The 2003 Revision of the Labor Standards Law: Fixed-term Contracts, Dismissal and Discretionary-work Schemes

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Introduction

The Labor Standards Law, which has played a central role in the protection of Japanese workers since its enactment in 1947, was considerably revised in 2003. The revised law was passed by the Diet last June, promulgated the following month, and came into effect on January 1, 2004.

The latest revision mainly concerns fixed-term labor contracts, dismissals, and discretionary-work schemes. The most significant aspects of the revision are the extension of the upper limit of fixed-term labor contracts from one to three years, and the first-ever explicit clause requiring employers to have just cause when dismissing employees. It is also noteworthy that various modifications were made to the government's original bill during Diet proceedings, modifications that symbolically represented the conflict between the move towards deregulation and its antithesis. This article will describe the contents of the revisions and examine their significance.[1]

Before turning to this task, a note concerning terminology would be appropriate. A contract concluded between the parties when an employer hires an employee is called an "employment (*koyo*) contract" in the Civil Code. The Labor Standards Law, on the other hand, uses the term "labor (*rodo*) contract" when it makes alterations to the Civil Code's rules of employment to better protect the interests of employees. The two contracts are identical in substance, and in many judicial decisions, in fact, employment contract and labor contract are used almost interchangeably. In the same vein, the Labor Standards Law uses the term "worker" rather than "employee." This article generally follows the terms found in the Labor Standards Law, although they may sound somewhat peculiar to foreign readers.

1. Background and Sequence of the 2003 Revision of the Labor Standards Law

The Labor Standards Law is a comprehensive statute laying out minimum standards for employment conditions. It provides for methods of wage payment; working hours, rest periods and days-off; annual paid leave; leave before and after childbirth; protection of young workers; compensation for industrial accidents; work rules; specification of working conditions at the time of hiring; notice of dismissal; equal wages for men and women; and so forth.[2] The law has been amended repeatedly since its enactment. Relatively recent amendments include revision of provisions concerning protection for female workers when the Equal Employment Opportunity Law was enacted and later revised (in 1985 and 1997), and revisions of provisions concerning working hours and paid leave when the 40-hour-a-week system was phased in (in 1987 and 1993). Also in 1998, one-half a century after its enactment, the Labor Standards Law underwent an overhaul, resulting in substantial revisions with respect to labor contracts, working hours, minimum age, work rules, among others.[3]

As described later, the latest revisions include some measures to reinforce or supplement the 1998 revisions. The general direction of the 2003 revisions is, first of all, towards deregulation or increased flexibility, allowing the parties more leeway in adopting various employment patterns and working styles. Secondly, there are revisions aimed at clarifying the rules

[1] Japanese-language sources concerning the latest revisions include *Jurisuto* No. 1255 (2003); *Kikan Rodo-ho* No. 203 (2003); and *Nihon Rodo Kenkyu Zasshi* No. 523 (2004). Comprehensive general information on Japanese labor law in the English language can be found in Takashi Araki, *Labor and Employment Law in Japan*, Japan Institute of Labor (2002); and Kazuo Sugeno, *Japanese Employment and Labor Law*, University of Tokyo Press/Carolina Academic Press (2002).

[2] The initial Labor Standards Law included provisions concerning minimum wages and safety and health, but these were separated out and became independent laws — the Minimum Wage Law (1969) and the Industrial Safety and Health Law (1972), respectively.

[3] Concerning the 1998 revisions, see Ryuichi Yamakawa, "Overhaul After 50 Years: The Amendment of the Labor Standards Law," *Japan Labor Bulletin* Vol. 37 No. 11 (1998).

of employment and strengthening the functions of contracts to prevent or promote smooth solution of disputes between the parties.

As for the course of events culminating in the revision, the Subcommittee on Working Conditions of the Labor Policy Council established in the Ministry of Health, Labor and Welfare began discussion in September 2001 on ideal future regulations for employment relationships, and embodied its conclusions in the form of a report in December 2002.[4] Later the same month, the tripartite Labor Policy Council adopted the report and proposed to the Minister of Health, Labor and Welfare that the law be revised in line with it. The ministry set about drawing up a draft in accordance with the proposal, and in March 2003, submitted a concrete bill to the Diet after approval in a Cabinet meeting.

This bill (the government bill) was then discussed in the Committee of Health, Labor and Welfare in the House of Representatives, where strong objections were raised, especially to provisions concerning dismissals and fixed-term contracts, and in June 2003, a modified bill was adopted in the committee. It was passed by a plenary session of the House of the Representatives, the Health, Labor and Welfare Committee of the House of Councilors, and a plenary session of the House of Councilors, and then on July 14, promulgated as the 2003 Law No. 104. In October, the Ministry of the Health, Labor and Welfare issued rules and regulations to implement the new provisions, and the revised Labor Standards Law came into effect on January 1, 2004.

For readers' information, the Central Labor Standards Council of the Ministry of Labor previously had responsibility to present a proposal to revise the Labor Standards Law, but since the merger of the Ministry of Labor and the Ministry of Health and Welfare in January 2000, a number of councils were integrated into the Labor Policy Council. This council, which has several subcommittees under it, is also responsible for examining other labor statutes. In fact, on the same day the proposal for the revised Labor Standards Law was put forward in December 2002, the same council presented proposals for revision of the Employment Security Law, the Worker Dispatching Law, and the Employment Insurance Law, all of which were actually revised within 2003. The revision of the Worker Dispatching Law in particular includes various features important for the future of Japanese labor markets, such as the extension of dispatching period and the lifting of the ban on dispatching workers to businesses in the manufacturing sector.

[4] The subcommittee consisted of seven members from the general public, seven workers and seven employers, under the chairmanship of Ken'ichiro Nishimura, Professor of Kyoto University.

2. Revisions concerning Fixed-term Labor Contracts

2. 1 Background

There are two types of labor contracts: fixed-term contracts and indefinite-term contracts. Since its enactment in 1947, the Labor Standards Law has, in Article 14, contained a provision on the former, setting the maximum length at one year.[5] Under a fixed-term labor contract, both the employer and the employee are bound to the contract and cannot terminate it during the life of the contract unless there is an urgent reason. Thus, the Labor Standards Law had, from the viewpoint of personal liberty, laid down a limit on contract terms in order to prevent workers from being bound for an excessively long period of time. Prior to the law, the Civil Code, written at the end of the 19th century, provided that employment contracts with fixed terms of five years or longer may be terminated any time after the first five years (Article 626, the Civil Code). However, the five-year term was unduly long and in fact there were many unscrupulous cases in prewar Japan where workers were bound for long terms against their will, which is why the Labor Standards Law drastically shortened the limit to one year.[6]

With this regulation, Japanese employers, when hiring workers, have had to choose between (a) concluding a contract for a short term of from several months to one year at a maximum, and (b) concluding an indefinite-term labor contract. In practice, regular employees, a firm's core work-

[5] Article 14 allows fixed-term contracts exceeding one year for "cases where the contract provides for a term necessary for the completion of a certain project." But such cases are limited to such fields as the employment of engineers for specific construction projects, and thus not applicable to most cases.

[6] See Sugeno, *supra* note 1 at p.152.

ers, are hired under indefinite-term labor contracts, whereas fixed-term contracts mostly cover the employment of non-regular workers such as temporary, part-time,[7] side-job and entrusted workers. If an employer wishes to hire a worker for exactly three years, for example, it is necessary to hire a worker with a one-year contract, and renew it twice, and then discontinue the employment when three years have passed. However, on the one hand, the worker is free to accept renewal of the contract or not, and thus there is no guarantee that the employer can retain him/her for three years. On the other hand, if the worker wishes to stay with the employer, he/she tends to expect, at the end of the third year, to have it renewed again, since the contract has already been renewed twice. This may cause a dispute when the employer refuses to renew and lets the worker go.

Criticisms of this provision as being too inflexible have grown among employers, and, due in part to the deregulation policies of the Japanese government,[8] Article 14 was revised for the first time in the context of the 1998 revisions. At this time, however, revision of the article was relatively restricted, the result of a compromise with workers who strongly opposed the revision, concerned about the expansion of unstable, limited-term employment. While fixed-term labor contracts up to three years were permitted in certain cases as an exception to the one-year rule, this applied only to (a) workers with highly specialized knowledge, skills, and experience required for research and development; (b) workers with highly specialized knowledge, skills, and experience necessary for duties involved in business start-ups, business transfers, etc.; and (c) workers aged 60 and above. Moreover, as for workers who fell in the first two categories, the three-year contract was applied only to business establishments which face a shortage of such workers, and exclusively for new contracts (i.e., a renewal of a three-year contract was not allowed). At the same time, the criteria for "highly specialized knowledge, skills and experience" had to be determined by detailed regulations from the Minister of Health, Labor and Welfare. This led to a number of complaints that three-year contracts were too restricted and too complicated.

[7] The terms, "part" or "part-time" in Japanese are often used in the sense of "workers who are not regular employees," and thus do not necessarily imply that such workers work shorter hours.

[8] Deregulation in Japan has been promoted under the initiative of the Council for Regulatory Reform, a collection of outside business people and academics who were entrusted by the prime minister through the Cabinet Office. Hence, tension sometimes runs between the Council and the Ministry of Health, Labor and Welfare.

2.2 Extending the Limit of a Contract (Article 14, Paragraph 1)

The latest revision changed the principles of Article 14 in two respects. First, the basic one-year ceiling on contracts was itself modified, extending the maximum term to three years. The fact that two- or three-year labor contracts now became universally available regardless of the type of business or job was one of the most remarkable changes in the law.[9]

However, deep criticism remained that it was unjustifiable to bind workers for a maximum of three years. As a result, a supplementary provision was attached to the revision, promising to review the new Article 14 and take necessary measures when three years since implementation of the revised law had passed. Next, Article 137 was added, which, until review of the revised Article 14, provides for workers to resign from their job after the first year, even if this is in the middle of a longer contract. This series of supplementary provisions was not included in the initial government bill but was adopted in the course of discussion in the House of Representatives to protect workers.

Thus, for the time being, even if a three-year labor contract is concluded, the employer cannot retain the worker for more than one year against his/her will. It is the employer which cannot terminate a three-year contract halfway through. (In other words, the worker is guaranteed the job for the entire term of the contract.) Nevertheless, it is still possible that employers may benefit from the automatic expiration of a fixed-term contract after three years. Some employers may hire new workers only on a trial basis for a three-year fixed term and then hire as regular employees with indefinite labor contracts only those who have demonstrated sufficient ability during

[9] In Japan, unlike in European countries, there is no legal regulation which requires special reasons for the conclusion of fixed-term labor contracts. Whether the term should be fixed or not is totally up to the parties involved.

the period.

Second, those who were allowed to conclude fixed-term labor contracts up to three years are then eligible for contracts with a maximum of five years. Those eligible are (1) workers with highly specialized knowledge, skills and experience, an integration of the above-mentioned (a) and (b) from the 1998 law, and (2) workers aged 60 and above. As for the first category, criteria was set for the Minister of Health, Labor and Welfare to define "workers with highly specialized knowledge, skills and experience."(Notification of the Ministry of Health, Labor and Welfare, No 356, October 22, 2003.) Because a longer term of five years is concerned, the new criteria are more restrictive than those applied for the maximum three-year-contract.[10] However, conditions for the longer contracts have been relaxed in other aspects, such as limiting them only to new hires in establishments facing a shortage of such workers.

Moreover, Article 137 described above does not apply to workers who are entitled to conclude fixed-term contracts up to five years, which means that their freedom to resign is restricted throughout their contract term. Since those who have highly specialized knowledge, skills and experience (category 1) are self-reliant, it is thought they can be given responsibility and are eligible for the longer contract term. By contrast, the purpose of including workers 60 years old and above (category 2) is to expand employment opportunities among elderly workers. It was questionable as to whether it was appropriate to allow such workers to tie themselves up for five long years. However, the proponents of deregulation are calling for another step, that is making fixed-term contracts up to five years applicable to all workers to conform to the standards of the Civil Code. Their reasoning is that one no longer has to worry about human rights violations in the form of contract-bound servitude such as existed before the war. Regardless of the merits of this optimistic opinion, Article 14 will be reviewed in three years as stated above, and further discussion will be held then, taking into account the actual conditions under the revised law.

[10] Category 1 includes people with a doctorate degree, certified public accountants, medical doctors, lawyers, licensed tax accountants, those who have passed either systems analysts or actuary examinations, and certain specialist engineers or designers who are paid ¥10.75 million or more per year.

2.3 Standards of the Minister of Health, Labor and Welfare concerning the Conclusion and Termination of Fixed-Term Contracts (Article 14, Paragraphs 2 & 3)

Other major changes in Article 14 were two newly introduced provisions stating that the Minister of Health, Labor and Welfare is authorized to devise standards for measures that employers should take to prevent disputes when a fixed-term contract is concluded or terminated (Paragraph 2), and that the Labor Standards Inspection Offices may give advice and guidance to employers based on the standards (Paragraph 3).

Traditionally, the Labor Standards Law, while setting a maximum contract term to prevent binding workers for long periods, has not addressed the other concern of workers under fixed-term contracts, that is, the absence of employment security when the term expires. A fixed-term labor contract automatically comes to an end when the contract term expires, and the principle of contract law dictates that both the worker and the employer are free either to agree to a subsequent contract or not. If the employer refuses to renew the contract, the worker cannot dispute the decision legally. However, a formalistic application of this rule could lead to a rather unfair situation for the worker. Accordingly, the Supreme Court held, in a case where a fixed-term labor contract had been renewed repeatedly in a mechanical manner for several years, that the meaning of the contract term was so diminished that the contract in question was essentially indistinguishable from an indefinite labor contract. The refusal of the employer to renew the contract was therefore regarded as an act of dismissal, or not acceptable without reasonable ground (The Toshiba Yanagi-machi Factory case, Supreme Court, July 22, 1974; *Minshu* 28-5-927). Furthermore, even when a renewed fixed-term contract cannot be considered essentially indistinguishable from an indefinite one, reasonable ground may still be required for the employer's refusal to renew if, in the light of circumstances, it is worth legally protecting the worker who expects the contract to be renewed once again (The Hitachi Medico case, Supreme Court, December 4, 1986; *Rodo-hanrei* 486-6).

Thus, thanks to judicial inventiveness, certain protection has been given to workers under fixed-term labor contracts, and in fact there has been a considerable number of lawsuits each year challenging an employer's

refusal to renew a contract. However, everything depends on the evaluation of the facts in individual cases, and it is difficult for people involved to predict the outcome of their own case. The latest revision of the law is aimed at preventing such disputes from occurring by clarifying the views of the parties in advance concerning the possibility of renewal after the expiration of the contract term.[11]

The standards laid down by the Minister of Health, Labor and Welfare in accordance with Paragraph 2 of Article 14 (Notification of the Ministry of Health, Labor and Welfare, No 357, October 22, 2003) require that (1) employers should clearly notify employees upon conclusion of a contract as to whether or not their fixed-term contract can be renewed after expiration of the term, and the criteria used to judge in case there is the possibility to renew; (2) employers give at least 30 days' advance notice if they are going to refuse to renew a contract with a worker who has worked longer than one year since the initial hiring, unless they have clearly notified the worker at the beginning that their contract would not be renewed; (3) in cases which fall in the preceding category, employers must issue a certificate without delay if the worker asks for a certificate stating the reasons the contract will not be renewed; and (4) employers should make efforts — when renewing the contract of a worker whose fixed-term contract has been renewed at least once and who has been hired more than one year since the initial hiring — to extend the contract term as long as possible, taking into account the actual state of the contract and the workers' wishes.

The requirements are fairly mild, and it remains to be seen if they are effective in preventing disputes.[12] Nevertheless, it is certainly noteworthy that the Labor Standards Law has for the first time paid some attention to issues regarding discontinuance of employment under fixed-term contracts.

[11] The Ministry of Health, Labor and Welfare has drawn up guidelines concerning fixed-term contracts and has administratively guided employers since 2001. The latest revisions, in this sense, are an explicit endorsement of such administrative authority.

[12] The Labor Standards Law is by nature a law which compels compliance, with punitive provisions, with minimum standards of working conditions. Thus Paragraphs 2 and 3 of Article 14 are exceptional in that they pursue compliance with administrative standards through administrative advice and guidance. Paragraphs 2 through 4 of Article 36 on the upper limit of overtime adopted in the 1998 revisions may serve as a precedent, but are somewhat different because they have real weight as the Labor Standards Inspection Office can yield considerable influence when overtime agreements are submitted by the employer as required by the law. By contrast, the effectiveness of Paragraphs 2 and 3 of Article 14 is not certain because there is no requirement for administrative procedures when employers agree to fixed-term contracts.

3. Revisions concerning Dismissal

3.1 Requirement of Reasonable Grounds for Dismissal (Article 18-2)

A new provision titled "dismissal" has been added as Article 18-2 in the newly revised Labor Standards Law. This is a straightforward incorporation of the preexisting judicial doctrine of the abuse of the right to dismiss.

> *Article 18-2: A dismissal shall be considered an abuse of the right to dismiss and therefore null and void if it is not based on objectively reasonable grounds and may not be recognized as socially acceptable.*

Traditionally, in Japan, there has been no legal provision specifically requiring the employer to have just cause for termination. Under the principle of the Civil Code, an indefinite-term labor contract may be terminated by either party at any time if two-weeks' advance notice is given (Clause 2, Article 627, the Civil Code). The Labor Standards Law has modified this principle by stipulating an obligation to give 30-days' advance notice, rather than two weeks, if the contract is being terminated from the employer's side (i.e. dismissals), but there has been no rule concerning the necessity of providing good reason to dismiss a worker. Hence, it could be understood that employers have a right to dismiss workers for any reason unless it falls in the specific, legally prohibited categories, such as retaliation against reporting to the Labor Standards Inspection Office, or discrimination based on nationality, creed, social status, sex, union membership and so on. However, the Japanese courts have created a situation where the exercise of the right is extremely limited and, in effect, workers cannot be dismissed without just cause. This is what is called the doctrine of the abuse of the right to dismiss (or the doctrine of abusive dismissal). When the court believes that a dismissal is not based on objectively reasonable grounds, it refers to the general provision of Clause 3, Article 1 of the Civil Code, which says, "rights shall not be abused," and decides that the dismissal is null and void because it constitutes an abuse of the employer's right to dismiss. The word "abuse" may give the impression that such a

case is rare and exceptional, but in practice the attitude of Japanese courts has been fairly strict toward employers. A dismissal cannot pass muster unless the employer provides a strong justification.

The doctrine of the abuse of the right to dismiss was already commonly cited in lower courts early after World War II, and the Supreme Court definitely endorsed it repeatedly in the 1970s (the Nippon Shokuen case, Supreme Court, April 25, 1975, *Minshu* 29-4-456; the Kochi Broadcasting case, Supreme Court, January 31, 1977, *Rodo-hanrei* 268-17). Firmly established as case law, however, the doctrine had no statutory foundation besides Clause 3, Article 1 of the Civil Code, which was general and abstract. It was not always easy for ordinary people to understand that just cause is required for dismissal as a matter of law. The latest revision is to clarify the situation by incorporating established case law, including the formulation of an "abuse of the right," into the Labor Standards Law. To confirm this, the passage "if it is not based on objectively reasonable grounds and may not be recognized as socially acceptable" which appears in the ruling of the Supreme Court in the Nippon Shokuen case mentioned above is used.[13] As for dismissals due to redundancy and other economic reasons, the courts have conventionally applied the doctrine of the abuse of the right to dismiss in a special way, checking, as concrete criteria on which to judge reasonable grounds, the following four points: (a) whether reduction in workforce was truly needed; (b) whether the employer had made an effort to avoid dismissals; (c) whether the selection of people to be dismissed was made rationally; (d) and whether the employer had provided an explanation to the workers and the labor unions and discussed the matter with them in an effort to obtain their understanding. Even after the revision of the law, the same criteria will be applied under Article 18-2 when judging the validity of such dismissals.

[13] Professor Tadashi Hanami takes the view that this amendment "restricts the employers' right to dismiss workers more than previous case law" and "is definitely more restrictive than previous policy." See Tadashi Hanami, "The Changing Labor Market, Industrial Relations and Labor Policy" *Japan Labor Review* Vol. 1, No. 1, at p.13, (2004). However, I believe that his understanding is not quite accurate. If there is a disadvantage for employers at all, it would be the fact that more employees are likely to become aware of the existence of the legal rule on dismissal as it is now clearly stated in the law, and launch a lawsuit challenging a dismissal rather than meekly accepting it.

In the context of the Labor Standards Law, Article 18-2 is somewhat unique compared to other provisions. The Labor Standards Law provides by its nature punitive measures to make employers comply with the standards, as well as checking on them through the Labor Standards Inspection Offices. However, there are no punitive provisions with respect to Article 18-2, which means that the act of dismissal without reasonable grounds will not be charged as a violation of the Labor Standards Law by the Labor Standards Inspection Offices. While Article 18-2 declares such dismissals to be null and void, to oppose these dismissal workers need to bring a civil suit against the employer and seek relief before the courts, which, as before, will pass judgment on the validity of the dismissal.[14]

3.2 Debates over the Provision on Dismissal

As seen above, Article 18-2 is a clear statement of an already existing legal principle, and seems quite innocent. However, there was quite a lot of debate before it was finalized. In fact, it is this article that caused the most heated argument in the Diet. Discussed below are two major points of controversy concerning dismissal.

First, the final form of Article 18-2 contains counterproposals made by opposition parties in the course of discussion in the House of Representatives. The initial governmental bill took the following form:

> *Article 18-2: The employer may dismiss workers except in cases where the exercise of the right to dismiss is restricted by the provisions of this law or other laws. However, a dismissal shall be considered an abuse of the right to dismiss and therefore null and void if it is not based on objectively reasonable grounds and may not be recognized as socially acceptable.*

The government explained that this was a simple stipulation of the cur-

[14] The Law for Promoting the Resolution of Individual Labor Disputes of 2001 stipulates procedures for conciliation of employment disputes before the administrative panel. With this, disputes may be settled voluntarily between the parties without going through lengthy judicial proceedings. In addition, currently under consideration is an expedited procedure called *rodo-shimpan* (labor summary-judgment) which, if adopted, will allow the courts to deal with employment disputes more properly with the help of experts in the field of labor. If adopted, workers will have improved access to judicial courts.

rent principle in case law, and that it was not designed to make it easier to dismiss workers. However, criticism was focused on the first sentence, which seems like emphasizing the employer's right to dismiss. The right to dismiss has been understood to derive from the rule under the Civil Code, whereby either party can terminate an indefinite-term labor contract for any reason, and no labor legislation has particularly ruled out that right. However, if it were stipulated anew in the Labor Standards Law, it could give the strong impression that the employer's right to dismiss was actually being reinforced. At the same time, stipulation of the most important point — that unreasonable dismissal means the abuse of the right — as a mere proviso in the second sentence may impact the burden of proof in lawsuits. It is customary in today's court procedures to require the employers' side to claim and prove, with sufficient evidence, that the dismissal in question is justified. However, the provision described above might be interpreted to mean that, basically, employers may dismiss workers, and it is plaintiffs that need to prove that the dismissal lacks reasonable grounds and is therefore socially unacceptable. The governmental draft was modified in response to such criticisms.

Behind this argument lies the fact that employers have often complained of over-strict regulations on dismissals in Japan. Some economists have also insisted that since case law rules are obscure by nature, the conditions for dismissal should be clearly specified in a statute, which is, in essence, a call for relaxation of the regulations on dismissals. Workers, on the other hand, have of course objected vehemently to the idea of relaxing dismissals. In the meantime, the Tokyo District Court delivered a series of controversial decisions a couple of years ago which allowed dismissals for economic reasons in a substantially less restrictive manner than usual.[15] In so doing, the court emphasized that the doctrine of the abuse of the right to dismiss should not alter the basic principle of freedom to dismiss. In the end, this tendency has not dominated the interpretation of Japanese courts, but it reminded people that the current law on dismissal is built on a delicate balance. Under these circumstances, the wording of the provision in the government bill seems to present a definite danger, as many critics have pointed out. In the author's opinion, this is a valid concern. If the government had truly intended to keep the substantive law unchanged, statements of the final version of Article 18-2 would have been more appropriate.

Secondly, although it was not eventually adopted in the latest revision of the law, there was a suggestion for a scheme whereby employers might terminate labor contracts by paying compensation even if the court had ruled that the dismissal was null and void. A special feature of the doctrine of the abuse of the right to dismiss is that a dismissal is declared null and void if it lacks rational justification and labeled as an abuse of the right. In other words, even though the employer believes that it has terminated the labor contract with the worker by exercising the right to dismiss, if the dismissal is pronounced null and void, and thus holds no legal effect, the contract will remain in effect as it has been. Accordingly, to remedy the situation, the court renders a judgment under which (a) it is confirmed that the dismissed worker has had and still has the rights and duties promised in their labor contract (or status of an employee), and (b) the employer is ordered to pay the wages which would have been paid between the dismissal in question and the judicial verdict in favor of the worker. The first condition will entitle the worker to his/her previous job. In reality, however, having been part of a dispute for a long period, workers frequently find it difficult to return to the workplace smoothly. It is not uncommon for workers to eventually leave the company, either by accepting a certain payment from the employer for the settlement, or without any pay and simply give up the idea of returning. However, unless the worker voluntarily agrees to leave, the legal effectiveness of the labor contract remains and the employer has to retain him/her. To bring resolution to this problem, a scheme was proposed, in vain, that would authorize the courts, upon instigation from either the worker or the employer, to terminate the labor contract when it becomes pointless for the employment relationship to continue, on the condition that the employer pay a certain amount of compensation to the worker.

This scheme was discussed in the Subcommittee on Working Conditions of the Labor Policy Council with reference to legislation in Germany and other countries, and in fact incorporated as a recommendation in the report of the Council. However, the workers' representatives put

[15] See Shinya Ouchi, "Change in Japanese Employment Security: Reflecting on the Legal Points," *Japan Labor Bulletin*, Vol. 41, No. 1, (2002).

up strong opposition, insisting that it would be scandalous if employers who had resorted to invalid dismissals were afterwards allowed to seek termination of contracts by such means. Consequently, the government in its concrete bill for the revision decided to defer adoption of the scheme. Thus, Article 18-2 has come in a form which adheres to existing case law regarding its legal effects as well. Nevertheless, the unsuccessful scheme continues to be studied by the Council, and it may draw attention as possible legislation again at some stage in the future.

3.3 Description of Reasons for Dismissal in Work Rules (Article 89)

The latest revision of the Labor Standards Law has introduced two more revisions apart from Article 18-2 in relation to dismissals, one of which is Article 89 concerning work rules. Article 89 of the Labor Standards Law obliges employers with 10 or more employees to formulate work rules which stipulate various employment conditions such as wages, working hours and so on. It enumerates a list, from No. 1 to No. 10, of groups of items to be incorporated in the work rules. Of these, item No. 3 used to be a simple provision, "matters concerning retirement." The term "retirement" has been interpreted very broadly as various ways to terminate labor contracts, including resignation of workers, dismissals by employers, mandatory retirement at a prescribed age, and expiration of contract terms.

In the latest revision of the law, a new phrase, "including reasons for dismissals," in brackets, has been added to item No. 3. From this, it has become clear that the term "retirement" includes dismissals, and also that work rules must include "reasons" for dismissals. Since there was hitherto no apparent consensus on the latter point, the revision certainly embodies a substantive significance. Here, too, the aim is to clarify rules on dismissals for the parties involved. Employers are expected to formalize their regulations on dismissals and to comply with them when resorting to dismissals.

In fact, a great number of employers already listed "reasons for dismissal" in their work rules before the revised law, and there have been debates over the interpretation of the listing in such work rules — whether this should be interpreted as a restrictive enumeration which excludes dismissals due to other reasons, or merely cites a list of possible examples which do not necessarily deny dismissals for other reasons. However, it has been noted that there is not much difference in practice between the two interpretations, because in many work rules a general clause, such as "other reason or reasons similar to those listed above," is inserted at the end of the list. In any event, the presence of reasons for dismissal as prescribed in work rules does not necessarily mean that the employer may actually resort to dismissal. Whether the dismissal in question is valid or not is decided according to the criteria contained in Article 18-2, considering all relevant facts of the particular case.

3.4 Certificate of Reason for Dismissal (Article 22, Paragraph 2)

The other revision with respect to dismissal is Article 22, which provides for a certificate of the reason for dismissal. Paragraph 1 of Article 22 was originally a provision to the effect that when a worker, on leaving employment, asks for a certificate of period of service, type of duties, status in the enterprise, and/or wages, the employer must issue the certificate without delay. This is obviously designed to help the worker in finding a new job. However, the 1998 revision of the law added "reason for retirement" in the list of items which the employer must certify, together with the statement that "in cases where retirement is due to dismissal, the reason for dismissal should be included." Thus, dismissed workers thereafter have a right to request certificates specifying the reason for dismissal. However, because of the structure of the provision, the timing had to be at the actual termination of employment. The period between the day the worker is notified of the dismissal and the day when the dismissal takes effect is not covered, despite the fact that it is the most crucial period if the worker is to challenge the validity of the dismissal.

Accordingly, the latest revision, set as Paragraph 2 of Article 22, has mandated the employer, when requested by the worker, to issue without delay a certificate of reason for dismissal even during the above mentioned period. The gap was thus filled, but it was produced in the first place because the 1998 amendment grafted what was in substance a procedural regulation on dismissal onto a provision of different nature. There are different views on whether the employer, when facing a subsequent litigation, is able to rely on reasons which were not specified in the certificate. However, even when a new reason is admitted before the court, it will

heighten the possibility that the dismissal is ruled as null and void, because an inconsistent attitude on the part of an employer surely casts a dubious shadow on the rationality of the dismissal.

4. Revisions concerning the Discretionary-work Scheme

4.1 Significance of Discretionary-work Scheme

The "discretionary-work" scheme is designed for workers who, due to the intellectual nature of their jobs, do not receive specific directions from their employer on how to process tasks and how to allocate their time, and it is therefore necessary to leave such work management to their own discretion. In such situations, it is difficult to apply the regulations concerning working hours under the Labor Standards Law — which sets the legal standard of 40 hours per week and eight hours per day — because the employers cannot accurately grasp how long such workers work. Hence, the Labor Standards Law chose to apply the notion "deemed working hours," or conclusive presumption of hours worked, which is a certain number of hours determined in advance between labor and management as the working hours, regardless of how many hours they in fact work.[16]

The scheme brings about a situation in which employers are in practice no longer required to pay overtime premiums no mater how long the workers might work, and thus it has been a very controversial system. Advocators contend that this is exactly the right system for intelligent white-collar workers who perform their duties autonomously, because it enables the employers to pay according to the workers' achievement rather than hours worked, thereby promoting efficiency. Its critics, on the other hand, condemn the scheme as merely a device for doing away with overtime payment while leaving the workers to put in many hours.

The discretionary-work scheme was initially adopted in 1987, which, after some modifications, now serves as Type 1, or the scheme for professional duties (Article 38-3). This type covers those who engage in certain professional duties specified in the regulations issued by the Ministry of Health, Labor and Welfare, such as research and development, planning and analysis of information systems, news coverage and editing, designing, producing and directing of TV programs, etc. The employer must enter into a written agreement with a majority union or, if there is no such union, a person representing a majority of workers of the establishment (hereinafter referred to as "a majority representative" whether it is a majority union or a person representing a majority of workers). The number of deemed working hours and other conditions of the scheme are stipulated in the agreement.

Then, as a result of the 1998 revision, Type 2 or the discretionary-work scheme for management-planning duties was introduced (Article 38-4). This type was designed to cover white-collar workers who are not exactly professionals but engage in duties such as planning, surveys, and analysis concerning management in the core sections of a firm. However, in response to strong objections from the workers' side, strict conditions have been stipulated for the application of this type of discretionary-work scheme.[17] For example, the employer must set up a permanent labor-management committee at the establishment and obtain its unanimous resolution, rather than an ad-hoc written agreement with a majority representative. It is also necessary to have the individual consent of affected workers, which is not the case with Type 1.

The latest revision has left these fundamental aspects of the discretionary-work scheme untouched, delivering relatively minor changes as described below. Accordingly, the scheme was not as vigorously discussed as dismissals or fixed-term contracts. This is in contrast to the 1998 revision, in which the discretionary-work scheme caused a great deal of controversy.

It should be noted that there is a deep-rooted criticism among employ-

[16] Article 41, Item No. 2 of the Labor Standards Law excludes those workers in managerial and supervisory posts from coverage under the working-hours regulation. By contrast, the system of "deemed working hours" does not deny the fact that the workers in question are subject to the stipulated limit on working hours, although they are applied in a special fashion. In addition to the discretionary-work scheme, workers who work outside of the establishment are embraced in another category of "deemed working hours" under Article 38-2 of the Law.

[17] See Yamakawa, *supra* note 3.

ers that the present provisions concerning working hours in the Labor Standards Law are too rigid because they were formulated with factory workers in mind, and therefore they conclude that it is inappropriate to apply these to those white-collar workers who exercise independent judgment and discretion. This has been the main force behind the introduction and expansion of the discretionary-work scheme. However, it seems likely that employers will seek to have such workers excluded from being covered under the working hours provisions by expanding the number of categories of workers exempted under Article 41 rather than focusing on the discretionary-work scheme in the future. In fact, the Subcommittee on Working Conditions of the Labor Policy Council proposed in its report that the system of "white-collar exemption" in place in the United States be studied.

4.2 Increased Protection for Professional-duties Type (Article 38-3)

In order to apply the professional duties type of discretionary-work scheme, there must be a written agreement between the employer and a majority representative specifying the types of duties to be covered, the number of hours deemed as hours worked, and the fact that the employer will not give directions to the workers concerning how to perform the tasks and allocation of working hours. In the latest revision of the law, two items were newly added as matters to be contained in the agreement: (i) measures to safeguard the heath and welfare of workers involved, and (ii) measures to deal with workers' complaints. These two items were included among the requirements for the management-planning type when it was introduced by the 1998 revision, but they were not required for the professional-duties type that had already existed. Once the measures had been adopted for the management-planning type, however, there were increased calls for measures to safeguard health and welfare and to handle worker complaints related to the professional-duties type appropriately, which culminated in the latest revision.

4.3 Relaxation of Requirements for the Management-planning Type (Article 38-4)

As mentioned above, the management-planning type of discretionary-work aroused such a controversy that when it was eventually adopted very strict requirements were laid down.[18] Employers were required to set up a new organization called a labor-management committee, and unanimously decide various conditions of the scheme, which include duties to be covered, the number of hours to be deemed as hours worked, measures for safeguarding the health and welfare of workers, measures for dealing with worker complaints, and the necessity for the workers involved to give their individual consent, as well as the statement that the employer will not give directions to the workers concerning how to perform the tasks and allocation of working hours. On the whole, many employers considered the scheme to be rather inhibitive. The latest revision of the law addressed such concerns by relaxing the requirements in some respects.

First, this type of discretionary-work scheme had been available exclusively for "an establishment where important decisions concerning management are made," that is, the headquarters of a company or equivalent. This restriction has been removed from the statutory provision. Although the administrative authorities still take the position that the scheme is not allowed for business establishments of minor importance, the revision has no doubt expanded the coverage. Second, the requirement of confidence votes for members representing workers at the labor-management committees has been abolished. The labor-management committee, a permanent body with an equal number of members from labor and management, is to discuss and examine general working conditions of an establishment, including the discretionary-work scheme. Committee members from the workers' side are designated by a majority representative, that is, a labor union organizing a majority of the workers at the establishment or, if there is no such union, a person selected by a majority of the workers. Previously, committee members thus designated had to go through a confidence vote by all workers. This voting requirement has been abolished on the grounds that the procedure was too burdensome. However, if one con-

[18] This provision took effect in April 2000, later than other provisions by one year, because of its controversial nature.

siders the fact that there have been frequent doubts about the appropriateness of the selection of representatives where there is no majority union, the criticism that the confidence vote should have been maintained seems to make sense. Third, as for resolutions from the labor-management committees, unanimous votes were previously required, but under the revised law they may be passed with a four-fifths majority. While the requirement of four-fifths is still strict, it can at least be seen as more practicable than before. Thus, the committees are now able to adopt the management-planning type of discretionary-work scheme with a four-fifths approval by committee members. In addition, labor-management committees, once established, have been authorized to replace the so-called Article 36 Agreement for overtime work with their resolutions and several other labor-management agreements required under the Labor Standards Law. The four-fifths majority vote for a resolution has been made applicable for such purposes also. Fourth, employers were previously required to file a report with the Labor Standards Inspection Office when they had set up a labor-management committee. This procedure has been abolished for the sake of simplicity, although when the committee writes a resolution to adopt the management-planning type of discretionary-work scheme it has to be submitted to a Labor Standards Inspection Office as required by law.

Currently, there are only a small number of firms which have labor-management committees. It is not clear if the latest relaxation of conditions will considerably increase the number of such committees. Even so, the system of labor-management committees serves not only as a necessity for the management-planning type of discretionary-work scheme, but may also be seen as a new model of employee representation in Japan. Its future will be worth following.

5. Conclusion

After reviewing the outline of the 2003 revised Labor Standards Law, it would be appropriate for the author to make two points.

First, while drives towards deregulation and flexibility certainly had a great impact on the latest revision of the law, most visible in the field of fixed-term contracts, some measures were taken to curb unlimited acceleration in this direction. Moreover, the revised law now includes confirmation and reinforcement of existing regulations such as those related to dismissals. This may be a typically Japanese-style deregulation, which is far from dramatic but in the form of repeated revisions to the laws accompanied by conflicts and compromises between labor and management.

Second, there seems to be a subtle change in the way working conditions are regulated under the Labor Standards Law. As seen in the revisions of the provisions concerning fixed-term contracts and dismissals, there are more provisions for labor contracts in the latest Labor Standards Law. The labor-management committee for the discretionary-work scheme is another feature of the new style of regulation. These committees represent a shift of emphasis from the traditional interventionist style, where compulsory substantive regulations with penalties were laid down with regard to various conditions, to a style where, by placing reliance on individual contracts between the parties and on collective decisions at the establishment level, the law establishes the mechanism necessary to make such contracts and decisions work properly.

Needless to say, the fundamental nature of the Labor Standards Law remains intact. However, now that the just cause requirement for dismissal is provided in the statute, we may see a call to codify other rules regarding labor contracts, such as transfer and discipline, which have been left mostly to judicial decision. In fact, some academics as well as labor lawyers have supported the idea of compiling rules and provisions governing labor contracts, separate from the Labor Standards Law, into a comprehensive labor contract law. This may not be realized in the near future, considering the difficulty in reconciling the opinions of labor and management, but it is undoubtedly an important theme for the future of Japanese labor law.