and the 2009 Survey.

(1) Fixed-term employment and other types of atypical employment

As previously mentioned, regular employees are hired under an employment contract of indefinite duration, while nonregular, atypical employees are typically employed under a fixed-term employment contract, though not all nonregular employees are hired under a fixed-term employment contract. Just by being a fixed-term employee, it is highly likely that an individual is also a nonregular, atypical employee.[14]

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[9] *See infra* notes 11, 15, and 18.

[10] Historical data no. 9 of the *Labor Force Survey*, available at: http://www.stat.go.jp/english/data/roudou/lngindex.htm (last accessed April 10, 2010).

[11] Note that, as explained in the main text below, the term "employees with fixed-term contracts" in the *Labor Force Survey* does not include employees under a fixed-term contract lasting more than one year.

[12] Available at: http://www.mhlw.go.jp/shingi/2009/09/s0930-10.html (last accessed April 10, 2010).

[13] Available at: http://www.mhlw.go.jp/toukei/list/41-17.html (last accessed April 10, 2010).

[14] A fixed-term employment contract is often enacted not because the job involved is a temporary or casual one, but because the employer wants to distinguish the employee from regular employees and to treat him or her as a

The 2005 Survey[15] reveals that 54.9% of fixed-term employees are part-time employees (*i.e.*, those whose daily working hours or weekly working days are shorter than those of the regular employees at the same workplace). In all, 17.4% of the fixed-term employees are part-time employees "in name only" (*i.e.*, their working hours or working days are basically the same as those of regular employees, but they are called "part-time employees" within the company and treated as nonregular employees, as well as distinguished from regular employees). In all, 11.0% of fixed-term contract workers are contract workers[16] and 7.7% are entrusted workers.[17] While various types of atypical employment exist under fixed-term employment contracts, part-time employment is considered the most typical form of employment involving fixed-term contracts.[18]

(2) Gender, age, and types of fixed-term employees

According to the 2005 Survey, nearly two-thirds (63.7%) of fixed-term employees are female. However, the male–female ratio among the different types of fixed-term contract varies. Part-time employees and "in name only" part-time employees consist largely of women (75.0% and 67.1%, respectively), while entrusted workers are overwhelmingly male (78.8%). Contract workers almost evenly comprise men and women.

According to the 2005 and 2009 Surveys, the average age of employees with fixed-term contracts is 44.1 and 39.9, respectively. In the 2005 Survey, the age categories of 50–54 (13.1%), 40–44 (12.3%), and 60–64 (11.6%) are more prominent (*i.e.*, comprise larger percentages of workers) than other age categories. The presence of the 15–19 and 20–24 age categories is not large (1.8% and 7.8%, respectively). As for male workers, nearly one-quarter of them fall under the age category of 60–64, while about one-half (49.4%) of them are 55 years old or above. Many female workers are found within the following age categories: 40–44 (15.6%), 45–49 (13.2%), and 50–54 (15.7%).

Just as the gender distribution within each fixed-term contract worker typology is different, so too is the distribution of age categories. Nearly 40% of the male contract workers are 55 years old or above, while about one-half of all female contract workers are between the ages of 20 and 34 years. Nearly 80% of all entrusted workers are 55 years or older. As for

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nonregular employee. In other words, the initiation of a fixed-term employment contract often confers upon an employee the "status" of "nonregular employee." *See* Shimada, *infra* note 60, at 859.

[15] The 2005 Survey divides fixed-term employees into five categories: contract workers, entrusted workers, part-time employees, "in name only" part-time employees, and other employees. Note that temporary agency workers are excluded from the survey, for unexplained reasons.

[16] "Contract worker" (a literal translation of the Japanese expression *Keiyaku-syain*) is quite a strange expression, since every Japanese worker works under some kind of contract. This term generally refers to those workers who are hired for their special skills or knowledge and are engaged in specific work or a project, for only a fixed period. Note that the term is a general term and does not in itself have a specific legal meaning with respect to the terms and conditions of employment.

[17] "Entrusted worker" (*Syokutaku-syain* in Japanese) is in most aspects similar to "contract worker." One major difference is that this term usually refers to those who are rehired after they have reached retirement age.

[18] According to the 2009 Survey, which adds to the 2005 Survey typology the category of "temporary agency worker," 34.6% of fixed-term employees are of that type; 14.1% are part-time employees and 15.5% are "in name only" part-time employees. Contract workers and entrusted workers occupy 26.0% and 6.3% of all fixed-term contract employees, respectively. Although the 2009 Survey indicates that "temporary agency worker" is the most representative form of fixed-term employment, there is the possibility that the result does not necessarily represent the true circumstances, considering the fact that the number of temporary agency workers (1.4 million in 2008) is far lower than the number of part-time employees (*i.e.*, part-time employees and "in name only" part-time employees, which together comprised a total of 8.21 million in 2008).

part-time employees—especially female part-time employees—the age categories of 40–44, 45–49, and 50–54 are more prominently represented than are the others.

In summary, the majority of fixed-term employees are female, and women (especially those aged 40–54) comprise the majority of part-time employees with fixed-term employment contracts; meanwhile, most of the male fixed-term employees are elderly and work as entrusted workers.

(3) The aims in enacting a fixed-term employment contract

According to the 2005 and the 2009 Surveys, employers use fixed-term employment for three main reasons: (1) to deal with mid- to long-term business fluctuations and adjust its workforce in response thereto, (2) to reduce labor costs, and (3) to make use of experienced elderly employees. According to the 2005 Survey, reducing labor costs is a dominant impetus for employers in hiring part-time and "in name only" part-time employees; similarly, making use of experienced elderly employees is the main reason that employers hire entrusted workers. It is quite clear that one of the main reasons employers initiate fixed-term employment contracts is to ensure workforce flexibility; it is noteworthy that the 2005 Survey also shows that, in the majority of cases, fixed-term employees engage in work that is similar in scope and quality to that of permanent, regular employees.

On the part of employees, some choose fixed-term employment because working hours and working days align with their personal needs and expectations; others choose fixed-term employment because regular-employee employment is not available.

(4) The wages and employment stability of fixed-term employees

In general, fixed-term employees are considered to be paid wages that are lower than those of regular employees. The 2009 Survey shows that nearly one-third of employers pay 60–80% of the wages of regular employees to fixed-term employees, and about one-quarter of employers pay 80–100% of the wages of regular employees to fixed-term employees. This tendency to offer lower wages basically applies not only to those employees who are engaged in work that is easier than that performed by regular employees, but also to those who are engaged in similar work. One exception to this trend is that employers tend to pay salaries to fixed-term employees who are hired for professional knowledge or skills that are more advanced than those of the other categories of fixed-term employees discussed above; one-third of employers pay salaries to these fixed-term employees that are even higher than those of regular employees. The 2009 Survey also shows that nearly one-half of employers do not award bonuses to fixed-term employees, and most of them do not offer retirement payments.

With regards to employment stability, it is noteworthy that although the total period of employment is longer, the contract is enacted in a much shorter term. According to the 2009 Survey, the majority of employers (54%) offer fixed-term employment contracts of six months to one year, and 20% of employers offer fixed-term employment contracts of three to six months' duration. Meanwhile, in 29% of cases, the total employment duration is one to three years; the duration is three to five years in another 29% of cases, and five to 10 years in 22% of cases. These figures suggest that fixed-term contracts are, in most cases, renewed at least several times: three to five times in 40% of cases, six to 10 times in 22% of cases, and more than 10 times in 15% of cases. It is quite exceptional when contracts are not renewed: only 6% of cases result in contracts that terminate without renewal. Since in principle contracts terminate automatically at the end of the term, fixed-term employees are vulnerable and susceptible to instability, even if the employment relationship continues for a longer period.

III. Development and current state of regulations regarding fixed-term contracts; limitations on the maximum allowable period for single contract terms and on refusals to renew fixed-term contracts

In Japan, there has been a dearth of regulations regarding fixed-term employment. There are almost no statutory regulations *vis-à-vis* fixed-term employment—at least until recently—except for the limitation of a maximum allowable period for a single contract period. For employees under fixed-term employment contracts, under such circumstances, case law has come to provide employment security to a certain extent by restricting employers' refusals to renew contracts (*i.e.*, imposing limitations on the termination of fixed-term employment contracts at the ends of their terms). In this section, both the development and current state of regulations with regards to the maximum limit for single contract terms and termination will be discussed.

A note is appropriate, however, before turning to regulations *vis-à-vis* contract periods. The period limitation discussed below is *for each single contract*; it is *not* a limitation on the *total duration* under which a fixed-term employment relationship can continue—a limitation that is found in some EU countries.[19] In Japan, there is no limitation on the total duration for successive fixed-term employment contracts. Therefore, for example, although under current law, in principle parties *may not* conclude a fixed-term employment contract for more than three years (three years is the maximum limit for each contract), they *may renew* the contract repeatedly and continue the relationship beyond three years, for as long as both parties wish.

1. Development of regulations regarding maximum limits for single contract terms[20]

(1) Civil law regulations on fixed-term employment contracts

In principle, both parties of a fixed-term employment contract are bound to the contract during the length of the term.[21] Considering that, from the viewpoint of preventing involuntary servitude and of enabling parties to accommodate changing circumstances, it was inappropriate to bind parties to a too-long contract;[22] as a result, the Japanese Civil Code, originally enacted in 1896, stipulated that an employment contract with a fixed term exceeding five years may be terminated by either party at any time after the first five years (Article 626, Paragraph 1).

[19] In practice, however, employers sometimes misunderstand the regulation as imposing a limitation on the total duration of successive employment contracts; as result, they sometimes terminate contracts that had been renewed several times, as the total duration approaches the maximum limitation stipulated in the statute. *See* Takashi Araki, *Rodoho* [Labor and Employment Law] 414 (2009).

[20] For a detailed English-language explanation of the development of regulations on the maximum limit for a single contract term, *see* Hiroya Nakakubo, "The 2003 Revision of the Labor Standards Law: Fixed-Term Contracts, Dismissal and Discretionary-Work Schemes," Vol. 1, No. 2 *Japan Labor Review* 4 (2004), 7–10. The description within this subsection basically relies upon the information provided in this article.

[21] Article 628 of the Civil Code stipulates that even if the parties enact a fixed-term employment contract, either party may immediately terminate the contract if there is a compelling reason for doing so. Many scholars consider that a presupposition of this provision is that a fixed-term employment contract cannot be unilaterally terminated during the term without a compelling reason.

[22] *See* Akira Watanabe, "Chuki Koyo to Iu Koyo Gainen ni tsuite" [On the Notion of Mid-Term Employment], in Nakajima Shigeya Sensei Kanreki Kinen Hensyu Kanko Iinkai ed., *Rodo Kankei Ho no Gendaiteki Tenkai* 71, 85 (2004).

(2) Development of the *Labor Standards Act* (hereinafter, the "*LSA*") limitation on single contract terms

(a) Initiation of the LSA in 1947

The *LSA*, which was enacted shortly after World War II, shortened the five-year limitation on a single contract term to just one year, stipulating that a fixed-term employment contract shall not encompass a period of more than one year, except in cases where the contract otherwise cites the term necessary for the completion of a certain project (Article 14). The reason for the change was that many employees were placed under unduly binding contracts prior to the end of World War II and the civil law limitation of up to five years was found to be too long.[23]

(b) The 1998 amendment to the LSA

For more than 50 years, the *LSA* had maintained the one-year limit for a single contract term. However, criticism emerged that the limitation was too restrictive, in that employers could not retain employees with special knowledge or skills for certain, longer periods needed for their business, even as the abusive relationships often found in the pre-war period were becoming rare. This request for deregulation led to the 1998 amendment to Article 14 of the *LSA*—the first of its kind. The revision was rather limited, however, due to strong opposition from labor representatives who said that loosening the limitation would only lead to an increase in the number of unstable and low-paying jobs. The 1998 amendment, while maintaining the principle of the one-year limitation, exceptionally allowed fixed-term employment contracts of up to three years to be enacted for: (1) employees with highly specialized knowledge, skills, or experience for a certain specific business (such as research and development), when such employees are newly hired at an establishment that faces a shortage of such employees[24] or (2) employees aged 60 or older.[25] The former exception was condemned as too restrictive, in that it was applicable only to newly hired employees (*i.e.*, renewals of contracts under this exception were not allowed) and only when an establishment was experiencing a shortage of knowledgeable, skilled, or experienced employees. In fact, a survey executed after the amendment—namely, the 2001 Survey on the Current Situation of Fixed-Term Employment Contracts—shows that only about 5% of fixed-term employees fall under exception (1) above. This led to an additional amendment in Article 14 of the *LSA*, in 2003.

(c) The current law: The 2003 amendment to the LSA

The 2003 amendment brought about two changes to Article 14 of the *LSA*, with regards to the maximum duration of a single contract term: (1) a change to the basic "one-year limit" rule and (2) the deregulation and simplification of the regulation with regards to fixed-term contracts for skilled or elderly employees.

The 2003 amendment brought about changes to the basic principle of a one-year limitation on a single contract term; the maximum allowable term was extended to three years (Article 14, Paragraph 1). Under the current provision,[26] parties are allowed to enact, for

[23] *See* Kazuo Sugeno, *Rodoho (Dai-8-Han)* [Labor and Employment Law] 173 (8th ed., 2008).
[24] Article 14, Items 1 and 2 of the *LSA* (before the amendment by *Act No. 104* of 2003).
[25] Article 14, Item 3 of the *LSA* (before the amendment by *Act No. 104* of 2003). This amendment sought to promote stable employment among those who looked to continue to work after they had reached the mandatory retirement age.
[26] Derogation from the provision is not allowed: the party may not extend the maximum allowable period stipulated in Article 14 through collective bargaining agreements or other agreement forms.

example, a three-year employment contract, even if the employee is not a particularly knowledgeable, skilled, or experienced one, or an elderly worker. Although the major driving force of the 2003 amendment was to advance deregulation,[27] the amendment also sought to make fixed-term employment contracts a more favorable form of employment for both employers and employees.[28]

However, the great concern was raised that, under the amended regulation, employees would be bound to unduly long contracts. The Diet, in consideration of this concern, added in the course of discussion provisions to the effect that the modified Article 14 would be reviewed and necessary measures would be taken after three years of implementation (Article 3 of the Supplementary Provision to *Act No. 104* of 2003), and that until such measures were taken, an employee under an employment contract for the term of more than one year might terminate it at any time, after one year had passed (Article 137 of the *LSA*). No such "necessary measures" have been taken thus far, and these tentative provisions are still in effect.

As a result, under the current law—even in cases where a three-year employment contract had been enacted, for example—the employee is free to leave after one year and the employer cannot detain him or her beyond that one-year period.[29]

In terms of evaluations of this amendment, scholarly opinions are divided. Some are concerned that it could lead to binding employees (*i.e.*, prohibiting their resignation) for too long a period.[30] Others insist that both employers and employees could benefit from an extension of the maximum period, since employers will become more eager to invest in an employee if it can retain him or her for a certain, longer period; other critics assert that the employees could enjoy more favorable and stable[31] employment conditions, but criticize the insertion of Article 137 as a possible disincentive for employers in offering longer-term employment contracts.[32]

Under the 2003 revision, the special up-to-three-years limitation for fixed-term employment contracts for skilled or elderly employees was also modified; an employer may

[27] *See* Yoichi Shimada, "Kaiko, Yuki Rodo Keiyaku Hosei no Kaisei no Igi to Mondaiten" [The Significance of and Problem with the 2003 Revision to Regulations on Dismissal and Fixed-Term Employment] 1556 *Rodo Horitsu Jyunpo* 4, 9 (2003); and Hiroshi Karatsu, "2003nen Rokiho Kaisei to Kaiko, Yuki Keiyaku Kisei no Arata na Tenkai" [The 2003 Revision of the LSA and New Development of Regulation on Dismissal and Fixed-Term Employment] 523 *Nihon Rodo Kenkyu Zasshi* 4, 9 (2004).

[28] Scholars insist, however, that the reason itself was not sufficient justification for changing the basic principle, since it is not clear why simply extending the maximum allowable period for the single contract term leads to a fixed-term employment contract becoming more favorable, without proposing, for example, provisions for equal treatment or for termination-related regulations. *See* Shimada, *supra*; and Karatsu, *supra*.

[29] Note that Article 137 of the *LSA* is applicable only to employees. Employers cannot terminate the contract during the term without a compelling reason (Article 628 of the Civil Code and Article 17, Paragraph 1 of the *Labor Contract Act*).

[30] *See, e.g.*, Shimada, *supra* note 27, at 10.

[31] Note that the purpose of the limitation posed by the Article 14 of the *LSA* is to prevent unduly long employment relationships (*see* Araki, *supra* note 19, at 411–412); Article 14 has, in itself, nothing to do with securing stable employment. However, since employment under the fixed-term contract is in principle secured during the term under Article 628 of the Civil Code and Article 17, Paragraph 1 of the *Labor Contract Act* (*see supra* note 29), a longer term derives greater stability. Note also that, under a contract with a longer term, there would be fewer occasions for the term to come to an end, thus reducing the risk of the contract renewal being refused.

[32] *See* Masahiko Iwamura et al., "Kaisei Roukiho no Riron to Un'yojo no Ryuiten" [Round-table Discussion on the Theory and the Practice of Revised LSA] 1255 *Jurisuto* 6 (2003), 9–10 (remarks by Prof. Takashi Araki); and Watanabe, *supra* note 22, at 92–93.

now initiate an employment contract with knowledgeable, skilled, or experienced employees or elderly employees, for terms of up to five years (Article 14, Paragraph 1, Items. 1 and 2). The 2003 *Act* removed the limitation that the provision for knowledgeable, skilled, or experienced employees is applicable only to newly hired employees and only when an establishment was in shortage of such employees. In addition, Article 137 of the *LSA*, discussed above, is not applicable to these skilled or elderly employees, in spite of the fact that they could be bound by a contract for terms longer than ordinary employees are.[33]

A violation of Article 14, Paragraph 1 occurs when a party enacts an employment contract that stipulates a term longer than the maximum allowable period (*e.g.*, an employment contract for five years for an ordinary employee).[34] The *LSA* provides a penal sanction for the violation (Article 120, Paragraph 1—a fine of not more than ¥300,000; this penal sanction is imposed only on employers).

How such a violation would affect the overall effect of a contract, however, is not stipulated in statutes and is instead left to interpretation. According to court cases[35] and commonly accepted views, the agreed-upon term should be shortened to fit within the limit (*e.g.*, in the case above, the term will become three years), and if the party continues the relationship beyond the limit (*i.e.*, if the employee continues to work and the employer does not object to it),[36] the contract will become one with an indefinite term, in accordance with Article 629, Paragraph 1 of the Civil Code.[37]

2. Development of regulations *vis-à-vis* the termination of fixed-term employment contracts

(1) Development of case law regarding the refusal to renew fixed-term employment contracts

As discussed at the beginning of this section, the *LSA* had long limited its focus on the maximum allowable term for a single contract period; it had not regulated the renewal or termination of fixed-term contracts. Under such circumstances and faced with a relatively severe restriction—by virtue of case law[38]—with regards to an employer's dismissal of indefinite-term employees, fixed-term employment contracts have been used by many companies as a mechanism to cope with economic fluctuations, while securing the workforce needed for their businesses; an employer could simply dissolve the employment relationship by refusing to renew the contract (*i.e.*, allowing the contract to expire at the end of the term and choosing not to initiate a new contract), if the employer needed to its reduce workforce. However, it was considered unfair to apply this rule formalistically and thus deny employment security—even to cases, for example, where fixed-term employment contracts had been renewed repeatedly and, as a matter of fact, had become virtually indistinguishable

[33] For criticisms pertaining to *not* applying Article 137 of the *LSA* to these employees, *see e.g.*, Shimada, *supra* note 27, at 11; and Nakakubo, *supra* note 20, at 10 (*i.e.,* criticism in not applying the Article to elderly employees).

[34] Note, however, that violations of Article 14, Paragraph 1 are quite rare.

[35] *See e.g.*, *Kono v. Asahikawa Daigaku*, 32 *Rominshu* 502 (Sapporo High Ct., Jul. 16, 1981).

[36] This is often the case because, although legally speaking, the term is shortened to the statutory limit, the party believes that the contract is valid for the whole of the period that they had agreed upon.

[37] Article 629, Paragraph 1 of the Civil Code stipulates that in cases where an employee continues to engage in his or her work beyond the term of employment and if an employer, knowing about that continued engagement, raises no objection, it shall be presumed that a further employment contract has been entered into under conditions identical to those of the previous employment contract. It is commonly accepted that the contract term is not included in "conditions" and that the renewed employment will be one with an indefinite term.

[38] *See supra* note 3 and accompanying text.

from indefinite-term employment contracts. Thus, the Japanese Supreme Court came to provide employment security, to a certain extent, for employees under fixed-term employment contracts, by restricting the employer's ability to refuse to renew those contracts.

In the precedent-setting *Toshiba Yanagi-cho Kojo Case*,[39] two-month employment contracts—under which the plaintiffs had been engaged in basically the same work as that of regular employees—had been renewed between five and 23 times (for a total of about one to four years) in a somewhat mechanical manner, before the employer refused to renew them. Upon hiring, the employer had expressed its desire for employees to stay employed for long periods, and the plaintiffs had also believed that they could be employed for longer periods than those stipulated in the initial contract. The Supreme Court pointed out that there had been an expectation by both parties that the employment relationship would continue unless a special circumstance arose and that the contract term thereby lost its meaning substantially; the Court also held that the employment contracts in question were *virtually* indistinguishable from indefinite-term employment contracts, and that a refusal to renew such a contract was substantially tantamount to dismissal. The Court therefore applied the doctrine of abuse of the right to dismiss by analogy, and held that a refusal to renew was not acceptable unless there were objectively reasonable grounds.

The Supreme Court, furthermore, later held in the *Hitachi Medico Case*[40] that even where a fixed-term employment contract is *not* virtually indistinguishable from indefinite-term employment contracts,[41] the doctrine of abuse of the right to dismiss was still applicable by analogy, if there was the expectation that the employment relationship would continue due, for example, to the fact that the contract had been renewed repeatedly.[42]

(2) The current law regarding refusals to renew fixed-term employment contracts

Thus, the Supreme Court established a rule regarding the refusal to renew a fixed-term employment contract that: (1) although in principle the contract would automatically expire at the end of the term, (2) the doctrine of abusive dismissal would be applied by analogy where (a) the contract is *virtually* indistinguishable from indefinite-term employment contracts, or (b) there is an expectation on the part of the employee that the employment relationship would continue, even if the contract were not *virtually* indistinguishable from indefinite-term employment contracts.

The courts decide whether the doctrine of abusive dismissal is applied by analogy, while thoroughly considering such factors as: (1) whether the work is of a permanent or temporary variety, (2) the number of contract renewals or the total duration of the employment relationship, (3) whether or not the procedure taken at renewal is appropriate, (4) how other employees in similar circumstances are treated at the time of renewal, and (5) whether an employer, by its words or deeds, provides an expectation that the employment relationship will be continued for a longer period.[43,44]

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[39] *Maeda v. Toshiba Co.*, 28 *Minshu* 927 (S. Ct., Jul. 22, 1974).

[40] *Hirata v. Hitachi Medico Co.*, 486 *Rodo Hanrei* 6 (S. Ct., Dec. 4, 1986).

[41] In this case, unlike the employer in the *Toshiba Yanagi-cho Case*, the employer had prepared a written agreement for the next term, before it had begun; in this way, it had executed an appropriate procedure at each time of renewal.

[42] In this case, the two-month employment contract had been renewed five times.

[43] *See* Rodosyo Rodo Kijunkyoku Kantokuka ed., *Yuki Rodo Keiyaku no Hanpuku Koshin no Syo Mondai* [Matters Concerning the Repetitive Renewal of Fixed-Term Employment Contracts] (2000) 39–48, 143–209; and Araki, *supra* note 19, at 421. Since courts consider these factors in total—even in cases where a contract had never been renewed—the doctrine can be applied by analogy if, for example, an employer expressed upon hiring the employee its desire for the employee to work for a period longer than that stipulated by the contract. *See*

In cases where the doctrine of abusive dismissal is applied by analogy, the employer is required to produce objectively reasonable and socially acceptable grounds for refusing the renewal and thus terminating the employment contract.[45] The extent of the protection given to employees under a fixed-term employment contract at the time of renewal, however, is quite limited in comparison to the protection regular employees enjoy.[46] The Supreme Court demonstrated this in *Hitachi Medico Case*, *supra*, where the refusal to renew a fixed-term employment contract was in question within the context of economic redundancy, by holding that it is not unreasonable to terminate an employee under a fixed-term employment contract in advance of regular employees, in cases of economic redundancy.

If a refusal to renewal is considered inappropriate due to a lack of objectively reasonable and socially acceptable grounds, the courts consider the previous fixed-term employment contract as having been renewed.[47] Thus, the employment relationship continues under the employment contract, for the same term as the previous one. There is currently no system under which an employer is allowed to refuse to renew an employment contract in exchange for the payment of a lump sum of money.[48]

(3) Administrative standards regarding the initiation and termination of fixed-term employment contracts[49]

Although case law has come to establish a rule that provides employment security to a certain extent, to some employees facing the contract-renewal issue, it lacks predictability. The outcome depends upon an evaluation of the facts of individual cases, and it is difficult for parties to foresee such outcomes. In order to prevent disputes regarding the legality of a refusal to renew a fixed-term employment contract, the 2003 amendment to the *LSA* added provisions that gave grounds to Japan's Ministry of Health, Labor, and Welfare to set administrative standards for enacting and terminating fixed-term employment contracts and to help employers comply through administrative advice and guidance (Article 14, Paragraphs 2 and 3 of the *LSA*).

The standards[50] set in accordance with this amendment require an employer: (1) to notify employees clearly upon the initiation of a fixed-term employment contract, as to whether the contract will be renewed at the time of expiration and, if there is the possibility of renewal, the

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Tonomizu v. Ryujin Taxi Co., 581 *Rodo Hanrei* 36 (Osaka High Ct., Jan. 16, 1991). If, on the other hand, an employer clearly expresses from the beginning that a contract will not be renewed, the application of the doctrine by analogy shall be denied. *See X (anonymous) v. Panasonic Plasma Display Co.*, 993 Rodo Hanrei 5 (S. Ct., Dec. 18, 2009).

[44] Note, further, that once there is an expectation for the continuation of an employment relationship, recent lower courts require either a special circumstance that cancels the expectation or an agreement of the party that they no longer renew the contract, in order for the application of the doctrine of abusive dismissal by analogy to be denied. It is not sufficient for an employer simply to tell employees that their contracts will not be renewed at the next time of renewal. *See X (anonymous) v. Hotoku Gakuen*, 974 *Rodo Hanrei* 25 (Kobe Dist. Ct., Amagasaki Br. Oct. 14, 2008); and *X (anonymous) v. Kinki Coca Cola Bottling Co.*, 893 Rodo Hanrei 150 (Osaka Dist. Ct., Jan 13, 2005).

[45] *See Panasonic Plasma Display Co. Case*, *supra* note 43.

[46] *See* Fumito Komiya, "Yuki Rodo Keiyaku – Yatoidome ni kansuru Hanrei Houri no Bunseki wo Chushin to Shite (Ge)" [Analysis of Fixed-Term Employment Contracts—Focusing on a Review of Cases of Refusal to Renew a Fixed-Term Employment Contract (2)] 1556 *Rodo Horitsu Jyunpo* 14, 20 (2003).

[47] *See Hitachi Medico Case*, *supra* note 40.

[48] This is also the case for dismissal in general.

[49] The explanation under this subsection basically relies upon Nakakubo, *supra* note 20, at 11–13.

[50] *See id.*, at 12, for details of the origin of the standards.

criteria for renewal[51]; (2) to give at least 30 days' advance notice if it is going to refuse a renewal of contract that had been previously renewed at least three times, or under which an employee had been employed for at least one year since his or her initial hiring; (3) upon request and without delay, to issue a certificate stating the reason for refusing to renew a contract in cases referred to in (2); and (4) to make the effort to extend as long as possible the term of a contract that had been renewed at least once and under which an employee had been employed for more than one year since his or her initial hiring, taking into consideration the actual circumstances concerning the contract and the desires of the employee.[52]

Although the amendment in 2003 was remarkable in that it brought into the *LSA*, for the first time, provisions concerning the termination of fixed-term employment contracts, regulations that were introduced on the basis of that amendment are not strict. Rather, the amendment provides grounds only for procedural requirements, and compliance is pursued only through administrative advice and guidance—*i.e.*, no other sanctions, such as criminal penalties or modifications of contents of an employment contract, are provided. It remains to be seen, whether the standards will be effective in preventing disputes regarding refusals to renew fixed-term employment contracts.

IV. The current state of regulations regarding other aspects of fixed-term employment contracts

As discussed in the previous section, regulations regarding fixed-term employment contracts in Japan have been confined almost exclusively to matters relating to the maximum duration of a single contract term and refusals to renew contracts. Japanese law has left most other aspects of fixed-term employment contracts unregulated.

1. Regulations concerning the initiation of fixed-term employment contracts

(1) No required reasons for entering into fixed-term employment contracts

Under Japanese law, *no* specific reason is required for employers to initiate (or renew) fixed-term employment contracts with employees. Thus, fixed-term employment contracts may be initiated, for example, not only to replace employees temporarily while they are taking maternity/paternity leave, but also to recruit workers for permanent jobs. In fact, as already discussed in section I, Japanese employers often hire employees for permanent jobs on a fixed-term basis, so as to obtain or maintain employment flexibility.[53]

It is noteworthy, however, that although an employer may initiate a fixed-term employment contract in order to offer a position to a person on a trial basis, case law considerably narrows this possibility. In the *Kobe Koryo Gakuen Case*,[54] where a high school teacher had been hired under a one-year employment contract—in order to determine whether the teacher was suited for the job, but was terminated when the term expired—the Supreme Court held that unless there were special circumstances whereby the parties had clearly agreed that the fixed-term employment contract would terminate automatically at the end of the term

[51] On these matters, employers are also required to inform employees of changes that have been brought about.
[52] As to this last point, Article 17, Paragraph 2 of the *Labor Contract Act* also requires that employers not fix an unnecessarily short term, stipulating that an employer shall give due consideration not to renew a fixed-term contract repeatedly by providing a term shorter than necessary, in light of the purpose of that employment contract.
[53] *See supra* II. 2. (3).
[54] *Asano v. Kobe Koryo Gakuen*, 44 *Minshu* 668 (S. Ct., Jun. 5, 1990).

and that the employment relationship would not continue beyond the period, the term is *not* regarded as that for the contract itself but as a probation period under a contract of indefinite duration.[55] Since it is in most cases unlikely that there is a *clear* agreement as to the effect referenced above (*e.g.*, an employer tends to express a desire that the employee will continue work for long period), most fixed-term employment contracts for trial employment are considered employment contracts of indefinite terms. It is believed that employers hesitate to initiate fixed-term contracts for trial employment, due to this case law.

(2) Clear statement of conditions concerning the contract term

Employers are obliged to clearly state, in writing, whether the employment contract has a definite or indefinite term (Article 15 of the *LSA*). Although a violation of the provision results in a penal sanction (Article 120, Paragraph 1—a fine of not more than ¥300,000), it does not follow that a fixed-term employment contract will automatically convert into an open-ended contract.

2. Regulations concerning renewal

As discussed in detail in section III 1, Japanese law has regulated the maximum allowable period for a single contract term. However, there are no limitations with regards to the total duration for successive fixed-term employment contracts, nor are there limitations on the number of contract renewals. The employment relationship can continue under successive fixed-term employment contracts, as long as both parties desire.

Also, as already discussed in detail in section III 2, a refusal to renew a fixed-term contract, especially when it has been renewed repeatedly, may come under the scrutiny of courts that may apply the doctrine of abusive dismissal by analogy.

3. Equal treatment

There is currently no statute in Japan requiring equal treatment between employees under fixed-term contracts and those under open-ended contracts.[56] Although Article 3, Paragraph 2 of the *Labor Contract Act* generally declares that employment contracts are to be initiated and amended with due consideration for "balanced treatment" in light of actual employment

[55] In a case where the contract is construed as one with an indefinite period, termination of the contract at the end of the probation period requires an objectively rational and socially acceptable reason (*Takano v. Mitsubishi Jushi Co.*, 27 *Minshu* 1536 (S. Ct., Dec. 12, 1973)). *See* Araki, *supra* note 2 at 68, for further details.

[56] The *Part-Time Work Act* (the *Act on Improvement, etc. of Employment Management for Part-Time Workers*), which was significantly amended in 2007, obliges employers to give equal treatment to certain limited categories of part-time employees, compared to full-time employees, with respect to working conditions; it also requires employers to endeavor to provide "balanced treatment" to other part-time employees who do not fall into the aforementioned category (*See* Michiyo Morozumi, Balanced Treatment and Bans on Discrimination – Significance and Issues of the Revised Part-Time Work Act, Vol. 6, No. 2 *Japan Labor Review* 39 (2009) for details of the *Act*). Of course, the focus of this legislation is on whether an employee is a part-time employee or a full-time employee, and not on whether he or she is working under a fixed-term or open-ended contract. However, since fixed-term employees are often, at the same time, part-time employees and full-time employees are typically under open-ended contracts, these provisions may, *as a matter of fact*, provide some fixed-term employee protection in terms of receiving equal or balanced treatment compared to that of employees under open-ended contracts, inasmuch as they fulfill the other requirements of the *Act*. Note also, that the administrative guidelines is issued on the basis of the report of a study group on the improvement of employment management of fixed-term employees (available at: http://www.mhlw.go.jp/shingi/2008/07/s0729-1.html (last accessed April 10, 2010)). Those stipulate that although the *Act* is not applied to full-time fixed-term employees, they should be so treated in accordance with the spirit of the *Act*. However, this guideline is only a basis for administrative advice and guidance, and has no legal binding effect.

conditions, it does not provide direct grounds for the parties' rights and obligations, due to its abstract nature.[57]

4. Transitions to open-ended employment

There is no statute requiring employers to help or promote the transition of fixed-term employment into open-ended employment. [58]

5. Fixed-term employees and social security

Social security statutes for employees—such as the *Health Insurance Act*, the *Employees' Pension Insurance Act*, the *Workers' Accident Compensation Insurance Act*, and the *Employment Insurance Act*—in general cover "employees," including fixed-term employees. However, fixed-term employees employed only for a short period—namely, day laborers not successively employed for more than one month since the initial hiring, workers employed for not more than two months, seasonal workers employed for not more than four months, and workers employed for temporary business of not more than six months—are excluded from coverage by the *Employees' Pension Insurance Act*. With regards to the *Employment Insurance Act*, day laborers are in principle excluded from the statute's coverage. Although fixed-term employees who work 20 hours or more per week and whose employment contract term is expected to be longer than 30 days are covered by the *Act*, they are eligible only for smaller benefit amounts than are ordinary employees, if their employment contract is expected to continue for less than one year. Fixed-term employees whose employment contracts are to continue beyond one year are treated in a manner similar to employees under open-ended contracts. A fixed-term employee is not eligible for parental leave under the *Child Care and Family Care Leave Act*, unless he or she has not been employed by the employer for at least one year and is expected to remain employed beyond the day that his or her child becomes one year old.

V. Concluding remarks: Evaluation of current regulations on fixed-term employment contracts, and future prospects

Japanese law has instituted limited regulations on fixed-term employment contracts; it has, thus far, generally achieved a fairly proper balance of security and flexibility with regards to the Japanese labor market:[59] regular employees are now afforded enough employment security while employers are allowed the flexibility to adjust their respective workforces through the use of atypical, fixed-term employment. Under this mechanism, fixed-term employees have been afforded employment security to only a limited extent, compared to regular employees, under indefinite-term employment contracts. This might have been less problematic in times when atypical employees—including fixed-term employees—were literally "atypical" in the labor market; however, now that one out of every three employees is working as an atypical employee, it is difficult to continue to treat them as truly "atypical." Appropriate employment security must now be provided, not only for regular employees under open-ended contracts, but also for fixed-term employees. In addition, fixed-term

[57] *Yamakawa*, *supra* note 5, at 8–9.
[58] Note that the administrative guidelines referred to in *supra* note 56 advise an employer to help or promote the transition of full-time, fixed-term employees into regular employees; however, as explained in the *supra* note, this guideline is only a basis for administrative guidance and advice, and it has no legal binding effect.
[59] *See* Sugeno, *Shin Koyo Syakai no Ho* [Employment System and Labor Law] (revised ed., 2004) 250–251, 258.

employees have tended also to receive less favorable treatment, especially with regards to wages and benefits, and regulations should be considered with regards to the fairness of working conditions, especially with regards to fixed-term employees engaged in work similar to that of regular employees.

In response to the increased prevalence of atypical and fixed-term employment, many proposals for legislation have been presented recently, most of which are guided by the laws of EU countries. These proposals include, among others, requiring objective reasons to initiate a fixed-term employment contract,[60] placing a cap on the number of contract renewals,[61] introducing equal treatment between fixed-term employees and indefinite-term employees[62] and writing into the statute the case-law rule regarding the refusal to renew a contract.[63]

Japan's Ministry of Health, Labor and Welfare has also started to consider the appropriate direction of regulations on fixed-term employment, by setting up the Study Group on Fixed-term Employment Contracts.[64] The conclusions of the Study Group are expected to be made public in the summer of 2010, and its discussions and outcomes are now drawing close attention.[65]

What is important is striking a proper balance among security, fairness, and flexibility. In considering this proper balance, the position of fixed-term employment as well as that of open-ended employment within the Japanese labor market must be re-examined, including whether indefinite-term employment is a principal form of employment, and whether fixed-term employment should be considered only an exceptional one. Should fixed-term employment be considered a desirable employment option? If "yes," what form should that "desirability" take?[66] In designing fixed-term employment regulations, these questions must be resolved on the basis of a proper understanding of the realities that fixed-term employees face.

[60] *See* Masao Nakajima, "Yuki Koyo Kakudai Seisaku to Hoteki Kadai" [Policies Promoting the Use of Fixed-Term Employment, and their Problems], in Satoshi Nishitani et al. eds., *Tenkanki Rodoho no Kadai* (2003) 326, 346–347; Karatsu, *supra* note 27, at 13; and Yoichi Shimada, "Yuki Rodo Keiyaku Hosei no Genjyo to Rippo Kadai" [Current Situation and Legislative Challenges of Regulations on Fixed-Term Employment], 134 *Minshoho Zasshi* 851, 871–876.

[61] *See* Shimada, *supra*, at 875.

[62] *See* Nakajima, *supra* note 60, at 347; and Tomoko Kawada, "Yuki Rodo Keiyakuho no Aratana Koso" [New Framework for Fixed-Term Employment Contract Law] 107 *Nihon Rodoho Gakkaishi* 52, 61–64.

[63] *See* Komiya, *supra* note 46, at 23.

[64] The discussion of the Study Group on Fixed-Term Employment Contract is available at: http://www.mhlw.go.jp/shingi/2009/02/s0223-12.html (last accessed April 10, 2010). The Study Group published its "interim report" on March 17, 2010 (available at: http://www.mhlw.go.jp/stf/houdou/2r98520000004psb.html (last accessed April 10, 2010)).

[65] This is because a report of the Study Group within Japan's Ministry of Health, Labor, and Welfare is usually a starting point for future labor and employment legislation.

[66] *See* Michiyo Morozumi & Ryo Kambayashi, "Yukikoyo no Hokisei" [Law and Economics on the Regulations of Fixed-Term Employment Contracts], in Takashi Araki et al. eds., *Koyo Syakai no Ho to Keizai* (2008) 138, 161–163.