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## Introduction

### **Illegal Labor**

Laws set out the rules that should be obeyed when people act socially. Actions that violate the rules set forth by these laws are illegal, and must therefore not be committed. The same is true of labor, where the various rules to be observed by everyone involved in labor, and particularly employers, are stipulated by law, or more specifically by labor and employment law. In actual society, however, illegal actions do occur. And again, the same is true of labor, where workers are sometimes employed in illegal formats. This is what we call illegal labor.<sup>1</sup>

In connection with illegal labor, “black companies” have become a topical issue in Japan over the last few years. “Black companies” do not exist as a legal concept, and they have not been clearly defined. These are companies that employ workers (or more particularly, young workers) in excessively hard labor for long hours. In other words, they use these workers as “disposable commodities.” Besides this, the phrase “black companies” is also used more broadly when referring to companies that employ workers in illegal formats, such as non-payment of overtime premiums,<sup>2</sup> failure to act against harassment in the workplace,<sup>3</sup> and dismissal or unfair attempts to encourage retirement.<sup>4</sup> People in Japan are now growing more concerned about various forms of illegal labor, with non-payment of overtime premiums, harassment in the workplace, and dismissal or unfair attempts to encourage retirement as representative examples.

Merely prohibiting illegal labor by law and imposing penalties on offenders will not

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<sup>1</sup> See the paper by Ryuichi Yamakawa for a definition of “illegal labor.” Based on Yamakawa’s description, actions that are considered illegal in light of labor and employment laws governing labor relationships in the broad sense will be assumed to be illegal labor in this Introduction.

<sup>2</sup> Under Article 37 of the Labor Standards Act of 1947, employers are obliged, in principle, to pay an overtime premium to workers, such as when they work for more than forty hours in one week or eight hours in one day, with the exception of workers listed in Article 41 of the Act (i.e. workers within a comparatively limited scope; in terms of management posts, for example, the exception only includes senior management posts).

<sup>3</sup> In employment contracts, employers are assumed to have a duty of care, such as preventing sexual harassment, bullying, and other forms of harassment in the workplace, or, if any such act has occurred, taking prompt and appropriate steps to resolve it. Failing to deal with workplace harassment could give rise to liability for damages as an act of tort. Of course, it is difficult to ascertain whether or not employers can be deemed to have violated this duty of care in individual cases, partly because a careful judgment is required as to whether a given act constitutes harassment or not.

<sup>4</sup> In Japan, dismissal is generally limited by the doctrine of abuse of the right to dismiss set forth in Article 16 of the Labor Contract Act of 2007. Dismissal constituting abuse of the right to dismiss is illegal. Meanwhile, attempts to encourage retirement, if persistent to a degree deemed socially unreasonable, could give rise to liability for damages as an act of tort. Of course, as mentioned in connection with workplace harassment in note 3 above, whether or not an attempt to encourage retirement is persistent to a degree deemed socially unreasonable is a problem that requires careful judgment and is difficult to ascertain.

suffice to address this problem. Rather, appropriate action aimed at correcting the problem needs to be taken after analyzing the causative factors lying behind illegal labor. This kind of research on efforts to eradicate illegal labor is a very basic yet important task. Moreover, the fact that “black companies” have become a topical issue in society, as mentioned above, would suggest that this kind of research is now a matter of urgency in Japan.

Based on these concerns, the aim of this Special Edition is to contribute to the discussion and efforts aimed at eradicating illegal labor. To this end, it will involve (1) examining the causative factors lying behind illegal labor in Japanese society from three perspectives—the historical perspective, that of behavioral economics and psychology, and that of human resources and labor management; (2) analyzing trends for systems of labor inspectors in EU and other countries, as representative examples of action against illegal labor; and (3) studying the present situation and future challenges facing methods of addressing illegal labor and the enforcement of labor and employment law.

Of the various kinds of illegal labor, forced labor (including human trafficking for sexual exploitation and other purposes) and child labor (often itself involving forced labor) may be cited as the most serious examples.<sup>5</sup> It is also seen as highly problematic that, in Japan today, not enough action has been taken for foreign workers under the Technical Intern Training Program for Foreigners,<sup>6</sup> senior high school girls under “JK business” such as “*enjo kosai* (compensated dating),” and others, even though these are all victims of forced labor and/or child labor.<sup>7</sup> Of course, this Special Edition will not deny that this forced labor and child labor are important problems in the field of illegal labor. But while recognizing forced labor and child labor as serious problems, the aim will be to study methods of addressing illegal labor more broadly, including these problems, and methods of achieving the enforcement of the law. Recent Japanese-language research on the problems of foreign workers in Japan, including the Technical Intern Training Program for Foreigners, has appeared in the *Nihon Rodo Kenkyu Zasshi* (Japanese Journal of Labour Studies), No. 662 (2015). Similarly, recent Japanese-language research on the problem of child labor, including the situation in Japan, can be found in *Kikan Rodoho* (Quarterly Labor Law), No. 249 (2015).

The papers included in this Special Edition will now be briefly introduced.

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<sup>5</sup> In Japan, forced labor is prohibited under Article 5 of the Labor Standards Act. As for child labor, Article 27, paragraph 2 of the Constitution of Japan prohibits child abuse, while the provisions of Article 56 to 64 of the Labor Standards Act, based on this prohibition, stipulate (among others) a minimum age for admission to employment, in line with related ILO conventions.

<sup>6</sup> The Technical Intern Training Program for Foreigners, implemented since July 1, 2010, is an amended version of the previous Industrial Training and Technical Internship Program for Foreigners. In 2015, the Cabinet submitted a “Bill on Proper Implementation of Intern Training for Foreigners and Protection of Trainees” to the Diet, aiming partly to improve the Technical Intern Training Program for Foreigners. Deliberation on this Bill will continue in the next Diet session, due to start in September 2016.

<sup>7</sup> See, e.g., U. S. Department of State, “Trafficking in Persons Report 2016,” pp. 217–18.

In “Developments and Issues in the Regulation of Illegal Labor in Japan,” Shinobu Nogawa first looks back over the history of employment systems in Japan, revealing that the employment relationship has developed as one premised on differences in status between employers and workers. For this reason, the employment relationship is seen as a master-retainer relationship, and this tends to blur judgments recognizing acts such as overwork and violations of workers’ rights as unfair or illegal. This structure survived even after employment relationships came to be positioned as legal contracts in the modern era, and if anything, was preserved within the outer form of a contract. Nogawa points out that Japan’s legislation for the protection of workers after the beginning of the 20th century, in response to vigorous resistance from financial circles, was strongly geared to securing good quality manpower, but that it had a weaker presence in terms of protecting the human rights and personal interests (i.e. physical health, freedom, privacy and other such factors that allow individuals to lead their lives with personal character and dignity) of workers. He also argues that, even after the Second World War, while a degree of employment security was given to regular employees under the custom of long-term employment that permeated in the period of high-level growth, authority-based employment relationships with a strong family-like orientation were conversely strengthened. At the same time, long working hours and infringements of personal interests in the workplace were not sufficiently regulated. On methods of enforcing legal regulations, Nogawa points out that the number of labor standards inspectors involved in criminal justice and administrative supervision is grossly inadequate compared to the number of businesses subject to supervision, and that even in connection with civil regulation, infringements of personal interests and other forms of workplace harassment that are often described as illegal labor in Japan today are not adequately protected under the Labor Contract Act. Moreover, cases of civil liability such as workers’ claims for damages are not being effectively pursued. Nogawa asserts that, in order to correct this situation, the number of labor standards inspector needs to be dramatically increased, while protection under the Labor Contract Act against workplace harassment and other infringements of personal interests needs to be enhanced.

In “Motivations for Obeying and Breaking the Law: A Preliminary Study Focused on Labor Law and the Role of Non-Instrumental Motivations,” Takashi Iida presents a framework for analyzing illegal acts in the field of labor and employment law, based on knowledge of social sciences other than jurisprudence. To this end, he examines specific motivations for compliance with laws and conditions that make it easier to violate laws, while also raising suggestions for labor policy based on this examination. According to Iida, motivations for obeying the law consist of “instrumental motivation,” which seeks to avoid direct sanctions (such as punishment by the state) or indirect sanctions (such as social disapproval), and “non-instrumental motivation,” whereby people try to obey laws because those laws have legitimacy or because they concur with their own sense of morals and values. In addition, according to Iida, people are more likely to break the law when the benefit of illegal behavior exceeds that of obeying the law, in connection with instrumental motiva-

tion, or when there is no legitimacy and they feel no psychological resistance, in connection with non-instrumental motivation. On the subject of labor relationships, Iida first stresses the importance of focusing on non-instrumental motivation in relation to non-compliance with the law. He then asserts that, as an important reason why people do not feel psychological resistance to labor-related legislation, “altruistic illegal behavior” is prone to occur in situations where people collaborate with each other, such as in the workplace. In particular, Japanese workplaces have a strong aspect of collective action, and “altruistic illegal behavior” is even more prone to occur there. Based on this examination, Iida asserts that there are limits to designing legal systems with focus only on instrumental motivation, and such designs also need to consider the effect of non-instrumental motivation.

In the first part of “Factors Contributing to Labor Law Violations and Employees’ Subjective Perceptions of “Black Companies”: Focus on Workplace Characteristics and Human Resource Management,” Toru Kobayashi analyzes the causes of uncompensated overtime, failure or inability to take paid leave,<sup>8</sup> and coerced resignation, which often become problematic as illegal labor, based on aggregated data. Secondly, he analyzes the causes behind workers’ perceptions that their own employer is a “black company,” again based on data. The focus here will be on analyzing the former, as it pertains to the overall theme of this Special Edition, and the analysis results will be summarized. Based on his analysis, Kobayashi indicates that, when a company has a system of performance-based pay or profit targets, or when it has imposed a total ban on overtime, it is more difficult for workers to apply for overtime payment even if they do work overtime, and this gives rise to uncompensated overtime. Moreover, the existence of overtime surveys and implementation of compliance training by companies has the effect of reducing uncompensated overtime. Kobayashi also sees a link between uncompensated overtime and improved corporate profits, asserting that the reduction in cost by not paying overtime premiums could outweigh the disadvantage resulting from non-compliance with the law, and therefore that it is important to improve this situation. The existence of profit target systems and large fluctuations in the daily volume of work per week are seen as causes of the failure or inability to take paid leave. As for coerced resignation, Kobayashi shows that coerced resignation is more prone to occur when accumulating human capital through continuous service is not so important

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<sup>8</sup> In Japan, paid annual leave is provided as a right of workers under Article 39 of the Labor Standards Act (contrary to the impression given by the text of said provision), and it is left to the worker’s discretion whether to actually take the leave or not. Strictly speaking, therefore, a worker merely not taking paid leave could in itself hardly be called illegal. On the other hand, employers are prohibited from obstructing efforts by workers to take paid leave (Article 119, paragraph 1 of the Act). On this point, if an employer creates a workplace atmosphere in which it is difficult for workers to take paid leave, it would be seen as a social problem, though not directly falling under a violation of the prohibition mentioned above. The general perception is that, in most Japanese workplaces, there is an atmosphere in which it is difficult for workers to take paid leave. In his paper, Kobayashi focuses on this situation in Japan, and appears to include failure or inability to take paid leave as one kind of illegal labor.

for a company, even though it may be required to a certain extent.

In “International Trends in Systems for Inspection of Labor Law Violations,” Toshiharu Suzuki makes a comparative study of labor inspector systems, mainly in EU countries, as representative methods that are actually used as a legal response to illegal labor, and discusses trends in them. In his paper, Suzuki reports that the ratio of inspectors to workers in EU countries is generally higher than the level set by the ILO as a rough guide (moreover, as stated in note 6 of the paper, the ratio in Japan is regrettably lower than the level set by the ILO), that there are differences from country to country in whether inspectors take over-all charge of all fields related to labor or whether they are divided into specific fields such as health and safety, and that the level of inspectors’ authority also differs from country to country. Besides this, Suzuki introduces initiatives aimed at cross-border collaboration between countries, and the use of the Internet to share information and build systems of inspection, train inspectors and increase the efficiency of information provision to society, as new attempts related to labor inspector systems by EU countries in recent years. Suzuki also asserts that not enough research has been accumulated on the administration of labor inspection, and that this needs to be enhanced.

In “Policy Measures to Tackle Violations of Labor and Employment Laws in Japan,” finally, Ryuichi Yamakawa discusses directions for labor policy to address violations of labor and employment law, with particular focus on measures for implementing labor and employment law (in the paper, violations of labor and employment law are defined broadly to include not only those for which penalties and administrative measures are planned but also acts in violation of norms that establish rights and obligations in civil law). As measures for implementing labor and employment law in response to violations, Yamakawa points out that steps have been taken for implementation by criminal justice, implementation by administrative agencies, and implementation through civil litigation or other means between private individuals (the paper also mentions measures designed to implement the law by preventing violations, such as by increasing awareness of laws to be obeyed, or developing organizations and systems). Of these, Yamakawa states that implementation based on criminal justice is not necessarily commonplace, and that implementation is more often attempted by administrative agencies. In particular, this takes the form of demanding voluntary correction by employers, such as by issuing recommendations to correct violations of the law. Of the violations often regarded as problems in Japan today, Yamakawa then describes the current legal response to overwork, long working hours leading to health impairments, and harassment in the workplace, but points out that it would appear difficult to address each of these problems using the methods adopted until now. Based on this examination, Yamakawa asserts that the present situation of illegal labor and of the response to illegal labor have not yet been fully ascertained, but also that it is important to ascertain and analyze these present situations, and that the perspective of a policy mix combining various policies is required as a method of responding to law violations. He finally proposes several improvement measures for a reactive response to law violations and proactive prevention

thereof.

Seen through the papers in this Special Edition, the strong characteristic of Japanese workplaces as closed communities can be discerned as a major causative factor lying behind the occurrence of long working hours (and, related to this, uncompensated overtime and the failure or inability to take paid leave) as well as harassment in the workplace, which are often mentioned as illegal labor in Japan today. This characteristic of Japanese workplaces is partly rooted in the Japanese employment system founded on long-term employment. In this sense, when addressing illegal labor such as the above, it would appear important that we also reconsider the pros and cons of the employment system currently practiced in Japan.

I strongly expect this Special Edition to contribute to an understanding of problems concerning illegal labor in Japan, and of action aimed at reducing illegal labor and enforcing the law. In turn, I expect it to contribute to enhancing research and policies aimed at reducing illegal labor and enforcing the law in our readers' own countries.

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