

Recent Trends in Labour Market Regulations

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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 increasingly 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 Katsuhiko Tsuji, “Shokugyo Anteihu 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,

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 Anteihō Rodosha Hakenho Kaisei no Igi to Hoteiki Kadai (Revisions of the Employment Security Law and Worker Dispatching Law, as Discussed from a Legal Perspective),” *Nihon Rodo Kenkyū Zasshi* 523 (2004).

³ For the 1999 revision, see articles in *Kikan Rodoho* 190 and 191 (1999), Michio Tsuchida; “Kaisei Shokugyo Anteihō no Igi to Kadai (Employment Security Law: Its Amendment and New Policy),” *Nihon Rodo Kenkyū Zasshi* 475 (2000), p. 36-; and Junichiro Mawatari, *Rodo Shijōho 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)

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/siryoi/>. 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 Council 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 2 of 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).

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 cause 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).

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 Forumu 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.

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).