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Legal and Policy Issues Concerning Labor Market

Contents

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EDITORIAL OFFICE
The Japan Institute for Labour Policy and Training
International Affairs Department
8-23, Kamishakujii 4-chome, Nerima-ku, Tokyo 177-8502 Japan
TEL: +81-3-5903-6315 FAX: +81-3-3594-1113
Email: jlr@jil.go.jp
Homepage: http://www.jil.go.jp/english/index.html
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Legal and Policy Issues Concerning Labor Market

Articles

NEXT ISSUE (Winter 2005)
The Winter 2005 issue of the *Review* will be a special edition devoted to **Changing Corporate Governance and Labor Employment Relations.**

INTRODUCTION
Legal and Policy Issues Concerning Labor Market

The changes which have occurred in Japanese employment practices over the past 10 years have necessitated profound revisions in Japanese labor law. In particular, the transformation of the industrial structure which has placed more importance on the service sector, the increasing number of white–collar employees and atypical employees such as part-time workers and dispatched workers, and the erosion of the lifetime employment system, evidenced by the high unemployment rate, have made obsolete traditional Japanese labor laws, the original purpose of which were to protect mainly blue-collar employees in the manufacturing industry while developing employment security for regular employees afterwards.

In 2003, to ensure that labor laws better corresponded to changed socio-economic conditions, as above-mentioned, the Employment Security Law (ESL) and the Law for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers (the Worker Dispatching Law) were partially modified. In addition Article 18-2, which limits the right of an employer to dismiss in a general way, was introduced into the Labour Standards Law (LSL).

The first of the three articles in this issue by Professor Ikuko Mizushima provides an overview of the revisions to the ESL and the Worker Dispatching Law and discusses legal problems arising from these amendments. The fee-charging employment placement industry was further deregulated with the revision to the ESL. This was in line with the drastic change of the legal policy that took place in this sector in 1999. The revision of the Worker Dispatching Law was an attempt to satisfy an increasing demand for worker dispatching from both management and labor. Nevertheless, Prof. Mizushima is skeptical about the positive effects stemming from the revised law. She acknowledges that the revision will allow some dispatched workers to find suitable employment opportunities, but notes that at the same time many workers will be forced to become dispatched workers and face an unstable employment situation.

The second article by Prof. Michio Tsuchida examines legal problems

concerning part-time workers that need to be tackled by the government. According to Prof. Tsuchida, today, part-time workers constitute an indispensable human resource for companies and, therefore, it is crucial to support their career formation. In particular, the author notes the substantial gap in wages between regular employees and part-time workers. In this context, the guidelines associated with the "Law concerning the Improvement of Employment Management, etc. of Part-time Workers" revised in 2003 mandates that employers maintain balanced treatment between regular employees and part-time workers engaged in the same duties and employed under the same career management schemes and conditions. Prof. Tsuchida stresses the necessity of incorporating a general legal norm (the idea of balance) into the Part-time Work Law so it can become a basis for rules concerning Japanese-style balanced treatment.

The third article by Prof. Shimada examines the working hour schemes for white-collar employees. As the performance-based wage system is more widely applied to white-collar workers, there are increasing calls to revise the linkage between working hours and wage determination. But Prof. Shimada is opposed to drastically revising the working hour schemes for white-collar employees — for example, introducing an exemption system — when considering the increasing phenomenon of "unpaid overtime" and excessively long working hours. The LSL contains some schemes regarding working hours in response to the special nature of white-collar workers, such as excluding managers and supervisors from coverage of regulations on working hours, flex-time schemes and discretionary work schemes. Prof. Shimada argues that, when taking into consideration the freedom and discretion that white-collar employees have, it is not appropriate to regulate their working hours according to effective working hours. However, if they are exempt from such regulations, they should be protected by a mechanism to bring their workload under control.

The review of *Examining Dismissal Law: From the Perspective of Legal and Economic Studies* by Prof. Kambayashi provides not only an introduction to the articles in the book, but also examines the difference between legal and economic approaches and points out the problems inherent in both from an economic standpoint. This book was originally published in 2002, but after the LSL was revised in 2003, it was reprinted

with a supplement containing a round-table discussion by the three editors of the book on Article 18-2, which was inserted into the LSL. Obviously, how dismissal law should be established is one of the most important issues in Japanese labor policy. However, the Article 18-2 doesn't make any addition or alteration to the case law doctrine, "abusive exercise of the right to dismiss." Instead of resolving problems regarding interpretation and application in case-law doctrine, as was expected, the new article contains some of the same problems. Thus, discussion on dismissal law must continue, and the contribution of economists will be indispensable. Prof. Kambayashi concludes, "The question seems to present a great venue for deepening our understanding of the nature of labor-related economic transactions or advancing our thinking about the workings of public rules in our society and economy."

Shinya Ouchi
Professor, Kobe University

Recent Trends in Labour Market Regulations

Ikuko Mizushima
Associate Professor, Osaka University

1. Introduction

Japan's unemployment rate in January 2004 was five percent. In the previous month, it had dipped below the five percent mark for the first time in two and a half years. However, the number of people unemployed seems to be on the decline, and it has been mooted that the economy is showing signs of improvement. There are some trends that support that outlook. For example, the national consumer price index has been showing positive trends, and the effective job opening ratio is rising in certain localities. Nevertheless, it is still too early to say that the outlook for the future has changed for the better.

The economic recession in Japan has persisted for over a decade, since the beginning of the *Heisei era* (it has hence been dubbed the "Heisei recession"). The recession has affected the labour market as well, and, as has been noted, the labour market became increasing fluid and diversified in the 1990s on the heels of the collapse of the "bubble economy." With revisions to the Employment Security Law and the Worker Dispatching Law, use of the external labour market has become even more extensive, a trend that can be attributed to the behavior of Japanese workers who no longer insist (nor can afford to insist) on long-term and regular employment and employers who are increasingly preoccupied with the goal of achieving rational and efficient management.

In response to these developments, the 156th Diet passed legislation for Partially Revising the Employment Security Law and the Law for Securing the Proper Operation of Worker Dispatching Undertakings and Improved Working Conditions for Dispatched Workers in 2003, which revised sections of the Employment Security Law, the Worker Dispatching Law, and other related laws.[1] These revised laws went into effect in March 2004. This article will provide an overview of the latest revisions of the

[1] For revisions to the Employment Security Law and the Worker Dispatching Law, see Katsuhiro Tsuji, "Shokugyo Anteiho Rodosha Hakenho no Ichibu Kaisei (Partial Revisions of the Employment Security Law and Worker Dispatching Law)," *Juristo* 1253 (2003), p. 92-; Akira Hamamura, "Kaisei

Employment Security Law and Worker Dispatching Law, and discuss potential legal issues arising from the revised Worker Dispatching Law.[2]

2. Revision of the Employment Security Law

2.1 Background

Following the adoption of the ILO Fee-charging Employment Agencies Convention (No.181) in 1997, the Japanese government began reviewing its laws and consequently in 1999 drastically revised the Employment Security Law.[3] The revised Employment Security Law allowed for fee-charging employment placement in a wide range of areas, with certain exceptions, marking a drastic basic policy shift concerning employment placement services. Faced with changing requirements regarding the supply and demand of labour, the government acknowledged the role of fee-charging employment placement services and begun to direct its attention to ensuring that employment placement agencies operated properly and devising regulations to protect job-seekers. The Committee on Labour and Social Policy in the House of Councilors attached a resolution to the 1999 revision requiring the government within three years of enactment to conduct a comprehensive examination on the future of the employment placement industry, including discussion of employment placement for part-time and short-term workers. The resolution also states that the government must monitor the situation and, when necessary,

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Rodosha Hakenho no Kento (Reflections on the Revised Worker Dispatching Law)," *Rodo Horitsu Junpo* 1554 (2003), p. 20-; Mami Nakano, "Kaisetsu Kaisei Rodosha Hakenho Kaisei no Pointo to Kadai (Commentary on the Revised Worker Dispatching Law: Main Features and Problems in the Revision)," *Rodo Horitsu Junpo* 1562 (2003), p. 4-; Masaru Anzai, "Kaisei Rodosha Hakenho no Mondaiten to Jitsumujo no Taio wo Megutte (Concerning Problems of the Revised Worker Dispatching Law and Responses at the Practical Level)," *Kikan Rodoho* 204 (2004), p. 2-. Although published before the revision, see also Noriaki Kojima and Keiko Fujikawa, "Three Issues on Amendment of the Workers Dispatching Law," *Osaka University Law Review*, No. 50 (2003), p. 21.

[2] This article is a revised version of my essay "Shokugyo Anteiho Rodosha Hakenho Kaisei no Igi to Hoteki Kadai (Revisions of the Employment Security Law and Worker Dispatching Law, as Discussed from a Legal Perspective)," *Nihon Rodo Kenkyu Zasshi* 523 (2004).

[3] For the 1999 revision, see articles in Kikan Rodoho 190 and 191 (1999), Michio Tsuchida; "Kaisei Shokugyo Anteiho no Igi to Kadai (Employment Security Law: Its Amendment and New Policy)," *Nihon Rodo Kenkyu Zasshi* 475 (2000), p. 36-; and Junichiro Mawatari, *Rodo Shijoho no Kaikaku (Reform of Labour Market Regulations)*, (2003) p. 60-.

review some of the provisions.

In August 2001, the Minister for Health, Labour and Welfare (HLW) asked the Subcommittee for Employment Security of Labour Policy Council to discuss revision of the laws concerning employment placement agencies, and the Subcommittee's Sectional Meeting on Private Workforce Demand and Supply System initiated the discussion accordingly.[4] That December, the Council for Regulatory Reform in the Cabinet Office submitted the "First Report regarding Promotion of Regulatory Reform."[5] Regarding the Employment Security Law, the report addressed such issues as relaxation of employment placement fee regulations and deregulation of businesses that offer employment placement services for free. In December 2002, the Council for Regulatory Reform submitted the "Second Report on the Progress of Deregulation" which, like the "First Report," underscored the need for drastic deregulation of the employment placement industry and proposed methods to accomplish this goal. In the same month, the Subcommittee for Employment Security of Labour Policy Council submitted a proposal, the basic direction of which corresponded to the "Second Report." Upon accepting the proposal, the Ministry of Health, Labour and Welfare (MHLW) drew up an outline to revise the bill in February 2003, ensuring that employment agencies match supply and demand in a smooth and proper manner so they could respond to the difficult employment situation and diversification of working styles. It was necessary, the outline explained, to submit a revised bill that would contain regulations on employment placement agencies to this end.

2.2 Overview

(1) Revisions concerning licensing and registration systems

Before the latest revision, both fee-charging and free employment placement agencies had to be licensed per place of business by the Minister of HLW. Now, licenses are issued to proprietors (or companies)

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[4] The minutes of the Sectional Meeting on Private Workforce Demand and Supply System, the Subcommittee for Employment Security of Labour Policy Council are available at http://www.mhlw.go.jp/shingi/rousei.html#syokuan-minkan

[5] The reports can be viewed at http://www8.cao.go.jp/kisei/siryo/. Shigeru Wakita critically examines the first report in his "Rodosha Haken Hosei to Shokugyo Shokai Hosei (Worker Dispatching Regulations and Employment Placement Regulations)," *Rodo Horitsu Junpo* 1522 (2002), p. 17-.

that operate employment agencies (Article 30, Paragraph 1 and Article 33, Paragraph 1 of the Employment Security Law).

Previously, after receiving notice from a free-charging employment placement operator, the Minister of HLW decided which occupations the operator could handle, as well as the scope of business activities the operator could engage in upon receiving a notification from the operator. While the operator still has to report to the Minister, he/she no longer needs the Minister's approval (Article 32-12 of the Employment Security Law). However, if the employment discriminates against a certain individual (or individuals), the Minister can order the operator to change the occupations he/she engages in for a definite period of time.

There are organizations that have been established by special laws which provide free employment placement services for their members, and it is reasonable to assume that such services are properly managed. Laws guarantee that these organizations will have a legitimate character, and they can only provide services for their members. Accordingly, it has been decided that such organizations only have to report to the Minister and do not need to be licensed (Article 33-3 of the Employment Security Law, new provision). The new provision applies to organizations established by special legislation such as agricultural cooperative unions, joint enterprise cooperatives, and chambers of commerce with 10 or more members (Article 25-3, the Enforcement Regulations of the Employment Security Law).

Regarding commissioning of recruitment without fee, the license system has been replaced by a registration system (Article 36-3 of the Employment Security Law, new provision). However, a license issued by the Minister of HLW is required when recruiters do receive remuneration.

(2) Duties of the employment placement manager

The 1999 revision mandated that operators of fee-charging employment placement agencies appoint an "employment placement manager." The latest revision has clarified that position, i.e. the person in charge of managing and supervising operations concerning employment placement (Article 32-14 of the Employment Security Law).

(3) Abolition of the "Prohibition on Having a Side Business" clause and the deposit system

The following provisions on employment placement services have been abolished:

(a) Provision concerning "Prohibition on Having a Side Business"

Previously, those running a restaurant, a food and drink service establishment, an inn, a loan company, or a sex business were prohibited from operating an employment placement agency (former Article 33-4 of the Employment Security Law), however, this ban has been completely abolished. The ban had been based on II-1 of the ILO Employment Agencies Recommendation (No. 42) of 1933. But the ILO's policy on employment placement services dramatically changed with the introduction of Convention No. 181 in 1997, and the recommendation was withdrawn. Therefore, the article which appeared in the previous Employment Security Law was no longer necessary.

The HLW Committee in both the House of Representatives and the House of Councilors attached an additional resolution to the revision regarding side businesses which demands that the government take strict measures to prevent abuses, such as forced labour and intermediary exploitations, now that this prohibition no longer exists. The resolution expresses concern about potential problems between debtors and loan businesses.

(b) Abolition of the deposit system

The deposit system was intended to compensate those who suffered damage due to illegal activities by fee-charging employment placement agencies. Money that was collected from employment placement agency operators, ¥300,000 per agency, was to be used for compensation (former Article 32-2 and former Article 32-3 of the Employment Security Law). However, the latest revision did away with the system since it had never really been utilized .

(4) Expansion of free employment placement services

Those whose status is equivalent to a student are now eligible to receive

free employment placement services that are operated by schools (Article 33-2 of the Employment Security Law). This includes those who are either receiving or have completed clinical training at a university hospital, those who are either receiving or have finished a commissioned vocational course equivalent to the vocational training offered at a public vocational training institute, among others (Article 25-2, Enforcement Regulations, and the Employment Security Law).

Local public bodies were not allowed to provide employment placement services prior to the latest revision, however they are now able to do so if they report to the Minister of HLW (Article 33-4 of the Employment Security Law, new provision). However, stipulations still exist, such as providing such services only as an accompanying measure when assisting welfare clients in their jurisdiction, or to attract businesses, and when carrying out other measures that advance the welfare of residents and promote economic and industrial development.

(5) Abolition of the 'Recruitment Area' clause

The "recruitment area" clause refers to a regulation which required employment placement agencies to make an effort to recruit workers who lived in areas from which they could easily commute to work (former Article 38 of the Employment Security Law). This regulation has been eliminated as it now longer seems relevant.

2.3 Commentary

The latest revision of the Employment Security Law mainly concerns relaxation of various regulations regarding employment placement agencies. The overall direction of the latest revision is essentially the same as that of the 1999 revision, however, the latest revision were only partial whereas the 1999 revisions were major ones that recognized fee-charging employment services and marked a basic shift in the government's approach toward employment placement.

As noted above in Section 2.2 (1), the regulations concerning employment placement agencies have been partially relaxed, and consideration has been given to how job-seekers may be negatively affected by deregulation and necessary measures have been incorporated to

deal with this.

The "prohibition on having a side business" and the deposit system discussed in 2.2 (3) were originally devised to protect job-seekers. The abolition of both these clauses has been criticized, with concern voiced that the government did not fully take into account problems that could arise in the present context. It also has been claimed that the revised law places excessively high and groundless expectations on employment placement agency operators.[6] The "prohibition on having a side business" has been eliminated, but the licensing system has been retained. In my view, it is still possible to screen dishonest and undesirable applicants to determine if an applicant meets the "requirements concerning proper business operation," (Article 31, Paragraph 1, Item 3 and Former Item 4 of the Employment Security Law).

Additional requirements will be created in certain categories to qualify for a license. Money lenders will have to register under regulations concerning money lending, and pawnbrokers will need to apply for a license as specified by regulations concerning pawn businesses, and both will need to prove they have operated their businesses in a proper manner. Those who run a business in the sex industry will not be allowed to operate a business that violates employment placement services. A penal provision was added before the revision targeting those who use violence and intimidation while conducting employment placement or those who recruit workers for jobs that are harmful to public morals (Article 63 of the Employment Security Law).

The deposit system was rarely used. Since one of the licensing standards requires applicants to possess an adequate financial basis, it is not necessary to demand a deposit from employment placement agency operators when they first begin to operate. Furthermore, job-seekers can still demand compensation directly from employment placement service operators. Therefore, it does not appear that the abolition of the deposit system will particularly disadvantage job-seekers.

From the onset, stringent requirements covering free employment

[6] Hiroshi Tanno, "Shokugyo Shokai no Henyo to Hoseisaku (Changes in Employment Placement and Legal Policy)," Satoshi Nishitani, Masao Nakajima, and Kaoko Okuda eds., *Tenkanki Rodoho no Kadai* (Issues for Labour Law in Transition) (2003), p. 295-.

placement services have been put into place (discussed in section 2.2 [4)]). An argument has been put forward that it is necessary to guarantee free entry into the field and create a more competitive environment precisely because the market principle does not operate in this area.[7] The fact that the revised law has permitted local public bodies to provide free employment placement "services" is particularly significant when viewed from the standpoint of mid- and long-term local job creation and employment policy. Of course, local public bodies were allowed to provide such services when it came to 1) policies supporting welfare clients in their jurisdiction, 2) policies to attract businesses, and 3) other policies equivalent to those in the first and second categories. Given the nature of the policies in the first and second categories, it is easy to understand that there is a need for locally-run employment placement services. In my view, however, free employment placement services should be permitted for policies other than those in the two categories as long as they are policies that advance the welfare of local residents or promote the local economy. The question for the future is how much room for interpretation will be allowed regarding the third category.

The "recruitment area" clause was eliminated. The initial aim was to protect job-seekers — it sought to ensure that recruited workers would be able to commute easily and carry out their daily duties by regulating the recruitment process. However, there is little need for such a regulation as job-seekers are free to decide whether to respond (or not to respond) to job opportunities. Moreover, workers are being recruited via the Internet, and many do apply for jobs in distant places. In my view, this regulation is no longer necessary.

[7] Noriaki Kojima, "Gaibu Rodo Shijo wo Meguru Hoseisaku to Sono Kadai (Legal Policy Concerning the External Labour Market and Its Problems)," Business Policy Forum, Japan ed., *Gaibu Rodo Shijo no Genjo to Kadai ni Kansuru Chosa Kenkyu* (Research on Present Conditions and Problems of the External Market) (2002), p. 119.

3. Revision of the Worker Dispatching Law

3.1 Background

The Worker Dispatching Law also underwent drastic revision in 1999.[8] Previously, worker dispatching was permitted only for highly specialized types of work (the positive list method), but the 1999 revision permitted worker dispatching in principle except for certain types of work. The revision was partly a response to the 1997 ILO Convention No. 181 which approved the activities of worker dispatching agencies, but it was also prompted by domestic factors. The labour market was becoming increasingly fluid, and there was an increasing demand for worker dispatching from both management and labour. This leads to a need to devise regulations to protect dispatched workers. The revised Worker Dispatching Law also was to be reviewed three years after enactment.

To facilitate diversification of working styles from the standpoint of regulatory reform and deregulation, the Council for Regulatory Reform proposed a revision to the Worker Dispatching Law which would expand the dispatched work force (the "First Report"). From the perspective of further expanding dispatch work opportunities, the "Second Report" of 2002 discussed the need to submit a revision to the law that would include either relaxing or eliminating the ceiling on the dispatching period. In addition, since August 2001 the Subcommittee for Employment Security of Labour Policy Councill of the MHLW had been reviewing the regulations concerning worker dispatching agencies and employment placement agencies. Finally, the subcommittee proposed revisions to both the Employment Security Law and the Worker Dispatching Law in December 2002 and presented an outline of the MHLW's revision bill in February 2003 that presented the same reasons for revision for both the Worker Dispatching Law and the Employment Security Law. In other words, it did not present any reason that was specific to the Worker Dispatching Law. However, it did mention some goals, such as stable

[8] For the 1999 revision, see articles in *Kikan Rodoho* 190 and 191 (1999); Noriaki Kojima, "Rodosha Haken Jigyo to Kisei Kanwa (Deregulation of Temporary Personnel Help Services)," *Handai Hogaku* 48:6 (1999), p. 1379-; Koichi Kamata, "Kaisei Rodosha Hakenho no Igi to Kento Kadai (A Reform of the Law Concerning Temporary Work in Japan)," *Nihon Rodo Kenkyu Zasshi* 475 (2000), p. 48-; and Mawatari (in footnote 3), p. 71-.

employment for dispatched workers and maintenance of proper working operations in worker dispatching agencies, and alluded to protecting dispatched workers.

3.2 Overview

(1) Creation of regulations for 'Temp to Perm Service (*Shokai Yotei Haken*)'

It became possible to conduct *shokai yotei haken* or "Temp to Perm Service" as one type of worker dispatching in December 2000.[9] However, as there were no provisions concerning Temp to Perm Service contained in the Worker Dispatching Law, this was regulated under the "Requirements for Permission to Simultaneously Operate a Worker Dispatching Agency and Fee-charging Employment Placement Agency." The revised Worker Dispatching Law defines Temp to Perm Service (Article 2, Item 6 of the Worker Dispatching Law,) as a form of dispatching in which the agency provides (or plans to provide) a Temp to Perm Service between the client and the dispatched worker before or after it has started to provide worker dispatching services. It also includes a system in which the dispatched worker and the client conclude an agreement — before the end of the dispatching period — that states the client will employ the dispatched worker. Prior to the revision, the dispatching agency could provide Temp to Perm Service only after the dispatching period ended. The revised Worker Dispatching Law allows the agency to probe whether or not the worker and the client want to conclude a labour contract, or if the client wants to make an informal job offer to the dispatched worker before the dispatching period ends.

In addition, Temp to Perm Service will be exempted from the provision which discourages the client from specifying what type of worker it is interested in (Article 26, Paragraph 7 of the Worker Dispatching Law). Now it is possible for the client to conduct interviews or request a resume before the end of the dispatching period, and this should allow the agency to dispatch and introduce workers who suit their clients' needs. In this respect, the latest revision can be congratulated for strengthening the job-

[9] For the Temp to Perm Service system, see Noriaki Kojima, "Shokai Yotei Haken to Kisei Kanwa (Japanese System of "Temp to Perm" and Its Regulatory Reform)," *Handai Hogaku* 51:5 (2002), p. 863-.

matching function of Temp to Perm Service.[10]

Sections of the regulations concerning Temp to Perm Service contained in the "Requirements for Permission to Simultaneously Operate a Worker Dispatching Agency and Fee-charging Employment Placement Agency" have been incorporated in the provisions of the Worker Dispatching Law (Article 32, Article 37, Paragraph 1, and Article 42, Paragraph 1 of the Worker Dispatching Law).

(2) Simplification of licensing and registration procedures

Under the revised Employment Security Law, employment placement agency operators instead of the agency are licensed (see Section 2.2 [1]). The same revision has been made in the Worker Dispatching Law as well (Article 5, Paragraph 1, and Article 16, Paragraph 1 of the Worker Dispatching Law).

(3) Responsibilities of the dispatching agency

(a) Clear notification of working conditions

Worker dispatching agencies are required to inform workers of the working conditions in advance. There is an additional requirement stipulating that the dispatched workers must be clearly notified the "first day on which the first day the conflict arises regarding dispatching period" (Article 34, Paragraph 1, Item 3 of the Worker Dispatching Law). Moreover, after the client notifies the worker dispatching agency about a change in the dispatched worker's period of employment, the agency must immediately notify the worker of the date (Article 34, Paragraph 2of the Worker Dispatching Law).

(b) Last day of work notice

The worker dispatching agency is not allowed to continue dispatching a worker beyond the period for which the client is allowed to receive dispatching services. The worker dispatching agency is also required to communicate this to the client and the dispatched worker (Article 35-2,

[10] Temp to Perm Service was never really able to carry out its employment placement function before. Problems with the regulations on Temp to Perm Service before the revision are discussed in Hamamura, p. 29 (footnote 1) and Kojima, p. 884- (footnote 9).

Paragraph 2 of the Worker Dispatching Law, new provision). The agency must issue an end of work notice to the dispatched worker between one month before and one day before the first day the conflict arises.

(c) Additional responsibilities of the chief-manager

The chief-manager has the additional responsibility of maintaining a liaison between the client and the person who handles and manages safety and health issues of the dispatched worker at the dispatching agency (Article 36, Item 5 of the Worker Dispatching Law). The provision was made in response to the lifting of the ban on dispatching workers to manufacturing jobs.

(4) Responsibilities of the client

(a) Determining the dispatching period

The client must stipulate in advance the period for which the worker is to be dispatched when receiving services from a worker dispatching agency for the same work for a period exceeding one year and less than three years (Article 40-2, Paragraph 3 of the Worker Dispatching Law, new provision). In making this decision, the client must take into consideration the opinions of the workers' representative (Article 40-2, Paragraph 4 of the Worker Dispatching Law). The workers' representative represents either a labour union comprised of a majority of the workers at the client company or represents a majority of the workers if that union does not exist.[11] The client must also hear opinions of the workers' representative before changing the stipulated dispatching period of a given dispatched worker.

(b) Additional responsibility

The client has the same additional responsibility as the chief-manager (discussed in 3.2 [3] [c]) (Article 41, Item 4 of the Worker Dispatching Law).

(c) Offering a labour contract to the dispatched worker

Before the latest revision, the client was only required to make an effort

[11] The same as defined in Article 36 and Article 90 of the Labour Standards Law.

to directly hire the dispatched worker after receiving services continuously for a period exceeding one year. The revised Worker Dispatching Law stipulates that the client must offer a work contract to the dispatched worker in two situations. The first arises when the client seeks to use the dispatched worker beyond the allowable dispatching period (Article 40-4 of the Worker Dispatching Law, new provision). The second concerns work which does not have a time-delineated period (discussed below in [5] [a]) and arises when the client seeks to use the dispatched worker for the same work for a period exceeding three years and employ that worker for the same work after that period (Article 40-5 of the Worker Dispatching Law, new provision).

When the client violates the provisions of the Worker Dispatching Law, the Minister of HLW can issue guidance or advice (Article 48, Paragraph 1 of the Worker Dispatching Law). If the client does not comply, the Minister can recommend that the client offer a labour contract to the worker (Article 49-2 of the Worker Dispatching Law). If the client still refuses to comply, the Minister can make the non-compliance public.

(5) Deregulation of dispatched work

(a) Expansion of work categories that have no Limit on the dispatching period

In principle, the dispatched worker can be dispatched to a given position for up to one year, but this limit does not apply to 26 specialized jobs that were on the positive list, projects of limited duration, or when workers on either maternity or child-care leave are replaced.[12] The revised law includes two additions to this list: positions with very limited workdays (positions for which the dispatched worker works far fewer days in a month than the other workers at the client company) or replacements for workers on nursing care-leave (Article 40-2, Paragraph 1 of the Worker Dispatching Law).

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[12] Concerning the 26 specialized work types, however, cabinet-order was issued limiting the dispatching period for up to three years. For discussion of this administrative order, see Noriaki Kojima, "Haken Kikan no Seigen ni Kansuru Oboegaki Iwayuru 3 nen no Kigen Seigen towa Nanika (Period Limitation of Agency Work for 26 Cabinet-order Designated Jobs)" *Handai Hogaku* 52:3-4 (2002), p. 671-.

(b) Extension of the dispatching period

Following the revision, the client can now receive worker dispatching services from a worker dispatching agency for the same work for a period of up to three years. To stipulate a dispatching period exceeding one year, the client must take required procedures. (discussed in 3.3 [4] [a] above).

(c) Worker dispatching now allowed for manufacturing jobs

The additional regulations contained in the old Worker Dispatching Law prohibited workers from being dispatched to manufacturing jobs for the "time being," but the ban has finally been lifted. However, the allowable dispatching period will be limited to one year for the three years after the revised law takes effect (Paragraph 5, the Additional Regulations of the Worker Dispatching Law). Moreover, the worker dispatching agency is required for the time being to indicate on its license application and registration forms that it will be conducting worker dispatching for manufacturing jobs (Paragraph 4, the Additional Regulations of the Worker Dispatching Law).

4. Legal Issues Concerning the Worker Dispatching Law

As discussed in Section 3.2, changes contained in the latest revision to the Worker Dispatching Law were wide sweeping. Those discussed in Section 3.2 (2) concern deregulation measures vis-à-vis employment placement agencies, and they do not seem to particularly affect dispatched workers. Therefore, the following section will focus on Temp to Perm Service (discussed in Section 3.2 [1]), client responsibilities (discussed in Section 3.2 [3] & [4])), and deregulation and expansion of worker dispatching (discussed in Section 3.2 [5.])

4.1 Temp to Perm Service: Will It Take Root as a New Job-matching Mechanism?

Dispatching workers for the purpose of introducing jobs used to be prohibited because it was thought to create confusion between the goal behind employment placement and worker dispatching, i.e. that it might allow the dispatching agency operator — who concludes a labour contract

with the dispatched worker — to neglect his responsibilities as an employer. However, the system of Temp to Perm Service was introduced in December 2000 because some workers were entering the dispatched workforce seeking employment, in particular there were dispatched workers who wished to be hired by client companies.

The Temp to Perm Service system has the following advantages. It gives dispatched workers the opportunity to test their compatibility on the job at client companies in advance. Moreover, workers can expect client companies to offer them a labour contract when the dispatch period expires, and promoting a pattern in which workers become regular employees through dispatched work. It gives client companies the opportunity to evaluate the skills and aptitudes of workers by observing the workers in actual job situations. The need for such an accurate evaluation becomes even more acute when employing high-cost groups such as specialists and middle-aged and elder workers, and the system should be particularly effective in these situations. Finally, the Temp to Perm Service system helps to avoid potential problems between the client and the worker dispatching agency such as a client company headhunting a dispatched worker. The system forces the parties to clarify and agree in advance what type of worker dispatching services are to be provided.

These advantages can only be used to their fullest when both the dispatched worker and the client are satisfied with the job available and the work provided. Because the revised law allows the client to interview the worker and request a resume in advance, clients will be able to receive dispatched workers more suited to their needs. The revision should receive a high mark in this regard.

However, problems can arise when a client is not willing to use Temp to Perm Service or does not offer a labour contract to a dispatched worker even though he/she may want to continue working for the client. Such cases may include client abuse of Temp to Perm Service services (such as having no intention of hiring the dispatched worker). If the client company does not offer a labour contract to the dispatched worker, the client must provide the worker dispatching agency with a written explanation if requested by the dispatched worker in order to prevent such abuses. In turn, the dispatching agency is required to do the same vis-à-vis the

dispatched worker (1999 Ministry of Labour Notification No. 137 and No. 138).

What will be problematic in such cases from the legal standpoint is judging the validity of the client's explanations. In these cases — leaving obvious cases of abuse aside —the following problems will arise: 1) To what extent should a worker's inability to do the job be a factor? 2) Can factors other than a worker's ability, such as a lack of cooperativeness, be regarded as legitimate explanations? 3) To what extent can the client use declining profits and bad business performance as an excuse not to offer a labour contract to the dispatched worker? Regarding the first two questions, which really concern the worker, judicial precedent concerning dissolution of a labour contract after a trial period can be used as one point of reference.[13] However, the Temp to Perm Service system and the trial employment system are different systems, although they possess similar functions. With Temp to Perm Service, the client and the dispatched worker are not bound by a contract, and they are not required to sign a contract. Smooth and effective matching of the supply and demand of labour is one of the aims of Temp to Perm Service. In light of these differences, it seems very difficult to apply standards used in cases dealing with trial employment to Temp to Perm Service cases.

The third question concerns clients. One could refer to judicial precedents dealing with the cancellation of an informal job offer and arrive at a decision through comparison.[14] But the wisdom of applying judicial principles in these precedents *mutatis mutandis* to Temp to Perm Service cases is questionable because, by definition, the client and the worker have not entered the stage of concluding a labour contract.

If the above interpretation is correct, it is therefore true then that workers dispatched through Temp to Perm Service services are placed in an insecure position. In my view, however, it is important to make a clear

[13] In the *Mitsubishi Jushi* case (Supreme Court, December 12, 1973, *Minshu* 27:11, 1536), the Supreme Court interpreted trial-based employment as a labour contract with a reserved right to dissolve the contract and ruled that this right can be exercised only when there is an objectively rational reason with respect to the purpose of the reserved right and when such exercise is considered socially acceptable.

[14] See the *Dainippon Insatsu* case, Supreme Court, July 20, 1979, *Minshu* 33:5, 582; and the *Infomix Case*, Tokyo District Court, October 21, 1997, *Rohan* 726, 37.

distinction between the traditional trial employment system and the Temp to Perm Service system. The former is predicated on long-term employment whereas the latter has as a goal the facilitation of smooth and accurate matching of supply and demand in labour. Quite understandably, such a view will be criticized as ignoring the question of protection of the dispatched workers. However, this author is more concerned that the introduction of the Temp to Perm Service system may case the current trial employment system to lose its *raison d'être*, causing new graduates and unemployed workers to view Temp to Perm Service as the main route to employment.[15] It is hoped that Temp to Perm Service will be used properly for both workers and jobs so that it can fully serve its true purpose.

4.2 Responsibilities of the Dispatching Agency and the Client: Have They Been Strengthened?

The latest revision to the Worker Dispatching Law strengthened the responsibilities of worker dispatching agencies and clients in several areas. Particularly noteworthy are those on the client's side: listening to the opinions expressed by the workers' representative and offering a labour contract to the dispatched worker.

The client can determine the dispatching period, that is, a period for which the client temporarily requires worker dispatching services due to business reasons and so on. In making such a decision, the client must listen to the opinions of the workers' representative in order to accurately assess actual workplace conditions and needs. The Labour Standards Law also stipulates that an employer must fulfill a similar obligation when drafting or changing workplace regulations which determine an employee's working conditions (Article 90, Paragraph 1 of the Labour Standards Law).

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[15] For the view that the expanded use of Temp to Perm Service (and encouragement of it) might increase the unstable worker population and drastically change the routes through which new school graduates enter the work force, see Masao Nakajima, "Haken Rodo no Kakudai to Hoseisaku (Expansion of the Dispatched Workforce and Legal Policy)," Satoshi Nishitani, Masao Nakajima, and Kaoko Okuda eds., *Tenkanki Rodoho no Kadai* (Issues for Labour Law in Transition) (2003), p. 379 and 392. See also Ikuko Mizushima, "Rodoryoku no Jukyu Chosei Shokugyo Shokai to Rodosha Haken (Supply and Demand Adjustment of the Labour Force: Employment Placement and Worker Dispatching)," Kokusai Rodoho Foramu ed., *Koyo no Furekushibiritii wo Meguru Nichio Hikaku* (Comparisons between Europe and Japan Concerning Employment Flexibility) (2002), p. 209.

The provision in the Labour Standards Law can be interpreted as giving a workers' representative the right to voice opinions, to a certain extent. Of course, it is only a right, and this right is predicated on the employer's right to unilaterally make decisions. The Labour Standards Law does not state that an employer must consult with the workers' representative or ask for his/her consent.[16] The provision in the revised Worker Dispatching Law can be interpreted as granting essentially the same right to the workers' representative. Still, in order to hear opinions properly, the client must make an effort to respect the opinions of the workers' representative. Specifically, a sufficient period of time for preparing must be provided before the hearing. When the worker's representative finds a dispatch period inappropriate, the client must review it (1999 Ministry of Labour Notification No. 138). The workers' representative is normally provided with information such as the intended work, the projected dispatching period, and when the dispatching period starts. These are essential for determining a dispatching period. The client can also provide other information to the workers' representative or ask his/her opinions on other matters.[17]

The latest revision strengthened the client's responsibility to offer a labour contract to the dispatched worker, from a duty to endeavor (*doryoku gimu*) to an actual legal obligation. The responsibility, however, is limited to that of offering a labour contract. Certainly, the client and the dispatched worker cannot and should not be forced to conclude a labour contract when they are unwilling to or do not agree with each other.[18] Therefore, there is good reason for requiring the client only to "offer a labour contract to" rather than "to conclude a labour contract with" the dispatched worker.

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[16] Kazuo Sugeno, *Rodoho Dai 6 Pan* (Labour Law, 6th Edition) (2003), p. 113.

[17] Such as the appropriateness of using worker dispatching services, the appropriateness of the work assigned to the dispatched worker, or questions regarding equalization of work conditions for the dispatched worker. See Hamamura (footnote 1), p. 24-.

[18] See Nakano (footnote 1), p.15 for an opposing view. According to Nakano, when worker dispatching is not based on the worker dispatching regulations, an employment relationship is presumed between the dispatched worker and the client. Since there is a provision requiring the client to offer a labour contract, the client will not be able to overturn the presumed employment relationship, and the dispatched worker can request status confirmation from the client on the ground that they have an employment relationship.

This requirement is problematic in some respects. First, its scope is limited.[19] According to Article 40-4 of the Worker Dispatching Law, the responsibility to offer a labour contract arises only when the client "seeks to continue using" the dispatched worker beyond the stipulated dispatching period; there is no such responsibility if the client decides to hire a new worker for the job. According to Article 40-5, the responsibility arises only when the client "seeks to employ" the dispatched worker for the same position for which the worker is dispatched. In other words, this responsibility does not apply if the client decides to continue using worker dispatching services for the job. Secondly, fair working conditions are not guaranteed as working conditions are determined between the worker and the client when a contract is offered.[20] Offering fair working conditions should be understood as part of the responsibility. When a client presents unfair working conditions (such as low wages and a possibility of being reassigned to a distant workplace without a justifiable reason), the client should be viewed as not fulfilling the responsibility to start with. Thirdly, dispatched workers will not be provided with adequate support when clients do not fulfill the responsibility.[21] The government should take administrative measures such as guidance and offering advice (see 3.2[4][c] above), but the responsibility in the Worker Dispatching Law is considered the one in a public law, hence workers can only claim damages for the illegal actions of the client company (i.e. damages for the client's failure to offer a labour contract).

The enforcement regulations in the Worker Dispatching Law have been revised, and an additional responsibility has been created for the worker dispatching agency operator requiring them to explain to the client company and to the dispatched worker why they have not enrolled the dispatched worker in social and labour insurance schemes (Article 27-2, Enforcement Regulations of the Worker Dispatching Law). The operator

[19] Hamamura (footnote 1), p. 27.

[20] The same point is made by Nakano. See Nakano (footnote 1), p. 15.

[21] According to Hamamura, workers can also claim damages from clients for defaulting on their responsibility. Although guided by different logic, our views are compatible in that the only form of relief available for workers is financial. Furthermore, it is unlikely there will be a major difference between the two views concerning the allowable amount of compensation. See Hamamura (footnote 1), p. 27.

must make an effort to ensure that there will be parity between the dispatched worker and workers at the client company in respect to social welfare benefits (1999 Ministry of Labour Notification No. 137). When the operator's reasons are insufficient, the client must request that the operator enroll the worker in these public insurance schemes before dispatching the worker. The client company must try to cooperate in these matters by informing the worker dispatching agency operator of the situation at the client company. Furthermore, the client must cooperate as much as possible in the professional education, training and development of the dispatched worker (1999 Ministry of Labour Notification No. 138).

4.3 Expansion of Worker Dispatching: Will It Generate More Employment Opportunities or More Unstable Employment?

As a result of the latest revision, the maximum period a worker can be dispatched has been relaxed, and workers can now be dispatched for manufacturing jobs. More workers are expected to be dispatched as a result of these changes. The question is whether the effects will be positive — more employment opportunities – or negative — destabilization of employment.

Compared to directly-hired and regular employees, dispatched workers overall tend to receive inferior treatment in terms of wages, other working conditions and contract terms (because a limit is placed on them). Therefore, it is difficult to dismiss the possibility that the expansion of dispatched work opportunities will have a destabilizing effect on employment. Since the deregulation policy contained in the latest revision makes it easier for clients to use dispatched workers, there has been concern that this might encourage the replacement of regular workers with dispatched workers.[22]

According to a survey conducted by the MHLW in January 2001, the most common reasons why dispatched workers (those registered with worker dispatching agencies) decided to work as a dispatched worker the first time included "could not find work as a regular employee" (28.8%) and "can choose the contents of work" (27.6%). Disadvantages cited by

[22] Nakajima (footnote 14), p. 391. See also Nakano (footnote 1), p. 5. Nakano stresses the need to prevent the substitution of regular workers with dispatched workers.

these workers included “insecure status and income” (45.8%) and “difficulty in planning for the future” (43.6%).[23] For those who are unable to find work as a regular employee, working as a dispatched worker can be an effective means to secure an employment opportunity and a step toward a future regular job. What is problematic, however, is development of social conditions in which workers are forced to work as a dispatched worker even though they possess the necessary abilities and aptitudes to work as a regular worker.

I believe that unnecessary regulations should be relaxed. Even if the labour market becomes stimulated as a result, it may not necessarily mean that workers of all levels will be able to find suitable jobs and employers will be able to find suitable workers. The revision will allow some dispatched workers to find suitable employment opportunities and clients to secure suitable workers. At the same time, there will be an inevitable increase in the number of workers who are forced to work as dispatched workers and face an unstable employment situation.

[23] The Ministry of Health, Labour and Welfare, “Rodosha Haken Jigyo Jittai Chosa Kekka Hokoku (Report on the Survey of Actual Conditions Concerning Worker Dispatching Enterprises)” (released by the ministry on September 3, 2001).

Career Formation and Balanced Treatment of Part-time Workers: An Examination Focusing on Legal Policy

Michio Tsuchida
Professor, Department of Law, Doshisha University

1. Career Formation of Part-time Workers

Part-time workers refers to those whose scheduled working hours are shorter than those of regular employees. The term "career formation" refers to the formation of professional careers in general, including development of an employee's professional abilities and skills.[1] This article seeks to examine the general direction of legal policy concerning balanced treatment for and the career formation of part-time workers.

Previously, the concept of career formation was generally regarded as irrelevant as far as part-time workers were concerned. In exchange for a high degree of freedom, part-time workers accepted inferior treatment and unstable employment as a member of the peripheral workforce. Career formation was only concerned with policy and institutions for regular employees taking on core duties. However, the number of part-time workers is growing due to the expansion of the service industry and changes in workers' attitudes. According to data for 2002, the number of part-time employees whose weekly scheduled working hours were less than 35 hours was 12.05 million (8.29 million of whom were women), constituting 22.9 percent of the entire employee population (39.3% of the female work force were part-time workers). Essentially, part-time workers have come to constitute an indispensable human resource for companies, and it has become crucial to also support their career formation. If the increase in the number of part-time workers is an irreversible trend, it will be necessary to develop conditions to ensure that part-time employment will come to be regarded as a "desirable employment opportunity" that workers will not view as creating unreasonable disadvantages for them. Promoting the career formation of part-time workers will be indispensable

[1] Concerning the importance of the concept of career in employment policy, see Yasuo Suwa, "Kyariaken no Koso wo Meguru Ichi Shiron (A Treatise concerning the Concept of the Right to a Career)." *Nihon Rodo Kenkyu Zasshi* 468 (1999), p. 54.

in realizing this goal. To this end, voluntary initiatives by labor, management and companies will be of utmost importance, but government policy for fostering such efforts will also be necessary.

Promoting the career formation of part-time workers will bring the following advantages to companies, workers and society. First, in the long run, such a policy will bring business benefits to companies by allowing them to secure improved human resources and enhance businesses efficiency, even though it may result in increased costs in the short run. From the workers' perspective, there is a growing demand for diverse and desirable employment opportunities, especially among female and older workers, and promotion of career development will provide them with an opportunity to improve their abilities and achieve self-realization. The perspective and policy of career formation are quite important also as a tool for reducing the number of *freeters*, so prevalent among today's youth. From the perspective of society as a whole, promoting the career formation of part-time workers will improve employment opportunities qualitatively as well as quantitatively, and enhance economic efficiency and the equity of society. It will also serve as a long-term policy tool for nurturing and supporting the next generation of workers as well as providing an avenue to balance work and one's personal life within the employment system, and secure a workforce to support an aging Japanese society.

In respect to part-time employment, the main agenda is promoting career formation while making part-time work an attractive employment opportunity in its own right. At the same time, it will be also important to encourage conversion from part-time employee to regular employee. No matter how vigorously the career formation of part-time workers is promoted, it is undeniable that companies will invest much more in the career formation of their regular employees than that of part-time workers. This is inevitable given that regular employees play indispensable roles in developing and handing down corporate ideals, strategies, knowledge and skills. One policy goal therefore is creating a bridge between part-time employment and regular employment, the latter of which is a better employment opportunity. This essentially means the setting of a goal to develop the abilities of part-time workers so they can be hired as regular employees (career formation).

On the other hand, it is also necessary to create diversity in employment types for regular employees. Compared to part-time workers, regular employees are placed under a higher degree of constraint, for example, working long hours, while simultaneously enjoying better treatment and stable employment. The problem is not only that part-time workers avoid the working style of traditional regular employees but also that regular employees themselves are increasingly concerned about the imbalance between work and their personal life. The polarization within the employment system between regular employees and non-regular employees seems to be escalating. The issue of diversification of regular employment will be revisited later in this article.

The career formation of workers can take place in companies and in the external market, but when it comes to part-time workers we should mainly think of career development within companies. Traditionally, human resource development policy in Japan placed priority on corporate initiatives and emphasized assistance for corporate in-house on-the-job and off-the-job training. With the transformation of the system of long-term employment, however, career formation measures that target individual workers are being implemented (including measures such as the education and training benefits system, the education and training leave system, and career consulting). However, the first priority should be the facilitation of career formation within companies because career formation and skill development are realized most effectively when they are built into corporate personnel and treatment systems. Part-time workers possess some of the same characteristics of standard employees, more so than other types of non-regular employee (non-typical employee), and it should be important to foster their career formation and skill development within the framework of a corporate employment system. Such a policy, of course, does not mean that part-time workers will be prevented from utilizing skill development opportunities outside their companies according to their individual needs.

2. Career Formation of Part-time Workers Within Companies[2]

When companies have responsibility for the career formation of part-time workers, it is important that they carry out institutional reforms that will accommodate diverse work styles as well as promote career formation that is balanced when compared to that of regular employees. Reforms that help accommodate diverse work styles will create a result that is different from career formation in which the gaps between regular employees and part-time workers continues to widen. However, balancing the career formation of both regular and part-time workers is not advantageous to the company and therefore has the potential of actually reducing employment opportunities for part-time workers.

Steady progress has been made in the field of legal policy concerning the diversification of employment types due to a series of recent revisions to the labor laws. Of particular importance is the relaxation of the regulation dealing with definite-term employment (Article 14 of the Labour Standards Law) as a result of the 2003 revision to the Labour Standards Law, and extension of the allowable period that workers can be dispatched and the lifting of the ban on dispatching workers for manufacturing jobs, both of which came about as a result of the 2003 revision to the Worker Dispatching Law. The revision of the Labour Standards Law in particular strongly impacts part-time workers.

How should career formation policy be approached? The two keywords here are “balance” and “fairness” in personnel management and treatment. It is important to foster the career development of part-time workers while striking a balance between regular employees and part-time workers in

[2] Concerning the issues discussed in this article, see also the Ministry of Health, Labour and Welfare, *Paato Rodo no Genjo to Kadai: Paatotaimu Rodo Kenkyukai Saishu Hokoku* (Present Conditions and Problems concerning Part-time Work: Final Report from the Study Group on Part-time Workers) (2002); Nissei Kiso Kenkyujo, *Tayo de Junan na Hatarakikata wo Sentaku dekiru Koyo Shisutemu no Arikata ni kansuru Kenkyukai Hokokusho* (Study Group Report on an Employment System in Which Workers Can Choose Diverse and Flexible Work Styles) (2002); and Michio Tsuchida, “Kaiko Rodo Joken no Henko Waaku Shearingu — ‘Hatarakikata no Tayoka’ ni muketa Hoteki Senryaku (Dismissals, Alterations of Working Conditions, and Work-sharing: Legal Strategies for ‘Diversification of Work Styles’).” *Doshisha Hogaku* 288 (2002), p. 115.

terms of treatment. It is inevitable that companies will invest differently in the career development of regular and part-time workers. If this gap becomes too extreme, however, the morale of part-time workers will decline, and corporate management will also be negatively affected. Therefore, it is necessary to promote balanced and fair treatment of part-time workers not only in the area of skill development but also in the personnel management system as a whole. It is also important to simultaneously implement measures that encourage part-time workers to become regular employees because regular employment offers a much better opportunity for their career formation. Legally speaking, "equality under the law" embodied in Article 14 of the Constitution becomes the moral foundation of the policy, and the "idea of balance" in the Part-time Work Law — discussed later in this article — is important in terms of part-time workers. After presenting an overview of the present situation and legal regulations concerning part-time workers, the remainder of the article will examine legal policy from the above perspective.

3. Present Situation concerning Part-time Workers

As noted above, the number of part-time workers is growing every year, and recently the number of part-time workers engaged in core and specialized duties nearly identical to those of regular employees ("core part-time workers") is increasing, particularly in the service industry. Moreover, many part-time employees are working as many hours as regular employees ("fulltime part-time workers"), currently constituting roughly 20 percent of all part-time workers. In addition, a great number of part-time workers are employed under indefinite-term contracts (roughly 25% in 2001), and part-time workers display characteristics similar to fulltime workers more so than any other type of non-regular employees. This has led some companies to begin implementing measures to foster the career formation of part-time workers, such as promoting skills development via personnel evaluation and promotion systems, and to consider promoting part-time employees to regular employees. Hence, there are indications that employment management is beginning to take into consideration the question of reaching a balance in treatment between regular employees and

part-time workers.

However, there are notable gaps between regular employees and part-time workers when it comes to wages. According to data for 2002 (*Basic Survey on Wage Structure*, The Ministry of Health, Labour and Welfare), the average hourly wage of part-time women workers was ¥891, 64.9 percent of the wage for regular employees, and ¥1,029 for men, 50.7 percent of the wage for regular employees. Moreover, the gap tends to get wider each year because the wages of regular employees increase at a higher rate than those of part-time workers. Therefore, whether this situation is lawful or not becomes an important legal issue.

4. Legal Regulations concerning Part-time Work

4.1 Application of Labor Laws and Other Regulations

The Labour Standards Law and other labor laws also apply to part-time workers since part-time workers are "workers" as defined by Article 9 of the Labour Standards Law. Regarding employment insurance, however, workers whose weekly scheduled working hours are less than 20 hours are not eligible to join the insurance system while those whose hours are more than 20 but less than 30 are considered "insured part-time workers" and treated differently from standard workers (Item 1-2, Article 6 and Paragraph 3, Article 22 of the Employment Insurance Law). In the area of social security, moreover, workers whose hours are roughly three-quarters or more that of standard workers and who also have a certain level of income are eligible to join the health insurance and welfare pension plans. As far as tax law is concerned, workers whose incomes are below a specified level (¥1.03 million) are not subject to income tax. A spouses is eligible for the spousal exemption and the spousal special exemption if her/his income is below a specified level (¥1.41 million), a situation which has caused the "work adjustment problem," that is, a tendency among part-time workers to curb their work hours so their annual incomes will not exceed the aforementioned specified levels. This is one of the factors hindering wages and career formation of part-time workers.

4.2 The Part-time Work Law

The basic law concerning part-time work is the "Law concerning the Improvement of Employment Management, etc. of Part-time Workers" enacted in 1993 (Law No.76 of 1993; referred to as the "Part-time Work Law" hereafter). The law is administrative policy legislation, and its aim is to allow the state to improve the employment management of part-time workers in areas such as maintenance of proper working conditions and to implement skills development and improvement measures in recognition of the increasing importance of part-time labor (Article 1). Therefore, all legal measures to improve employment are limited to "duties to endeavor" (*doryoku gimu*) and cannot be considered very effective.

The Part-time Work Law applies to "short-time workers" whom it defines as "those whose weekly scheduled working hours are shorter than regular workers employed at the same workplace" (Article 2). Therefore, not only "part-time employees" but also casual workers and *freeters* are regarded as short-time workers and covered by the law as long as their working hours are shorter than those of regular workers. On the other hand, the law does not apply to those whose scheduled working hours equal or exceed those of regular employees ("fulltime part-time workers") even though they may be treated as part-time workers by their employers. This is unfair. The Guidelines of the law stipulate that it is the duty of the employer "to make an effort to provide proper treatment, as with regular employee" for those who are treated differently in terms of treatment and working conditions even though their working hours and professional duties are more or less the same as those of regular employees (3-4, Guidelines).

To achieve its goal, the Part-time Work Law stipulates:

1) The employer's responsibility to improve the employment management of part-time workers (Article 3)
2) The general responsibilities of the government and local public bodies (Article 4)
3) The establishment of basic government policy concerning part-time workers (Article 5)
4) Measures concerning improvement of employment management of part-time workers (Article 6–Article 9)

5) The government's power to request a report from and give advice, guidance and recommendations to employers (Article 10)
6) Special consideration for vocational training provided by the government and other institutions (Article 11) and enhancement of the employment placement service system (Article 12)
7) The establishment of the "Part-time Work Support Center" to conduct surveys and research on part-time workers and to offer seminars to employers (Article 13–).

Stipulations contained in number 4 include the employer's duty (duty to endeavor) to issue a document to the part-time worker concerning his/her working conditions (Article 6), the employer's duty (duty to endeavor) to listen to the views and opinions of a worker representing the majority of part-time workers when drafting or changing work regulations (Article 7), the establishment of guidelines concretely specifying the employer's responsibility to improve employment management stipulated in Article 3 (Article 8), and the employer's duty (duty to endeavor) to appoint an employment manager for part-time workers (Article 9). The Guidelines (Ministry of Health, Labour and Welfare Notification No. 297, 2003) play an important role in clarifying the employer's responsibility as stipulated in number 1 and promoting balanced treatment.

5. Treatment and Working Conditions of Part-time Workers

5.1 Basic Ideal

According to Paragraph 1, Article 3 of the Part-time Work Law, the employer is required to "endeavor to promote effective utilization of the abilities of part-time workers, in due consideration to their actual conditions of employment, and to maintain balance in treatment with regular employees by securing proper working conditions, providing education and training, improving their welfare, and improving other aspects of employment management." Essentially, the Part-time Work Law requires employers to consider a balance between part-time workers and regular employees in determining treatment and working conditions of part-time workers, and this can be called the "idea of balance."[3] In other

[3] See Michio Tsuchida, "Paatotaimu Rodo to 'Kinko no Rinen' (Part-time Work and the 'Idea of Balance')". *Minshoho Zasshi* 119: 4-5 (1999), p. 547 for the "idea of balanced treatment."

words, the basic aim of the law is to ensure proper working conditions for part-time workers by generating a balance between the treatment given to regular employees and the treatment of part-time workers while acknowledging certain differences between them. The law provides important guidelines for promoting balanced treatment and career formation.

5.2 Clear Notification on Working Conditions

Labor disputes involving part-time workers occur often because their working conditions are not clearly specified. For this reason, the Part-time Work Law stipulates that the employer must make an effort to immediately issue a document (employment notice) clearly indicating working hours and other working conditions when hiring a part-time worker (Article 6 of the Part-time Work Law, and 3-1 (1) of the Guidelines). Some parts of these provisions overlap with the provisions concerning the employer's duty to clearly inform the employee of the working conditions that are contained in the Labour Standards Law (Article 15), and the Part-time Work Law therefore does not have particular significance in this respect. But its Guidelines state that the employer must also include information in the employment notice on pay raises, allowances, amount of overtime hours, safety and hygiene, education and training, and leave of absences, and it is in these areas that the law has made an original contribution.

5.3 Work Regulations

The employer is allowed to establish work regulations for part-time workers that are different from those for regular employees. The Guidelines also stipulates that the employer has a responsibility to establish work regulations for part-time workers (3-1(2) of the Guidelines). The failure to establish work regulations for part-time workers, if the work regulations for regular employees are not being applied, is a violation of the provision on the duty to establish work conditions as set forth in the Labour Standards Law.

Moreover, the employer must endeavor to listen to the opinions of a worker representing the majority of the part-time workers at the workplace when establishing or altering work regulations for part-time workers

(Article 7 of the Part-time Work Law and 3-1 (2) of the Guidelines). The provision seeks to allow the views and opinions of part-time workers to be reflected in work regulations as their working conditions and interests differ from those of regular employees.

5.4 Wages

a) The biggest issue concerning part-time workers is to what extent the gaps that exist between them and regular employees in the economic areas, such as wages and allowances, are legal. As noted above, there exist notable wage gaps between part-time workers and regular employees. The issue of the legality of the difference in wages is particularly problematic for part-time workers engaged in duties that are identical or similar to those of regular employees (core part-time workers) and part-time workers who work the same number of scheduled hours as regular employees (fulltime part-time workers). In this case, the question is whether such gaps constitute discrimination based on one's "social status," which is prohibited by Article 14 of the Constitution (concerning equality) and Article 3 of the Labour Standards Law, which deal with equal treatment. Conventional view does not recognize the applicability of "social status" in this situation, arguing that "social status" refers to hereditary positions and not positions that are acquired, such as job status.[4]

b) Another academic view takes the principle of "the same wage for the same work of the same value," predominant in Continental European countries, to argue that wages gaps are unlawful. According to this view, this principle corresponds to the public order provision (Article 90 of the Civil Code), and discriminating in wages against part-time workers who offer labor of the same value as regular employees is a violation of the public order provision and therefore illegal.[5] However, in Japan there is no

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[4] Kazuo Sugeno, *Rodoho Dai 6 Pan* (Labor Law, Sixth Edition) (Kobundo, 2003), p. 149.

[5] See Mutsuko Asakura, "Paatotaimu Rodo to Kinto Taigu Gensoku (Part-time Work and the Principle of Equal Treatment)." *Rodo Horitsu Junpo* 1387 (1996), p. 45; and Shozo Yamada, "Paatotaimaa ni taisuru Kinto Taigu Gensoku (Principle of Equal Treatment for Part-time Workers)." *Rodoho* 90 (19), p. 92. It has also been argued that the "principle of the same wage for the same responsibility" should be applied to part-time workers who have responsibilities (degree of required commitment to their companies) as well as duties that are identical to those of regular employees and, that the wage gaps between them and regular employees are unlawful. See Yuichiro Mizumachi, *Paatotaimu Rodo no Horitsu Seisaku* (Yuhikaku, 1997), p. 234.

standardized occupation-based wage system cutting across different companies, which is often seen in Europe, and wages are determined by a variety of factors such as age, length of service, professional duties, education and contribution to the company. It therefore seems difficult to interpret the principle of the same wage for the same work of the same value as corresponding to the public order provision, which is a universal legal norm.[6] In terms of international labor standards, a provision of ILO Convention 175 (1994) guarantees part-time workers wages that are proportionately calculated on the basic wages of comparable fulltime workers (Article 5). Those who argue that the wage gap is legal focus on the introduction of this provision, but it is doubtful that strong legal intervention based on this provision — without regard to the difference in labor markets — will work effectively. Furthermore, part-time workers and regular employees often have different levels of responsibility and constraint (freedom to decide working hours, obligation to work overtime, acceptance of personnel changes, and so on) even when engaged in the same duties. The wisdom of arguing for the same wages for both types of workers while ignoring this difference is questionable.

On the other hand, there are some who argue that wage gaps are legal, noting that those who argue that wage gaps are illegal lack a legal basis. They propose that correction of the gaps should be left to the market and self-governance by labor and management.[7] However, this argument seems to be dismissive of the fact that the existing Part-time Work Law is based on the "idea of balance." As a matter of fact, leaving the problem up to the market and self-governance by labor and management has resulted in widening differences in treatment in general. This situation is problematic from the perspective of the "idea of balance." Another problem with the argument put forward by those who believe that the wage gap is legal — that it can be corrected through collective self-governance by labor and management — is that the majority of part-time workers do not (or cannot) belong to a union. Hence, in my view, a certain degree of policy response

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[6] For the same view, see Kazuo Sugeno and Yasuo Suwa, "Paatotaimu Rodo to Kinto Taigu Gensoku (Part-time Work and the Principle of Equal Treatment)." *Gendai Yoroppa Ho no Tenbo* (Survey of Modern European Law) (Tokyo Daigaku Shuppankai, 1998), p. 131.

[7] Refer to Sugeno and Suwa (cited in footnote 6), p. 129-. The *Nihon Yubin Teiso* case, Osaka District Court, May 22, 2002, *Hanji* No. 830, p. 22 is an example of a similar judicial case.

is required.

c) Instead of making such polarized arguments, I have stressed the importance of striking a balance between the treatment of part-time workers and regular employees.[8] As noted above, Article 3 of the Part-time Work Law stipulates that the "idea of balance" is its overarching goal. According to this idea, companies are allowed to differentiate between part-time workers and regular employees in accordance with the level of responsibility and time constraints for each type of worker, but, at the same time, gaps must be limited to a rationally justifiable degree. The "idea of balance" is, to be sure, only a duty to endeavor, but it is still possible to interpret the idea as corresponding to the public order provision (Article 90 of the Civil Code) and to regard tremendous gaps in working conditions between part-time workers and regular employees as a tort in violation of the public order provision (Article 709 of the Civil Code). In other words, if a gap between regular employees and part-time workers engaged in work that is identical in terms of quality and quantity develops to a socially unacceptable degree, it is appropriate to interpret such a situation as a tort in violation of the public order provision based on the "idea of balance." Of course, what the "idea of balance" guarantees is *balanced* wages between regular employees and part-time workers. Therefore, not all wage gaps should be considered illegal, and differences according to degrees of constraint (involving factors such as the recruitment process, freedom to choose working hours, obligation to accept personnel changes, work overtime, and so on) are permitted.

There is a judicial precedent which corresponds to my view, the Maruko Alarms Case.[9] This case was fought over whether wage gaps (more than 33% at the largest) between regular employees and part-time workers (definite-term employees) engaged in the same type of duties for nearly the

[8] See Tsuchida (cited in footnote 3), p. 563- and Tsuchida (cited in footnote 2), p. 135. Although similar to my discussions in its conclusion, Yoichi Shimada's "Koyo Shugyo Keitai no Tayoka to Horitsu Mondai (Diversification of Employment and Work Styles and Legal Problems)" *Jiyu to Seigi* 51:12 (2000), p. 86 more succinctly argues that excessive wage gaps between part-time workers and regular workers are a violation of the part-time worker's right to receive equal treatment concerning wages and hence is unlawful.

[9] The *Maruko Keiho Kiki* case, Ueda Branch, Nagano District Court, March 15, 1996, *Rohan* No. 690, p. 32.

same length of time at the same assembly lines were lawful. While rejecting the principle of the same wage for the same work of the same value, the court held that the idea of equal treatment upon which the principle is based corresponded to the public order provision. Based on this, the court ruled that it was a violation of the public order provision if wages of part-time workers were less than 80 percent of those of regular employees who had worked for the same number of years. The court found the employer liable for damages for the difference between the actual wages of the part-time workers and roughly 80 percent of the regular employees' wages. This can be seen as an example of a court ruling that emphasizes a balance between treatment of regular employees and that of part-time workers.

5.5 Working Hours and Annual Paid Holidays

Many workers choose part-time work because it gives them a large degree of freedom to match their working hours and individual situation. The Guidelines, therefore, require that the employer give adequate consideration to the situation of part-time workers when establishing and changing work hours and workdays and to avoid demanding that they work outside their scheduled working hours and workdays (3-1 (3) of the Guidelines). In terms of legal interpretation also, an employer should not change the work hours of a part-time worker nor demand he/she work overtime or on holidays without the worker's consent, unless there is a specific stipulation. Even when such a special stipulation exists, the employer should consider the individual circumstances of the part-time worker as stipulated in the Guidelines, and employers who order workers to work overtime and on holidays without such consideration will be considered as abusing their right. Moreover, when demanding that part-timers work overtime or on holidays, employers are required to offer them balanced treatment that is appropriate to the work they will do. Currently, a legal policy discussion is under way regarding the obligation of the employer to pay the equivalent of the increased wages for statutory overtime when part-time workers engage in work outside their scheduled working hours (Article 37 of the Labour Standards Law).[10]

[10] Ministry of Health, Labour and Welfare, *Shigoto to Seikatsu no Chowa ni kansuru Kento Kaigi Hokokusho* (Study Group Report on Balancing Work and Life) (2004).

Unlike other working conditions, there is a provision concerning annual paid holidays in the Labour Standards Law, according to which the employer is required to give statutory annual holidays that are proportionately calculated for part-time workers with fewer scheduled workdays (Paragraph 3, Article 39).

5. 6 Dismissals and Non-renewal of Contracts

a) Regulations on non-renewal of contracts

In principle, when a part-time worker is employed under a definite-term contract, his/her contract will expire when the term ends. However, if there is reasonable ground for a worker to expect continued employment, for example if his/her contract has been renewed repeatedly, when the contract is not renewed, it will be possible to apply the regulation dealing with abuse of the right of dismissal. In this case, the employer must provide a rational explanation as to why the contract was not renewed. What constitutes a rational explanation for not renewing a contract is more loosely defined for part-time workers than for regular employees, who are employed under indefinite-term contracts, but the employer is still required to make an effort to avoid non-renewals of contracts of part-time workers under certain conditions.[11] Moreover, the Guidelines require the employer to stipulate the longest possible contract term — within a one year limit — for part-time workers who have been employed for more than a year because their contract has been continually renewed, and to give 30 days notice if the contract will not be renewed (2-1 (5) of the Guidelines).

b) Regulations concerning dismissals

The regulation on abuse of the right of dismissal (Article 18-2 of the Labour Standards Law) is applied in the same manner to regular employees and to part-time workers employed under indefinite-term contracts, and dismissing these workers requires an objectively rational explanation. In this case too, what constitutes a rational explanation for dismissal is defined more loosely for part-time workers. However, when the working hours of part-time workers is identical to those of regular employees and they have worked under indefinite-term contracts for many years,

[11] The *Zenkoku Shakai Hoken Kyokai Rengokai* case, Kyoto District Court, September 10, 2001, *Rohan* No. 818, p. 35 ruled against the non-renewal of a contract.

dismissals of these workers will be regulated more strictly in accordance with the degree to which they can reasonably expect continued employment.[12] Moreover, the provisions concerning dismissals (Article 19), dismissal notification (Article 29) and notification of retirement (Article 22) of the Labour Standards Law also apply to these workers.

5.7 Skills Development and Promotion to Regular Employee

In promoting balanced treatment of part-time workers, it is important to provide them with opportunities to develop their skills, and core part-time workers and fulltime part-time workers are demanding the opportunity to be promoted to regular employee. To address this issue, the Guidelines require that employers not only provide opportunities for part-time workers to receive education, training and skills development (3-2 (1)), but also to give priority to part-time workers, in terms of access to information and application opportunities, when hiring regular employees (3-2 (6)). The revised 2003 Guidelines will be discussed in the next section.

6. Legal Policy concerning Part-time Work

6.1 Study Group Report on Part-time Workers and the Revised Guidelines

The existing legal policy concerning career formation and balanced treatment of part-time workers has been discussed above, and, as argued at the onset of this article, and moving forward on this issue is a task for the future. As discussed above also, it is necessary to promote measures that encourage part-time workers to become regular employees while maintaining the position that part-time work is a desirable employment opportunity when tackling this task. Based on such an understanding, the "Study Group on Part-time Workers" within the Ministry of Health, Labour and Welfare issued its final report entitled *Problems concerning Part-time Work and Direction of Response (Final Report of the Study Group on Part-time Workers)* in July 2002. Based on this report, the following section of the article will examine problems concerning legal policy.

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[12] There is a case in which the court ruled that a dismissal of a part-time English-language typist was a case of abuse of the right of dismissal. See the *Wakita* case, Osaka District Court, December 1, 2000, *Rohan* No. 808, p. 77.

The final report proposes "rules on Japanese-style balanced treatment" for part-time workers, rules that are based on the "idea of balance." They require that the "principle of equal treatment" be applied to part-time workers who are engaged in duties identical to those of regular employees and who are employed under the same career management schemes (professional responsibilities and functions, freedom to determine working hours, and extent and frequency of personnel moves). At the same time, the rules also stipulate that the employer has a "duty to consider the balanced treatment" of part-time workers who are engaged in duties identical to those of regular employees but who are employed under different employment management schemes. However, both stipulations are not intended to require balanced and equal treatment of part-time workers in a uniform fashion. The main objective of the principle of equal treatment is to devise similar methods for determining the treatment of part-time workers with that of regular employees, and the duty to consider balanced treatment means that employers should implement various measures with the goal of achieving the balanced treatment of part-time workers. In this sense, these are rules for promoting initiatives by labor, management and companies, and they can be regarded as an example of Japanese-style soft-law regulations. In terms of specific measures, the rules recommend the introduction of performance-based personnel management and treatment for part-time workers, the creation of employment types that fall between regular employment and part-time employment such as "part-time regular employees" and guarantee the mobility among different employment types, and the participation of part-time workers when making decisions abouttheir treatment. By inducing companies to implement such measures, the rules aim to promote equal and balanced treatment of part-time workers. As mentioned, the focus of labor policy for part-time workers should be "balanced treatment" with regular employees, and this should be achieved through rules that support the independent initiatives of companies, labor and management rather than forceful legal intervention into the labor market. From this standpoint, the rules seem appropriate.

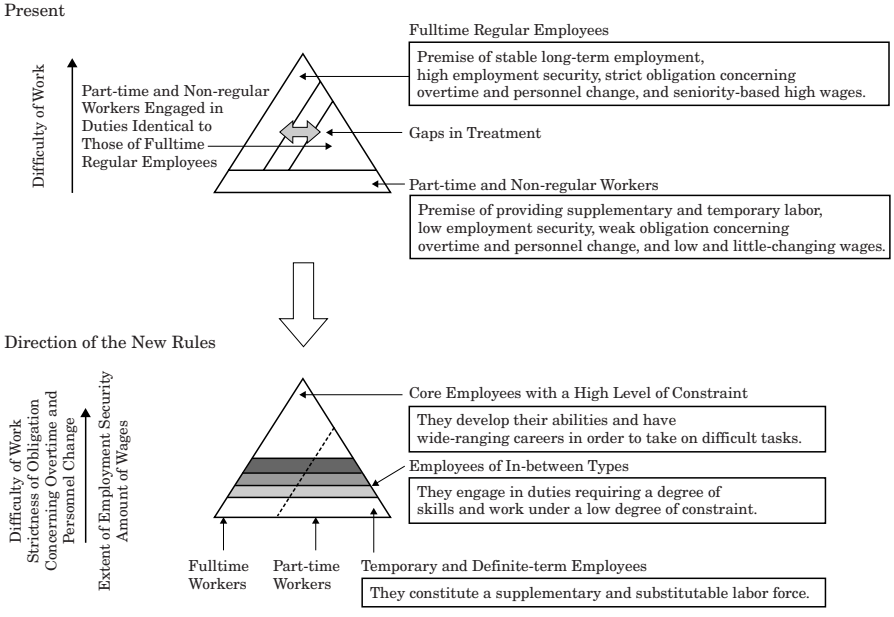
The Guidelines were subsequently revised in 2003 following discussions in the Labor Policy Council's Subcommittee on Employment Equality. The revision reflects much of the final report discussed above. In

terms of basic rules, the revised Guidelines require that the employer maintain a balance in treatment between regular employees and part-time workers who are engaged in the same duties and employed under the same career management schemes and conditions by standardizing the methods used to determine their treatment. As for those employed under different employment management schemes and conditions, the Guidelines stipulate that the employer must try to maintain balanced treatment for part-time workers by basing their treatment according to the individual worker's ability, experience and performance (2 of the revised Guidelines). In term of specific rules to secure balanced treatment, the revised Guidelines lay out the following:

1) The employer should make arrangements to facilitate the conversion from part-time employment to regular employment, such as establishing a regular employee conversion program, skills development for conversion, and provision of pertinent information (3-2 (7)).
2) The employer should implement measures such as applying promotions, pay raises and personal evaluation systems to part-time workers to match their treatment to that of regular employees according to duty, willingness, experience and performance (3-3).
3) The employer should devise mechanisms to facilitate discussion between labor and management to deal with such matters as explaining treatment, listening to opinions, and handling complaints (3-5).

Hence, recommendations contained in the *Final Report of the Study Group on Part-time Workers* are reflected in the revised Guidelines, but the Guidelines have failed to adequately incorporate the *Final Report's* recommendation to develop a diversified employment system (creating an intermediate type of employee). The *Final Report* recommends the development of a pluralistic employment system as a way to achieve the balanced treatment of and career formation for part-time workers, and proposes to transcend the current employment system based the traditional dichotomy with part-time workers/non-regular employees playing only supplementary roles vs. fulltime regular employees. The report envisions "in-between" employees to be those who are "engaged in duties requiring a certain degree of skill but placed under a lower degree of constraint," and cites part-time regular employees, employees whose areas of employment

Figure 1. Pluralizing the Employment System (Conceptual Diagrams of Corporate Employment Management)



1 Pluralistic systems concerning employment security, levels of constraint (such as overtime and personnel change), and wages/ treatment will be created.
Choices for workers will be expanded, and employment flexibility of companies will be increased.
2 Fulltime employees preferring a low level of constraint and part-time employees engaged in core duties will constitute employees of in-between types.
3 Regardless of part-time or fulltime, methods for determining treatment of employees concerning overtime and personnel change will be standardized by, for example, using the same wage chart.
4 A balance in treatment will be maintained even among employees of different types.

Source: "Career formation of part-time workers and balanced treatment" Figure 32

are stipulated, and core part-time workers as examples of such in-between types of employee.

Such a policy should be significant from the standpoint of achieving the balanced treatment of and career formation for part-time workers. Regarding the balanced treatment of part-time workers, the policy would facilitate treatment and career formation for part-time workers that would match different individual circumstances by creating varying employment types, including for regular employees.

In particular, the policy would contribute to the career formation of core part-time workers as it would situate them as "in-between" type employees and facilitate the development of evaluation, treatment and skill development systems that are appropriate for this position. In fact, many companies that actively utilize part-time workers are creating detailed employment management classification systems for them, utilizing systematic personnel evaluation and qualification systems, and actively supporting their skills development. Recent studies also show that companies which conduct meticulous personnel management by classifying employees into various employment types tend to maintain a better balanced treatment for part-time workers,[13] and such methods are bringing positive results to their business performance.[14] Therefore, when promoting career formation for part-time workers it is necessary to devise a comprehensive personnel management system combining evaluation, wage and treatment as well as skill development systems, and to achieve balanced treatment. Regarding diversification of employee types, promoting balanced treatment not only between part-time workers and regular employees but also among part-time workers who are classified differently according to employment type will be an important policy issue.[15]

This policy would also be effective in encouraging conversion of part-

[13] Hiroki Sato, Yoshihide Sano, and Hiromi Hara, "Koyo Kubun no Tagenka to Jinji Kanri no Kadai (Pluralizing of Employment Types and Problems for Personnel Management)." *Nihon Rodo Kenkyu Zasshi* 518 (2003), p. 31.

[14] Maeko Nishimoto and Koichiro Imano, "Paato wo Chushin ni shita Hiseishain no Kinko Shogu to Keiei Pafomansu (Balanced Treatment for Non-regular Workers Focusing on Part-time Employees and Business Performance)." *Nihon Rodo Kenkyu Zasshi* 518 (2003), p. 47.

[15] Sato, Sano, and Hara (cited in footnote 13), p. 45.

time employees to regular employees. Because regular employment offers better employment opportunities from the standpoint of developing a worker's career, developing a route to regular employment for part-time workers is important. However, if regular employment were limited to fulltime regular employment with a high degree of constraint, the notion be becoming a regular employee would only be "pie in the sky" as both employers and part-time workers would be hesitant to commit under such a condition. It is possible to encourage part-time workers to become regular employees more easily and to increase their conversions to regular employee by incorporating various types of workers into the category of in-between type of employees and creating various forms of employment for regular employees.[16] This would also support the creation of a mechanism in which workers could move continuously among the varying forms of work styles in accordance with their different life stages.[17] Regarding the issue of diversification of regular employment, it is important to consider various types of in-between employees, such as home-based workers, workers with flexibility concerning discretionary labor, and regular employees with definite-term contracts as well as the aforementioned part-term regular employees, employees with specified areas of employment, and employees with specified duties.[18]

In moving forward with such a policy, it is also important to take measures that would make the hiring of regular employees attractive for companies. The key concept in this case is achieving a balance in treatment among various types of regular employees. Just as in the case of balancing treatment between part-time workers and regular employees, maintaining reasonable differences between regular employees with a low constraint (regular employees with in-between status) and fulltime regular employees is permissible and lawful, and companies should be allowed to do so in order to reduce their excess costs. Because regular employment will take various forms, however, carefully considering the correct balanced treatment for each type of regular employee is necessary.

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[16] Norio Hisamoto, *Seishain Runessansu* (Renaissance for Regular Employees) (Chuo Koronshinsha, 2003) advocates the promotion of career formation based on a "diverse regular employee" model.

[17] The example of Daiei is well known for introducing such mechanisms. *See Rosei Jiho* 3551 (2003), p. 3.

[18] Concerning this point, discussions in *Shigoto to Seikatsu no Chowa ni kansuru Kento Kaigi Hokokusho* (Study Group Report on Balancing Work and Life) is useful.

6.2 Direction of Legal Regulations

The *Final Report* suggests incorporating a general legal norm (the idea of balance) into the Part-time Work Law that can be used as a basis for the rules governing Japanese-style balanced treatment, but this suggestion is not included in the revised Guidelines. However, promotion of balanced treatment and career formation for part-time workers is a desirable goal for workers, companies and society as a whole, and now is the time to stipulate it as a basic norm in the Part-time Work Law. Of course, actual activities for realizing balanced treatment should be left to the initiatives of labor, management and companies, and the Guidelines should only support them. Nevertheless, it is necessary to establish a clear norm in the Part-time Work Law in order to promote such activities, and this is a matter that needs to be urgently addressed.

6.3 Other Issues

The problem with part-time labor contracts not being renewed has already been discussed. It is possible that the anxiety and disputes related to part-time workers under definite-term contracts are reducing their incentive to take on a career. The 2003 revision of Article 14 of the Labour Standards Law set standards for concluding, renewing and not renewing definite-term labor contracts, and the government is to provide advice and recommendations (Paragraph 2 and 3, Article 14 of the Labour Standards Law). The core of this change is the requirement that the employer clearly present “standards for deciding to renew or not renew” a definite-term labor contract (Ministry of Health, Labor and Welfare Notification No. 357, October 22, 2003). Companies will be required to establish these standards in a clear fashion and to provide explanations.

As previously mentioned, part-time workers are treated differently in the tax and social insurance systems and this contributes to the problem of work adjustment among part-time workers. It is necessary to modify these systems as well into systems that will be fair for all working styles and to remove barriers that prevent the career formation of part-time workers while promoting the balanced treatment of and career formation for part-time workers within companies.

Working Hour Schemes for White-Collar Employees in Japan

Yoichi Shimada
Professor, Waseda University

1. Introduction

Currently in Japan, regulations concerning the working hours of white-collar employees have come under scrutiny. As the performance-based wage system is being more widely applied to white-collar workers, there are increasing calls to revise the linkage between working hours and wage determination, a policy that is prevalent under conventional human resource management. One typical example is the request to adopt a "white-collar exemption scheme" whereby white-collar workers would be exempt from coverage offered by regulations on working hours under the Labour Standards Law.

However, there are certain factors which should cause one to hesitate before moving towards such an exclusion. Although official statistics show that total annual working hours have decreased —— to 1,837 hours in 2002 —unpaid overtime (the infamous so-called "service overtime") has again become a focus of attention, mostly due to the spread of the self-declaration system in the management of working hour and the management scheme known as total labor expenses.[1]

To deal with this state of affairs, the Ministry of Health, Labour and Welfare in 2001 published "criteria for measures that employers should take to gain a proper grasp of working hours (Labour Standards Bureau Notification [*kihatsu*] No. 339, April 6, 2001)," and put supervision and guidance concerning unpaid overtime at the top of their priority list. As a result, in 2002, the number of cases heard by Labour Standards Inspection Bureaus in which they called for unpaid overtime to be paid more than doubled in a 10 year period, marking a record high of approximately 17,000 cases. At the same time, similar cases sent to the Public

[1] According to the Japan Productivity Center for Socio-Economic Development (2002), for example, 63.3% of the heads of personnel departments who were queried, and 51.1% of managers in departments responsible for production lines answered, "I feel that our workers do 'service overtime'."

Prosecutor's Office reportedly totaled 49 (an increase of 15 over the previous year).[2]

According to the Ministry of Health, Labour and Welfare, between October 2002 and March 2003, firms where the amount of unpaid overtime exceeded ¥1 million numbered 403, the total amount of unpaid overtime standing at ¥7.23899 billion.[3] Accordingly, on May 23, 2003, the ministry issued an "Outline for Comprehensive Measures against Unpaid Overtime," in which it drew up guidelines for measures to be taken to eliminate unpaid overtime.

Hesitation to exclude white-collar workers from regulations on working hours does not entirely stem from the issue of unpaid wages. It is also attributable to the claim that white-collar employees work excessively long hours. Labor economist Yuji Genda notes that with the prolonged recession, cutbacks in new hiring and an increase in the amount of everyday work tend to increase the proportion of workers who work 60 hours or more per week, particularly young workers in large firms.[4] Meanwhile, a survey by the Ministry of Health, Labour and Welfare indicates that the rate of taking paid-holidays has been decreasing since 1997, falling as low as 48.4 percent in 2002.[5] The rate is lower than that marked in 1988, which was 50 percent, when regulations on working hours were drastically revised. These facts undoubtedly convey the severe working conditions affecting today's white-collar workers. Kazuo Sugeno, a leading expert on labor law, has said that this situation "Appears to give the impression that in regard to working hours, we are facing a new problem that is once again rooted in the long-term employment system."[6]

Taking the situation as described above, it seems that the current system concerning working hours is inappropriate when applied to white-collar workers, and thus certainly needs revision. At the same time, however, one cannot simply conclude that it is sensible to exclude such workers from regulations on working hours. The question is, what is the ideal form that regulations on working hours should take when applied to white-collar

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[2] *Nihon Keizai Shimbun*, July 28, 2003.

[3] An announcement on November 28, 2003, by the Ministry of Health, Labour and Welfare. (http://www.mhlw.go.jp/houdou/2003/11/h1128-2.html)

[4] See Genda (2001), pp.132-138.

[5] http://wwwdbtk.mhlw.go.jp/toukei/youran/indexyr_d.html

[6] See Sugeno (2002), p. 201

workers.

This article surveys how white-collar workers have been treated within the framework of working hour regulations, taking into consideration whether legal controls on working hours are necessary for white-collar workers in the 21st century, and, if so, what kind of legal framework is required. Bearing these questions in mind, Section 2 reviews previous regulations on working hours, and how they were applied to white-collar workers, while Section 3 discusses the special characteristics of white-collar workers and suitable forms of regulations on working hours. Finally, Section 4 makes some suggestions for the ideal forms that regulations on working hours for white-collar workers should take.

Incidentally, there is no legally defined term for "white-collar." This article, therefore, relies on the occupational classification used in the 2000 Population Census in Japan, and tentatively considers "professional and technical workers" (13.5%), "managers and officials" (2.9%), "clerical and related workers" (19.2%), and "sales workers" as white-collar workers (15.1%).[7] Using this definition, white-collar workers account for 50.7 percent of all employed people.

2. Previous Legal Structures concerning Working Hours and Treatment of White-collar Workers

2.1 Enactment of the Labour Standards Law

Japan adopted Continental methods of regulations on working hours, as seen in ILO Conventions. The current Labour Standards Law, enacted in 1947, defines legal working hours and obliges employers to observe them, with punitive provisions. However, in Japan the working hours scheme also embodies a mechanism that substantially eases the strictness of the law; a relatively simply procedure makes it possible for employers to resort to extra-legal working hours. An employer is lawfully allowed to take advantage of overtime work if he/she has a written agreement with the representative of a majority of the employees[8] (the so-called "36

[7] This definition is adopted by a leading expert on the study on white-collar labor, Atsushi Sato (2001), p. 19.

[8] If there is a labor union consisting of more than an absolute majority of employees as a whole, it serves as a representative of the employees; otherwise, people who represent more than an absolute

Agreement"), and reports this to the responsible administrative authority (Clause 1, Article 36 of the Labour Standards Laws). The pay rate for extra-legal working hours was set at 25 percent of legal working hours, lower than international standards due to the economic situation in Japan at the time.[9] In addition, since there was no legal ceiling on overtime hours, as long as the "36 Agreement" was concluded, it was possible for employers to flexibly take advantage of overtime hours. The temporary, provisional aspect of overtime work was not highly respected, either institutionally or in practice.[10]

In legislating legal working hours under the Labour Standards Law, a flexible concept of overtime work was embodied from the beginning. According to Hirosaku Teramoto — who was then, as a bureaucrat, involved in the enactment of the law —it was understood that the eight-hour work system, the international labor standard at the time, was not only intended to protect the life and health of workers but also incorporated aspects to secure leisure time and cultural welfare. But at that time Japan had not reached the point where Japanese workers consciously expected leisure in their lives, so it seemed reasonable to adopt a "soft" working hour system" which flexibly allowed for overtime, rather than adopting ILO Convention No. 1 (1919) or other strict systems ("hard" working hour systems).[11]

How were white-collar workers treated at the time the Labour Standards Law was enacted? While factory workers and other typical workers conformed to this legally defined system which emphasized regulations on actual working hours, there were some who called for the exclusion of or for different treatment for white-collar workers with regard to working hours. Apparently bureaucrats involved in the enactment of the Labour Standards Law intended that white-collar workers be subject to the

majority of employees do so (Article 36 of the Labour Standards Law).

[9] The current Labour Standards Law was revised slightly in this respect in 1993, stipulating that extra payment for non-legally defined working hours should be set within the range of 25% to 50% of payment for legally-defined working hours. However, Government Ordinance No. 5 (January 4, 1994) set the rate of overtime pay at no more than 25%, and the rate for work done on days-off at no more than 35%.

[10] See Shimada (1999), pp. 42-44.

[11] See Teramoto (1952), pp. 297-298.

regulations laid down in the law, but that they should be exempt from the scope of the regulations concerning working hours.[12] Also, initially civil servants engaged in clerical work were to be excluded from coverage offered the Labour Standards Law. The reason behind these moves was the commonly held belief that before the war white-collar workers were treated better than blue-collar workers, and that the working style of the former was not compatible with regulations on working hours designed for the latter. But this was opposed by the workers, and eventually the Labour Standards Law was enacted with the following provisions concerning white-collar workers.

Civil servants, who accounted for a majority of white-collar workers at the time, would not be excluded from coverage under the Labour Standards Law but would be required to work overtime without a "36 Agreement" (Clause 3 of Article 33),[13] and that senior white-collar workers would be excluded from application of the regulation on working hours (Clause 2 of Article 41).[14] At the same time, in implementing sections of the law it was decided that hours worked outside the workplace would be considered scheduled working hours (Article 22 of the old version of the Enforcement Regulations of the Law).[15] This made it possible to partially exempt sales activities and other work conducted outside the workplace from the regulation on actual working hours. Other than this, ordinary salaried employees were fully subject to the regulation.

2.2 Major Reforms to the Legal Structure of Working Hours and White-collar Workers

Subsequently, during the period of the high economic growth starting in the 1960s and ending in the mid-1970s, the pattern of working hours of white-collar workers remained outside serious discussion. This seems to be

[12] In a draft of the Labour Standards Law, workers engaged in office work were excluded from coverage offered by regulations on working hours (Article 39 of the draft). For details, see Yamamoto (1992), pp. 83-88 and Yamamoto (1994), pp. 221-.

[13] However, national civil servants are exempt from application of the Labour Standards Law under Article 16 of the supplementary provision of the National Civil Service Law.

[14] Article 41 of the Labour Standards Law excludes application of the regulations on working hours and holidays law, but does not exclude application of the regulations on annual paid holidays and night work.

[15] For this, see Yamamoto (1994), p. 217 and in particular p. 221 ff.

attributable to the fact that such workers were privileged compared to other types of workers during a period of affluence. At the same time, since overtime was not strictly regulated, there was not much room to voice critical opinions concerning the working hours of either factory and other standard workers or of non-standard, including white-collar, workers. This also prevented the issue from coming to the surface.

In the 1980s, when tertiary industry became the dominate force in the economy, the number of white-collar workers increased, and debates over their productivity heated up. Around the same time, in response to international criticism,[16] there was an attempt to reduce the number of hours worked. This pushed the issue of the number of hours white-collar employees worked to the fore. To heighten the productivity of these workers while promoting shorter working hours, it was decided that ordinary schemes for working hours would no longer by applied to white collar workers. This required a break in the link between working hours and wage level. In the series of major reforms to the legal structure of working hours starting in 1987, legally defined weekly working hours were reduced from 48 to 40 hours, but various adjustment schemes were introduced, such as varied working hours calculated on an annual basis (Article 32-4), a flex-time scheme (Article 32-3), a discretionary work scheme (Article 38-3 and 38-4); and others. Regulations on working hours conducted outside the workplace were brought into the Labour Standards Law (Article 38-2). To some extent these revisions provided answers to the issue of the working hours of white-collar workers.

2.3 Current Legal Structures concerning Working Hours and Management of White-collar Working Hours

This section outlines the functions of the current scheme for working hours which is institutionalized in response to the special nature of white-collar workers; and their limitations.

[16] The Japanese economy quickly absorbed the damage arising from the first oil shock and from the latter half of the 1970s began to strengthen its global competitiveness, in response to which criticism heightened in the U.S. and European countries, claiming that longer working hours in Japan represented unfair competition. In fact, an individual's total annual actual working hours in the first half of the 1980s in Japan exceeded 2,100 hours, 200 to 600 hours more than the figure for workers in other advanced countries.

1) Managers and supervisors are excluded from coverage of the legal structure of working hours

No. 2 of Article 41 of the Labour Standards Law, which has existed since the law was enacted, is an exact reproduction of Article 2-(a) of ILO Convention No. 1 which stipulates that the eight-hour workday is standard. However, it does not contain regulations requiring special procedures, whereas No. 3 of the same article states that administrative permission is needed to exclude workers from the legal restrictions on working hours if they are engaged in supervising, intermittent work. Even so, the regulation simply refers to "those who are in a position to supervise or manage," and does not clearly define what this means. The equating of those who "supervise or manage" with workers in managerial posts at ordinary firms together with the prevalent view that those in managerial posts should not be paid overtime are to a large extent responsible for this oversimplified regulation.[17]

According to administrative notices (Minister's Notification *[hatsuki]* No. 17, September 13, 1947, Labour Standards Bureau Notification *[kihatsu]* No. 150, March 14, 1988, among others),[18] "those who supervise or manage" are defined in general as directors-general, department directors, factory directors and other workers who are the equivalent of management executives in terms of decision-making on labor conditions and other aspects of human resource management. On the other hand, the scope of workers who are allowed to be excluded from this regulation is confined to those who have important duties and responsibilities which essentially require work engagement exceeding the regulation on working hours, and thus whose actual working conditions are not in agreement with the regulation on working hours. In addition, the treatment of such workers is taken into account. Specifically, consideration is given to whether regular remuneration, executive allowance, and other treatment is appropriate to the position; whether there should be preferential treatment in the rate of bonus payments and other factors; and so on. However, the

[17] For an analysis of court cases related to "those who supervise or manage" see Yamamoto (1992) pp. 90-93. Since problems related to this issue arise frequently in financial institutions where there are quite a few white-collar workers, a special administrative notice was released (Labour Standards Bureau Notification [*kihatsu*] No. 105, February 28, 1977).

[18] For a detailed analysis on administrative notices, see Yamamoto (1992), pp. 88-90 of.

administrative notices do not necessarily make clear whether these criteria for treatment are required when judging if the workers in question fall in the category of supervising or managing.[19]

The term "those who supervise or manage" originally referred to managers on production lines. Currently, however, there is an increasing number of back-office staff whose job did not exist when the Labour Standards Law was enacted. These workers are equivalent to supervisors and managers in terms of professional qualification rank in their firms, but do not possess a job title suggesting managerial work for line production. An administrative notice (Labour Standards Bureau Notification *[kihatsu]* No. 150, March 14, 1988) indicates that these back-office workers are also, like supervisors or managers, eligible to be exempt from coverage of regulations on working hours. But here, too, the difference between back-office workers and white-collar workers who are subject to the planning-type discretionary work system, is not necessarily clear.

2) Flexible working hour scheme and white-collar workers

This section views the functions, within management of working hours for white-collar workers, of the flexible working-hour scheme established after 1987 in the course of other reforms concerning the legal structure of work hours, and the limitations of the scheme.

(i) Flex-time

Flex-time is a "scheme which does not rigidly fix the starting and ending times of the business day, but defines a certain number of hours to be worked (total hours of work) within a certain period — a period shorter than one accounting month — by which workers themselves are authorized to decide their own starting and ending times for the business day (Article 32-3 of the Labour Standards Law).[20] The scheme is similar to the varied (flexible) working hours scheme introduced in 1987, when the Labour Standards Law was revised, for the purpose of enabling workers to engage in their duties efficiently while appropriately allocating their time between work and personal life. It is the larger firms that tend to adopt this with as

[19] Among discussions theoretically in agreement with this point is Nishitani (1994), p. 549.

[20] See Asakura, Shimada and Mori (2002), p. 200.

many as 32.8 percent of firms with 1,000 or more employees doing so. (*2002 General Survey of Working Conditions*, Ministry of Health, Labour and Welfare)

Since the flex-time scheme places management of starting and ending times of the business day in the workers' hands, it makes it possible for white-collar workers, whose duties proceed depending on their discretion, to work flexibly. In particular, a flex-time scheme with no "core-time" has a high elasticity.[21]

However, total working hours in this scheme are confined to one accounting period, and hours exceeding the upper limit of the legally defined number of working hours in one period are considered as overtime. Hence, working hours still need to be managed. In this sense, the scheme embodies the linkage between wages and working hours referred to in Article 37 of the Labour Standards Law (overtime allowance) .[22]

(ii) Discretionary work scheme

Discretionary work is a "scheme whereby working hours are calculated based on the sum regarded as working hours, since the time required for the execution of certain duties, by their nature, is substantially up to the individual worker."[23] The scheme was introduced under the 1987 revised Labour Standards Law. Revised three times since then, it currently consists of two schemes: the discretionary work scheme for professional workers which has existed since the introduction of the scheme and is applicable to workers engaged in research and development, and other professional occupations (Article 38-3 of the Labour Standards Law); and the scheme for workers engaged in planning and other duties which was newly established under the 1998 revision of the law and is applicable to a wider range of white-collar workers[24] (Article 38-4 of the Labour Standards Law). A series of revisions to the discretionary work scheme were

[21] See Atsushi Sato (2002), p. 120.

[22] In practice, this problem is reportedly avoided by adopting the flex-time scheme and paying fixed amounts of overtime pay based on the declared number of hours worked. The intent is to create the same effects as the discretionary work scheme within the framework of the flex-time scheme; Asakura, Shimada and Mori (2002), on page 206, criticize it as a pseudo-discretionary work scheme.

[23] See Mori (1997a), p. 28.

[24] For details of trends in the discretionary work scheme, see Araki (1999) and Mori (1998). For the latest revision made in 2003, see Shimada (2003) and Mori (2003).

introduced during a dispute between those who consider it applicable to white-collar workers and want to apply it to other types of workers, and those who object to the scheme on the ground that it confirms and aggravates prevalent long working hours and "service overtime." After a tug-of-war between the two sides, it was decided to incorporate complicated procedures, particularly when introducing the scheme for workers engaged in planning and other duties. To avoid hasty adoption of the scheme, the new regulation required that the newly established "labor-management committee" must pass a resolution introducing the scheme rather than a labor-management agreement that is necessary when adopting other flexible working hour schemes.

Discretionary work schemes tend to break the linkage between working hours and wage levels, which the flex-time scheme does not do. The Labour Standards Law does not insist on that wage systems should link wages and working hours, whereas those two elements are associated with each other when it comes to overtime payments. However, because the "wage ledger," which the Labour Standards Law requires employers to keep, must contain information on working hours (Article 108 of the Labour Standards Law, and Article 54 of the Enforcement Regulations of the Law),[25] it is understood that in practice the law insists on a linkage between working hours and wages. Under discretionary work schemes, unlike the hours regarded as working hours applicable to work outside the workplace, hours that are determined to be working hours are not explicitly required to be considered as "normally required hours." Thus, labor and management are free to regard overtime exceeding legally defined working hours regarded as working hours for which overtime is paid, and regard scheduled working hours or legally defined working hours regarded as working hours. In the latter case, even if the actual number of hours worked exceeds the legally defined number of hours worked, there is no need to pay extra wages. Thus the connection between working hours and wages is broken, enabling the performance-based wage system to function at its fullest, allowing employers to get out from under the obligation to find out exactly how many hours their employees work. Thus, although the discretionary work scheme was designed to deal with exceptional working

[25] This rule is applicable to the discretionary work scheme. For this, see Kojima (1998), pp. 32-33.

hours, in practice it is widely accepted as a scheme whereby wage levels are determined in accordance with the employee performance.[26] Thus, this is viewed, in terms of its functions, as similar to a scheme to be exempt from regulations on working hours laid out in Article 41 of the Labour Standards Law.

However, initially the discretionary work scheme was not intended to be a positive scheme for white-collar working hours, but a regulation to calculate working hours within exceptional working styles. Thus Araki (1999) thinks the current discretionary work scheme is "a half-baked scheme lying somewhere between regulations concerning the actual number of hours worked and being exempt from legal application" (p. 5).[27]

Let us now examine to what extent the discretionary work scheme is used. According to a Ministry of Health, Labour and Welfare survey, the percentage of firms which have adopted the scheme remains quite low: 1.2 percent use the scheme for professional workers, and 0.9 percent for workers engaged in planning and other duties (*2002 General Survey of Working Conditions*, Ministry of Health, Labour and Welfare). On the other hand, a survey by the Japan Productivity Center for Socio-Economic Development (JPC-SED) (2002), which covers firms with 500 or more employees, shows that 10.1 percent of all the firms surveyed have adopted the discretionary work scheme, with a majority, 9.6 percent, using the scheme for professional workers, whereas a mere 2.4 percent have adopted the scheme for workers engaged in planning and other duties.

According to the survey by JPC-SED, the main reason given for not adopting the scheme targeting workers engaged in planning and other duties was that, "It would be complicated and cumbersome to manage a workplace that has both workers who are subject to the scheme and those who are not" (52.3% of firms that replied) This was followed by "It would be difficult to specify which workers should be subject to the scheme" (47.9%); "The legal procedures are complicated and cumbersome" (36.4%)[28]; and "The adoption of flex-time is sufficient" (20.9%).

Sugeno (2002) concludes that the low number of companies that use the

[26] See Mori (1997a), pp. 28-29.

[27] Yamakawa (1995) also calls the discretionary work scheme a "transitional scheme" (p. 197).

[28] The revisions in 2003 to some extent simplified the procedures needed to introduce this scheme, and regulations concerning the scope of business establishments were also abolished. For these revisions, see Shimada (2003) and Mori (2003).

scheme is an indication that the system does not meet actual needs, and calls for a fundamental revision of the scheme (p. 202).

He also suggests that, "In the mid- to long-term, after a comprehensive change has been made concerning coverage of professional and managerial work — which is self-directive and thus is not compatible with the scheme — the discretionary work scheme should be reorganized so that it is exempt from regulations dealing with working hours" (p. 202).

As seen above, since the discretionary work scheme is institutionalized as being exempt from other regulations dealing with the actual number of hours worked, it is not adequate to manage the working hours of white-collar workers and thus is not fully utilized.

3. Special Characteristics of White-collar Employees and Regulations on Working Hours

This section investigates the special features characterizing white-collar workers and clarifies the basic viewpoints about schemes of working hours applicable to such workers.

3.1 Characteristics of White-collar Employees and Regulations on Working Hours

There is a common opinion among those calling for the relaxation of regulations concerning the actual number of hours worked by white-collar employees — that such workers should be paid according to their performance and achievement, not on the basis of the number of hours worked. According to this view, the problem is that existing regulations make it impossible to sever the relationship between working hours and wages.[29/30]

How to interpret this view will be important when considering issues surrounding working hour regulations. But first, let us look at a well-

[29] Examples include "On Revisions of the Discretionary Work Scheme (Opinions)" (1994) by a Nikkeiren (Japan Federation of Employers' Associations) study group.

[30] Regulations on actual working hours in the current Labour Standards Law are linked to wages in one limited aspect, that is, as shown later, when payment of overtime allowances is concerned. Attention should be paid to the inaccuracy of this assertion from the legal point of view. See Mori (1997b), p. 29.

organized definition of working hours in relation to personnel management supplied by Imano (2001).

Imano notes that the number of hours worked has functioned as an index to measure both "labor" and "achievement" within the framework of personnel management. Working hours comprise these two aspects, and when the level of "achievement" increases in proportion to the amount of "labor" expended in terms of the number of hours worked, the dependence of personnel management based on working hours becomes more convincing for labor and management. However, for duties that are completed at the discretion of individual workers, such as those of white-collar workers, the level of "achievement," even if it is the same number of hours worked, varies substantially in accordance with the way the individual handles his/her work. Moreover, if wages are paid in accordance with the number of hours worked, less efficient workers are likely to receive higher wages. Thus, working hours cannot be used as the basis for personnel management of those who work at their own discretion.

Those involved in personnel management believe it is not appropriate to legally link working hours done at the discretion of the individual and wages.

Imano classifies "discretion" into two groups. The first is "discretion in work procedures" which allows individuals to decide what kind of work they will do, and the second is "discretion in the amount of work" which leaves the decision concerning the amount of work to the individual. Imano believes that most workers are suited to personnel management based on working hours because such workers enjoy little of these two "discretions." At the same time, senior managers are allowed to exercise a substantial amount of discretion, and their working hours thus can be left to them. This, however, leads to a problem in that white-collar workers may have substantial discretion in terms of work procedures, but have little discretion concerning the amount of work they must complete. Obviously, personnel management based on the number of hours worked is not suitable for these employees, yet if they are exempt from coverage under regulations dealing with working hours, they will not be able to gauge their "achievement" using working hours as a guide. This could allow their superiors to increase their workload indefinitely, raising the possibility that they might

be asked to work for infinitely long hours. To avoid this, Imano emphasizes the need, first, to develop an alternative measure of determining achievement and to establish a personnel management system based on this measure. Secondly, Imano argues for the establishment of a mechanism which will guarantee an appropriate workload. At the same time, he says it is necessary to consider some mechanism to manage working hours, together with revisions of organizations and work systems, which would stipulate the workload, and thereby avoid excessive work.

The classification presented in Imano (2001) is highly suggestive in considering, from a legal point of view, issues related to regulations on the number of hours worked by white-collar workers. Imano categorizes white-collar workers into three groups depending on the amount of discretion, in terms of working hours, they have.

The first group covers highly-placed white-collar employees who have the freedom to select their work procedures and workload. Workers in this group are actually empowered to manage their own working hours, so that they are likely to protect themselves even if they fall outside those covered by regulations on actual working hours.

The second group concerns white-collar workers who have a certain degree of freedom in work procedures but little concerning workload. Although their situation does not perfectly match those covered by regulations on actual working hours which synchronize the level of remuneration, neither are they covered by simple regulations on their actual working hours. If they are excluded from coverage under the regulations that link working hours to wage levels, it is necessary to combine a personnel evaluation system and a management mechanism which will prevent overtime. Atsushi Sato (2001a) holds that "discretionary work is not a type of work where an individual engages in a freewheeling style" but "work, in many cases, which is controlled by a particular entity at a managerial post. Such work can hardly be executed without supervision, and in this sense, the manager plays a vital role in work management" (p. 142). His analysis suggests that there is a certain group of workers who have a high degree of freedom when it comes to work procedures but their superiors control their workload.

The third group concerns workers who have little freedom, though they

are white-collar employees, in either work procedures or workload.[31] It is not necessary to exempt workers in this group from coverage offered by regulations concerning actual working hours.

3.2 White-collar Workers and the Flexible Working Hour Scheme

What conditions are necessary for the flexible working hour scheme to function appropriately when applied to white-collar workers? It is imperative to research this question when designing a new scheme of working hours for white-collar workers.

For the different schemes concerning flexible working hours to function well and meet various needs, Atsushi Sato (2003) claims it is necessary to meet four elements: (1) apportioning the right amount of labor to the correct number of hours worked; (2) appropriately balancing the workforce with the workload; (3) ensuring appropriate targets for work management; and (4) establishing a scheme to handle complaints (p. 73). Moreover, Atsushi Sato (2001) states that, "A mechanism attaching great importance to work achievement is required" (p. 142),[32] whereas Hiroki Sato (1997) notes that, "In order for flexible working hour schemes to function, in addition to schemes that manage working hours, other schemes are also necessary, such as those covering work management, evaluation systems, and changing the consciousness of those in managerial posts" (p. 52).

As shown above, to achieve smooth operation of the flex-time scheme, students of personnel management emphasize the importance of achieving proper workloads and proper evaluation systems. It has been noted that the absence of appropriate workload management does not necessary lead to a malfunctioning of the flexible working hour scheme, but is highly likely to generate some bad effects stemming from excessively long working hours. Such debates suggest that any scheme concerning working hours for white-collar workers should be designed, not so much as a scheme focusing on working hours, but rather as a multidimensional system equipped with

[31] Some workers do not necessarily have a lot of freedom, although they are engaged in duties subject to the discretionary work scheme for professional workers. For this, see Atsushi Sato (2001a), pp. 243-244.

[32] Atsushi Sato (2001a) states that the role of managers in actual workplaces is essential in work management and in evaluating targets and achievements from the viewpoint of personnel management (p. 142 and pp. 244-245). Also see Atsushi Sato (2001b), p. 120.

other appropriate functions and guarding against negative effects.

The question is how to pursue such a scheme — whether the discretionary work system by itself is sufficient, or whether exempting some workers from application of regulations on working hours should be considered. Before reaching a conclusion, let us look at various measures that have been taken when introducing the planning-type discretionary work scheme, since this is not just a scheme for working hours in the narrow sense, but contains embryo elements that are required for a multidimensional scheme.

3.3 Various Measures Taken when the Planning-type Discretionary Work Scheme Was Introduced

The discretionary work scheme for planning and project-type work, introduced in 1998 when the Labour Standards Law was revised, requires that firms obtain unanimous agreement from their labor-management committees on various issues, including (i) the scope of work to be covered; (ii) which workers will be covered; (iii) working hours; (iv) measures to secure the health and welfare of the workers under the scheme; (v) measures to handle complaints from workers under the scheme; (vi) consent of the workers who will work under the scheme; and (vii) resolutions prohibiting the dismissal or other unfair treatment of the workers who do not agree to work under the scheme as shown in the previous requirement.[33]

Of particular importance is the fact that the discretionary work scheme for planning and project-type work, unlike the scheme for professional workers available before revision of the law in 1993, requires the labor-management committees to issue resolutions. This will be of a great significance where future management of working hours by white-collar employees is concerned, in that it suggests that employers must take measures to ensure that the scheme operates properly, even though the scheme itself frees them from managing the working hours of white-collar workers.

A summary of measures to be taken to secure the health and welfare of

[33] Due to the 2003 revision, the issues in (iv) and (v) were incorporated in the items that labor and management had to agree on when the discretionary work scheme for planning and project-type work are introduced (Nos. 4 and 5, Clause 1, Article 38-3 of the Labour Standards Law).

workers under the scheme and to handle complaints from such workers is presented in a guideline concerning the discretionary work scheme for planning and project-type work (announcement by the Ministry of Labour, December 27, 1999).

One important measure to ensure the health and welfare of workers is the requirement that the working schedule of such workers must be monitored by keeping records of the time of arrival and departure at workplaces. The guideline explicitly states as a "point of concern" that the discretionary work scheme for planning and project-type work does not "exempt employers from the obligation to protect employees' lives and health from danger" (the so-called obligation to consider safety). Therefore, providing compensatory days-off or special holidays, providing health check-ups, encouraging workers to take paid holidays, setting-up health counseling desks, and so on are assumed to be concrete measures.

Also, the discretionary work scheme for planning and project-type work implies that this scheme is not just a simple way to calculate working hours, but in fact is closely linked to wage systems. This is also underlined by the fact that the labor-management committees, those who decide on the introduction of the scheme, must consider and discuss wages, working hours, and other working conditions, and present opinions to employers. It is also true that this type of the discretionary work scheme is more than a simple scheme to manage working hours. There are two points which are implicitly premised on the close linkage between this type of discretionary work scheme and annual salaries and other performance-based wage systems: one is that the foregoing guideline requires that labor and management clarify the nature of evaluations and wage systems before workers agree to work under this scheme. The second point is that appropriate coverage of complaints includes "not only complaints concerning implementation of the discretionary work scheme for planning and project-type work, but also those concerning the evaluation system applied to the workers under the scheme, and problems related to the corresponding wage system and other issues contingent to the scheme."

4. Future Ideal Schemes for White-collar Working Hours

Finally, let us address issues which need to be discussed when considering schemes regulating the working hours of white-collar workers in the future.

The first is that discussion, including wage systems, of the number of hours worked by white-collar employees who have substantial freedom should begin with recognition of the limitations that any regulation has on the number of actual hours worked. This does not necessarily mean that the discretionary work scheme should be seen as something absolute, even if it is accepted as a special case to calculate working hours. Nevertheless, it does not seem reasonable to exclude simple regulations on working hours as presented in Article 41-2 of the Labour Standards Law. Even if the scheme to not apply the regulations on working hours is taken into consideration, the actual procedures taken should be related to the current discretionary work scheme.

Second, a new regulation on the number of hours white-collar employees work should be based on factors that will enable it to function properly. The White-collar Exemption Regulations in the U.S.[34] make it possible to introduce exemptions for certain workers, but stipulate that it is still essential to consider regulations which will prevent likely contingent problems.

Third, various schemes should be designed and implemented in accordance with the various degrees of freedom that white-collar workers have. While workers who have a substantial degree of freedom in deciding their workload are eligible to be exempt from regulations on actual working hours, those who have little freedom, although they may be free to decide work procedures, should be protected by a mechanism to bring their workload under control so they also can be exempt from such regulations. In this case, it should be noted that currently in Japan people do not have a rigid concept of working hours.

Fourth, even if they are not mandated to manage actual working hours, employers do have the responsibility to manage working hours arising from "safety obligations." In this sense, too, it is necessary to set up a

[34] For the regulations, see Kajikawa (2002)

mechanism to ensure a proper workload.

Fifth, with appropriate management of workloads being a prerequisite in all cases, alternative methods to manage working hours to ensure they comply with regulations on actual working hours may include: — (i) regulations on hours spent at the workplace[35]; (ii) securing holidays, including compensatory days-off; (iii) use of all annual paid holidays; and (iv) granting of paid holidays for education and training. At the same time, health and welfare, and complaint-handling measures under the discretionary work scheme should be revised to be more specific and adopted as explicit requirements when the scheme is introduced. In addition, the current scheme concerning holidays and days-off should also be reconsidered.

Concerning statutory days-off as defined in Article 35 of the Labour Standards Law, unlike schemes strongly affected by religions such as Christianity where Sundays are fixed holidays, in Japan days-off are neither fixed, nor it is necessary that they be specified. The regulation is fairly flexible, merely calling for the granting of four days off within four weeks (Clause 2 of Article 35). This is a reflection that the holiday scheme in Japan does not take into consideration the idea of securing freedom in one's private life or pursuing a harmonized lifestyle with family members, although in theory holidays are intended to maintain workers' health.[36] As a result, occasionally employees work on days which have been scheduled as days-off, and the missed day-off is treated as an ordinary working day under the provision that reallocates days-off to any other working day. In this case, the missed day-off is not even counted as "work on a day-off" under the "36 Agreement."

Next, it hardly needs to be stated that the annual paid holiday scheme does not play a sufficient role as a systematic long-term holiday scheme —– which is supposed to be its keystone. This system (Clause 3 of Article 39 of the Labour Standards Law) was introduced for the purpose of raising the number of paid holidays that workers actually take, but has not been

[35] In France, workers must take a continuous rest of 11 hours between periods of work (L. 220-1). However, it should be noted that future development of IT equipment enables white-collar workers to engage in work during their free time and outside their workplaces.

[36] For example, having days-off on either weekends or on weekdays is an issue of great concern for parents responsible for school-aged children. However, this is not taken into account in the current scheme.

accepted widely enough and therefore it has not lived up to expectations. In fact, as stated above, the number tends to decrease conversely. In debates concerning white-collar workers, the demand to relax regulations on the actual number of hours worked in many cases is connected to proposals for securing holidays and days-off; but it is difficult to realize this under the current system.

Sixth, the procedures for introducing the discretionary work scheme certainly need to be revised,[37] but even the current method based on labor-management agreement does not seem to reflect employees' opinions satisfactorily. Thus it is necessary to devise a mechanism whereby adequate time will be spent debating various relevant issues, such as the system of working hours, the coverage of workers, the mechanism to decide appropriate workloads, compensation schemes, wage schemes, evaluation systems, and so on. Opinions emerging from such debates can be incorporated as feedback when devising procedures. It is also important that workers can hear the opinions of experts, so that concrete discussion can take place.

It is possible to legalize procedures that define which workers will be covered by the scheme and appropriate workloads, but workers should have a guarantee that these issues will be carefully considered, since in practice decisions inevitably devolved on particular labor-management groupings. Particular attention should be paid when the labor union does not represent more than half of the employees.

Finally, when regulations on actual working hours are applied to white-collar workers who do not have substantial freedom to decide their workload, and have little freedom in deciding time allocation, the consent of workers should be required, as it is in the current discretionary work scheme for planning and project-type work. It is appropriate to do this considering the difficult question of determining the right workload is left to collective decision making by labor and management.

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[37] There are a number of points to consider, such as whether the labor-management committee should be set up when the labor union represents an absolute majority of workers.

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Law and Economics of Labor in Japan: Review of *Kaiko Hosei wo Kangaeru: Hogaku to Keizaigaku no Shiten (Examining Dismissal Law: From the Perspective of Legal and Economic Studies)* Fumio Ohtake, Shinya Ouchi and Ryuichi Yamakawa, eds.*

Ryo Kambayashi
Associate Professor, Department of Economics, Tokyo Metropolitan University

Section I: Introduction

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1. Law-and-Economics of Labor

For the labor market to function efficiently, it is necessary for labor resources to be distributed in the most efficient manner. This resource distribution in the labor market is realized through the specific actions of individual economic actors — employers hiring and dismissing, and workers finding and leaving work. Therefore, a social mechanism governing the efficiency of the labor market is tantamount to a social mechanism that regulates the particular activity of employers and workers. Thus, regulating the behavior of employers and workers is generally an important issue, and labor policies in many countries have actually been formulated and implemented from this viewpoint.

When analyzing these policies, we should remember that the issue has two aspects. On the one hand, a nexus of legal devices called labor laws provides public rules which oversee each action in the labor market with the support of third-party enforcement through the courts; that is, the issue has legal aspects.[1] On the other hand, there are also economic aspects

[1] From the economic perspective, it is useful to categorize these social mechanisms if we focus on rule enforcement mechanisms. First, when the economic actors voluntarily obey a set of rules, it is called first-party enforcement. Second-party enforcement refers to mutual enforcement by transactioneers themselves based on a set of rules. The most crucial is third-party enforcement in which a third party

involved. Since individual actions in the labor market are naturally assumed to be economically motivated, any analysis of the public rules concerning labor should also be based on the presupposition that every actor, to a certain degree, makes rational choices. This is why we need to analyze the legal and economic aspects of labor issues.

The main target of analysis in this field has been dismissals, because dismissals by employers are regarded as particularly important among the various actions that take place in the labor market. It is well-known that being dismissed usually reduces a worker's income, both in the short and long run, making it difficult for him/her to financially maintain his/her pre-dismissal standard of living.[2] Being dismissed also can result in strong psychological trauma and can negatively impact the worker's life, even in a country such as the United States where dismissals are supposed to be relatively common.[3] In contrast, one does not usually think that a worker leaving a job will seriously damage an employer. Thus, among the various economic behaviors that occur in the labor market, it is imperative to first consider how to control dismissals to ensure that labor resource distribution leads to greater social welfare.

As widely recognized, a significant number of studies on the economic effects of dismissal rules have been accumulated in the West. In Japan, scholars, mostly those in legal studies as well as economics, began to research the topic in the 1990s. The book under review in this article, *Kaiko Hosei wo Kangaeru: Hogaku to Keizaigaku no Shiten (Examining Dismissal Law: From the Perspective of Legal and Economic Studies)*, contains articles which have been published in *Nihon Rodo Kenkyu Zasshi*, and it is an excellent tool for grasping the overall direction of current Japanese research on the subject.[4] To stimulate a dialogue between the

who is not directly involved in the transaction enforces a set of rules. It is generally believed that *private* third-party enforcement was predominant in the early modern era, and *public* third-party enforcement came to occupy an important place after the beginning of the modern era. See, for example, Milgrom, North and Weingast (1990).

[2] Higuchi (2001) surveys recent trends in employment and unemployment in Japan.

[3] See, for example, Darity and Goldsmith (1996).

[4] In May 2004, the second edition of the book was published. Some articles, mainly legal studies, have been edited in accordance with the passage of two years. New sections include a round-table discussion during which Article 18-2 of the Labour Standards Law was discussed, as was the original version of this article.

scholarships of law and economics, major revisions have been made to some of the articles, allowing the reader to view the history of the debate among the authors of the essays. Additional care has been taken to make the book accessible to non-specialists, and anyone interested in an analysis of dismissal rules or the labor market institution in Japan should find it easy to follow. Following the December 2002 publication of the first edition of this book, the Labour Standards Law was amended, paving the way for Article 18-2 which legislates the judicial principle of "the abusive exercise of dismissal right" which was enacted in January 2004. Since the amendment, statutory grounds to restrict dismissals have been recognized, and conflicts over dismissals no longer seem to be confined to the world of case law. However, according to the author of Chapter 1, "Although the amendment has great importance in that the legislators clarified the general constraint of dismissals, the provision merely copies a sentence in current judicial principle. Therefore, there the dispute over regulations governing dismissals continues." The 2004 amendment to the Labour Standards Law does not reduce the importance of the discussions contained in this book.

In reviewing this book, I will attempt to survey the field and introduce major issues concerning law-and-economics of Japanese labor.

2. Review of Section I

The book has three sections. Section I is entitled "Introduction," and the chapter "Nihon no Kaiko Hosei – Rekishi Hikakuho Gendaiteki Kadai (Japanese Dismissal Law: History, Comparative Law and Contemporary Issues)" by Yamakawa introduces basics facts concerning dismissal law and surveys the major issues involved.

According to Yamakawa, what is distinctive about Japanese dismissal law is that "for a long time statutes codifying general regulations about dismissals were virtually non-existent, with case law playing an important role in constituting the judicial principle of 'the abusive exercise of dismissal right' in practice." However, in prewar Japan, both the right to dismiss and the right to resign were treated symmetrically as general civil law problems, and came under the framework of dissolving a contract. It

was only after the first half of the 1950s that court decisions advocating some restrictions on the exercise of the right to dismissal, not the right to resign, became predominant. When viewed internationally, the author continues, the institutional frameworks that regulate dismissals have some similarities, while also containing some differences. For example, few countries have established clear standards even though they may have statutory law provisions regarding dismissals. On the other hand, the court system in each country varies, such as the existence or the lack of a specific institution to handle labor disputes. What these similarities and differences imply is that a dismissal law of a given country — be it the employment-at-will principle of the Untied States or the judicial principle of "the abusive exercise of dismissal right" — should not be treated as perpetual truth but instead should be analyzed in the particular context of that country's historical development and in comparison with other countries.

Therefore, it is not surprising that Yamakawa presumes a complementary institutional relationship between the employment system and corporate governance — as assumed in the Comparative Institutional Analysis (CIA) approach — in Japanese dismissal law. In this section, he infers that if the institution of corporate governance changes as a result of international competition or for other reasons, "The employment system and judicial principles, which reflect a social consensus, will be affected by the change." Based on the speculative understanding that Japanese dismissal law may have been actually affected by such change in recent years, he poses three points on changing judicial decisions concerning "the abusive exercise of dismissal right": labor contracts limiting job types, notification of dismissal with an option of different work conditions (*henko kaiyaku kokuchi*), and reexamination of the so-called "four requirements" needed to carry out adjustment dismissals in advance.

In fact, Japanese studies on the relationship between the institutions of corporate governance and the practice of employment adjustments have produced certain successful results. For example, studies measuring the quickness in which Japanese corporations carry out employment reductions have provided some empirical support for Koike's "deficits-in-two-consecutive-periods" hypothesis — meaning a company is more likely

to greatly reduce its work force in the period following two consecutive periods of deficit. These empirical studies are consistent with the theoretical inference of the CIA approach, according to which, when a major event affecting a corporation's future occurs, the balance of power among stakeholders over control of the corporation will be altered, and a major employment reduction will be carried out.[5] However, in most empirical studies, the term "employment adjustment" can simply mean an adjustment in the number of employees (or work hours). Unfortunately, there is no clear distinction as to the different methods used — such as dismissals, enlisting voluntary retirements, increasing of voluntary resignations, and adjusting overtime hours — which is important from the standpoint of legal studies as well as of social welfare. This lack of detailed information is connected to the understanding that dismissal regulations are a monetary cost for employers, but it does not really address the direct relationship between legal arrangements and actual dismissal behavior (or other employment adjustment behavior). Therefore it should be understood that the relationship between the forms of corporate governance and the dismissal behavior of the employers has not been sufficiently clarified, either empirically or theoretically.

Although chapter 1 certainly offers us an interesting framework to conceptualize overall institutions in the Japanese labor market, we really have less empirical evidences than Yamakawa seems to have. Moreover, the fact that the framework is rarely used in the following chapters indicates that there still exists the gap between understanding overall social mechanism of labor market and analyzing the particular behavior in it. This gap may cause the readers to feel the conclusions of each chapter to be too artificial. It is a helpful message of this chapter that filling this gap is a useful way to practically link the results of each chapter with the actual labor market policies.

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[5] See, for example, Komaki (1998), Abe (1999) and Urasaka, and Noda (2001). Other studies include Tomiyama (2001) which examines the relationship between the so-called "Main-Banks" and employment adjustments, and more recently Noda (2002) who examines the hypothesis in connection to industrial relations. As for the CIA approach, refer to Aoki (2001).

3. Review of Section II

The articles in Section II, "Theoretical Analysis of Dismissal Law," discuss the justification of dismissal law, more specifically, the justification of the judicial principle of "the abusive exercise of dismissal right" from the perspectives of *pure economic theory and legal dogmatics*.

Chapter 2, "Fukanbi Keiyaku Riron to Kaiko Kisei Hori (Incomplete Contract Theory and the Judicial Principle of Dismissal Regulations)," by Tsuneki examines which theoretical models should be used to undertake an economic analysis of dismissal law. Citing Chuma (1998) and Eguchi (2000), the article rejects analysis based on the theory of incomplete contract and argues that the theory of repeated game, with its stress on the "long-term relationship between the worker and the company," should be used as the main analytical tool. This negative conclusion about the theory of incomplete contract is drawn by using the following arguments: the theoretical implication of the model relies on the "unrealistic assumption of the ability of the court to correct information and make decisions," therefore, "the recent argument explaining economic rationality for dismissal regulations using the theory of incomplete contract is not sufficiently persuasive." (Eguchi responds to this point in Chapter 3.)

However, a good portion of Chapter 2 is dedicated to a discussion of normative standards in legal and economic studies of labor. The conclusion drawn here is that the "main goal of labor law" should be limited to "determining the proper rules and initial conditions for the parties to negotiate and come to an agreement." To this end, Tsuneki stresses that the concept of (Pareto) efficiency, a commonly accepted normative standard in economics, is "merely a necessary condition [that is, a tentative and intermediate evaluation] for the realization of distributive justice." In this respect, the concept of efficiency in economics is not different from the normative evaluation in legal studies, that is to say, both employ a tentative standard most likely to receive a social consensus as a normative evaluation. Contrary to the common understanding about standards, he admits that "they have different views over legal schema for realization [of the above tentative standard]." Because economists consider "A contract, which is voluntarily concluded, is by definition meant to improve the

interests of both parties at the same time," it should be approved naturally not only in terms of efficiency but also in terms of fairness. Therefore, public laws, such as those concerning taxes and social security, should be used as the primary tool to correct wealth inequality, and intervention through private laws, such as civil law and commercial law, should only be used secondarily and as little as possible because it would hinder concluding contracts freely. On the other hand, legal scholars have not made such a clear prioritization, and occasionally argue that "The fairness should be realized at a different level [that is, in the realm of private law] … other than wealth redistribution through public law [such as tax]." However Tsuneki emphasizes that legal scholarship lacks persuasive arguments as to why private law intervention must take precedent over public law when trying to redistribute wealth. Therefore, contrary to legal scholars who argue in favor of private law intervention, Tsuneki writes that such intervention is an "ad hoc justification for the pre-existing legal practices."

By applying the same line of argumentation, then, Tsuneki takes a skeptical position toward the views of Uchida. To legally justify the judicial principle of "the abusive exercise of dismissal right," Uchida attaches importance to the reasoning behind the relational contract theory in legal studies, which has provided empirical support for the development of the theory of incomplete contract in economics in the United States. Uchida also emphasizes the two basic principles underlying that theory — the *continuity principle and flexibility principle* (Chapter 8 includes Uchida's response to Tsuneki). To a certain extent, Tsuneki understands the rationale behind those who justify private law intervention based on the relational contract theory when he writes, "If the premise of rationality [of individuals] is in doubt, it will be meaningful to provide judicial relief for contractual detriments by placing legal [private law] constraints on the range and possibilities of the contract and/or by developing general provisions concerning civil rights." When the availability of judicial resources is limited, Tsuneki argues that the interpretation of interfering dismissal rules based on the continuity/flexibility principle can make sense. However, according to Tsuneki, Uchida sees the rationality of the two principles not as limited human rationality, but as residing in "the

protection of the communal value which is in opposition to and in competition with individualistic liberalism," something the author cannot accept.

Chapter 3 is entitled "Seiri Kaiko Kisei no Keizai Bunseki (Economic Analysis of Adjustment Dismissal Regulations)" by Eguchi. By using the incomplete contract theory which Tsuenki criticized in Chapter 2, this chapter seeks to demonstrate that dismissal regulations might improve social welfare under certain conditions. Eguchi's model will be discussed in some detail here because it is a clear-cut example of the analysis of the principle of the abusive exercise of dismissal right utilizing the theory of incomplete contract.

The fundamental premise of the model is the incomplete nature of a contract. That is, it is impossible to work out in advance an agreement in which a worker will actually continue to be employed after the training period, although some company-specific training investment will be required beforehand. In this situation, workers can suddenly be dismissed and the money they spent on training will be lost just as they ready themselves for a career and set out to earn wages in that company. Eguchi hypothesizes that dismissal regulations produce an additional (social) cost for terminating employment and presents a comparative statistics for the equilibria with and without regulations.

When a regulation (that is an additional cost) exists, the company can offer a lower wage *ex ante* to the worker instead of incurring costs to adjust employment *ex post*. In this case, there is no incentive for the company to terminate employment *ex post* because it is costly and, therefore, it is easier for the company to tacitly convince the worker that it will curb the number of dismissals which might emerge after the contract has been concluded. On the other hand, when dismissal regulations do not exist, there will be no costs involved in carrying out an employment reduction afterward. Even if the company offers a tacit promise to curb the number of dismissals *ex ante*, it will be difficult for the company to convince the worker. This is because the company has an incentive in ignoring such tacit promises — which is never a clearly written contract obligation — and in carrying out employment reductions at will, depending on the environment. Therefore, the crux of the theory of incomplete contract is about committing

precautionary indirect measures to regulate the *ex post* actions of the parties when the situation cannot be clarified beforehand. An analysis of dismissal rules using the theory of incomplete contract shows that they can be interpreted as precautionary measures.

Since the chapter adopts a Benthamian definition of social welfare, whether a set of dismissal regulations improves social welfare depends on whether or not an increase in production resulting from an increase in employment will exceed the social cost resulting from dismissal regulations. In other words, when the benefit (increased production) resulting from predetermined artificial restrictions outweighs the cost, such restrictions are justified from the perspective of efficiency. This is one way to justify dismissal regulations in terms of economics.

The above discussion, however, rests on an assumption that the company and the worker can work out only one wage level in the contract regardless of economic fluctuations. If it were somehow possible for them to commit an agreement *ex ante* to change the wage level in accordance with *ex post* situations, it would be possible for the company to induce the worker to accept a more efficient promise without resorting to dismissal, which incurs a social cost. The chapter lists some examples such as issuing separate expenses for wage and training costs, establishing regulations concerning retirement allowances, and allowing the labor union and management to negotiate the total sum of wages *ex post* to be shared among the union's members. However, Eguchi finds all of these possibilities infeasible and concludes that creating a social device for commitment in the form of legal regulations of dismissals can improve social welfare.

Chapter 4, "Kaikoken Ranyo Hori no Seitosei (Justification of the Judicial Principle of Dismissal Right Abuse)" by Tsuchida, justifies the judicial principle of "the abusive exercise of dismissal right" with the continuity/flexibility principle as discussed by Tsuneki in Chapter 2.

Tsuchida begins with a discussion of the general theories surrounding the judicial principle. Mainly employing the theory of incomplete contract, he argues that the principle has a certain economic rationality. He continues that at the same time, it is generally necessary for legal studies that the continuity/flexibility principle should regulate contractual

relationships, for example continuous contracts (typified by labor contracts), because of the bounded nature of human rationality. He considers the judicial principle as an embodiment of this general inference, considering "inequality between labor and management" as a problem specific to labor contracts. The principle also functions as a legal norm to meet the ideal of "establishing actual equality between labor and management," and this is why there is an asymmetry between the right to dismiss and the right to resign. Based on these inferences, he concludes that the principle "should not be immediately relaxed simply because of changes in the market environment" as it is a kind of social norm.

Of course, a social norm in the labor market must be an illustrated expression of the general principle running through the concept of labor law which can be referred to as the "doctrine of employment security." The norm can take any form as long as it substantially guarantees "employment (maintenance and continuation of the labor contract) and the ideal of actual equality between labor and management." That is to say, there is no reason that the current judicial principles have to be the only expression of the doctrine of employment security, implying that these judicial principles have some room for reevaluation. Tsuchida actually proposes to reevaluate Japanese labor law as a whole, including judicial principles to ensure that they closely follow the doctrine. For example, decisions allowed in dismissal right abuse cases should be decided more flexibly according to the type of employment, a comprehensive approach to handling adjustment dismissal cases should replace a formal application of the four requirements, and the judicial principle of altering working conditions should be legally reconfigured from the perspective of the doctrine of employment security.

As seen above, Tsuneki's critique of the interpretations of dismissal rules based on the theory of incomplete contract and relational contract theory in Chapter 2 concerns particular shortcomings in the individual articles he cites and by no means finds a defect in the logic of the interpretation. Therefore, justification of a judicial principle of "the abusive exercise of dismissal right" — in terms of either economic efficiency or legal justice — by the theory of incomplete contract theory in economics and the continuity/flexibility principle in legal studies still

remains a persuasive argument to a certain degree. Of course, there are only a few studies which analyze the theoretical foundations of dismissal rules, similar to the chapters contained in this book, and it is necessary to develop more literature combining a variety of models, such as — for example in economics — the repeated game theory mentioned by Tsuneki and the efficient wage theory used in Ohashi (2004).

4. Review of Section III

As section II proposes some theoretical candidates to understand the working of the dismissal rule in Japanese labor market, then we need the evidences to clarify which of the theories can most reasonably explain the actual dismissal behavior. Section III is entitled "Analysis of the Current Situation concerning Dismissal Law," and contains three empirical studies on the judicial principle of "the abusive exercise of dismissal right." Unfortunately, rather than directly test the validity of the theoretical interpretations developed in Section II, these studies only present valuable but peripheral materials concerning this question.

"Seiri Kaiko no Jissho Bunseki (Empirical Analysis of Adjustment Dismissals)" by Ohtake in Chapter 5 is unique for its survey of labor cases and its quantitative analysis. As a matter of fact, there have been few studies which chronologically survey adjustment dismissal and normal dismissal cases, and this is the first study to conduct an econometric quantitative analysis in Japan.[6]

Using the so-called Priest/Klein 50 percent rule as a premise, Ohtake notes that the judicial principle of "the abusive exercise of dismissal right" was established in the mid-1960s while the predictability of the principle

[6] General surveys of adjustment dismissal cases in legal studies include Liu (1999) who covers the period from 1945 to the1950s, Hara and Okuno (2004) from 1975 to 1985, and the Hokkaido Daigaku Rodo Hanrei Kenkyukai (2001), which covers the 1989-2000 period. Only a few such studies have been conducted in economics, one of which is Kawaguchi, Kambayashi and Hirasawa (2004). On the other hand, we do not have many empirical studies on general dismissal cases. The lack of empirical data has delayed examining basic facts that would provide the foundation of policy discussion. For example, it is commonly assumed (even in national parliaments where bills are made) that it is difficult for a worker to return to the workplace after receiving a verdict nullifying his/her dismissal during deliberation, but the empirical data about this issue has been addressed only by Maeda (1995) and Yamaguchi (2001).

declined in the 1990s. Then Ohtake proposes the "development of statutes concerning dismissals" in order to "reduce the uncertainty in judicial decisions," with pointing out that litigation impacts different groups differently, and stresses the importance of deciding "to which group should the rules first apply." However, because "it is extremely difficult to illustrate each of diverse effects and to establish the most proper standards without precedent, the use of social experiments should be considered." He prefers the litigation of such standards to experimentally introducing various laws into certain geographical areas and types of corporations and then examining the results.

This chapter adopts a rather unprecedented research strategy for quantifying court rulings and presents a way forward for empirical studies in law-and-economics in labor. However, it is not free of methodological problems. Quantifying court rulings and constructing data for statistical purposes is surely interesting, and in fact econometric studies using such data as codified in court cases have been increasing in the United States recently. But it is first necessary to carefully examine the nature of court rulings when using them for statistical purposes. It is not easy to classify court decisions into several patterns, and it is still more difficult to categorize into finite codes the reasoning behind the decisions. A ruling handed down by a court is not a designed questionnaire using random-sampling, but a private diary with artificial selection. Actually, among the empirical studies on the effects of dismissal law in the United States, for example, it is difficult for researchers to reach consensus even over a question as simple as "In which case did the ruling limit the employment-at-will principle" in a given state, and disagreements lead to opposite conclusions about the effects. We have to keep in mind that this approach always runs the risk of producing widely varying analytical results, and depends on the judgment of individual analysts.[7]

This chapter also takes up the issue of interpretation of data. The Priest/Klein 50 percent rule has been widely used as one of the most

[7] Epstein and King (2002) is an extensive critique of problems in empirical studies in law-and-economics which includes discussion of this point. Chapter 5 uses the database *Hanrei Taikei CD-ROM* (Judicial Precedents CD-ROM) published by Daiichi Hoki. The cases and court rulings are categorized by codes which were devised by the publisher and assigned to each court decision.

powerful analytical tools in the field of law-and-economics. Accordingly, a number of theoretical and empirical problems of the hypothesis also have been noted.[8] In particular, the empirical question involving how much of a stake either the plaintiff or the defendant has in each case or how the attitude toward the risks involved will be reflected in each set of data is perhaps of great relevance to Ohtake's analysis. The more the defendant/plaintiff has a stake in a case, the more likely it is that the defendant/plaintiff will take steps toward litigation even if such action seems to be speculative. Therefore, even if the rate of victory in judicial verdicts deviates from the 50 percent mark (as a trend or not), it may not be because there are deviations among subjective victory rates, but simply because the plaintiff (or the defendant) takes his/her own stake more seriously than the other. Considering Kawaguchi, Kambayashi and Hirasawa (2004) points out the backgrounds of workers who participated in the dismissal cases widely varied, without controlling the relative amount of stake in each case, the deviation from the 50 percent mark does not mean the instability of judgments. We have not yet received a reliable answer when the judicial principle of "the abusive exercise of dismissal right" was established in Japan.

In Chapter 6 "Seiri Kaiko Hori no Saikento – Seiri Kaiko no '4 Yoken' no Minaoshi wo Tsujite (Reexamining the Judicial Principle of Adjustment Dismissals: Review of the 'Four Requirements for Adjustment Dismissals')," Fujiwara provides an overview of trends that can be seen in recent court rulings on dismissals and develops a legal debate with reference not only to general dismissals but also specifically to adjustment dismissals. In Fujiwara's view, a series of decisions by the Labour Division

[8] In theoretical debate, issues about strategy and/or rationality — that is, how the plaintiff/defendant might predict the probability of winning or the amount of compensation — have been debated. Cooter and Rubinfeld (1989) concisely survey the analysis of judicial processes from the perspective of law –and –economics, including the Priest-Klein hypothesis. Kessler, Meites and Miller (1996) provide a survey of empirical studies on the Priest-Klein hypothesis which notes that the 50 percent rule in its simplest form has not been proven in most of the empirical studies and suggests making some modifications to the rule when using it in empirical studies. As noted in this study, Ramseyer and Nakazato (1989) conducted empirical research and confirmed that the unaltered 50 percent hypothesis does not work in Japanese cases as well. The study by Korobkin and Ulen (2000) is a comprehensive critique of the premise of rationality which is employed in a variety of law-and-–economic studies.

of the Tokyo District Court between 1999 and 2000, which are frequently referred to in this volume, seem to have "drastically changed the abuse of the right of dismissal principle and the principle of adjustment dismissals in form as well as substance." He does not view them as a determined judicial alternation but as "one of prompting discussions toward future reexamination [of the existing judicial principles]." While maintaining the proposition that "the four requirements should be retained," Fujiwara argues that they need to be theoretically reinforced and he develops the following argument.

At first he argues from the premise that there exists "the employer's contractual duty (*hairyo gimu*) to endeavor to maintain the employment relationship for as long as possible," and this duty offers the logical basis for the judicial principle of "the abusive exercise of dismissal right." The employer's supposed duty is founded constitutionally on the right to work (*kinro ken)* and the right to life (*seizon ken*) as noted in the Japanese Constitution and legally on the *bona fide principle* of the civil law and the Labour Standards Law. However it is interesting that Fujiwara does not need the help of the continuity/flexibility principle, which the authors of Chapter 4 and Chapter 8 insist on, although he does not clearly explain why.

The duty to endeavor to maintain employment should be "determined through the weighing of the interests between labor and management, that is, carefully balancing both the interests of the employer and the worker," and the concrete criterion used to determine the employee's duty in each case should be standards such as the four requirements for adjustment dismissals which we have used until now. In the discussion Fujiwara makes the interesting observation that the term "duty" means that employers only need to make an effort (*doryoku gimu*), they do not need to meet a strict goal. As for his conclusion, he states that, "Realistically we cannot resolve labor disputes without giving up the stability of law and/or the predictability of results, because the court must consider complex circumstances in each individual case." He therefore casts doubt on the effectiveness of codifying dismissal rules into statutes.

Chapter 7 is "Kaiko Kisei no Keizai Koka (Economic Effects of Dismissal Regulations)" by Kuroda. This is a survey of existing works on

the effect that dismissal law has on the labor market, with its main focus being studies of Europe in the 1990s. Dismissal law usually functions as a uniform rule within a single country, therefore, there are two methods to detect the economic effects of the law on the labor market. One is using a cross-national comparison, and another is a time-series comparison that occurs before and after a law has been passed in a given country. The former has been used predominantly up until now, and as part of its research agenda the OECD has translated the dismissal laws of its member countries into a set of numerical data which has been used in a number of research projects. This chapter discusses the compilation process of the national indexes of dismissal law which have been used in various studies, mainly those of the OECD, and this manual should be useful for readers interested in using these indexes in the future. However, as Kuroda points out, it is important to always recognize that "the indexing of laws generates dispersions among datasets because it is impossible to avoid the arbitrariness of those compiling the indexes, and therefore it is necessary to maintain a great degree of flexibility in interpreting empirical results based on cross-national comparisons and indexes."

Before surveying results from empirical studies, this chapter summarizes the theoretical models by dividing them between the insider-outsider theory and the job creation and destruction theory. The overall outline of Kuroda's summary is as follows. The insider-outsider theory emerged in the late 1980s. Based on a hypothesis that dismissal law gives more "bargaining power" to a currently employed worker (the insider) rather than a worker who is not employed (the outsider), the theory posits that dismissal law generates a gap among workers and exacerbates the employment rate. This insider-outsider theory has inspired recent argument in Japan that the judicial principle of "the abusive exercise of dismissal right" only protects the workers currently employed (especially full-time regular workers) and actually aggravates the situation for young and/or future workers. The equilibrium search theory was first put forward in the 1990s, and has successfully generalized the model within the framework of the dynamic partial equilibrium model first and then within the framework of the general equilibrium model. This theoretical extension of the equilibrium search theory allows us to evaluate the welfare effects of the

dismissal law by measuring the performance of the labor market with economic fluctuations, and shows that the above implication derived from the insider-outsider theory merely focuses on a situation in one particular phase of economic fluctuations. At the same time, the theory concludes that the effects of dismissal law — regardless of whether they are positive or negative — are ambiguous when considered over a long period of time. The theory also implies that slightly different models easily produce varying results on how the dismissal law will affect employment/unemployment, and it is difficult to theoretically deduce a robust implication.[9] When the theory does not put forward a robust implication, economists traditionally reach conclusions by looking at the data. With the gathering of OECD law indexes and the flow data of various countries, a number of empirical studies have been published to settle the issue. Results of these studies are efficiently presented in Figure 7.3. As indicated, unfortunately, existing empirical studies have not yet found solid evidence concerning the effects of dismissal law on employment/unemployment rates. After all, the relationship between dismissal law and employment/unemployment rates has not been clarified either empirically or theoretically. To do away with this ambiguity, some scholars have attempted to find the effects by focusing on indirect indicators, such as wage gaps or frequency of limited-term employment. As pointed out by Kuroda, however, they have not yet developed a sufficient theoretical foundation nor accumulated enough empirical results.

After surveying the existing studies, Kuroda finishes the chapter by commenting on — perhaps with the insider-outsider theory in mind — Japanese dismissal law: "The time has come to explore a more desirable form of dismissal laws while taking into account the possibility that forms of employment will be even more diverse in the future."

To be sure, as Kuroda argues, "The empirical strategies employed in the existing studies in Europe and the United States are imperative to Japan as well." However, it is unlikely that we can simply apply these strategies to Japanese cases since Japan has few mutually comparable units of analysis,

[9] However, it is important to recognize that equilibrium search theories suppose that there is an additional (social) cost for making after-the-fact employment adjustments as Chapter 3 does, and this supposition is slightly different from the supposition of the insider-outsider theory.

such as the neighboring countries in Europe and states in the United States. Moreover, the results of the existing studies suggest that not only the intensity of dismissal regulation is absorbed by changing working conditions, such as wages, but also that there might be a severe limit to the methodology of the so-called "reduced form approach" which tries to demonstrate results of the performance of institutions by supposing an inductive model in an ad hoc manner.[10] To avoid these shortcomings, as Ohtake advocates in Chapter 5, there may be a rather bold method of carrying out social experiments. Also it may be necessary to build an explicit hypothesis about specific social mechanisms through which dismissal law constrains the behavior of economic actors, and examine the deduced proposition by employing such micro data as historical data and court rulings. The intellectual separation between section 2 and section 3 in the book seems to reveal the immaturity of research field.

5. Review of Section 4

Entitled "Future of Dismissal Law: Debate on Legal Policy," this section wraps up the volume with three essays focusing on policy debate.

Chapter 8 is "Kaiko wo Meguru Ho to Seisaku Kaiko Hosei no Seitosei (Law and Policy concerning Dismissals: Justification of Dismissal Law)" by Uchida. Uchida investigates whether dismissal law hinders desirable policy goals and whether dismissal law generates negative effects. By answering these two questions in the negative, his essay presents a counterattack to those who advocate abandoning the judicial principle of "the abusive exercise of dismissal right."

[10] First of all, a solid consensus has not been reached on whether institutions affect economic growth. Since North and Thomas (1973) raised the issue, many scholars, particularly the neo-institutionalists, have supported the positive relationship between guaranteeing agents' incentives by institutions and economic growth and development. More recently, the debate has extended its scope to questions such as the connection between judicial traditions (such as the Continental Law and the Anglo-American Law) and differences in patterns of economic development. Research in this area continues to be conducted vigorously as seen in the works by Acemoglu, Johnson and Robinson (2001), (2002) and Glaeser and Shleifer (2002). As seen in Pritchett (1997), however, there is still strong support for the argument represented by Mankiw, Romer and Weil (1992) that the economic growth rates of nations tend to converge in the end regardless of where they start from and that therefore there is no correlation between institutional arrangements and long-term economic growth.

Regarding the first question, he first adopts the desirable policy goals of "fluidity of employment for newly developing industries" and "workforce reduction in declining industries" as examples. For the first example, Uchida states that it is sufficient to transfer labor from unemployed workers to new industries now that there is a large pool of excess labor [in the form of unemployment]. As for the second example of out-flow from declining industries, he argues that promoting voluntary labor turnover should be the most commonsensical approach. More fundamentally, "The judicial principle of 'the abusive exercise of dismissal right' is not a judicial principle that prevents corporations from dismissing workers even when they are faced with bankruptcy." He concludes that neither abandoning nor relaxing the judicial principle is a proper solution to the above policy goals.

Concerning the second question, he takes on the argument that dismissal law actually increases unemployment among young people and non-regular employees. He wisely refers to the poverty of empirical evidence supporting this argument, and expresses skepticism about the degree to which the judicial principle "can actually affect the hiring activities of Japanese corporations in general." As for the increase in non-regular employees, wages of non-regular employees would have to be higher than those of regular employees if the increase were caused by the de-regulated dismissal relative to regular workers. Therefore the current increase in the number of non-regular workers cannot be attributed to restrictions placed on the dismissal of regular workers and the argument seeking negative effects of the judicial principle loses its ground. He then concludes that, "The argument for liberalization of dismissals does not seem to have an adequately compelling policy-level foundation."

If the argument loses its basis on a positive foundation, at least, it has to find a normative foundation. After surveying the normative debate on the justification of the principle, Uchida proposes that the differences among participants in the debate are rooted in their different visions of society. Just imagine "one society in which dismissals can be done efficiently while the distributive inequality is minimized and free dismissals are permitted" and "another society, in addition to fulfilling the above requirements, in which justifiable reasons are required for dismissals and

that corporations seek to maintain employment to the extent possible by using the internal labor market and adjusting working conditions." He then asks, "Which society does one choose?" His answer is not normative but it is a "matter of one's social vision." Uchida believes scholarship should not conclude whether or not to maintain the judicial principle of "the abusive exercise of dismissal right," because this question is essentially a political issue.

In Chapter 9, "Koyo Hosho ni Tsuite no Kisei Kaikaku – Keizaigaku no Shiten Kara (Deregulation of Employment Security: A View from Economic Studies)," Yashiro develops a policy discussion from the perspective of economic studies. He attributes the gap concerning deregulation between legal studies and economics to different positions regarding the market principle, differences of opinion about the negative impact of wealth gap correction policies, and different premises about competition in the market. He then discusses the incomplete contract theory and the continuity/flexibility principle, both of which argue for employment security. According to Yashiro, "The company itself rejects opportunistic behavior as a rational actor when it needs human capital," and "nothing in the four requirements for adjustment dismissals seems to take into consideration the size of investment that has been made in education and training." Therefore, he concludes that the "matter should be left to free exchange in the market as long as it operates in a rational fashion."

The final chapter is "Kaiko Hosei no 'Pro Veritate' ('Pro Veritate' of Dismissal Law)" by Ouchi which succinctly surveys the general issues discussed in the volume, specifically mentioning the codification of dismissal rules.

Ouchi poses two questions: 1) Can codification of dismissal rules be justified in a normative sense?, and 2) Can it actually accomplish its goals? He answers both in the negative.

Ouchi bases his position on the premise that dismissal right is "a corollary to 'freedom of contract' in the Constitution," and any restrictions placed on that right must be justified. He then identifies three possible justifications: "the right to life, the right to labor … or it would present a danger to the life of the worker," the continuity/flexibility principle, and

protection of moral rights. He finds the second justification inadequate as a normative basis for restricting dismissal right because if dismissal right is to be restricted then the right to resign should also be restricted. In addition, "weakening the contractual nature of industrial relations [by recognizing the communal normative standards supporting the two principles]" can discourage workers from working voluntarily. Ouchi goes on to state that "protection of moral rights," the third justification, "should be handled by making the employer treat the worker with sincerity and care when dismissing the worker," but concludes that this also is insufficient as a normative ground for restricting dismissal right. Therefore, the restriction on dismissal rights must mainly find its general normative basis in a situation where "a given worker will suffer greatly by being dismissed," which leads us to evaluate the "degree to which each worker is involved in the company" when applying the restriction to individual cases.

In this respect, even codified dismissal rules will require elastic application because the loss the dismissed worker would suffer depends systematically on many circumstances, such as the outside labor market. As for decisions regarding specific cases, there is a judicial rule that the court's justice about specific cases must be realized through a judgment based on general provisions. In either case, Ouchi concludes, the idea of codifying dismissal rules is hard to obtain normative justification compared to the judicial principle of abusive right. Of course, three disadvantages that are fundamental to case law are commonly pointed out in discussions about dismissal rules. The first is that the "elastic application [of judicial principles] is mostly left to the decision of individual judges." The second is the lack of concern about the general impact of the decision because of its preoccupation with realization of individual justice. The third is the lack of uniformity in case law's recognition or availability. Ouchi comments that the first problem is unavoidable regardless of whether we employ a codified statutory law or case law as long as we rely on the court system. The second problem can be ameliorated to some degree if there is a judicial norm requiring judges to consider the general impact of their decisions, and this requirement can be materialized precisely because of the elastic nature of a given case law. Regarding the third issue, he sees no difference between case law and

statutory law. For these reasons, he concludes, that replacing case law with statutory law to regulate dismissal rights will not benefit anyone.

Based on the above discussion, he infers that the main point is not whether dismissal rules should be codified but rather how to establish precision in the rules. From this perspective, it is useful to introduce two normative concepts, that is "behavioral norms" and "evaluative norms." First of all, legal norms can be divided into "'behavioral norms' that demand [in advance] action from the parties, and 'evaluative norms' that provide standards for which to evaluate the actions of parties after the fact." When this normative categorization of before-and-after is applied to dismissal rules, he suggests, they should meet two sets of demands — one is to clarify the rules as a behavioral norm and the other is to realize individual justice as an evaluative norm. However, there is a tradeoff between these two.

In 2002 when labor and management discussed codification of the judicial principle of "the abusive exercise of dismissal right," which took effect in January 2004 as Article 18-2 in the Labour Standards Law, both objected to the original proposal, but for different reasons. The disagreement can probably be explained by the above trade-off. Labor perhaps suspected that the codification would narrow the area of decision for dismissal rules as an evaluative standard and hence interpreted the codification as a *relaxation* of dismissal regulations. In contrast, management focused on the expanded area of decision for dismissal rules as a behavioral norm and interpreted the codification as an enhancement of dismissal regulations. To make the argument fruitful, it is necessary for us to consider the tradeoff of norms. As a way to reduce, if not eliminate, the tradeoff, Ouchi proposes that the concept of "primacy of procedural rules" be at the center of labor law. According to Ouchi, the concept has a normative justification legally, "It is desirable to resolve problems through mutual consent between labor and management." By clarifying procedures surrounding dismissal rules, the concept will allow them to play a role as a behavioral norm (in advance) while not greatly constraining realization of specific justice as an evaluative norm (afterward).

Therefore, Ouchi concludes that we should "establish general procedural rules in labor law and effective requirements specific to

dismissals" while maintaining the judicial principle of "the abusive exercise of dismissal right" as it currently stands. When constructing each requirement, we should consider financial resolutions as an additional way to deal with dismissals in court. Also, because the judicial principle of "the abusive exercise of dismissal right" constitutes the core of various judicial principles concerning labor contracts, he concludes, "The codification of dismissal rules … is an issue that should be discussed within the context of the future of judicial principles that concern everything about labor contracts."

6. Issues in Japan

In recent years, dismissals have received increasing attention in Japan, which can be explained by several circumstances that are specific to current Japan. For example, employment adjustments have widely occurred in response to the economic recession that has continued since the 1990s, and many workers face the possibility of being dismissed. In the 1980s, if one thought it was impossible to be discharged, today there is growing concern that the existing dismissal rules are changing.[11] In fact, as frequently mentioned in the volume, a series of court decisions concerning dismissal cases between 1999 and 2000 by the Tokyo District Court became the focus of attention and were interpreted as setting a precedent for future decisions. Moreover, as structural reform discourse, with its steadfast belief in the free market, spreads among the general public, a growing number of commentators are arguing that existing dismissal rules actually hinder future economic growth. Consequently, Article 18-2 of the Labour Standards Law codifying the judicial principle of "the abusive exercise of dismissal right" took effect on January 1, 2004. It reads, "A dismissal shall, where it lacks objectively rational grounds and is not considered to be appropriate in general social terms, be treated as a misuse

[11] In fact, according to *Koyo Doko Chosa (Survey on Employment Trends)*, in June 2002, the proportion of those who left their jobs due to business reasons (including *shukko*, or transfer to an affiliated firm, and return from *shukko*) reached 14.4%, clearly showing a huge jump compared to 6.8% in 1985 and 4.8% in 1990. Genda (2002) examines the reality of "unemployment due to restructuring" among middle-aged and older workers from a variety of angles.

of that right and invalid." In the legislative process, it has been repeatedly emphasized that the new Article 18-2 merely codified existing case law, and many do not believe that the codification will cause a major change in the way courts handle cases.[12]

However, the debate during the legislative process was confusing, and it generated speculation about the possible effects of codification. At the root of this confusion is the fact that the judicial principle of "the abusive exercise of dismissal right" — which is the basis of Japanese dismissal rules — is no more than case law. Since it is case law, there are no clear grounds for a decision in each specific case. Rules regarding dismissals should clearly explain what is and what is not permissible based on a given normative principle, but the courts always apply them in an incomplete manner. Since it is case law, the courts are allowed, to a certain degree, to adjust the standards they use to make decisions over time and with changes in the economic structure. If a particular case that was heard 10 years ago was to be tried today, it is possible that an entirely different decision might be reached. Therefore, the extent to which such "vaguely" defined dismissal rules constrain real-world economic activities is not entirely clear, and it will be difficult to reach a consensus as to which part of case law should be codified when codifying dismissal rules.

The discussion above leads to an important point when examining public rules concerning the labor market. Many of the studies on dismissal regulations in the West view dismissal rules as an "act of placing a cost on dismissals." In this line of thinking, which economic activities constitute dismissals is a self-evident question. The action of dismissing is regarded as "economic goods," and the main idea is to indirectly control dismissals in the economy by taxing the "price" of dismissals or regulating the "demand size" of dismissals. In other words, it is possible to follow the equilibrium theory in neo-classical economics based on the idea of price/quantity adjustment in this scheme.

However, this approach is limited when applied to the empirical analysis of Japan where dismissal rules take the form of a judicial principle. Some of the essays in this volume adopt the approach that

[12] This issue is featured in *Kikan Rodoho* 203 under the title of "Kaisei Rodo Hosei no Igi to Kadai (Significance and Problems of the Revised Labour Law)."

simply treats dismissal rules as a dismissal cost, but it is difficult to accept that in light of the available studies on labor law and actual court cases. This is because the judicial principle of "the abusive exercise of dismissal right" clearly is not intended to manipulate the number of dismissals, as emphasized in Chapter 8. It becomes easy to see this if we think about how and which part of the principle or which part of Article 18-2 of the Labour Standards Law must be changed in order to place a given cost or quota on dismissals.

Of course, it may be possible to shift from the approach of treating dismissal rules as normative doctrines to the "tax/quota" approach. What is at least clear, however, is that Japanese dismissal rules have never used such an approach before. One challenge for those involved in the study of law –and economics of labor in Japan is to explain this transformation. The question seems to present a great venue for deepening our understanding of the nature of labor-related economic transactions or advancing our thinking about how public rules work in our society and economy.

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JILPT Research Activities

As was introduced in the first issue of the *Review*, January 2004, the Japan Institute for Labour Policy and Training (JILPT) has launched research projects under nine themes in a three-year plan from FY2003 to FY2006. The following is an update of the progress status of each project for FY2004.

In addition to those research projects, researchers of JILPT also conduct "individual research." There are approximately 50 themes for such individual research, a number of which are also outlined below.

Themes of Research Projects

1. Geo-structural analysis of unemployment

In FY2004, the project has conducted research on employment and unemployment in the regions from the perspective of labor mobility and changes in industrial structure, as well as on regional vitalization through employment.

2. Restructuring of the system determining working conditions

In FY2004, the system determining working conditions of part-time workers has been comprehensively studied. The project has also conducted research on the modalities for labor-management relations given structural changes, including diversification of working conditions.

3. Desirable employment strategy in Japan

In FY2004, while continuing to study employment strategies in member countries of OECD and EU, the project has comprehensively analyzed public employment policies in Japan. It has also conducted specific analysis on the development of employment policies since the 1990s (presentation of primary model plan). The project has investigated the synergy between employment policies of central and local governments and employment strategies by corporations.

4. Environment containing employment and safety nets which would make possible diverse workings styles

In FY2004, the project has conducted case studies on outsourcing and personnel of non-profit organizations (NPOs) as well as on diverse working conditions at companies that extend employment contract beyond the retirement age of 60 years old.

5. Comprehensive analysis of corporate business strategies and personnel treatment systems, etc.

In FY2004, the research has been conducted to grasp the recent changes in human resources management systems of Japanese companies. It has also

investigated how such changes are having an effect on corporate results, worker productivity and morale, and physical and mental well-being.

6. Desirable infrastructure development for the labor market regarding vocational ability development

In FY2004, the project has undertaken research to gain a picture of the status of the training market by conducting a questionnaire survey to educational institutions and training providers in the private sector on qualitative aspects, such as content, period and level of training provided in the training market, that are not immediately discernible from existing statistics. It also conducted interviews with workers, results of which have been comprehensively analyzed in comparison with related data.

7. Establishment of a system which would harmonize private and occupational life

In FY2004, the project has investigated corporations and employees on their policies designed to support harmonizing occupational and private life, such as child-raising and nursing-care, as well as their needs, to identify the way to expand and enhance such policies in the future and elucidate obstacles to harmonization of private and occupation life. This issue of harmonization has also been investigated from the perspective of a diversification of working styles and lifestyles.

8. Development of an integrated occupational information database

In FY2004, as a pilot study, the project has operated an Internet database for evaluation to improve the system. It has also developed and maintained occupational information, the substantial contents, including data on figures, to develop the primary version of practical use aimed for practical test scheduled in FY 2005.

9. Support for the re-employment of middle-aged and older workers who have lost their jobs

In FY2004, the project has developed tools designed to assist job-seekers realize their own potential and general status of re-employment. It has also developed prototype systems based on a research into a guidance system for attitude inventory, a management experience check list, the career counseling process and "*Career In ★ Sites*" for middle-aged and older workers. A number of career counseling cases have also been collected.

Individual Research conducted during FY2004

Estimates for demand and supply of labor force

Researcher(s) seeks to estimate the labor force and unemployment rates until approximately 2050, which serves as basic information in formulating employment policies.

Research into the issue of foreign workers

Researcher(s) seeks to gain an understanding of the trends in labor demand by corporations for foreign workers under the current high unemployment rate, and examine causes for such trends.

Research into the characteristics of the unemployed and paths to re-employment

Researcher(s) investigates the actual situation on the unemployed to analyze the differences in their re-employment path according to characteristics. Based on that, the researcher(s) aims to make policy proposals towards re-employment of the unemployed.

Follow-up study on actual situation of the unemployed

Researcher(s) conducts a three-year follow-up study on the actual situation on the unemployed. The results of the study will be analyzed as panel data to be used as reference for planning of more appropriate unemployment measures.

Research into theoretical analysis of unemployment rate

Researcher(s) studies method to analyze structural and frictional unemployment more accurately to understand the labor market. The researcher(s) also provides reference materials to be used to identify the effectiveness of labor policies in responding to structural or frictional unemployment.

Investigation and research into young people's transition to labor market and modalities for supporting such a transition

Researcher(s) conducts hearings into the support policies of Japan for young people that have recently been initiated and also studies the operational and evaluation status of new policies including "Connections" service in the United Kingdom to provide materials to be used to effectively develop support policies for young people in Japan.

Research into jobs and workplaces with appeal for young people

Using the Human Resource Management (HRM) checklist, researcher(s) conducts a case study to investigate the kind of jobs and workplaces that have appeal for young people. The results of this study will be used as reference for support policies for young people.

Investigation into the labor contracts for workers engaging in a side job

Researcher(s) studies a type of a side job that enables life design as a second

career, starting from the form of side business (employment) to the form of a self-employment business. This includes studies on working regulations and career counseling provided by companies, changes in positioning of side jobs in the training system, and commission labor contract or employment at NPO as a side job.

Wage reforms in large companies over the past ten years and future issues

Researcher(s) collects actual cases to understand changes to the wage structure of leading companies in such industries as electronics and automobile during the so-called "lost decade," to give an outlook for the future of wage systems.

Research into wage data for work and duties standards

Wage information, represented by the "Basic Statistical Study on Wage Structure," or the one that relates to job descriptions and duties, is, with some exceptions including foreign-affiliated companies, not accessible. The researcher(s) aims to organize and provide wage information based on compact working standards.

Research into legislation pertaining to labor standards and labor contract (Development of labor contract)

Based on the supplementary resolution to the revised Labour Standards Law enacted in the 156th regular session of the Diet, researcher(s) conducts questionnaires and hearings to companies and labor unions, to gain a picture of the changes in labor conditions in Japan, and the development of labor contracts, including temporary or permanent transfer, and reassignment.

Research into corporate compliance and employment

Researcher(s) studies human resources management from the perspective of corporate compliance, the results of which are to be used as reference for planning of employment policies. The research will employ an approach to take the employment of persons with disabilities as an example, which is a theme that has been vigorously discussed in recent years in the United States and other countries.

Research into workers job consciousness

The Japanese style of employment premised on life-long employment is being replaced with a growing diversity of working styles including part-time work, dispatched work and contract labor, the needs of which are increasing. In addition, the circumstances surrounding workers are undergoing great change including the introduction of performance-based evaluation system. Researcher(s) aims to accurately grasp the direction of changes in needs and workers' job consciousness in order to appropriately promote tailor-made employment policies in such a changing environment.

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The Japan Institute for Labour Policy and Training (JILPT) organizes a Foreign Researcher Invitation Programs. Currently we are inviting foreign researchers to Japan who are highly motivated and have a desire to study Japanese labor issues. The conditions are as follows:

Term of invitation:

1) 1 to 12 months
2) Less than 1 month

Expenses:

The JILPT will cover travel, living and other expenses.

Requirements:

1) Must conduct research on Japanese labor policies or other labor issues.
2) Must submit a research report to the JILPT at the end of stay.
3) Must possess sufficient command of Japanese or English.
4) Must stay at JILPT while conducting research.
5) Health must be sufficient to carry out and complete intended studies.

Application deadline:

Applications are accepted annually. We are currently accepting applications for 2005 (April 2005 to March 2006). If you would like to apply for this year, please submit your application documents by December 10, 2004.

For more details, please access the Foreign Researcher Invitation Program on our website or contact us at:

The Japan Institute for Labour Policy and Training
International Affairs Department
8-23, Kamishakujii 4-chome, Nerima-ku,
Tokyo 177-8502 Japan
TEL: +81-3-5903-6311 FAX: +81-3-3594-1113
Email: inviting@jil.go.jp
URL: http://www.jil.go.jp/english/index.html

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