"Phase III" of the Japanese Equal Employment Opportunity Act

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Introduction

Presently in Japan, more than 40% of all employed persons (more precisely, 22.8 million or 41.6% of 54.7 million employees) are women, with female workers comprising more than 40% of the entire labor force population.[1] What was once a low percentage for female students entering universities now exceeds 40%, bringing it nearly on a par with that of male students when also including students entering two-year colleges.[2] This suggests that business firms will not grow without effectively utilizing these valuable human resources. Nevertheless, there are still countless employers who fail to treat male and female workers equally in the workplace.

From a social perspective, it is imperative that female workers not be excluded simply because of their gender. They should be provided with equal opportunities to exercise their capability to perform important roles at work. For the purpose of establishing gender-equal workplaces, the Japanese Equal Employment Opportunity Act (hereinafter referred to as the "EEOA") was enacted in 1985 and took effect in April of the following year.[3]

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[1] Figures for 2006 shown in the annual "*Rodoryoku Chosa"* (Labor Force Survey) by the Ministry of Internal Affairs and Communications.

[2] 53.6% for male students and 51.0% for female students, according to figures for 2006 shown in the annual "*Gakko Kihon Chosa"* (Basic Survey on Schools) by the Ministry of Education, Culture, Sports, Science and Technology. The percentage of students entering universities is calculated by dividing the number of students entering universities (including students entering universities one or more years after graduation from high schools) by the number of 18-year-olds. The percentage of female students among all university (undergraduate) students has also reached 40.4%.

[3] Strictly speaking, this act was originally made in 1972 as the Act to Promote the Welfare of Working Women. It became the so-called Equal Employment Opportunity Act in 1985 when the provisions for equal employment opportunities of male and female workers were added. Its complete name, which was slightly changed in 1997, is the Act on Securing Etc. of Equal Opportunity and Treatment between Men and Women in Employment. English translation of the act after the 2006 revisions is available from http://www.cas.go.jp/jp/seisaku/hourei/data/MandW.pdf, although this paper deviates from it in some respects.

Incidentally, the expression of the Equal Employment Opportunity Law (EEOL) was

Prior to this act, although Article 14 of the Constitution clearly stipulated the prohibition of discrimination on the basis of sex, it was construed as not directly applicable to private employment relations. The only provision relating this principle to employment issues was Article 4 of the Labor Standards Act (hereinafter referred to as the "LSA"), which prohibits wage discrimination between male and female workers. Sex discrimination regarding loss of employment was outside the reach of Article 4, but Japanese courts, invoking Article 90 of the Civil Code which nullifies a contractual provision repugnant to "the public order and good morals of the society," struck down some types of unfavorable measures against women, such as the "retirement on marriage" rule and the lower mandatory retirement age.[4] It was certainly a commendable effort on the part of judiciary to realize the spirit of the Constitution in the workplace. However, as for the stage of recruitment and hiring, the Supreme Court, in contrast to its attitude towards employment termination, emphasized that a wide range of freedom should be given to employers, allowing them even to make discriminatory selections unless there is a specific statutory ban.[5] Thus, a policy of employing only men for main career positions on the career advancement track was widespread, and women were often hired for ancillary positions with inferior educational background. Even when there was a wage differential between male and female workers, the employer could easily argue that they did not engage in equivalent work, thereby severely limiting the functions of Article 4 of the LSA.

The purpose of adopting the EEOA was to rectify such situations, as well as to ratify the United Nations Convention on the Elimination of All Forms of Discrimination against Women (1979). However, the legislative movement met with strong opposition that it conflicted with the traditional employment practices and the social values of Japan. As a result, the original EEOA became a product of compromise, wherein, for example, employers were only obligated to

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more popular in the past, but the Japanese government recently adopted a policy of using the word "Act" instead of "Law" in English translation of the names of statutes and this paper follows it. The same applies to the Labor Standards Act.

4 The Supreme Court endorsed this theory in Nissan Motor Co. case (March 24, 1981, *Minshu* 35-2-300), holding that mandatory retirement age of 55 for women was null and void when men could be employed until age 60. The provision of work rules setting such discriminatory retirement ages was in breach of Article 90 of the Civil Code, which should reflect the spirit of Article 14 of the Constitution.

5 Mitsubishi Jushi Co. case, December 12, 1973, *Minshu* 27-11-1536.

"endeavor" to treat men and women equally during the recruiting and hiring processes. This law was therefore criticized for being lukewarm and ineffective, but substantial strides were made with the 1997 revisions (implemented in April 1999). They reinforced provisions for equality, such as a square mandate of equal treatment at the time of recruitment and hiring, and added special provisions pertaining to sexual harassment.[6]

Then, in June 2006, more than 20 years after the enactment of the EEOA, a bill requiring further major revisions was passed by the Diet, and took effect on April 1 of this year. The current revisions achieved significant development with a move from prohibiting discrimination against women to prohibiting "discrimination on the basis of sex." At the same time, new provisions were added to prohibit so-called indirect discrimination and to protect female workers from pregnancy-related discrimination. In fact, the issue of indirect discrimination attracted a great deal of attention as opposing opinions repeatedly found their way into newspapers and other media. The following paragraphs will show an outline of the EEOA embodied in the 2006 revisions.[7]

1. Prohibition of "Discrimination on the Basis of Sex"

(1) From Discrimination against Women to Discrimination on the Basis of Sex

In the current revisions, the most important issue affecting the nature of the law is a change from "discrimination against women" to "discrimination on the basis of sex," which applies to both men and women.

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[6] For the 1985 Act, see Loraine Parkinson, *Note, Japan's Equal Employment Opportunity Law: An Alternative Approach to Social Change*, 89 Colum. L. Rev. 604 (1989). For the 1997 revision and the situation thereafter, see Takashi Araki, *Recent Legislative Developments in Equal Employment and Harmonization of Work and Family Life in Japan*, 37-4 Japan Labor Bulletin 5, http://www.jil.go.jp/jil/bulletin/year/1998/vol37-04/05.htm (1998); Kiyoko Kamio Knapp, *Don't Awaken the Sleeping Child: Japan's Gender Equality Law and the Rhetoric of Gradualism*, 8 Colum. J. Gender & L. 143 (1999); Jennifer S. Fan, *From Office Ladies to Women Warriors?: The Effect of the EEOL on Japanese Women*, 10 UCLA Women's L. J. 103 (1999); Robert Larsen, Ryousai Kenbo *Revisited: The Future of Gender Equality in Japan After the 1997 Equal Employment Opportunity Law*, 24 Hastings Int'l & Comp. L. Rev. 189 (2001); Tadashi Hanami, *Last 20 Years of Equal Employment Opportunity in Japan*, in ISLSSL, 8TH ASIAN REGIONAL CONGRESS of LABOUR AND SOCIAL SECURITY LAW 107 (2005), http://www.airroc.org.tw/ISLSSL2005/program/invited.asp.

[7] The provisions quoted in this paper are those of the current act after the 2006 revision. When referring to a provision of the act prior to the revision, it will be indicated as "Former Article _."

The previous provisions for equality stipulated that "employers shall provide women with opportunities equal to men" (former Article 5) or that "employers shall not treat women workers discriminatorily on the basis that they are female" (former Articles 6 through 8). These provisions were designed to protect only women from discrimination. The revised law modified these to "employers shall provide equal opportunities for all persons regardless of sex" (Article 5) or "they shall not discriminate against workers on the basis of sex" (Article 6), descriptions that are universally applicable to male and female workers. Furthermore, in the provision stating the basic principle of the law (Article 2), the word "women" was deleted from the former description, "women workers be enabled to engage in full working lives . . . without discrimination based on sex."

It is a well-known fact that the purpose of the original EEOA was to "promote the welfare" of female workers. According to the administrative interpretation given by the then Ministry of Labor, while excluding female workers from certain positions or providing them with less favorable treatment than their male counterparts (for example, "employing only men for main career positions" or "limiting the number of men and women to 10 and 5 respectively" was clearly in conflict with the goals of the act, it did not prevent employers from taking preferential treatments for female workers. Therefore, for instance, "employing only females for part-time positions" was permissible because it would promote the welfare of female workers by expanding their opportunity. This interpretation was criticized for not embracing the true concept of equality and leading women to segregated, unfavorable jobs.

Consequently, a new interpretation surfaced in conjunction with the 1997 revisions, which established a provision on positive (affirmative) actions (former Article 9, and Article 8 of the current EEOA). It specifically permits the employer to take "measures in connection with women workers with the purpose of improving circumstances that impede the securing of equal opportunity and treatment between men and women in employment." It was understood that the revised EEOA prohibited even preferential treatment of women as falling under the discriminatory treatment and therefore the new provision was needed to legalize positive actions in support of female workers. Hence, except for cases of appropriate positive actions, the discriminatory treatment of male workers became illegal. However, it was only an incidental result of having prohibited the discrimination against female workers.

By contrast, the current revisions changed the purpose of the law itself to the "prohibition of discrimination on the basis of sex." Male workers were recognized for the first time as subject of protection under the EEOA. Practically speaking, if a male worker is treated discriminatorily, he may now take the procedure of the EEOA to solve his dispute, asking for assistance (advice, guidance, or recommendations) from the Prefectural Labor Bureau and for mediation by the (Prefectural) Dispute Adjustment Commission (Articles 17 and 18). The prohibition of sex discrimination applies to both male and female workers in other developed countries, and the EEOA has finally evolved into such an act.[8]

(2) Expansion of Matters Subject to the Prohibition of Discrimination

One major feature of the equality provisions of the Japanese EEOA is that they do not cover the entire employment relationship, but individually list those matters subject to the law. At the time of its enactment in 1985, provisions were established concerning (a) recruitment and hiring, (b) placement and promotion, (c) education and training, (d) fringe benefits, and (e) retirement and dismissal. No provisions were made regarding wages because Article 4 of the LSA had already dealt with it. As for (a) and (b) above, bearing in mind the wide range of "freedoms" previously enjoyed by employers, the legal mandate was so placidly restricted that the only obligation to employers was to "endeavor" to avoid discrimination. At the time of the 1997 revisions, however, these provisions were strengthened and converted to provisions prohibiting discrimination.[9] In addition, provisions (b) and (c) were integrated.

In the 2006 revisions, the areas subject to the prohibition of discrimination were extended in the following two points. First, it is stipulated that the term "placement" includes the "allocation of duties" and "grant of authority" (Article

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[8] For comparison, Article 4 of the LSA states that an employer "shall not engage in discriminatory treatment of a woman with respect to wages on the basis that they are female." Despite this seemingly one-sided wording, it has long been interpreted that preferential treatments of female workers are also prohibited as discriminatory treatment. Kazuo Sugeno, JAPANESE LABOR AND EMPLOYMENT LAW 162 (2002).

[9] This change may make a difference to pre-existing employees as well. Those female workers who were employed for a non-career track before the arrival of the EEOA were awarded damages for the period after the revision of the EEOA, because it was held illegal to continue disparate placement of these women without making efforts to remedy the situation. See Nomura Securities Co. case, Tokyo District Court, February 20, 2002, *Rodo-hanrei* 822-13.

6, Item 1). Thus, for example, if workers occupy the same managerial position but their duties and authorities vary by gender, it constitutes sex discrimination regarding "placement." Second, the "demotion" of workers, "change in job type or employment status," "encouragement of retirement" and "renewal of the labor contract" were added as new areas subject to the prohibition of discrimination (Article 6, Items 1, 3 and 4). The renewal of labor contracts actually means an employer's refusal to renew a fixed-term employment contract because of the employee's sex. Although these matters are closely related to placement, promotion or dismissal, it was arguable that they are technically outside the coverage of the EEOA. The revision aims to fill the gap.

In addition, there was an organizational change to the equality provisions. Except for the provision dealing with recruitment and hiring (Article 5), three provisions for the prohibition of discrimination—former Article 6 (placement, promotion and training), former Article 7 (fringe benefits), and former Article 8 (retirement and dismissal)—were integrated into a single provision of new Article 6, which prohibits discrimination with regard to Items 1 through 4.

On the other hand, the ban on discrimination concerning retirement and dismissal based on female worker's marriage, pregnancy, childbirth or maternity leave, which was included in provisions of (e) above, was reallocated and included in Article 9 as described below. Because pregnancy and maternity issues are unique to female workers, it was considered appropriate to separate them from the prohibition of discrimination on the basis of sex.

Article 5 (Prohibition of Discrimination on the Basis of Sex)

With regard to the recruitment and hiring of workers, employers shall provide equal opportunities for all persons regardless of sex.

Article 6

With regard to the following matters, employers shall not discriminate against workers on the basis of sex.

(i) Assignment (including allocation of duties and grant of authority), promotion, demotion, and training of workers;

(ii) Loans for housing and other similar fringe benefits as provided by Ordinance of the Ministry of Health, Labor and Welfare;

(iii) Change in job type and employment status of workers; and

(iv) Encouragement of retirement, mandatory retirement age, dismissal, and renewal of the labor contract.

(3) Prohibition of Indirect Discrimination

After the 2006 revisions, the above two provisions for the prohibition of discrimination are followed by a new provision entitled "Measures on the Basis of Conditions other than Sex" (Article 7), which prohibits what is known as indirect sex discrimination. It is targeted at the employer's measures regarding matters covered by Articles 5 or 6 which apply "a criterion concerning a person's condition other than the person's sex" and which are specified by the Ordinance of the Ministry of Health, Labor and Welfare as measures that may cause discrimination in effect by reason of sex, considering the proportion of men and women who satisfy the criterion and other factors. This provision says that the employer may not take such a measure unless there is a legitimate reason, such as cases where it is specifically required for the purpose of performing the job in question or for the purpose of employment management of the firm.

There was no provision in the former EEOA addressing indirect discrimination, and it was not generally understood to subsume this legal principle. However, as the prohibition of indirect discrimination became an international trend, a growing number of people began proclaiming the need to tackle the problem of inequality resulting from facially gender-neutral standards in order to effectively promote equality. However, employers showed strong opposition, claiming that the concept of indirect discrimination was not only unfamiliar in Japan but also dangerously ambiguous and undefined. This became the greatest point of contention during the current revisions of the EEOA.

Consequently, the prohibition of indirect discrimination was introduced in a compromised form, limiting its application to "the measures specified by the Ordinance of the Ministry of Health, Labor and Welfare." The Labor Policy Council (tripartite advisory committee under the Minister of Health, Labor and Welfare), which established the contents of the bill, agreed that for the time being the prohibition of indirect discrimination should apply only to the following three cases: (i) applying a criterion concerning body height, weight or physical capacity when recruiting or hiring workers, (ii) in case the employer adopts dual career ladder system, requiring workers to be able to accept future transfers with a change of residence when recruiting or hiring workers for

main positions of the core career course, and (iii) requiring workers to have experiences of job relocation when deciding their promotion. After the passage of the revised EEOA, the Ministry of Health, Labor and Welfare issued a new ordinance incorporating the above items (Article 2 of the EEOA Enforcement Regulations). Such limitation may be deplorable to those who sought a general prohibition of indirect discrimination. Still, the fact that they were adopted overcoming fierce opposition is indeed an achievement.

In any event, as for the above three cases, it was officially recognized that such criteria are likely to cause unfavorable outcomes for one sex (female workers in particular) and could lead to discrimination on the basis of sex. In order to adopt these measures, employers must have "a legitimate reason" arising from the nature of the job or the necessity of business operations. Whether such a reason exists or not is determined on a case-by-case basis. The Ministry of Health, Labor and Welfare has given guidelines on this issue, showing some examples where it is recognized that no legitimate reason exists. In the case of (ii) above, for instance, no company can justifiably claim to have a legitimate reason if it has no branches or regional offices across wide areas and has no plans to have ones in the foreseeable future.

On the other hand, Article 7 does not apply when a company, for example, specifies required college degree (such as engineering or literature) at the time of recruitment or adopts the criterion of "head of household" with regard to fringe benefits, even though they may bring about a significant disparity in the ratio of male and female workers among applicable persons.[10] According to the Ministry, these applicable criteria are to be reviewed from time to time on the basis of the trend of court cases and other developments, and new criteria pertaining to indirect discrimination may be added when the Ordinance is revised in the future. Furthermore, if a civil lawsuit pertaining to such a criterion is filed, a bold judge may decide it to be indirect discrimination even under the current law, either by interpreting the EEOA widely or by relying on Article 90 of Civil Code.

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[10] There is also an argument that differences in treatment between regular employees and part-time workers are forms of indirect discrimination against female workers. However, at least, the current ordinance under Article 7 of the EEOA does not cover such cases. At the same time, measures to require equality according to relative conditions of regular and part-time workers have been considered, apart from the theory of indirect sex discrimination. The Diet has just passed a revision pursuing such a direction to the Act for the Improvement in Managing the Employment of Short-time Workers.

As mentioned earlier, wage discrimination between male and female workers is subject to Article 4 of the LSA. The act has not been revised and there is no special provision for indirect discrimination, but some people have contended that the theory of indirect discrimination be accepted as the interpretation of the article.[11] This argument is expected to continue.

Article 7 (Measures on the basis of Conditions other than Sex)

An employer shall not take measures concerning the recruitment and hiring of workers or any of the matters listed in the items of the preceding Article which apply a criterion concerning a person's condition other than the person's sex and which are specified by the Ordinance of the Ministry of Health, Labor and Welfare as measures that may cause a discrimination in effect by reason of sex, considering the proportion of men and women who satisfy the criterion and other matters, except in cases where there is a legitimate reason to take such measures, such as where said measures are specifically required for the purpose of performing the relevant job in light of the nature of that job, or cases where such measures are specifically required for the purpose of employment management in light of the circumstances of the conduct of the employer's business.

2. Prohibition of Disadvantageous Treatment of Female Workers by Reason of Pregnancy and Childbirth, etc.

Although the EEOA has become an act for the prohibition of sex discrimination of both male and female workers, pregnancy and childbirth remain unique to female workers. Disadvantageous treatment of female workers based on these issues would undermine equality among men and women, which clearly is contrary to the aim of the EEOA.[12] However, as the cases of

[11] The decision of the Tokyo District Court in Sanyo Bussan Co. case (June 16, 1994, *Rodo-hanrei* 651-15) is known for its statement that because most of the persons listed as "head of household" on residence registries are men, paying higher salaries to these householders puts female workers at a disadvantage. The court held the employer in breach of Article 4 of the LSA, and the decision aroused a controversy whether it adopted the notion of indirect discrimination under the article. It was, however, a case where the employer's intention to treat female workers disadvantageously was so clear from the outset. There was so much evidence of direct discrimination that it is hard to tell the relevance of indirect discrimination.

[12] For example, in Shokokai Uwajima Hospital case (Matsuyama District Court, Uwajima

"*ninshin-risutora*" (termination upon pregnancy) are reported in weekly magazines, it is not rare at all that a female worker is forced to retire from her company or to accept a change in employment status to part-time when the employer knows of her pregnancy. In fact, according to 2006 statistical data, among the cases in which the Equal Employment Opportunity Offices of Prefectural Labor Bureaus assisted in the resolution of disputes under the EEOA, 90.8% of cases pertaining to retirement and dismissal were allegedly "by reason of pregnancy, childbirth, etc."[13]

In the 2006 revisions, while the sentence requiring that female workers be enabled to engage in full working lives "with respect for maternity" was maintained in the basic principle of the EEOA (Article 2), amendments were made so as to strictly prevent the disadvantageous treatment of female workers by reason of pregnancy or childbirth. As mentioned earlier, some of such provisions were contained in the former EEOA prohibiting discrimination against female workers regarding retirement and dismissal. They were separated from Article 6, which now stipulates the prohibition of discrimination of both genders, and were reallocated and included in a separate article (Article 9).

(1) Forced Retirement by Reason of Marriage, Pregnancy or Childbirth, and Dismissal for Marriage

Paragraph 1 of Article 9 prohibits employers from stipulating "marriage, pregnancy or childbirth" as a reason for retirement of female workers, and Paragraph 2 of the same article states that employers shall not dismiss female workers for marriage. These provisions were contained in the former EEOA, although dismissal for marriage was prohibited together with dismissals by reason of pregnancy, childbirth or maternity leaves taken before and after childbirth. These are dealt with separately in Paragraph 3 of Article 9, as shown below.

Aside from pregnancy and childbirth, "marriage" may happen to male workers, too. Therefore, establishing a provision that applies only to female workers in this regard goes not without question. If female workers alone are

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Branch, December 18, 2001, *Rodo-hanrei* 839-68), the employer refused to renew the employment contract of a female worker because of her pregnancy. The court nullified the termination, holding that it was against the aim of the EEOA.

[13] Ministry of Health, Labor and Welfare, *"FY2005, Danjo Koyo Kintoho no Shiko Jokyo"* (The Status of EEOA Implementation) (2006).

forced to retire or dismissed for marriage while their male counterparts are retained, it clearly falls under discriminatory treatment on the basis of sex concerning retirement and dismissal (Article 6, Item 4). However, it was decided to maintain the provision to address retirement and dismissal of female workers for marriage, considering the fact that specific legal regulations on this subject are required by the Convention on the Elimination of All Forms of Discrimination against Women. Moreover, the system of retirement-on-marriage for female workers[14] was once prevalent among Japanese companies, and a similar mentality may still exist today. It sould be helpful to indicate the significance of the issue by prohibiting such dismissals directly (in other words, regardless of how male workers are treated).

(2) Additional Prohibited Reasons and the Prohibition of Disadvantageous Treatment

Paragraph 3 of Article 9 prohibits the dismissal of female workers by reason of pregnancy, childbirth, or maternity leaves taken before and after childbirth as guaranteed by Paragraphs 1 and 2 of Article 65 of the LSA. This provision was contained in Paragraph 3 of Article 8 of the former EEOA together with the prohibition of dismissal for marriage, but the latter forms an independent paragraph now (Paragraph 2 of Article 9, mentioned above). At the same time, Paragraph 3 is strengthened over its predecessor in the following two points.

The first is an expansion of prohibited reasons. The words "other reasons related to pregnancy or childbirth as provided by the Ordinance of the Ministry of Health, Labor and Welfare" were added. For example, dismissal is now prohibited in cases where a female worker requires a change in work hours or a reduction in workload in accordance with a doctor's recommendation, or in cases of decreased efficiency or inability to work due to the worker's health condition arising from pregnancy or childbirth, which includes morning sickness.

The second is the prohibition of "disadvantageous treatment" of female

[14] The leading case on this issue is the Sumitomo Cement case (Tokyo District Court, December 20, 1966, *Rominshu* 17-1-1407). The court held that the stipulation requiring female workers to resign upon marriage was null and void under Article 90 of the Civil Code because it was repugnant to the public order and good morals of the society, which should reflect the equality principles of the Constitution. The decision repudiated the "common practice" of the time and significantly contributed to the development of a legal theory of equality between men and women before the arrival of the EEOA. See Frank K. Upham, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 131-139 (1987).

workers in addition to "dismissal." For example, if a woman is demoted because of her pregnancy, it was once necessary to employ a technique of interpretation, such as it should not be permitted in light of the "aim" and "spirit" of the EEOA, which prohibits dismissal by reason of pregnancy. Now it constitutes a clear violation of the revised act. However, sometimes it is not easy to tell whether or not a particular measure falls under illegal disadvantageous treatment by reason of pregnancy, childbirth, etc.[15] The Ministry of Health, Labor and Welfare has established guidelines to aid in that determination.

(3) Dismissal during Pregnancy or in the First Year after Childbirth

Moreover, Paragraph 4 of Article 9 was added as an entirely new provision, which says that dismissal of female workers who are pregnant or in the first year after childbirth shall be "void." At first glance this provision appears rather drastic, but the following proviso states that this shall not apply in the event that employers prove that the dismissal is not for reasons prescribed in Paragraph 3 of Article 9. Hence, this is in essence a change in the burden of proof. Nonetheless, it will be of great significance in the real workplace that the dismissal is presumed to be void, since employers have to refrain from dismissing female workers in the absence of a fully persuasive reason for termination.

Article 9 (Prohibition, etc. of Disadvantageous Treatment by Reason of Marriage, Pregnancy, Childbirth, etc.)

(1) Employers shall not stipulate marriage, pregnancy or childbirth as a reason for retirement of women workers.

(2) Employers shall not dismiss women workers for marriage.

(3) Employers shall not dismiss or give disadvantageous treatment to women workers by reason of pregnancy, childbirth, or for requesting absence from

[15] For example, the Supreme Court held in Toho Gakuen case (December 4, 2003, *Rodo-hanrei* 862-14) that, under a system in which the attendance ratio of 90% or more is needed for an employee to receive semi-annual bonuses, the employer may not refuse to pay a bonus at all by treating the leaves taken by a female worker before and after childbirth as absence from work, because it defeats the purpose of the LSA which guarantees the right to maternity leave. However, the same decision indicated that reducing the amount of the bonus in proportion to the length of absence from work is permitted. Although not a case under the EEOA, it shows the difficulty of drawing a line between proper measure taken according to the actual length of absence and illegal disadvantageous treatments because of pregnancy, childbirth and/or maternity leave.

work as prescribed in Article 65, paragraph 1, of the Labor Standards Act (Act No. 49 of 1947), or having taken absence from work as prescribed in the same Article, paragraph 1 or 2, of the same act, or by other reasons relating to pregnancy, childbirth as provided by Ordinance of the Ministry of Health, Labor and Welfare.

(4) Dismissal of women workers who are pregnant or in the first year after childbirth shall be void. However, this shall not apply in the event that the employer proves that the dismissal in question was not for reasons prescribed in the preceding paragraph.

3. Employer's Obligation to Take Measures against Sexual Harassment

Japanese legal theory on sexual harassment was developed, at the outset, under the Civil Code with almost no correlation to the EEOA. A victimized female worker sued the perpetrator and his employer for damages under tort provisions of the Civil Code, contending that her rights of human dignity and sexual freedom were injured.[16] While the number of successful cases increased rapidly and everybody knows the concept of sexual harassment (or at least the word "*sekuhara*" in abbreviated Japanese language) today, it has not been viewed clearly as a form of discrimination because of sex.

Nonetheless, in the 1990s, as many lawsuits were filed against sexual harassment, public awareness was raised that it is an important issue for female workers. Consequently, in conjunction with the 1997 revisions, a special provision to address sexual harassment was added to the EEOA. Embracing two types of sexual harassment known as "*quid pro quo*" and "hostile environment" cases, the provision mandated employers to "give necessary consideration from a viewpoint of employment management" so that female workers may not suffer from these two types of sexual harassment (Former Article 21, Paragraph 1). The Ministry of Health, Labor and Welfare issued guidelines detailing the provision. As easily perceived from its weak wording, however, the nature of this provision, unlike the equality provisions to prohibit discrimination, was best characterized as a supportive measure for female

[16] The most famous decision on sexual harassment in the early days was rendered in 1992 in so-called Fukuoka Sexual Harassment case (Fukuoka District Court, April 16, 1992, *Rodo-hanrei* 607-6). For Japanese legal theory on sexual harassment, see Ryuichi Yamakawa, *We've Only Just Begun: The Law of Sexual Harassment in Japan*, 22 Hastings Int'l & Comp. L. Rev. 523 (1999).

workers. It was written in Chapter 3, "Measures to be Considered Regarding the Employment of Women Workers," along with measures to be taken for health management during pregnancy and after childbirth. Accordingly, protection by the provision was limited to female workers, with no measures afforded to male counterparts victimized by sexual harassment.

The 2006 revisions, firstly, strengthened the obligation by requiring that employers "shall establish necessary measures in terms of employment management to give advice to workers and cope with problems of workers, and take other necessary measures…" (Article 11, Paragraph 1). Therefore, the law imposes a positive duty upon the employer to take necessary measures with respect to sexual harassment. According to new guidelines, the contents of such measures are almost identical to those advocated under the former EEOA, consisting of the following three pillars: (a) to clarify the employer's policy against sexual harassment and to inform and educate all employees about such policy, (b) to establish internal systems to respond to grievances of sexual harassment and take adequate measures, and (c) to take immediate and adequate measures at the time of occurrence of sexual harassment. Secondly, the phrase "women workers" of the former provision was replaced in all instances with "workers," so as to equalize the treatment of male and female workers. Hence, sexual harassment against male workers has been taken cognizance of for the first time by the EEOA.

Furthermore, although the new provision is still placed alongside of the provisions of measures for healthcare during pregnancy and after childbirth (Articles 12 and 13), these provisions are bound together under the title of "Measures to Be Taken by Employers" (Section II) and are found in Chapter II, "Securing, Etc. of Equal Opportunity and Treatment between Men and Women in Employment." This makes it clear that the measures for healthcare during pregnancy and after childbirth and those concerning sexual harassment are not mere welfare but integral part of efforts to achieve equality in the workplace.

Article 11 (Employment Management Measures Concerning Problems Caused by Sexual Speech or Behavior in the Workplace)

(1) Employers shall establish necessary systems in terms of employment management to counsel workers and cope with their problems, and take other necessary measures so that workers they employ do not suffer any disadvantage in their working conditions by reason of said workers'

responses to sexual speech or behavior in the workplace and that their working environments do not suffer any harm due to such sexual speech or behavior.

(2) and (3) omitted.

4. Other Points of Revision

(1) Strengthened Procedures

In order to settle disputes under the equality provisions, the EEOA establishes procedures for assistance (advice, guidance and recommendations) provided by the Prefectural Labor Bureau and those for mediation by the Disputes Adjustment Commission (Articles 17 and 18). The 2006 revisions have expanded the areas of dispute covered by these procedures. Disputes related to discrimination on the basis of sex (above 1), disadvantageous treatment by reason of pregnancy, childbirth, etc. (above 2), as well as disputes related to the obligations of employers to take measures regarding sexual harassment and measures concerning healthcare during pregnancy and after childbirth (above 3) are now all subject to these procedures.

Moreover, in connection with the procedures for mediation by the Disputes Adjustment Commission, the revised EEOA clearly states that the Commission has power to make the parties appear and hear their views (Article 20), and that the Commission may discontinue the procedures when it finds no chance for amicable resolution (Article 23). It also establishes provisions for interruption of prescription (Article 24) and for suspension of court proceedings (Article 25). In addition, under the revised EEOA, the Health, Labor and Welfare Minister may announce to the public the name of violating employer regarding wider range of issues than before (Article 30), and the employer must face tougher sanction than before if it refuses to comply with, or files a false report to, the Minister's request for reports (Article 33). Although relatively modest, these procedural improvements are designed to enhance the effectiveness of the EEOA.

There is a persistent criticism that the administrative remedies provided by the EEOA are toothless and ineffective, and the victims of discrimination have no other choice but to file a civil lawsuit against the employer in cases of noncompliance. The current revisions do not change this picture. However, it is also true that there are many cases of successful assistance in which the

employer, taking advice of the Prefecural Labor Bureau, corrects its practices.[17] Greater opportunities for government involvement under the revised act will certainly help workers.

(2) Assistance for Positive Action Measures

As for positive action programs, the 1997 revisions introduced two provisions: one to recognize their legality and the other for governmental assistance for them. Taking over these provisions, the revised 2006 EEOA states (1) that the prohibition of discrimination on the basis of sex shall not preclude employers from taking "measures in connection with women workers with the purpose of improving circumstances that impede the securing of equal opportunity and treatment between men and women in employment" (Article 8), and (2) that the State may provide consultation services and other assistance to employers regarding such measures (Article 14).

With regards to the above (1), which is exactly the same as its predecessor, it is noteworthy that even though the prohibition of sex discrimination has become applicable to both men and women, the object of positive action is limited to female workers. According to the guidelines prepared by the Ministry of Health, Labor and Welfare, employers are allowed to take positive action measures if the ratio of female to total workers in a particular workplace (employment-management division) is less than 40%.

The above (2) is also almost identical to its predecessor. Only a slight change was made by specifying government assistance for disclosure of information on the implementation of positive action measures (Article 14, Item 5). It is aimed at promoting voluntary actions of business firms through publicizing good examples.

Meanwhile, in Japan, implementation of positive action programs depends upon the initiative of the employers and is not required by law or regulation.

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[17] According to "*FY2005, Danjo Koyo Kintoho no Shiko Jokyo*," *supra* note 13, the Prefectural Labor Bureaus (to be precise, their Equal Employment Offices) received 19,724 inquiries and requests for consultation in 2005, of which 141 were requests of action from workers regarding specific cases of equal treatment. In addition, based on reports from employers, the Prefectural Labor Bureaus provided 5,042 corrective instructions to 2,827 organizations. In most of these cases, the employer corrected its practices in accordance with the Bureau's guidance. Meanwhile, the number of mediation cases handled by the Disputes Adjustment Commission was typically low at 4 cases, but all parties concerned accepted proposed plans and resolved their disputes accordingly.

They are only encouraged and expected mildly by the Basic Act for Gender-equal Society (1999). This did not change in the latest revisions of the EEOA. However, the fact that the EEOA has become an act for prohibiting sex discrimination regardless of men or women raises the question all the more acutely, whether the "equality" that keeps the legacy of inequalities of the past untouched should be acceptable.

According to 2005 figures on Japanese companies, 20 years after the enactment of the EEOA, the ratio of females was only 10.4% among assistant managers, 5.1% among section managers, and 2.8% among general managers.[18] This suggests that business firms need to take a more aggressive attitude toward promoting female workers. If no substantial improvements are made, the reinforcement of positive action measures will be discussed during the next EEOA revision, perhaps in a more drastic way.

(3) Easing of Regulations on Female Underground Work under the LSA

The promotion of sexual equality through the EEOA has been accompanied by the easing of female protection provisions of the LSA, because they tended to limit job opportunities of women unnecessarily.[19] When the EEOA was adopted in 1985, the LSA was also amended so that, firstly, the former Chapter 6, "Women and Minors," which provided for their special protection, was divided into Chapter 6, "Minors," and Chapter 6-2, "Women," reflecting their differing needs and conditions. Secondly, restrictions on overtime and rest-day work, night work, and dangerous or injurious work by female workers were moderately relaxed.

It was a somewhat compromised move, commensurate with the lenience of the original EEOA. However, when the EEOA was revised in 1997, the special restrictions related to working hours, rest-day, and night work of female workers stipulated in the LSA were completely abolished, although they enjoy special protection regarding these matters during pregnancy and for a year following childbirth (so-called expectant or postnatal women). On the other hand, ban on female workers in general remained applicable to underground work (Article

[18] Ministry of Health, Labor and Welfare, *"Hataraku Josei no Jitsujo"* (Actual Conditions of Working Women), 2005 edition (2006).

[19] It should be noted that protection of female workers during pregnancy and after childbirth has been reinforced while restrictions on female workers in general have been abolished or relaxed.

64-2 of LSA) and to certain types of hazardous work, or, to be exact, work involving the lifting of heavy materials and work in locations where poisonous gasses or dusts such as lead or mercury are emitted (Articles 64-3, Paragraph 2 of the LSA; Article 3 of the Women's Labor Standards Regulations).

At the time of the 2006 revisions of the EEOA, restrictions on underground work of women were relaxed. Excluding the cases of expectant or postnatal women, the conventional default rule of prohibition was removed and female workers may be employed for underground work unless it falls under the prohibited category, that is, manual excavation and other sort of work "specified by the Ordinance of the Ministry of Health, Labor and Welfare as injurious work for women." In reality, in addition to manual labor, the ordinance also prohibits working with engines and dynamite, and only allows employers to use female workers for management and supervisory work below the ground. Nevertheless, this change undeniably benefits female civil engineers, who are increasing in number lately, by expanding their opportunities for work.[20]

Moreover, as a result of the current revisions, the title of Chapter 6-2 of the LSA was changed to "Expectant or Postnatal Women, etc." from "Women." Thus, it is clear now that the provisions of this chapter, beginning with maternity leaves before and after childbirth (Article 65) focuses not on women in general but on their functions of pregnancy and childbirth. This seems to be in line with the prohibition of discrimination regardless of gender as stipulated in the EEOA.

Conclusion

As shown above, the EEOA was significantly improved by the 2006 revisions. The legal concept of equality was streamlined and the new doctrine of indirect discrimination was introduced in limited areas. It is also notable that the EEOA addresses the issues of pregnancy and childbirth, considering the reality facing female workers. In addition, the EEOA improved in terms of the ease of use by workers and the government.

Of course, it remains to be seen whether the "new and improved" EEOA may cut into Japanese workplaces effectively, where traditional male-based thoughts and practices die hard. Although the Child Care and Family Care Leave

[20] In the Japanese LSA, the underground work is interpreted as including not only work in mines but also underground work for tunnel construction.

Act has developed considerably since the 1990s to overcome practical obstacles to gender-free workplace, unless male workers are really able to, and learn to, balance work and family life, there will be still many female workers who have to pass up opportunities for promotion or retire upon marriage or childbirth.

Nevertheless, slowly but steadily, the Japanese EEOA has been improving. Naturally, there are criticisms such as that it took too long to get this far or that the EEOA is still too subdued. However, instead of providing a list of complaints about the EEOA, the author would like to conclude this paper with the hope for positive impact that phase III of the EEOA will have on the behavior of Japanese employers.