

The Amendment of the Employment Measure Act: Japanese Anti-Age Discrimination Law

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The Employment Measure Act, which was enacted in 1966 and proclaimed the general principles of Japan's labor market policies, was revised in 2007. This paper sheds light on the meaning and effect of Article 10, to which much attention was paid as Japan's first anti-age discrimination regulation. Article 10 stipulates that firms must provide equal opportunities to workers in relation to recruitment and hiring irrespective of age, thereby making a former 'duty to endeavor' into a 'legal duty.' As a result, job offers with age limits may be rejected by employment placement organizations and discriminated workers may claim damages in tort suits.

However, there are some doubts as to the effectiveness of Article 10 due to its broad exemptions, including hiring only 'new graduates.' Therefore, in view of its constitutional basis and policy objectives as well as limited outreach, this paper observes that anti-age discrimination regulations in Japan still indicate the nature of the employment policy approach rather than the human rights approach. Regulations on age-based treatment appear to be merely a patchwork rather than a conclusive anti-age discrimination law.

Apart from the anti-age discrimination provision, in order to improve the employment management of youth and foreigners, the 2007 revision added an obligation of employers to report to Public Employment Security Offices in the event of the employment and separation of foreign workers. It also adopted 'duty to endeavor' provisions and guidelines, both of which recommended employers to take various measures, such as the introduction of a recruitment process for old graduates, employment of youth as regular workers, support of foreign workers in claiming for workers' compensation benefits, and so forth. This paper provides an analysis that though these measures based on 'duty to endeavor' have only weak legal effects, they seem an appropriate means to attain their policy objectives while not giving rise to the issues of 'reverse discrimination' or 'intrusion into freedom of contracts.'

I. Introduction

The Employment Measure Act (hereinafter, the EMA), which was first enacted in 1966 and proclaimed the general principles of Japan's labor market policies, was revised in 2007 with the amendments taking effect as of October 2007. Among the changed and newly introduced articles, the 'anti-age discrimination in relation to recruitment and hiring' provision (Article 10) attracted special attention.¹ In addition, this amendment created a

¹ Regarding the developments of the EMA, see: Noboru Yamashita, *Boshu Saiyo ni okeru Nenrei Seigen Kanwa to Chukonenreisha no Saishushoku*, Rodo Horitsu Junpo 21 (No. 1525, 2002); Keiichiro Hamaguchi, *Nenrei Sabetsu*, 79 Horitsu Jiho 53 (No.3, 2007); Takeshi Yanagisawa, *Atarashii Koyo Taisaku Hosei*, Kikan Rodo Ho 110 (No.218, 2007). Regarding the regulations on

duty of employers to endeavor to improve the employment management of youth and foreign workers. Furthermore, the system of mandatory notification was introduced, in which employers are obligated to notify the Public Employment Security Offices in the event of the employment or separation of foreign workers.

This paper begins with an explanation of the major features of the amended EMA (Section II). In particular, it sheds light on the meaning and effect of the ‘anti-age discrimination in relation to recruitment and hiring’ provision. Section III is devoted to the analysis of the provision’s nature from the perspective whether it deals with an age equality issue or an employment policy issue. Finally, issues remaining after the amended EMA and the possibility of its future developments are addressed in Section IV.

II. Features of the EMA 2007 Revision

1. Anti-Age Discrimination in Relation to Recruitment and Hiring

(1) Backgrounds and Contents of the EMA 2001 Revision

Regulations against age limits for recruitment and hiring have been gradually reinforced in Japan in recent years. The first step was the revision of the EMA made in 2001.

After the collapse of the bubble economy in the 1990s, persons above the age of 40 and once unemployed as a result of their company’s restructuring found it difficult to obtain new jobs for the following two reasons. First, the typical recruiting practices in Japanese firms had an adverse impact on unemployed middle-aged or older workers. In the case of long-term regular workers, recruitment activities customarily began during the spring of the year prior to graduation of high schools, colleges or universities. New recruits entered their companies immediately following graduation and started working without specification of the jobs in which they would engage. They were expected to acquire occupational skills through on-the-job training and work reassignments over a long time, and would gain promotion from within. Thus, persons above the age of 40 and who had graduated from school many years ago found it quite difficult to obtain new jobs. Second, mid-career hiring, which refers to hiring those who have worked elsewhere, is becoming prevalent recently; however, even those companies that have opened their doors to mid-career hiring often set age limits for recruitment and hiring, such as “No one above 40 admitted.”²

setting mandatory retirement age, see: Hideyuki Morito, *Graying Japan, Swaying the Policymaker*, 16 *The International Journal of Comparative Labour Law and Industrial Relations* 25 (No. 1, 2000); Noboru Yamashita, *Act Concerning Stabilization of Employment of Older Persons*, 4 *Japan Labor Review* 71 (No. 3, 2007); Makoto Fujimoto, *Employment of Older People after the Amendment of the Act Concerning Stabilization of Employment of Older Persons: Current State of Affairs and Challenges*, 5 *Japan Labor Review* 59 (No.2, 2008).

² According to the white paper of the Ministry of Labor in 2000, the average age limit for recruitment was 41.1 years of age.

Under these circumstances, labor economists and trade unions began to contend that Japan should introduce anti-age discrimination laws to abolish the practice of imposing such age limits. Accordingly, the EMA was first revised in 2001 to provide that proprietors must, when regarded as necessary in order for workers to effectively display their abilities, ‘endeavor to provide equal opportunity’ to workers in relation to recruitment and hiring irrespective of age (Former Article 7); also, ten allowable reasons for age limits were set out by the guidelines of the Ministry of Health, Labor and Welfare. Therefore, without any of those allowable reasons, firms were required to make an effort not to impose age limits on recruitment or hiring.

The allowable reasons could be divided into three types. First, age limits for recruitment and hiring were considered justifiable as occupational qualifications in cases where:

- a-1. There is a requirement for smooth business with customers in the particular age brackets whom the proprietor targets in selling goods and providing services.
- a-2. There is a requirement for authenticity in the arts or entertainment.
- a-3. There is a requirement for the prevention of accidents and ensuring safety at work in view of the frequency of accidents at that workplace.
- a-4. A certain level of physical functions including strength or eyesight, which generally deteriorates as a result of aging, need to be maintained to perform job duties smoothly.

Second, age limits could be set in order to comply with statutes. Firms could set age limits when:

- b-1. They employ only persons aged 60 years or older, or persons in certain age brackets, the employment of which is encouraged by employment policies including the provision of subsidies.
- b-2. There is a statutory age limit for that particular work.

Third, even in the following cases where age was not relevant as an occupational qualification, age limits were allowed to be set in order to maintain typical Japanese employment practices, namely recruitment from new graduates, long-term employment until the mandatory retirement age³ and age-based pay systems, where:

- c-1. Proprietors recruit and hire persons in particular age brackets, such as ‘new graduates,’ in order to provide them with skills development over a long period of service.
- c-2. Proprietors recruit and hire persons in particular under-represented age brackets in order to restore and maintain the workforce’s age balance, and thus maintain their continued business and succession of skills and knowledge.
- c-3. Proprietors recruit and hire persons in particular age brackets in consideration of their

³ A ‘mandatory retirement age’ signifies a system that causes employment contract relations to terminate automatically, regardless of the worker’s wishes, when the worker reaches a certain age.

mandatory retirement age and necessary periods between hiring and retirement, in order for workers to display their ability effectively or develop the ability to perform their work duties.

- c-4. Proprietors recruit and hire persons in particular age brackets where wage systems for existing workers would have to be modified due to age-related pay systems in the establishments being not suitable for hiring middle-aged or older persons.

These guidelines were criticized for putting in place too many allowable reasons.⁴

(2) Legal Effects of the Duty to Endeavor under the EMA 2001 Revision

In addition, the legal effects derived from the ‘duty to endeavor’ were considered weak for the following reasons. Where a firm offered Public Employment Security Offices, which provided free employment placement under the Employment Security Act (hereinafter, the ESA), to post their job offerings while imposing an age limit on job seekers, officials could ask the firm to repeal the age limit; or where the firm did not repeal it, to give one of the ten allowable reasons for the maintenance of the age limit. However, offers for posting job offers setting age limits without any of the allowable reasons may not be rejected under the ‘duty to endeavor’ provision of the EMA in 2002. Article 5-5 of the ESA provides that “Public Employment Security Offices and employment placement business providers shall accept all offers for the posting of job offerings; this is provided, however, that such offers may be rejected if their contents violate any laws or regulations.” Meanwhile, offers setting age limits without any of the allowable reasons, which violate not a legal duty but only a ‘duty to endeavor,’ should be accepted.

Moreover, in the case of firms refusing to employ workers on the grounds of their age without any allowable reasons, these refused workers were not interpreted to have rights to claim for employment or damages. Article 3 of the Labor Standards Act (hereinafter, the LSA) of 1947, which states the principles of equal treatment applicable to labor contracts, prohibits only discrimination by reasons of the nationality, social status and creed of workers. The Japanese constitution promulgated in 1946 contains the guarantee of equality under the law, but prohibition of discrimination is limited to that on the grounds of race, creed, sex, social status or family origin (Article 14, Paragraph1). Age discrimination, which is not clearly prohibited by these laws, nevertheless could be arguably interpreted to be unlawful as an unreasonable and differentiating treatment violating the general principle of equality derived from these provisions, and in the spirit of the former Article 7 of the EMA. However, this interpretation was not adopted by labor law scholars in light of the Supreme Court decision in the *Mitsubishi Jushi* case.⁵

The *Mitsubishi Jushi* case involved denial of employment to a worker who did not

⁴ Hideyuki Morito, *Koyo Seisaku to shite no Nenrei Sabetsu Kinshi*, in *Shogai Geneki Jidai no Koyo Seisaku* 85, 126 (Atsushi Seike ed., Nippon Hyoronsha 2001). Thus, the 2004 revision of the OPESA also obliged proprietors to explain their reasons for imposing age limits on applicants.

⁵ The *Mitsubishi Jushi* Case, Supreme Court, Dec. 12, 1973, Minshu 27-11-1536.

disclose his history of campus activism at a job interview. The firm refused to formally hire him because it emerged that he had told a lie at the interview. Denial of employment for such reasons was alleged to run counter to the principle of equal treatment in the LSA, as well as the constitutional guarantee of freedom of beliefs (Article 19) and the equality clause (Article 14). However, the Supreme Court stated that the fundamental human rights prescribed by the constitution did not directly apply to the acts of private persons. Moreover, the court held that the principle of equal treatment in the LSA was limited to post-hiring working conditions and was not applicable to the process of hiring. The Court stressed that the principle of freedom of contracts should be applied to cases where there was no contravention of statutory or other special restrictions on hiring practices.

As such, age discrimination, which was not explicitly enumerated as prohibited grounds under the Constitution or the LSA and had just started to be regulated by the ‘duty to endeavor,’ was not interpreted to be unlawful.⁶ Thus, former Article 7 and the guidelines were criticized for being in its nature a ‘duty to endeavor’ and setting forth too many allowable reasons.

(3) Reinforcement of Regulations by the EMA 2007 Revision

Apart from unemployed older workers, youth unemployment⁷ had begun to be recognized as a social challenge at the time of the amendment made in 2007. Normal recruitment practices based on age barred persons in their 20s or 30s from stable jobs, including those who had received a higher level of education. Some persons in their late 20s or 30s—so-called ‘older-younger persons,’—who had graduated from school following the burst of the economic bubble and found it quite difficult to secure work of their choice at that time, had been looking for a stable job while working at a temporary job. Some of them had not been able to obtain stable employment since their graduation. In addition, movement between jobs is not rare among the younger generation these days. It was reported in the 1990s that 50% of high school graduates and 30% of university graduates leave their first jobs within 3 years.⁸

Older-younger workers and youth unemployment were recognized as urgent social issues, with increasing concerns about the enlarged income gap among nations and rapid progress of the aging population.⁹ Therefore, in June 2007 the following provision of the EMA was made compulsory:

⁶ Yamashita, above n.1 (concerning the EMA), at 25.

⁷ According to the OECD report published in 2008 (*Jobs for Youth: Japan*), the unemployment rate of persons 15 to 24 years of age was 7.7% (twice that of those 25 to 54 years of age) in Japan in 2007 and below the OECD average of 13.4%. However, the long-term unemployment rate rose to 21% among those 15 to 24 years of age and was over the OECD average of 19.6%.

⁸ Regarding youth employment, see Yuki Honda, “*Freeters*”: *Young Atypical Workers in Japan*, 2 *Japan Labor Review* 5 (No.3, 2005).

⁹ According to the white paper of the Ministry of Welfare, Labour and Health in 2006, the population aging rate (the percentage of persons aged 65 or over) was 20.8 % in 2006.

Article 10: Proprietors must, when it is regarded as necessary under the Ordinance of the Ministry of Health, Labour, and Welfare, in order for workers to effectively display their abilities, provide equal opportunity to workers in relation to recruitment and employment irrespective of age, in accordance with the Ordinance of the Ministry of Health, Labour and Welfare.

This provision has the following legal effects. First, the Minister of Health, Labour and Welfare may give advice, guidance or recommendations to firms violating this Article (Article 32). Second, when a worker is treated unfavorably on the grounds of age in relation to hiring, he or she may follow the procedures of the Act on Promoting the Resolution of Individual Labor-Related Disputes to solve her or his dispute, asking for assistance (advice and guidance) from the Prefectural Labor Bureau (Articles 1 and 4).¹⁰

These two enforcement systems are not totally new, since they could be taken under the former ‘soft-law approach.’ However, under the new ‘hard-law approach’ there are two additional routes to rectify age limits. Where firms provide job offers setting age limits to employment placement organizations (Public Employment Security Offices or private employment placement providers), in light of the provision’s strengthened mandatory character, they may decline to post their offers under Article of 5-5 of the ESA, which stipulates that job offers violating statutes may be rejected.

When a firm fails to employ a person on the grounds of age and as a result that person files a lawsuit, the court will not order the firm to hire that person in consideration of the principle of freedom of contracts. This provision merely obliges employers to give equal opportunity, and does not give individuals the right to demand employment.¹¹ However, the court may order the firm to pay some consolation money for non-economic damages to the discriminated worker in tort suits (Civil Code, Article 709) where appropriate, as in the case of violation of the Act on Securing, etc. of Equal Opportunity and Treatment between Men and Women in Employment (hereinafter, the EEOA) comprehensively prohibiting sex discrimination in employment.¹²

(4) Justifiable Reasons for Age Limits under the 2007 Revision

It should be noted that the Ordinance issued on this article maintained some of the former exemptions while also deleting other exemptions, in accordance with the decision accompanying the bill that the exemptions should be reduced as much as possible. In the following six cases, proprietors can:

- a. Set age limits for hiring workers in accordance with mandatory retirement age.
- b. Set age limits for hiring workers where there is a statutory age limit for the

¹⁰ They cannot ask for mediation by the Dispute Adjustment Commission, since the act excludes disputes in relation to hiring from mediation process (Article 5).

¹¹ See, Yanagisawa, above n. 1, at 116.

¹² Discriminated workers are not considered entitled to claim for employment; however, failure to hire by reason of sex is interpreted to constitute a cause of action under the tort provision.

- particular work.
- c. Recruit only new graduates who are youth, or below certain ages, in order to give them the opportunity to develop and improve their occupational abilities over a long period of service.
 - d. Hire persons in particular under-represented age brackets in order to maintain the succession of occupational skills and knowledge.
 - e. Set age limits for hiring where there is a requirement for authenticity in the arts or entertainment.
 - f. Employ only persons aged 60 years or older, or persons in certain age brackets, the employment of which is encouraged by the state's employment policies.

As a result, the following four reasons under the former Article 7 were not included in the new Ordinance, that is smooth business with customers, prevention of accidents at work, maintenance of workers' physical functions, and maintenance of age-based wage systems.

The remaining six justifiable reasons have the following meaning. According to exemption (a), for example, where companies have a mandatory retirement age at 60 years and they want to hire workers under contracts for an indefinite period, they can set limits for hiring at age 60 in accordance with the mandatory retirement age. In order to understand this exemption, one should know the regulations against setting a mandatory retirement age under the Act Concerning Stabilization of Employment of Older Persons, which was enacted in 1971 and amended in 2004 (hereinafter, the OPESA). The OPESA stipulates that when an employer sets a mandatory retirement age, it cannot be below the age of 60 (Article 8). In light of this, companies can maintain the mandatory retirement age at 60 years or over to the extent that they comply with the regulations for workers over the age of 60; according to Article 9 of the act, when an employer fixes the retirement age it shall conduct any one of the measures listed in the items below in order to secure stable employment for older workers until the age of 65:

- a. Raising the mandatory retirement age;
- b. Introduction of a continuous employment system (refers to the system of continuing to employ an older person who wishes to keep working following their mandatory retirement); or
- c. Abolition of the mandatory retirement age.

'Continuous employment systems' include the system under which employees meeting certain objective requirements, such as a certain level of physical strength,¹³ following the employee's mandatory retirement, are given the opportunities to conclude fixed term contracts with their employers again. Against this legal background, many companies maintain the mandatory retirement age at 60 years and provide workers between the ages of

¹³ The selection criteria can be set forth by a labor-management agreement, which is concluded between an employer and a union organizing a majority of the workers at an establishment or, in its absence, a person representing a majority of the workers.

60 -65 years opportunities to work under fixed term contracts.¹⁴ In such cases companies can set limits for hiring at the age of 60 years, in accordance with the mandatory retirement age.¹⁵

According to exemption (b), when persons in a particular age bracket are prohibited from engaging in certain jobs by statutory provisions, firms can set age limits for hiring based on the provisions. ‘Minors,’ which refers to persons under the age of 18, are considered, when compared to adults, physically and mentally immature and technically unskilled to require special safety and health protections. Based on that idea, an employer is not permitted to employ a person under the age of 18 between 10:00 p.m. and 5:00 a.m (Article 61 of the LSA), to have persons under the age of 18 work underground (Article 63 of the LSA), and to engage such persons in hazardous and harmful duties (Article 62).¹⁶ The Security Service Act also prohibits persons under the age of 18 from working as a security guard and prohibits security service companies from engaging such persons in security service (Article 14). The Explosives Handling Act prohibits persons under the age of 18 from handling explosives and stipulates that any individual shall not engage such persons in handling explosives (Article 23).

According to exemption (c), when a firm hires workers under indefinite contracts, it is permitted to set age limits for hiring on the grounds that the firm requires workers to develop their job skills through long-term employment.¹⁷

The meaning of exemption (d) is somehow complex and would be better understood

¹⁴ In the survey conducted by the JILPT in 2006 on firms with 300 workers or more, more than 90% of them introduced the continuous employment system rather than elimination or extension of the mandatory retirement age. Also, around 70% of these firms established selection criteria. More than 80% of these firms use fixed term contracts to employ older people beyond the mandatory retirement age. See Fujimoto, above n. 1.

¹⁵ This exemption is applied in the case of employment under indefinite terms. In the case of employment under fixed term contracts, age limits for hiring cannot be set in accordance with the mandatory retirement age. The age limits must coincide with the mandatory retirement age. For example, where firms set the mandatory retirement age at 60 years, they cannot set the age limits for hiring at 55, on the grounds that a 5 year period is necessary for workers to develop occupational skills until the mandatory retirement age is reached.

¹⁶ Hazardous duties include cleaning, oiling, inspecting or repairing the dangerous parts of any machinery or power transmission apparatus while in operation, putting on or taking off the driving belts or ropes of any machinery or power transmission apparatus, operating a crane driven by power, engaging in any other dangerous work as specified by the ordinances, or handling heavy materials as specified by the ordinances. Harmful duties include the handling of poisons, powerful drugs or other injurious substances, or the handling of explosive, combustible or inflammable substances, or in places where dust, powder, harmful gas or radiation is generated or where there are high temperatures or pressure levels, or other places which are dangerous or injurious to the safety, health, or welfare of workers.

¹⁷ It is to be noted that an employer is not permitted, when attempting to justify setting age limits on the grounds of this exemption, to require workers to have job experiences or satisfy the upper age limits, such as ‘persons between the ages of 20 and 30 years,’ and ‘persons below the ages of 30 years with 5 years experience in similar jobs.’

through the use of some illustrations. For example, firms wishing to hire system engineers under indefinite contracts are permitted to set age limits for recruitment as ‘persons aged between 30-34 years.’ This is in the case where firms currently employ only 20 system engineers between the ages of 30-34 years, while also employing 50 system engineers between the ages of 25-29 and 45 system engineers between the ages of 35-39 years; thus, system engineers aged between 30-34 years can be considered underrepresented for the job. The age range, which is used to decide whether workers at certain ages are underrepresented, must be 5-10 years between the ages of 30-49 years. The job category is to be specified in accordance with the small occupational category provided by the Ministry of Health, Labour and Welfare, such as ‘system engineers,’ rather than the general term ‘engineers.’ If the number of workers belonging to certain age brackets in certain jobs is less than half the number of persons belonging to the upper and lower age brackets in that undertaking, they are deemed to be ‘underrepresented.’ Accordingly, the new guidelines made it more difficult for firms to meet the requirements of this exemption.

According to exemption (e), firms can set age limits when they want to hire an actor who is to play a child’s part. However, they cannot set age limits for clothes salespersons on the grounds that their shops target customers in certain age brackets, since this reason does not constitute ‘requirements for authenticity in the arts or entertainment.’

The exemption (f) allows firms to employ only persons aged 60 years or older, or persons in certain age brackets, the employment of which is encouraged by employment policies. One example of ‘the employment encouraged by employment policies’ is ‘Trial Employment,’ under which the Public Employment Security Offices refer persons who experience considerably difficulty in finding new jobs because of their experience, knowledge and their personal categorizations such as ‘younger persons’ (persons under the age of 40 years) or ‘older persons’ (persons over the age of 45 years). Firms can employ these workers temporarily, and they can receive certain wage subsidies for three months; when the firms finally decide to hire those workers after three months, they can receive other subsidies in certain cases.

(5) Effectiveness of the Anti-Age Discrimination Provision

There is a survey showing that recruitment practices with age limits are being reduced.¹⁸ Despite this, some labor law scholars doubt the effectiveness of the new anti-age discrimination provision. The Ordinance maintains still broad exemptions, such as hiring only ‘new graduates.’¹⁹ In the case of denial of employment on the grounds of age without any of justifiable reasons, the remedy for discriminated workers will be nominal, such as the provision of consolation money or compensation for some transportation expenses. No

¹⁸ According to the survey conducted by Zenkoku Kyujin Joho Kyokai in the fall of 2008, the rate of job offerings without age limits on job seekers increased from 55.3% to 76.3% after amendment of the EMA. http://www.zenkyukyo.or.jp/pdf/age_release.pdf

¹⁹ Yanagisawa, above n.1, at 116.

doubt it would be quite difficult to adduce sufficient evidence to establish that age motivated a firm's failure to hire, where they do not at face value set age limits for recruitment and there are no direct effects. Moreover, Article 10 does not clearly cover indirect age discrimination. For example, age-neutral practices with discriminatory effects on youth or seniors, such as imposing the requirements of certain periods of occupational experience on job applicants, would not, per se, be construed as being unlawful.

2. Measures to Promote Youth Employment

As seen before, while normal recruitment practices targeting new graduates have had positive effects on the smooth transition from school to employment, they have also presented a high hurdle for those who once deviated from the normal hiring tracks. A series of reforms have been introduced in recent years to combat youth unemployment, including setting up a one-stop service center for young job seekers (so-called job cafés), 'Trial Employment' and so on. One measure included in the EMA to combat youth unemployment is the prohibition of age limits in relation to recruitment and hiring (Article 10) as discussed above. Another measure is the creation of a new provision imposing the following 'duty to endeavor,' and setting guidelines titled 'the guidelines for proprietors to take appropriate measures for securing employment opportunities for younger workers.'

According to Article 7 of the revised EMA, proprietors must endeavor to ensure employment opportunities for youth in consideration of their roles in the future industry and society. To this end, proprietors are expected to take measures for the improvement of employment management. These include a change in their methods of recruitment and hiring as follows. According to the guidelines, first, in order to legitimately make the hiring decisions of firms depending on an individual's ability and experiences, firms are expected to clarify the information of job contents, working conditions, required occupational abilities and skills development. Second, firms are also required to give job opportunities to those who have already graduated from school (hereinafter, 'old graduates'), and set forth year-round recruitment procedures or recruitment procedures in fall as well as normal recruitment procedures in spring. These measures would enable job opportunities to be provided to those who did not follow the typical spring recruitment processes.

In order to prevent youth unemployment, firms must also endeavor to take necessary measures to improve the stability of the workforce among the younger generation. According to the guidelines, firms are required to clarify the information of job contents, working conditions, and so forth, thereby preventing disappointed young persons from leaving their jobs. Employers are also required to give younger persons in non-regular work, such as temporary or part-time jobs, opportunities to move into regular work. In order to facilitate the development and improvement of practical occupational abilities, employers are required to conduct both on-the-job and off-the-job training.

In short, this 'duty to endeavor' provision (Article 7) was expected to improve the youth employment situation by rectifying traditional employment practices, such as hiring

only new graduates on a voluntary basis. Based on a soft-law approach, the legal effect of this provision is weak from one perspective; firms not performing the duty may merely have advice or guidance from the Minister of Health, Labor and Welfare. These firms are subject to neither criminal penalties nor civil liability. However, from another perspective, this provision and the guidelines recommend recruitment with specified job contents, year-round or fall recruitment procedures, and extension of job opportunities to old graduates, thereby inevitably intervening in the freedom of companies to determine recruitment methods, that is the 'principle of freedom of contracts.' Furthermore, where employers give only youth opportunities to move from non-regular work into regular work, it might arguably constitute 'age discrimination' against seniors. Presumably because of these concerns, legislators took a soft-law approach in calling for an improvement in recruitment and hiring methods.

3. Measures for Foreign Workers

(1) Findings Surrounding Foreign Workers

According to a survey on the employment situation of foreign workers conducted by the Ministry of Health, Labor and Welfare in June 2006, one fourth of 223,000 foreign workers in Japan are in precarious employment situations, such as dispatched workers or contract-based workers.²⁰ As for compulsory state-run insurance programs,²¹ the rate of coverage was not high among foreign workers.²² Under these situations, the 2007 revision of the EMA introduced two measures; one is the system of mandatory notification of the employment and termination of foreigner workers, and the other is the duty to endeavor to improve the employment management of foreigner workers.

(2) Notification of the Employment and Termination of Foreign Workers

When a firm hires a worker whose nationality is not Japanese, or when such a worker leaves them, they bear an obligation to confirm the worker's name, status and terms of residence as specified by the Immigration Control and Refugee Act, as well as their date of birth, sex and nationality by checking their passports or any other identification materials, and submit a written form on these matters to the Chief of the competent Public Employment Security Office (Article 28, Paragraph 1). Foreigners who are already employed on October 1, 2007 are also covered. Any proprietor who has violated this article shall be punished by way of a fine not exceeding 300,000 yen (Article 38).

²⁰ Regarding measures for foreign workers, see Kazuaki Tezuka, *Foreign Workers in Japan: Reality and Challenges*, 2 *Japan Labor Review* 48 (No.4, 2005); Chizuko Hayakawa, *Gaikokujin Rodo no Hoseisaku* (Shinzansha 2008).

²¹ Employees meeting certain requirements must enroll in employee health insurance and employee pension insurance. Employers must pay insurance premiums for the employees.

²² According to the employment management survey on foreign workers conducted by Nomura Soken in 2002, around half of workers were not covered by social insurance programs in companies with 50 or more workers who are mostly of Japanese ancestry.

On receipt of the preceding notification, the State shall endeavor to improve the employment management of the foreign workers concerned, and also promote the re-employment of terminated foreign workers by taking the following measures (Article 28, Paragraph 2). The Public Employment Security Offices shall provide firms with necessary guidance and advice to facilitate the proper employment management of foreign workers. In order to promote the re-employment of separated foreign workers, the Offices shall provide the foreigners with employment information and placement, and search for job offers for these workers. Occupational training shall be implemented for them through public vocational training agencies.

The notification system is also intended to be used for immigration control. The Minister of Health, Labor and Welfare shall, when the Minister of Justice makes a request in order to confirm certain matters with respect to the residence of a particular foreigner and take some measures specified by the Immigration Control and Refugee Act, shall submit the information on the foreign workers provided by their employers (Article 29).

Until the amendment made in 2007, notification of the employment of foreign workers was operated on a voluntary basis once a year in June at companies with 50 or more employees. The new notification system was made compulsory for all employers with one or more foreign workers, and a notification duty is imposed each time one or more foreigners enter or leave employment at their workplaces. The reinforced notification duty is expected to contribute to the improvement of the employment management of foreigner workers, as is discussed below.²³

(3) Improvement of the Employment Management of Foreigner Workers

According to the newly introduced Article 8, proprietors are imposed with a ‘duty to endeavor’ to improve the employment management of foreign workers employed by them. It includes measures to facilitate adaptation to their occupation, thereby enabling them to effectively display their abilities. In addition, when foreign workers leave firms as a result of dismissals or other reasons and wish for reemployment, firms must endeavor to take necessary measures to support their reemployment. In order to put this ‘duty to endeavor’ into effect, ‘the guidelines for proprietors to take appropriate measures with respect to the improvement of employment management of foreign workers’ has been issued by the Ministry of Health, Labor and Welfare.²⁴ The contents are as follows.

²³ By contrast, in the legislative process it was feared that the mandate of notification, which possibly requires employers to investigate the nationality of employees, might be taken as an infringement upon the right of privacy for employees and discrimination against foreigners. The guideline explained below emphasizes that such discrimination would not be allowed.

²⁴ As for foreign workers, ‘the guidelines with respect to the terms and conditions of employment of foreign workers’ has already been put in place since 1993 as a circular notice for labour inspectors and officials of Public Employment Security Offices. The meaning of Article 8 of the EMA and the new guidelines, therefore, is the introduction of a clear statutory base for both the regulations of foreign workers as well as the addition of new contents.

Firms must comply with labor laws and social insurance laws equally applied to foreign workers. It should be repeated here again that proprietors shall not engage in discriminatory treatment prohibited under Article 3 of the LSA,²⁵ that is discrimination by reason of nationality in relation to the terms and conditions of employment. In addition, proprietors shall not impose a worker's nationality as a condition on recruitment when they post job offerings to Public Employment Security Offices and private employment placement service providers (Article 3 of the ESA). Apart from these legal duties, according to the guidelines, proprietors must 'endeavor' to hire workers through 'fair selection' within their residence status. Failure to hire foreigners on the grounds of their nationality, as mentioned above, has not been construed unlawful under Article 3 of the LSA; however, the guidelines implicitly recommend firms to conduct the selection of workers without special consideration of their nationality.

Second, proprietors are required to treat foreign workers appropriately in consideration of their limited knowledge about language, culture, employment and job seeking practices in Japan, and any other special circumstances as follows. In relation to recruitment, proprietors are required to present the terms and conditions of employment of foreign workers in written forms or e-mails where appropriate, and for workers living foreign countries, a share of the travel expenses and arrangement of residence in addition to these items. Proprietors shall not hire foreign workers who cannot engage in work legally under immigration control. Special recruitment and hiring processes for foreign students are also recommended.

In regards to working conditions, in order to secure health and safety at work, firms are required to teach foreigners the Industrial Safety and Health Act, machineries and equipments used by them, safety devices and protective equipment, verbal instructions and body signs for the prevention of accidents and the firm's safety regulations, through methods that can be easily understood by foreign workers including illustrated postings or signs. With respect to social insurance systems, firms shall let foreign workers know the relevant acts and their procedures, and enroll them in these systems. When foreign workers leave workplaces, firms shall go through the legitimate procedures and inform them of Public Employment Security Offices through which workers can obtain unemployment benefits, as well as provide them with any other support as required. It is also necessary for firms to support a foreign worker's claim for benefits from Industrial Accidents Insurance.

In relation to the prevention of dismissals and promotion of reemployment, employers are required to refrain from dismissals and in cases of redundancy they are required to support the reemployment of foreign workers, such as the introduction of any other group companies, implementation of occupational training and provision of information on job

²⁵ It provides that "An employer shall not engage in discriminatory treatment with respect to wages, working hours or other working conditions by reason of the nationality, creed or social status of any worker."

offerings.

These regulations have no mandatory effect on labor contracts between employers and employees. Firms violating these regulations, however, might receive advice, guidance, or recommendations from the Minister of Health, Labor and Welfare (Article 32). Moreover, in cases where a foreign worker meets with an industrial accident and the employer's instructions on safety were insufficient or difficult for them to understand, the worker may file a lawsuit to the court. In this case, the court might order the employer to compensate the worker for damages not covered by the benefits from Industrial Accidents Insurance, on the grounds that violating the guidelines constitutes negligence under the tort (Civil Code, Article 709).

III. Age Discrimination: Equality Issue or Employment Policy?

Are the regulations on setting age limits for recruitment and hiring and the treatment of youth, to which much attention was drawn as the first step toward Japan's anti-age discrimination law, based on a human rights approach?²⁶ Or perhaps on an employment policy approach?²⁷ The human rights approach regards differences of treatment based on prohibited grounds, such as sex and race, as a violation of the human rights of the individual to equal treatment. Any exception to this principle is strictly construed so as to interfere with the rights of individuals as little as possible. In contrast, the 'employment policy approach' uses a variety of policy instruments to support individual workers, paying attention to their different attributes. When certain treatments based on certain grounds are regulated to attain policy objectives, those regulations take on a patchwork aspect.

The anti-age discrimination provision included in the revised EMA can be deemed to be based on the employment policy approach rather than the human rights approach. This conclusion is obtained in light of the EMA legal basis, policy objectives, ways of regulations and comparison with sex discrimination law, as follows.

²⁶ See Kazuo Sugeno, *Discrimination in Employment: Dynamism and the Limits of Harmonization in Law*, in *Discrimination in Employment XV World Congress of Labour Law and Social Security* 5, (Roger Blanpain ed., Peeters 1998); Takashi Araki, *The Impact of Fundamental Social Rights on Japanese Law*, in *Social and Labour Rights in a Global Context: International and Comparative Perspectives* 215 (Bob Hepple ed., Cambridge University 2002).

²⁷ Regarding the analysis of age discrimination law from this perspective, see Colm O'Connell, *Comparative European Perspectives on Age Discrimination Legislation*, in *Age as an Equality Issue* 195 (Sandra Fredman and Sarah Spencer eds., Harts 2003); Bob Hepple, *Legislation against Age Discrimination in Employment: Some Comparative Perspectives*, JILL Forum Special Series (No. 19, 2004); Ryoko Sakuraba, *Nenrei Sabetsu Kinshi no Hori* (Shinzansha 2008); Ryoko Sakuraba, *Employment Discrimination Law in Japan: Human Rights or Employment Policy?*, in *New Developments in Employment Discrimination Law* 233 (Roger Blanpain, Hiroya Nakakubo, Takashi Araki eds., Wolters Kluwer Law & Business 2008).

1. Constitutional Basis

First, the statute prohibiting age discrimination in respect to recruitment and hiring was the EMA, a statute categorized under the ‘Labor Market Law’; this fact itself shows that the new provision for rectifying age limits is based on the employment policy approach rather than being treated as an equality issue. The basis for the development of Japanese employment law after World War II was the constitutional provisions.²⁸ In addition to human rights, the Constitution also prescribes fundamental social rights. Article 27, Paragraph 1 proclaims that all people shall have the right to work and thus obliged the State to give workers suitable employment opportunities. This obligation of the State is fulfilled through the ‘Labor Market Law,’ which consists of the ESA that regulates employment placement services, recruitment and labor supply businesses, the OPESA and other acts including the EMA.

2. Policy Objectives

The second feature is the policy objectives of the revision. The ‘anti-age discrimination in relation to recruitment and hiring’ provision was first introduced in 2001 as a ‘duty to endeavor’ as explained above. The then act’s title, which including the phrase ‘cope with economic and social changes by ensuring smooth reemployment’, was reflective of its policy objective. To this objective, the relaxation of age limits on hiring was considered necessary to promote job matching depending on the ability of workers. The policy objective was extended to efforts to combat youth unemployment in the 2007 revision. The employment of youth and elderly is promoted by the revised EMA as well as that of women, persons with disabilities and foreigners. All of them are expected to participate in the labor market and contribute to the reinforcement of the State’s financial foundation in the midst of a progressing aging society.

It is noteworthy that the EMA as of 2007 can be characterized as the symbol of transformation of employment policies in Japan. The development of ‘Labor Market Law’ in Japan can be divided into three stages; first, right after World War II, where the main objective of employment policies was to facilitate the function of external labor markets and a smooth labor transition; second, following the oil shock of the 1970s, when employment security within a company was given priority; and third, in the post-bubble economy, during which Japan’s employment policy shifted its emphasis to flexible labor movement once again in the midst of rising unemployment rates. The subsequent revisions of the EMA, therefore, were part of the measures to diversify employment policies in order to cope with changing economic and social conditions.

²⁸ Regarding the Constitutional basis of Japanese employment and labour law, see Araki, above n. 26.

3. Methods of Regulations

Third, regulations on age-based treatment appear to be merely a patchwork rather than a conclusive anti-discrimination law. Since the EMA regulates only age limits for recruitment and hiring, a mandatory retirement system at the age of 60 years remains lawful. Setting such a mandatory retirement age is lawful if it satisfies the requirement of the OPESA as seen above. Apart from age limits for recruitment and hiring and the mandatory retirement age, employers have the possibility of maintaining age-based practices as follows.

Is redundancy targeting older workers unlawful? It depends on the application of the adjustment dismissals doctrine. The ‘abuse of dismissal rights’ doctrine was codified in the Labor Contract Act (Article 16) in 2007.²⁹ With regards to employment adjustment dismissals, judicial decisions have been handed down stating that any adjustment dismissal is an abuse of the right to dismiss unless it meets the following four requirements: there must be a business necessity, the employer is obliged to take various measures to avoid adjustment dismissals such as the implementation of transfers, the selection of those workers to be dismissed must be made according to reasonable criteria, and proper procedures must be taken.

Redundancy targeting older workers triggered a discussion on whether or not the selection criterion of ‘older workers’ was reasonable, and if it satisfied the third requirement. In one case, the court refuted the dismissal on the grounds that older workers usually found it difficult to secure new jobs, their ability did not deteriorate as a result of aging, and their disadvantages should at least be compensated by special early retirement allowances.³⁰ On the other hand, there have been several cases where the reasonableness of dismissal was affirmed. The judges ruled that the dismissal of older workers was necessary to save money as the wages of such workers were relatively high.

Another example of disadvantageous age-based practices is the wage-cut system for the elderly.³¹ In recent years, traditional age or length of service-based wage systems are being transformed into performance-based pay through changes of work rules or the conclusion of collective agreements. The ‘Daishi Ginko Case’ was the first instance where the Supreme Court decided on this issue.³² The wages of those between the ages of 55-60 years were reduced in exchange for an extension of the retirement age from 58 to 60 years. The court considered the advantages of employment extension and consequently viewed the reduction of wages as a reasonable modification having a binding effect on workers. On the

²⁹ Regarding the development of this doctrine, see Takashi Araki, *Labor and Employment Law in Japan 17ff* (The Japan Institute of Labour 2002).

³⁰ The *Varig Nihon Shisha* case, Tokyo District Court, Dec. 19, 2001, Rohan 817-5.

³¹ Regarding the work rules doctrine, see Araki, above n.29, at 51ff; Shinya Ouchi, *Restructuring of Enterprises and Protection of Working Conditions of Middle-Aged and Elderly Employees in Japan*, Kobe University Law Review 29 (No. 30, 1996). This doctrine was codified in Articles 7, 9 and 10 of the Labor Contracts Act, which was adopted in November 2007.

³² The *Daishi Ginko* case, Supreme Court, Feb. 28, 1997, Minshu 51-2-705.

other hand, in the second Supreme Court case³³ in which the wages of the elderly were cut by 30%-40% of those paid under the former system while the wages of younger workers were increased, a decision was reached that the disadvantages were too great and unfair in that only older employees were disadvantaged.

Thus, in cases of redundancy or reduction in wages targeting older employees, since there are no statutes explicitly prohibiting these practices and the tests applied here are no more than reasonable tests, some age practices have remained lawful.

4. Comparison with Sex Discrimination Law

Fourth, its character as an employment policy is made clear if it is compared to the EEOA prohibiting sex discrimination in employment in Japan. The EEOA states its aim as securing equal opportunity and treatment between men and women in employment 'in accordance with the principle in the Constitution of Japan of ensuring equality under law' (Article 1), and thus clearly indicates that it deals with the issue of equality.

The EEOA enacted in 1985³⁴ still indicated its character of the employment policy approach, since employers were merely obliged to 'endeavor' to treat men and women equally during the processes of recruitment, hiring, assignment and promotion while provisions with respect to training and education, fringe benefits, and retirement and dismissals were mandatory. However, the 'duty to endeavor' clauses were effective in changing workplace culture and building a social consensus that women should be given equal employment opportunities. Accordingly, the EEOA was strengthened in 1997 with the addition of a mandate of equal treatment at the time of recruitment and hiring, assignment and promotion. In June 2006, the material scope of regulations was extended to 'placement' including the 'allocation of duties' and 'granting of authority,' the 'demotion' of workers, 'change in job type or employment status,' 'encouragement of retirement' and 'renewal of the labor contract' (Article 6), as well as recruiting and hiring (Article 5), promotion, education and training, fringe benefits, and retirement and dismissal (Article 6). Therefore, employers should not discriminate on the grounds of sex at almost all stages of employment unless they can demonstrate legitimate reasons justifying differential treatment.

The guideliness issued by the Ministry of Health, Labor and Welfare allow only narrow justifications. The following acts are permitted as positive actions and occupational requirements:

- a. Favorable treatment for women in employment categories where women are substantially under-represented (positive action).
- b. Unfavorable treatment against men or women if:

³³ The *Michinoku Ginko* case, Supreme Court, Sep. 7, 2000, Minshu 54-7-2075.

³⁴ Regarding the development of the EEOA, see Takashi Araki, *Equal Employment and Harmonization of Work and Family Life: Japan's Soft-Law Approach*, 21 *Comparative Labor Law & Policy Journal* 451 (No. 3, 2000); Hiroya Nakakubo, "Phase III" of the Japanese Equal Employment Opportunity Act, 4 *Japan Labor Review* 9 (No. 3, 2007).

- b-1-1. requirements of authenticity call for the assignment of a man or woman only in the arts or entertainment;
- b-1-2. requirements of security call for the assignment of a man only in a guarding role;
- b-1-3. any other occupational characteristics, such as those of a religious or moral nature, or work in a sports competition, calls for the assignment of a man or woman only and where there is the same degree of necessity as in the aforementioned items.
- b-2. statutes prohibit employers from assigning a man or woman to particular work.³⁵
- b-3. a job requires work in a particular foreign country whose manners and customs are so different that a man or a woman could not exercise his or her ability.

In summary, it can be analyzed that revisions of the Act brought a shift from the employment policy approach to the human rights approach, in that its application was extended to all aspects of employment in order to effectuate ‘the principle in the Constitution of Japan of ensuring equality under law.’

By contrast, the EMA merely prohibits recruitment and hiring discrimination. Moreover, age limits for hiring can be set when they fall under the listed exemptions; (a) in accordance with a mandatory retirement age; (b) there is a statutory age limit for a particular work; (c) recruiting only young persons to give them skills development over a long period of service; (d) hiring persons in a particular under-represented age bracket; (e) there is a requirement for authenticity in the arts or entertainment; (f) employing only persons in certain age brackets, the employment of which is encouraged by employment policies.

Among these, (b), (d) and (e) are recognized as justifiable reasons even under the EEOA. On the other hand, there are special justifiable reasons for age limits (a), (c) and (f). The exemptions (a) and (c) can be explained as those included to respect traditional employment practices in Japan. Exemption (f) was added to put into effect the EMA objective of promoting the employment of youth and the elderly. Thus, in light of its limited outreach, age discrimination regulations contained in the EMA are far from being based on the human rights approach derived from the equality principle.

IV. Conclusion: Current State of Affairs and Future Issues

1. Anti-Age Discrimination and Promotion of Youth and the Elderly

As the foregoing indicates, it can be said that the revised EMA took the employment policy approach by allowing relatively broad exemptions. Also, it might be criticized for taking only lukewarm measures. It seems, however, a suitable means to attain its objective of promoting the employment of older and younger persons in a gradual process while

³⁵ The LSA provides that an employer may not have a woman engaged in underground work, work involving lifting heavy materials and work in places where harmful gas or dust such as lead is generated (Article 64 (2) and 64 (3), Paragraph 2); furthermore, only women could be licensed to perform as midwives (Health Nurses, Midwives and Nurses Act, Article 3).

considering the possible impacts of strengthened regulations on employment practices. Setting a mandatory retirement age and hiring only new graduates have been considered an integral part of the Japanese long-term employment system. It is feared that prohibiting these practices as unlawful age discrimination would result in the collapse of Japanese employment management. Attempts to rectify the practice of hiring only new graduates would inevitably curtail the ‘freedom of contracts’ of employers to some extent; firms would be required to take pro-active measures for the improvement of employment management. As such, the practice of hiring of only new graduates is expected to be modified through the firms ‘duty to endeavor’ to introduce an all-year-round process of recruitment or recruitment covering old graduates.

In regards to the treatment of age, the employment policy approach, which allows for flexibility in selecting policies in view of built-in employment practices, would be suitable. Generally, age discrimination can be seen as an area in which employers should enjoy a relatively broad margin of discretion, since age-based treatment affects everyone in society and is reasonable in some cases. Matters relating to age equality in Japan are therefore addressed through the employment policy approach rather than the human rights approach. Seemingly weak regulations, such as the ‘duty to endeavor,’ have played an important role in the development of Japanese anti-discrimination law, as shown in the case of the EEOA. As such, in the future there is the possibility that administrative efforts based on such clauses will contribute to consensus building among labor, management and citizens for the reinforcement of regulations on setting age limits for hiring.

Another controversial future issue would be whether or not Japan should introduce comprehensive anti-age discrimination law beyond the current regulations on age limits for hiring. With the influence of the anti-age discrimination laws both in the US and the EU, there is an increasing number of theorists arguing in favor of this.³⁶ Careful deliberation of the possible impacts on Japanese employment practices would be necessary, in view of the special character of age discrimination.

2. Improvement of the Employment Management of Foreign Workers

Subsequently, the question would arise as to whether or not measures for foreign workers, which are also addressed through the ‘duty to endeavor,’ are legitimate. Is the protection given to foreigners not sufficient, in spite of the character of nationality, which relates to the identity of workers and cannot be chosen freely by their own will? Or on the contrary, is there too much protection that constitutes ‘reverse discrimination’ against domestic workers?

In regards to the first question, emphasis should be put on the contents of the ‘duty to endeavor.’ They include namely proactive measures such as a special recruitment process for foreign students, explanation of Japanese labor laws for foreign workers, and support of

³⁶ See, Takeshi Yanagisawa, *Koyo ni okeru Nenrei Sabetsu no Hori 241ff* (Seibundo 2006).

foreign workers claiming for workers' accident compensation benefits. In a sense, recommending these measures would invade the freedom of the employment management of firms. Therefore, here again, a soft-law approach based on Article 8 and the guidelines seems appropriate. It is expected that the employment management of foreign workers would be improved, and they would be more integrated into the labor force through administrative efforts based on this Article.

As for the second concern, it is certain that the special treatment of foreigners as recommended by the guidelines, in which domestic workers could not be included, can be seen as reverse discrimination against Japanese workers. However, attention should be paid to the different attributes of foreigners, such as their limited knowledge about the language, culture and employment practices in Japan. Legislators presumably thought that the special treatment of foreigner workers by employers in accordance with the guidelines would be allowed as a positive action; this would compensate for their real difficulties in employment while at the same time being not so disadvantageous for domestic workers, and would not constitute unlawful nationality-based discrimination.

The most serious current legal issue would be whether or not discrimination by reason of a worker's nationality in relation to hiring, which has been interpreted to not violate Article 3 of the LSA on the basis of the Supreme Court's decision, should be banned. With the increasing labor mobility and strengthened regulations on hiring practices such as prohibition of age or sex discrimination, it would not be surprising that nationality-based discrimination in relation to hiring may be prohibited by revision of the EMA or LSA, or adoption of comprehensive anti-discrimination laws in the future.