
Problems Surrounding the Collection and Disclosure of Workers' Personal Data

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Introduction

Generally speaking, the protection of employees' personal data has not received much attention in Japanese labor relations. Under the system of long-term employment, the idea that employers needed to obtain as much personal data of their employees as possible for personnel management purposes has been accepted by both management and labor. However, individual workers seem to be changing their attitude on this question, and fewer workers entertain the prospect that they will be able to work for the same company until retirement. Consequently, the usual attitude of entirely depending on a company is declining. In addition, as more women enter the labor market, the number of workers who feel uncomfortable about providing their employers with extensive personal data is increasing.

In today's highly information-oriented society, moreover, various violations of privacy are increasingly seen as a problem, and there has been growing recognition about the importance of protecting personal data. The Personal Data Protection Law, which deals with the protection of personal data in general, was enacted on May 23, 2003, and the former Ministry of Labour issued the "Code of Practice on the Protection of Workers' Personal Data" on December 20, 2000 to protect personal data in the workplace. The contents of this code are in line with international trends.

Thus, substantial measures have been taken to protect employees' personal data. However, the importance of employees having access to their own files has yet to receive the attention it deserves. In Japan, the collection of employees' personal data has never been conducted on the basis of equality between employees and employers; while employees are required to submit personal data, employers do not have to disclose that data to employees. For the past several years, many companies have implemented performance-based wage systems, and in this context, the extent to which employees should be allowed to access personnel

management data held by employers is becoming an important issue.

Another emerging issue is e-mail monitoring in the workplace. The need for such monitoring cannot be completely dismissed as it is a means to maintain corporate security, but constraints should be placed on such monitoring to protect the privacy of employees. Moreover, employees should be informed about the purpose and method of monitoring before it occurs.

The first part of this article discusses certain characteristics of Japanese labor relations, and the second outlines the basic legal and administrative framework for protecting the personal data of prospective and current employees. The third part examines the present situation using actual cases. The fourth part discusses problems that arise when personnel data held by employers is disclosed, and the fifth and last part discusses the problem of e-mail monitoring in the workplace.

1. Characteristics of Japanese Labor Relations

Until recently, employment in Japan was based on a system of long-term employment — the so-called life-time employment system. Hence, companies hired new graduates during set recruiting periods without expecting them to possess specific occupational skills. When hiring, companies valued the future potential of an applicant rather than any occupational skill that person may have. For this reason, it was argued that companies must holistically evaluate an applicant's personality from various angles, and, consequently, collecting wide-ranging personal data on prospective employees, including information about their personal lives, during the hiring process has been justified as necessary.

In Japanese corporate culture, moreover, human relations in the workplace are based on communal, rather than contractual, bonds. Therefore, supervisors are expected to be aware of personal details of their subordinates. Consequently, they try to obtain as much information as possible, including aspects that are of private nature.

Furthermore, while employers have various labor contractual obligations toward their employees, more often than or not, employees have no choice but to disclose information on their private lives. The

Japanese wage and welfare (pension and medical insurance) systems are premised on such submission of personal data.

Finally, since most labor unions are enterprise unions, they too are keen to acquire personal data on their union members. To have the upper hand in labor negotiations, it is also necessary for unions to be knowledgeable about their members private lives. Therefore, labor unions, like companies, are eager to collect personal data from union members, but they are not very careful about protecting this information.

2. Basic Framework to Protect the Personal Data of Prospective and Current Employees

Previously, there were few legal restrictions placed on the collection of personal data by employers. The Supreme Court ruling in the *Mitsubishi Jushi* (Mitsubishi Plastic, Inc.) Case of December 12, 1973 was a de facto recognition of the collection of extensive personal data from job applicants by companies during the hiring process.¹

However, since then there have been changes in both the legislative and administrative fronts concerning the collection of extensive personal data during the recruiting and hiring processes. In this sense, it appears that the right of employers to collect personal data embodied in the 1973 ruling is being restricted.

On the legislative front such changes include revisions of the Equal Employment Opportunity Law, the Employment Security Law, and the Worker Dispatch Law. Due to these revisions, companies can no longer specify a particular gender (“Male Applicants Only” “Female Applicants Only”), and the range of personal data that may be collected is limited to information that is necessary to execute the work.

On the administrative front, the guidelines published by the Ministry of Health, Welfare, and Labour prohibits the collection of personal data that is not related to work — in particular information that may cause discrimination. Moreover, the Public Employment Security Offices require a business establishment with 100 or more employees to appoint an officer

¹ *Mitsubishi Jushi K.K. v. Takano*, Saiko Saibansho Daihotei (Supreme Court, Grand Bench), 12 December 1973, 27 *Minshu* 1536.

in charge of promoting fair hiring practices and human rights, and instructs each business establishment to conduct fair hiring practices under the leadership of such an officer. Other indications on the administrative side point to a trend toward stricter regulations on the collection of employees' personal data.

3. Actual Cases Involving Collection of Personal Data

1) Health-related information

Protection of personal data is rarely taken into consideration when it comes to information on employees' health. One explanation is that employers manage the health insurance programs of their employees, a central feature of the Japanese approach to industrial safety and health management. The Industrial Safety and Health Law provides a typical example: it requires employers to provide regular health examinations for employees. Moreover, because the responsibility of employers regarding occupational hazards is high, they are naturally interested in obtaining information about their employees' health. Since the management of employee health is seen as the employer's responsibility, information about the health of employees is regarded as necessary in fulfilling such responsibility.

According to the Industrial Safety and Health Law, employees must undergo medical examinations for items specified in the law. There have been disputes as to whether or not employees have to be examined for items that are not specified in the law. An example is the refusal of an employee to be examined at a hospital specified by the employer in accordance with office regulations and labor agreements. In this case, the Supreme Court set a judicial precedent by ruling that if an employer issues such orders, an employee must comply.² Concerning this ruling, it has been noted that a medical examination administered by a doctor — in theory — comprises a bodily invasion and that the ruling is problematic as it potentially undermines the privacy of an employee and his/her right to make their own decisions.

² *Denshin Denwa Kosha Obihiro Kyoku v. Kaneko*, "Saiko Saibansho Dai 1 Shohotei" (Supreme Court, First Petty Bench), 13 March 1986, 470 *Rohan* 6.

Also problematic is collection of so-called sensitive health information such as information about HIV and hepatitis which might lead to discrimination, and presents the possibility of invading the privacy of an employee if handled in the same manner as regular medical examinations.

In its guidelines for how to handle HIV-positive cases in the workplace, the former Ministry of Labour wrote that employers cannot conduct HIV screening tests during the hiring process.³

More recently, there have been several court cases over HIV and hepatitis screening tests conducted by employers.⁴ In each case, the court has ruled that collecting information about an employee's HIV status or hepatitis infection without his or her consent constitutes a violation of that employee's privacy and is illegal. The court has also made clear that even when an employer inadvertently obtains information about an employee's HIV status or hepatitis infection, the employer is not allowed to divulge such information to a third party. Moreover, according to the rulings, dismissing an employee because he/she is HIV-positive is an illegal act deviating from social decency.

2) Information about private life

To determine wage, welfare and pension systems in many companies, employees' families are factored into the payment of benefits. Consequently, companies gather extensive information about their employees' families. As families are becoming more diverse, however, some employees are beginning to feel uneasy — albeit gradually — about disclosing such information, which previously had been a matter of course. This is a noteworthy development. A good number of employees have refused to divulge information about their family even though this may put them at a disadvantage in the wage system. This seems to be an indication that the basic premise behind the corporate wage, welfare and pension

³ *Kihatsu* No.75, 20 February 1995.

⁴ *Roe V. A K.K. et al.*, "Tokyo Chiho Saibansho" (District Court), 30 March 1995, 667 *Rohan* 14, *Ichiro Kono v.T Kogyo K.K. et al.*, "Chiba Chiho Saibansho" (District Court), 12 June 2000, 785 *Rohan* 10, *Tokyo Chiho Saibansho* (District Court), *Ichiro Kono v. City of Tokyo et al.*, "Tokyo Chiho Saibansho" (District Court), 28 May 2003, 852 *Rohan* 11, *A v. B*, "Tokyo Chiho Saibansho" (District Court), 20 June 2003, 854 *Rohan* 5.

systems — the disclosure of information about the family by employees — might be fundamentally called into question in the future.

Frequently employees rotate jobs within the same firm (*haiten*), requiring relocation. Since such personnel changes significantly impact an employee's family, companies are expected to take the employee's individual circumstances into consideration when deciding personnel questions. Showing such consideration is regarded as the employers' responsibility, and consequently, they must energetically obtain information about the personal life of their employees. Employees must disclose personal data when asking for special consideration related to personnel management matters such as an exemption from working overtime, a request for paid holidays, as well as job rotation.

To date, few have questioned the practice of disclosing personal data to employers to obtain necessary time off. In fact, under the present system, employees cannot receive any special treatment they may be entitled to unless they present personal data to employer. Therefore, it can be argued that the system indirectly coerces employees to disclose personal data. It is necessary to question the appropriateness of such a system in relation to the goal of protecting employees' personal data in the future.

4. Disclosure of Personnel Files

To date, the most distinctive feature of the Japanese wage system has been the so-called seniority-based treatment for regular employees. However, a system which determines wages according to an employee's ability as measured by work performance is being introduced, albeit slowly. This is the so-called performance-based wage system.

In the performance-based wage system, wages are determined by the level of an employee's work performance, and therefore personnel evaluations play a larger role in the determination of wages. Personnel evaluation in Japan is more problematic than its counterparts in other advanced industrial nations in terms of fairness for employees. In some companies, personnel evaluations have openly been used as a tool for discrimination. For evaluations to be fair, it is essential that employees have access to their evaluation results and the reasons behind them, as well

as the objective standards used for evaluation.

To this end, an understanding should be developed that employers have a responsibility, as part of their labor contract obligations, to allow employees to view personal data on themselves. Moreover, a mechanism should be established so that employees can dispute their evaluation and demand a correction if an error has been made in either the results or the evaluation process.

Following revision of the Civil Procedural Law, the list of documents which are required to be submitted has been expanded. Consequently, there have been several lawsuits requesting documents concerning personnel data held by companies.⁵ The majority of these cases were over wage discrepancies between male and female employees, and the plaintiffs demanded that employers open their files on wages to determine the difference between male and female employees. In such gender-based wage discrimination cases, disclosure of personnel management data is indispensable to the plaintiffs in proving that wage discrimination exists. Therefore, the expansion of the list of documents required to be submitted is extremely significant.

According to legal precedent, the court has ordered employers to present documents when they plan to disclose personnel evaluation results to employees or submit them to government agencies, which means that the court can demand that employers present documents only when they have been produced for public release or will be submitted to external groups or institutions.

5. PC Monitoring in the Workplace

Concerning e-mail monitoring in the workplace, the “Code of Practice on the Protection of Workers’ Personal Data” notes that employees’ privacy must be respected and protected. However, Japan is lagging behind Western nations in addressing this when it comes to e-mail monitoring.

Recently, the first two court rulings involving personal e-mail were

⁵ *Yokota v. Shoko Kumiai Chuo Kinko*, “Osaka Chiho Saibansho” (District Court), 24 December 1998, 760 *Rohan*, 35, *Shoko Kumiai Chuo Kinko v. Yokota*, “Osaka Koto Saibansho” (High Court), 31 March 1999, 784 *Rohan*, 86, etc.

issued.

The first case involved a female employee, the plaintiff, who had been annoyed by repeated invitations to go eating and drinking with her supervisor, the defendant. She mistakenly sent an e-mail with disparaging remarks about the supervisor, which had been meant for her husband, to the supervisor himself. This incident resulted in the defendant monitoring her e-mails.⁶ The issue was whether or not the defendant's action constituted an invasion of the plaintiff's privacy. In its ruling, the court acknowledged that e-mail monitoring by an employer can potentially constitute an invasion of privacy if there are no office regulations against the use of e-mail for private purposes. The court indicated that it has to take into consideration the reason and method of monitoring and balance that against any losses that the employee may suffer when determining if an employer's action constitutes an invasion of privacy. The court also noted that it can only rule that such monitoring is an invasion of privacy when it is deemed to have deviated from appropriate social norms. Regarding this specific case, however, the court ruled that the defendant's actions were appropriate as he was the supervisor of an entire department, and thereby dismissed the plaintiff's case arguing that her use of company e-mail for private purposes was excessive.

The second case involved a company, the defendant, which conducted an internal investigation over anonymous slanders made against a group of employees.⁷ The defendant suspected one employee, the plaintiff, but had no evidence. During the investigation, however, the defendant discovered a number of personal e-mails in the plaintiff's mail server and reprimanded him. In this case, the issue was whether the investigation by the defendant constituted an invasion of the employee's privacy. The court ruled that the employee's private e-mail was an act of negligence of his responsibility to devote himself to his professional duties and a violation of corporate regulations. Hence, such action, it ruled, can be subject to disciplinary measures, and an investigation to decide disciplinary measures is not illegal. The court did not deal with the aspect of an employee's privacy.

⁶ *Kono v. Otsukawa*, "Tokyo Chiho Saibansho" (District Court), 3 December 2002, 826 Rohan 76.

⁷ *Kono v. Nikkei Quick Jyouthou K.K. et al.*, "Tokyo Chiho Saibansho" (District Court) 26 February 2002, 825 Rohan 50.

On a philosophical level, it is easy to accept the argument that employees should not be allowed to use office PCs for private purposes. However, work PCs are based on individual use — each employee has a password, exclusive access to his or her account, and wide room for personal discretion regarding its use. For this reason, in reality, private e-mailing does take place to a certain extent, and employers normally give implied consent as long as it does not interfere with their business operations. Especially in countries like Japan where employees tend to spend long periods at work, a total ban on private e-mails would be impractical. Private e-mailing should be regarded as negligence of devotion to one's professional duties only when it clearly interferes with work (such as when it becomes excessive). This seems to be a realistic approach.

Employers may have a right to monitor the workplace and thereby to limit the privacy of employees to a certain extent, but this should not allow them to completely disregard an employee's privacy. Depending on the method, workplace monitoring can potentially violate the privacy of employees. Clear protocols should be established regarding monitoring employees' e-mails, and monitoring should take place with prior notice. Recently software designed to find key words that represent a danger have been developed, and monitoring should be conducted primarily through the use of such software. The actual contents of an employee's e-mail should be examined only under exceptional circumstances. The aforementioned "Code of Practice on the Protection of Workers' Personal Data" stipulates that employers should examine only e-mail titles and avoid examining the contents of employees' e-mails except when absolutely necessary.

Both cases were rather unusual, and they involved situations in which the court did not allow an employee's right to privacy to play a role in the rulings (for example, the excessiveness of an employee's PC use.). Consequently, it was perhaps difficult for the court to give primacy to employees' rights in a clear-cut fashion.

Conclusion

In Japan, legal precedent set by the aforementioned Supreme Court decision in the *Mitsubishi Jushi* Case (1973) has allowed employers to obtain a wide range of personal data from their employees. With the

advance of the information age, however, there has been growing awareness about the need to protect personal data, and legal and administrative measures which limit the amount of personal data employers can collect have been implemented. Our society is expected to move in the direction of protecting personal data more so in the future in line with growing interest in how personal data should be collected and managed.

Among the various types of personal data, handling of health-related information raises a number of privacy protection issues. While the highly private and sensitive nature of health-related information is recognized internationally, this rarely extends to the handling of employees' health-related information because employers have certain responsibilities in the management of their employees' health, a central feature of industrial safety and health management. An important issue to be resolved in the future is striking a balance between employers' management of health programs and the newly emerging need to protect employees' personal data.

Generally speaking, an employee's right to view his/her personnel files has received little attention in Japan even though the information contained in those files might be very important for them. In Japanese labor relations, the reality is that employees must present a great amount of personal data, while it is not easy for them to view that information. The issue of access to personnel management/evaluation data is going to be especially controversial in the future as the performance-based wage system becomes more widely accepted in Japan, however, has been slow in developing mechanisms to deal with this issue. Disclosure of employees' personal data is desirable for good employee-employer relations as well, and the issue needs to be discussed further.

The problem of e-mail monitoring in the workplace is also being discussed. There have been court rulings that have recognized elements of privacy in employees' personal e-mails in the workplace, albeit in a limited fashion. In the future, a number of disputes over this issue are expected to emerge, and, in order to prevent such disputes from occurring, it is extremely important to establish a clear set of workplace rules which take employees' privacy into consideration.

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