Policy Measures to Tackle Violations of Labor and Employment Laws in Japan

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This paper sets out to identify and study ways in which labor policies respond to violations of labor and employment laws. Firstly, the term "violations of labor and employment laws" will be defined, in terms of labor policies, as referring to acts that violate certain prohibitive or instructive norms when these have been imposed on employers and others by law. Next, types of labor policy response to violations of labor and employment laws will be identified from the viewpoint of measures for implementing labor law. Thirdly, the current situation of labor and employment law violations seen as particularly problematic in Japan today will be introduced, along with the action taken to address them. And finally, future issues and perspectives for study will be indicated, with focus on the aspect of proactively preventing violations of the law, in connection with the future directions to be taken for policy response against violations.

I. Introduction

This paper sets out to identify and study ways in which labor policies respond to violations of labor and employment laws. In Japan, there have been increasing reports in the mass media and elsewhere of labor problems caused by "black companies," companies that defy labor and employment laws, in recent years (e.g., Konno 2012), but there does not appear to have been much systematic or theoretical study on the question of what sort of policy response should be made to address labor and employment law violations efficiently and sufficiently.

Therefore, this paper will attempt to study this problem with focus on the measures for implementing labor law that should be applied to address violations of labor and employment law in the policy response.

In the following, after first briefly discussing the definition of "violations of labor and employment laws" (Section II), various directions for policy response to this problem will be identified (Section III). Then, after introducing the present situation of the problem in Japan and the policy response thereto (Section IV), issues and perspectives when considering future policy responses will be identified (Section V).

II. Definition of Violations of Labor and Employment Laws

First, the definition of the term "violations of labor and employment laws" will be

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briefly considered. To clarify the scope of discussion in this paper, violations of labor and employment laws would typically refer to cases in which employers are judged unlawful or illegal in their employment of workers, in light of laws governing labor and employment relationships (labor law in the broad sense).

Of course, even when adopting this interpretation, it is still not necessarily clear what actually constitutes an "illegal" act. On the one hand, as for example in violations of the Labor Standards Act, cases that are prohibited by law based on criminal penalties, or for which certain administrative measures are planned against violations (including those with no binding force, such as a recommendation for correction by a Labor Standards Inspector), may certainly be regarded "illegal." These could be seen as acts for which governmental power or public authority is to be exercised with regard to certain prohibitive norms and instructive norms.

On the other hand, the question also arises as to whether acts that are not accompanied by criminal penalties and such administrative measures under the law may be described as "illegal." For example, there may be cases in which a worker acquires certain rights vis-à-vis an employer under legal norms that only establish legal effects under civil law, in the form of establishing rights and obligations between private individuals, such as provisions on employment in the Labor Contract Act or the Civil Code. More specifically, this could include unlawful acts of tort that give rise to liability for damages (Article 709 of the Civil Code) or dismissal adjudged to be an abuse of dismissal rights (Article 16 of the same).

On this point, we need to bear in mind that the question as to whether it is appropriate to use the expression "illegal" may depend on the purpose of using that expression. The purpose of this paper is to study directions for labor policy, and in light of this purpose, when there are legal norms (prohibitive or instructive norms) that prohibit employers and others from committing certain acts or order their implementation, in the broad sense, it should not be impossible to use the expression "illegal" for acts that violate these and to study the policy response to them. This should be true whether or not implementation based on criminal penalties or administrative measures is taken as a result of the violation of such norms. In that sense, the term "violations of labor and employment laws" in this paper should be positioned as a relative concept established in line with the purpose of the study.

III. Policy Measures to Tackle Violations of Labor and Employment Laws

1. Measures for Implementing Labor Policies[1]

(1) The Definition of Labor Policy

While there is not necessarily a clear definition of the term "labor policy," one could say that a strict definition is not really necessary. Here, it will be broadly defined as policy

[1] On issues such as the relationship between measures for implementing labor policy and labor law, respectively, see Yamakawa (2014, 171; 2015).

Figure 1. The *Kurumin* Mark

with labor-related objectives, in line with the broad interpretation of the phrase "violations of labor and employment laws" above. Seen from this angle, the term "labor policy" would not only be used for cases where the government establishes specific legal norms related to labor. Rather, this term can be broadly used for cases where the government takes various actions to implement certain objectives as the administration.

(2) Measures for Implementing Labor Policies

While there could be various measures for implementing labor policy in the broad sense as defined above, regulation by law could be seen as the most representative way of doing so. Of course, there are also various conceivable measures even when it comes to regulation by law.

Firstly, the most direct measure would be that of setting certain prohibitive or instructive norms under labor law vis-à-vis the addressees of legal provisions. Criminal penalties and administrative measures when prohibitive or instructive norms have been violated would be positioned as measures for implementing the respective norms.

Under the law, meanwhile, there is also the measure of seeking voluntary implementation of certain policy objectives without going as far as setting prohibitive or instructive norms. This would include imposing a moral obligation on the addressees of legal provisions to make good-faith efforts. Another measure would involve inducement aimed at reaching policy objectives by awarding subsidies or other incentives. These incentives need not be limited to financial ones, but could also be incentives in the sense of boosting a company's social reputation. An example of this is the "*Kurumin* mark" (Figure 1), which businesses can attach to their products and services when certified by the Minister of Health, Labour and Welfare. This certification is based on the assessment of the businesses' action plans as well as their achievement aimed at improving the environment for employees who raise children, in line with the Act on Advancement of Measures to Support Raising Next-Generation Children.

Besides the above, steps can also be taken to implement certain labor policies by setting private legal norms on rights and obligations in labor relationships, as in Article 16 of

the Labor Contract Act on the abuse of dismissal rights. Here, private legal norms are measures for implementing labor policies, and court systems and alternative systems of dispute resolution would, in turn, implement such legal norms.

A measure that has appeared in recent years, moreover, is that of requiring the parties concerned (particularly employers) to establish norms consistent with certain policy objectives, and of requiring them to establish the content of their own norms, of which the detailed content is entrusted to the parties concerned. An example of this is the requirement that businesses draw up action plans under the aforementioned Act on Advancement of Measures to Support Raising Next-Generation Children. Recently, businesses have also been obliged to draw up action plans for promoting women's active participation in the workplace, under the Act for the Promotion of Women's Active Participation in Employment. Moreover, this Act requires businesses to publish these action plans and information on the situation of women's participation in their own companies on the Internet and elsewhere, and this information is expected to be used by women engaged in jobseeking activity.[2] The intention of this requirement is to implement the policy of promoting women's participation by stimulating competition between companies for recruiting human resources, based on the disclosure of information in the labor market and therefore on their reputation in the market.[3]

Besides this, attempts are sometimes made to implement labor policy via legal regulation other than labor law. An example of this is the so-called employment promotion tax, or more specifically, the system in which businesses are given tax incentives if they increase their workforce.[4] Though not subject to legal regulation on the labor relationship itself, this is still positioned as a means of achieving the labor policy objective of promoting employment. Again, when the government and local authorities enter into agreements (public contracts) with private businesses, whether or not the businesses concerned meet certain standards in terms of the labor relationship is sometimes used as a factor for consideration when selecting contractors. In the aforementioned Act for the Promotion of Women's Active Participation in Employment, for example, companies whose action plans for promoting the active participation of women in the workplace have been certified by the Minister of Health, Labour and Welfare are expected to increase opportunities for winning public contracts from the government.

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[2] The Ministry of Health, Labour and Welfare has created a website that can be used by businesses to publish this kind of information (http://www.positive-ryouritsu.jp/positivedb/).

[3] Besides these examples, under the Act for the Promotion of Youth Employment, companies that engage in excellent employment management are certified as "Youth Support Companies" by the Minister of Health, Labour and Welfare. These companies are permitted to use a symbol mark and are given priority PR in public employment security offices.

[4] Regarding employment promotion tax, see the website of the Ministry of Health, Labour and Welfare. http://www.mhlw.go.jp/stf/seisakunitsuite/bunya/koyou_roudou/koyou/roudouseisaku/koyousokushinzei.html.

(3) Political Measures

So far, the discussion has focused on measures that attempt to implement labor policy by setting legal norms in the broad sense, but political measures other than legal norms are also sometimes used to achieve objectives in labor policy. In spring 2014, for example, the government adopted a policy of seeking wage rises from companies as part of "Abenomics," which stands for the economic policies announced by the current Prime Minister Abe. In doing so, the measure of political arrangement including the establishment of a Tripartite Roundtable was adopted (Hisamoto 2014, 2). This kind of movement is positioned as having objectives in terms of labor policy, but does not depend on the format of establishing legal norms (this point will not be broached in this paper, as its main focus is on violations of labor and employment laws).

2 Violations and Implementation of Labor Law

As shown above, labor law is positioned as one measure for implementing labor policy, but we could also consider measures for implementing the labor law itself. While there are also various measures for implementing labor law such as providing subsidies, the aim of this paper will be to enumerate only those that are necessary for addressing violations of labor and employment laws, as that is the focus of study here.[5] When "responding to" violations of labor and employment laws, meanwhile, a proactive response of preventing violations of the law in advance is also conceivable besides the reactive response taken after a violation has occurred. As such, that point will also be dealt with here.

As will be shown below, labor law is sometimes implemented through the exercise of public authority and sometimes through the resolution of disputes between private individuals. The characteristics of such dual-style implementation of labor law is based on the fact that, while labor relationships governed by labor law are basically relationships between private individuals (i.e. workers and employers who are contractually bound to each other), they also have the characteristic that public intervention by government is inevitable, in light of the disparity in bargaining power between the two parties, and that the state of the labor relationship or the labor market is related to the government's economic policy.

(1) Implementation through the Exercise of Public Authority

i. Implementation through Criminal Sanctions

When certain acts are prohibited by law, or when there are norms that order certain acts, sanctions based on criminal penalties could be imposed on persons who violate such legal requirements. The Labor Standards Act, the Industrial Safety and Health Act and the Minimum Wage Act are typical examples of this kind of legal norm, including provisions on criminal penalties against violation.

[5] For details such as measures that merely specify a principle or an obligation to make efforts, and set out to implement these voluntarily through administrative guidance and various incentives such as subisidies, see Yamakawa (2013, 75).

But criminal procedures are not often implemented in Japan. Of 173,250 inspections carried out by Labor Standards Inspectors in 2012, violations of law were discovered in 68.4% of workplaces, but only 1,133 cases were sent to the Public Prosecutor's Office as having violated those laws.[6] Of course, it is not always desirable to pursue criminal liability for violations of laws. This is because it is sometimes more desirable to actually provide reliefs for workers (for example, by resorting to the recommendation for correction discussed below), rather than through sanctions based on criminal penalties, considering the fact that labor relationships are relationships between private individuals. Also, when pursuing criminal liability, it should be borne in mind that more stringent procedures and proof are required under the Code of Criminal Procedure than civil and administrative procedures.

ii. Implementation by Administrative Agencies

In Japan's case, the efficacy of prohibitive or instructive norms under labor law is often secured by administrative agencies. In the field of labor law, it is not unknown for the cessation of illegal acts to be ordered directly by an administrative measure (such as an order suspending the use of machinery or equipment under the Industrial Safety and Health Act). Nevertheless, administrative recommendations including recommendations for correction under the system of Labor Standards Inspectors in the Labor Standards Act and elsewhere tend to play the larger role. Recommendations for correction do not have legally binding force as administrative penalties, as their purpose is only to seek voluntary correction. But they are premised on the finding that violations have occurred, and employers are normally asked to report that they have corrected the violation in question.

Unlike cases where individuals file for civil proceedings, the object of correction is not limited to specific individuals who claim their rights when measures for implementing labor law such as recommendation for correction are taken by administrative agencies. When a violation of the law is recognized in a workplace investigated by a Labor Standards Inspector, for example, the correction may apply to all of the workers affected by the violation. This is because the system of recommendation for correction does not stop at relief for damages to individuals, but also has the nature of enforcing the public interest throughout the workplace. As such, it could be seen as another advantage of having labor law implemented by administrative agencies.

Besides the above, there is also the measure of publishing the names of companies that fail to comply with prohibitive or instructive norms, after following certain procedures such as administrative recommendations. This "naming and shaming" system has already been used for some time in connection with the Act on Employment Promotion, etc. of Persons with Disabilities.[7] Recently, this system has also been adopted for the Equal Employ-

[6] Labour Standards Bureau, MHLW, *2012 Annual Labor Standards Inspection Report* (2012, 40, 51).

[7] There were between one and seven cases of 'naming and shaming' based on the Act on Employment Promotion, etc. of Persons with Disabilities between FY2006 and FY2011, but none in

ment Opportunity Act, the Worker Dispatching Act, the Elderly Employment Stabilization Act and the Industrial Safety and Health Act. Under the Equal Employment Opportunity Act, there was no case of "naming and shaming" for some years after the system was introduced under the 2007 amendment. In September 2015, however, a company name was published for the first time in a case involving discrimination on grounds of pregnancy.[8] This method of responding to violations of the law by "naming and shaming" not only imposes social sanctions on companies that break the law by publishing their names, but could also be seen as a measure to prevent future violations, in that employers would refrain from such violations, being afraid of the loss of their reputation in society.

While this "naming and shaming" system is intended to disseminate information on employers that violated labor law, another measure relating to information is to deny access to public employment agencies to employers that violated labor law, thereby excluding their information on job posting from the labour market, as long as employment agencies are concerned. The Act for the Promotion of Youth Employment, enacted in 2015, contains a provision (Article 15) under which the Public Employment Offices may reject applications for posting job offering for young workers by an employer who violates certain labor laws.[9]

iii. Measures to Secure Efficacy for Exercising Public Authority

Mechanisms are in place to appropriately implement responses to violations of law in the forms described above and to ensure their efficacy (these could be described as secondary measures for implementing labor law in order to make the main measures more effective). Firstly, administrative agencies have been established to enforce labor law based on administrative measures and criminal penalties. Under the Labor Standards Act, for example, Labor Standards Inspectors are responsible for duties including recommending correction when a violation has been discovered, as well discovering and preventing violations through their supervision.

Meanwhile, mechanisms for creating and preserving records related to compliance with labor legislation are another important aspect when administrative agencies address violations of the law. Under the Labor Standards Act, for example, employers are obliged to prepare a wage ledger for each workplace, enter the facts upon which wage calculations are based, the amount of wages, and other matters, and preserve said records for three years. By requiring employers to prepare and preserve records and to submit or report them if neces-

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FY2012 and FY2013. There were eight cases in FY2014, but again none in FY2015 and FY2016. See the MHLW web page. http://www.mhlw.go.jp/file/04-Houdouhappyou-11704000-Shokugyouanteikyoku koureishougaikoyoutaisakubu-shougaishakoyoutaisakuka/0000118555.pdf.

[8] See the MHLW web page (http://www.mhlw.go.jp/stf/houdou/0000096409.html). Meanwhile, there have been no cases of publication under the Worker Dispatching Act, the Elderly Employment Stabilization Act, or the Industrial Safety and Health Act, perhaps because the system has not been in place for very long in those cases.

[9] See the web page of the Diet (Lower House). http://www.shugiin.go.jp/internet/itdb_gian.nsf/html/gian/honbun/houan/g18905050.htm.

sary, the aim is to discover violations and, in turn, to make it easier to secure correction. Under the Labor Standards Act, Labor Standards Inspectors are authorized to demand the submission of documents from employers.

Furthermore, Article 104 of the Labor Standards Act stipulates that workers may report violations of the Act, and there are similar provisions in the Industrial Safety and Health Act and the Minimum Wage Act. This system of reporting could be said to have both the function of promoting supervision by administrative agencies and their response to violations through reports by workers as private individuals, and the function of promoting the implementation of workers' statutory rights.

(2) Implementation through Resolution of Disputes between Private Individuals

When labor law stipulates norms that establish private rights and obligations between employers and workers, and when disputes arise between such private individuals, these are typically implemented by one of the parties using civil litigation or other dispute resolution procedures against the other party. As a result, rights may thus be implemented through a court ruling, for example. Since such rulings that order the implementation of rights can be secured through civil enforcement when the addressees fail to comply, they may ultimately have a tone of enforcement by public authority.

Meanwhile, because normal civil proceedings are not easily accessible for many workers in labor disputes, because of a number of factors such as the cost required and the time taken, there has been a progressive improvement of resolution procedures for labor disputes and particularly for individual labor disputes in recent years in Japan. A system to promote resolution of individual labor disputes as a procedure for promoting the resolution of disputes by the administrative agencies under the Act on Promoting the Resolution of Individual Labor Disputes, and a labor tribunal system as a procedure for the resolution of disputes by courts under the Labor Tribunal Act have been introduced.

A representative legal norm that is expected to be implemented through this kind of dispute resolution in civil law is the Labor Contract Act. However, Article 13 of the Labor Standards Act establishes rights under private law based on minimum standards of labor conditions, among others, as well as establishing prohibitive or instructive norms against employers. It thereby adopts a mechanism whereby workers can exercise their rights in civil procedure against employers. This means that the exercise of rights under the Labor Standards Act could also be implemented through the aforementioned dispute resolution systems.

The implementation of labor law through this kind of resolution of disputes between private individuals is consistent with the objective of providing relief for individuals, and since it is a procedure carried out by private individuals. Under existing law, conversely, there is a limitation in that the recipient of relief for damages is limited only to the individual who raised the litigation. Also, labor law is not only limited to adjusting interests between private individuals but also has an aspect of implementing the public interest. For this reason, it is sometimes subject to different treatment compared to normal civil disputes. For

example, under Article 114 of the Labor Standards Act, courts may order employers to pay an additional sum equal to the sum of unpaid money in the case of certain violations of the Act, such as violation of the obligation to pay a dismissal notice allowance or to pay increased wages for overtime work under Articles 20 and 37 of the Labor Standards Act (i.e. in total, the employer may be ordered to pay double). This may be designed to focus attention on and promote the fact that the Labor Standards Act includes a function of implementing the public interest (Yamakawa 2013, 86).[10]

(3) Preventing Violations of the Law

In measures for implementing prohibitive or instructive norms under labor law, the main effectiveness could be said to lie in cases where these norms are violated. In reality, however, it is important to ensure that the law is complied in the first place. With regard to labor law, if a worker suffers damages due to a violation, it may not always be possible to provide full restitution for those damages through criminal sanctions or administrative recommendations after the event, or through a mechanism whereby rights and obligations are implemented through civil proceedings alone. As such, preventing violations of the law from occurring in the first place is of great significance.

Although there are various ways of preventing violations of the law, they are all premised on sufficient familiarity with the laws that should be observed. In labor law, it goes without saying that employers, who are often the main subjects of compliance with the law, must be sufficiently familiar with the law. Educating workers on labor law also has an important significance, since workers' knowledge about their protection under labor law is useful not only for implementing rights and obligations but also for preventing violations from occurring in the first place (e.g., Doko [2014, 4]). This is also the case with employer's dissemination of the legal rules in the workplace in order for workers to understand such rules.

Another useful measure is to prepare systems that smoothly promote compliance with the law by employers. For this reason, some labor laws make it mandatory for employers to prepare organizations and systems for fulfilling their obligations under the law. For example, the Industrial Safety and Health Act requires employers to appoint general safety and health managers, safety officers, health officers and industrial physicians as persons responsible for safety and health in the workplace, and to establish safety committees, health committees, or safety and health committees, depending on the scale of the workplace.

These mechanisms to promote the prevention of violations sometimes go beyond merely preparing organizations and systems. For example, Article 11 of the Equal Employment Opportunity Act (as amended in 2006) obliges employers to establish necessary measures in terms of employment management to provide consultation and advice to work-

[10] In the United States, various systems that incorporate an aspect of materializing the public interest in the civil resolution of disputes have been developed. These include attorney fees being borne by the losing party and filing of suits against employers by administrative agencies. For details, see Yamakawa (2013, 87–88).

ers on sexual harassment in the workplace and cope with complaints filed by workers. The specific content of such measures includes (i) clarifying and familiarizing policies prohibiting sexual harassment, (ii) developing systems to respond appropriately when workers seek advice or file a complaint, and (iii) promptly and appropriately responding when a worker actually files a complaint on sexual harassment.[11] Although sexual harassment in itself is not prohibited under the Equal Employment Opportunity Act, it can be subject to illegal assessment as an act of tort for both the direct perpetrator and the employer under the rule of vicarious liability under the Civil Code (e.g., Yamakawa [1996, 69]). The Equal Employment Opportunity Act obligates employers to take measures for prevention of such illegal conduct as well as resolution of disputes.

Sometimes, prevention of violation is promoted indirectly by granting certain benefits in exchange for taking measures to prevent violation, rather than making the prevention of violation compulsory in itself. For example, Article 121 of the Labor Standards Act states that, while criminal liability for violations of the Act shall primarily be borne by the person who actually committed the violation (the perpetrator punishment principle), if a person who has violated the Act is an agent or other employee acting on behalf of the employer of the enterprise, a fine shall also be assessed against the employer (dual liability rule). It also states, however, that this shall not apply if the employer has taken necessary measures to prevent such violation.

This provision stipulates that employers shall be penalized under certain conditions, but from another angle, it can be seen as encouraging measures for employers to prevent violation of the law, in that it gives employers an opportunity to avoid liability by taking the necessary measures to prevent violation.

IV. Problems of Labor Law Violation in Japan and the Response Thereto

Below, the problems of long working hours and harassment in the workplace will be described as patterns of labor law violation that are seen particularly problematic in Japan recently. After introducing the present situation and response by the government, the issues involved will be presented.[12]

1. Long Working Hours

(1) Present Situation

Japan's Labor Standards Act sets maximum limits of 40 working hours per week and 8

[11] See "Guidelines on measures to be taken by employers in employment management concerning problems caused by sexual harassment in the workplace" (Ministry of Health, Labour and Welfare Notice No.615 of 2006). As discussed below, a similar obligation to take measures against so-called maternity harassment has also been established recently.

[12] Besides these, non-payment of wages, forced redundancy and others are sometimes cited as typical violations of labor and employment laws. See Sakai (2015, 63).

hours per day (Article 32) and invalidates agreements that violate these limits. It also stipulates that contractual working hours shall be automatically amended to meet the standards given above (Article 13) and includes penal provisions for employers who violate the standards (Article 119). There are several exceptions to these rules, however. Most notably, if the employer has entered into a written agreement either with a labor union organized by a majority of the workers in the workplace, when a union has been organized, or with a person elected to represent a majority of the workers, when there is no union (known as an "Article 36 agreement"), the employer may extend the working hours or have workers work on days off to the limit specified in the agreement, on the condition that the employer submit the contents of the Article 36 agreement to the Director of the Labor Standards Inspection Office (Article 36).

Statistically, working hours in Japan (actual working hours) have gradually been decreasing since 1987, when the aforementioned 40-hour week rule was added to the Labor Standards Act. The annual average in FY2015 was 1,734 hours, decreasing from 2,031 hours in 1990.[13] However, this trend toward shorter working hours has not been so pronounced for regular employees. The decrease in average working hours seen in statistics is largely due to an increase in part-timers and others atypical workers with short working hours, while the present situation among regular employees is that many still work long hours.[14]

It goes without saying that these long working hours bring a high risk of detrimental effects on the health of workers. In fact, Industrial Accident Compensation Insurance benefits are increasingly being paid on grounds that excessive work typified by long working hours aggravates underlying ailments like high blood pressure and arteriosclerosis and causes acute brain and heart diseases like stroke and heart attack, or that long working hours increase workers' stress, leading to depression and other mental illness.[15]

(2) Response

Regulation by the current Labor Standards Act cannot completely control the problem of long working hours, and there have been calls for the Act to be amended. Specifically, first of all, the provisions of the existing Labor Standards Act do not prescribe an upper limit for overtime work, except in cases of dangerous and harmful work. Secondly, although notification by the Minister of Health, Labour and Welfare concerning the upper limit on overtime work (the upper limit standard) is stipulated for Article 36 agreements that permit temporary overtime work, the obligation on the employer to observe the upper limit standard under the Minister's notification is merely a moral obligation to make efforts, the viola-

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[13] See the JILPT web pages. http://www.jil.go.jp/kokunai/statistics/shuyo/201607/0401.html and http://www.jil.go.jp/kokunai/statistics/databook/2016/06/p203-204_t6-1.pdf.

[14] See the MHLW web page. http://www.mhlw.go.jp/file/05-Shingikai-11601000-Shokugyouanteikyoku-Soumuka/201312061-2.pdf.

[15] For details of insurance payments in FY2015, see the MHLW web page. http://www.mhlw.go.jp/stf/houdou/0000128216.html.

tion of which does not result in criminal sanction or administrative recommendation for correction. And thirdly, the Labor Standards Act includes no interval regulation requiring employers to guarantee a given number of non-working hours.

Therefore, in the process of preparing a report as the basis of a Bill for Amendment of the Labor Standards Act (which was submitted to the Diet in 2015 and is still under deliberation as of September 2016), the Working Conditions Subcommittee of the Labour Policy Council discussed whether or not to introduce an upper limit or interval regulation on overtime work. In the end, however, neither of these was introduced into the Bill owing to opposition from corporate management, although certain measures to reinforce regulation were incorporated, such as abolition of the period of grace for SMEs regarding the premium rate for overtime work exceeding 60 hours per month.[16]

As a result, measures against long working hours are being attempted by strengthening regulatory administration rather than through draft legislation. From April 2016, for example, the Ministry of Health, Labour and Welfare changed the standard for on-site inspections by Labor Standards Inspectors to businesses where overtime work exceeded 80 hours per month, as targets of priority supervision, compared the previous standard of overtime work exceeding 100 hours.[17]

Again, action on preventing the adverse impact of long working hours on physical and mental health has been implemented under the Industrial Safety and Health Act. For example, the Act obliges employers to take measures such as giving interview guidance on request from workers who work more than a certain number of hours, and changing their job duties if deemed necessary, based on the opinion of a doctor. Moreover, on Industrial Accident Compensation Insurance benefits for "*karoshi*" (sudden death due to overwork), the notification by the Ministry of Health, Labour and Welfare[18] has been amended to make insurance benefits more widely applicable, in light of an accumulation of court rulings that overturn decisions by Directors of Labor Standards Inspection Offices to dismiss requests for insurance benefits. Besides the above, the Act to Promote Measures for the Prevention of Karoshi was enacted in 2014, and the government is now responding by researching and providing data on *karoshi* and other problems, holding Consultative Meetings on the Promotion of Measures for the Prevention of Karoshi, and so on.

The problem of long working hours is difficult to resolve, and a response through law amendments faces considerable opposition from corporate management. The background to this is that the factors behind long working hours are thought to be closely tied to the way work is done, as well as the demands of customers and suppliers, so that a uniform strengthening of regulation would be difficult to observe in practice. In this sense, the problem of long working hours could be seen as an example that highlights the limitations to

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[16] See the MHLW web page. http://www.mhlw.go.jp/topics/bukyoku/soumu/houritu/dl/189-41.pdf.

[17] See the MHLW web page. http://www.mhlw.go.jp/file/05-Shingikai-12602000-Seisakutoukatsukan-Sanjikanshitsu_Roudouseisakutantou/0000121610.pdf.

[18] *Kihatsu* (Labour Standards Bureau Notification) No.1063 of December 12, 2001.

conventional ways of implementing labor law.

2. Harassment

(1) Present Situation

Harassment in the workplace takes a variety of forms. In Japan, sexual harassment started to be seen as a problem in court cases from around the beginning of the 1990s (Yamakawa 1996). And still today, numerous disputes involving sexual harassment seem to arise. Although precise statistical surveys on disputes involving sexual harassment cannot be found, in the Equality Offices of Prefectural Labor Bureaus responsible for enforcing the Equal Employment Opportunity Act, more than half of the consultation cases initiated by workers have been related to sexual harassment almost every year in recent years.[19]

Besides sexual harassment, the phenomenon known as "power harassment" in the workplace has also been seen as a serious problem in recent years. Although the concept of power harassment is not necessarily clear, a typical case would be one in which a superior harasses a worker in the workplace by abusing his or her authority in a manner that impairs the worker's personal dignity. If this power harassment is added to cases of bullying by coworkers and others in the workplace, these are the types of dispute with the largest number of cases of consultation, advice and guidance, and mediation based on the system of promoting resolution of individual labor disputes operated by Prefectural Labor Bureaus in recent years.[20]

Recently, moreover, a phenomenon known as "maternity harassment," in which female workers are harassed on grounds of their pregnancy or childbirth, or of requesting or taking maternity or childcare leave, has come to be seen as a problem (since fathers may also take childcare leave, harassment because of childcare leave is called "paternity harassment"). This maternity harassment is second only to sexual harassment in consultation cases brought by workers to the Equality Offices of Prefectural Labor Bureaus, accounting for around 20% in recent years.[21]

(2) Response

When sexual harassment first became a problem in Japan, there was no legislation governing it in labor law. In many cases, therefore, the offended worker would claim damages from the offender, in that the offending act corresponded to tort under the Civil Code, or pursued the vicarious liability of the employer (liability for damages) in that the act occurred within the scope of work. In the 1996 amendment to the Equal Employment Opportunity Act, however, a duty of care to prevent sexual harassment and provide appropriate

[19] On the number of consultations since FY2013, see the MHLW web page. http://www.mhlw.go.jp/bunya/koyoukintou/sekou_report/dl/160603.pdf.

[20] See the MHLW web page. http://www.mhlw.go.jp/file/04-Houdouhappyou-11201250-Roudoukijunkyoku-Roudoujoukenseisakuka/0000126541.pdf.

[21] See the MHLW web page cited in note 19.

response was imposed on employers. Furthermore, as stated above, the 2006 amendment made this duty of care more concrete as an obligation on employers to declare the principle of prohibiting sexual harassment and set up systems for consultation and grievance procedure. It also imposed an obligation to take certain measures (such as responding appropriately after the occurrence of a dispute) which, if not taken, could lead to liability for violations of the law. As stated above, however, cases of administrative consultation involving sexual harassment have continued to be numerous since then, so that the efficacy of the measures also needs to be verified.

Next, power harassment is sometimes regarded as tort under the Civil Code, in that it infringes workers' rights to personal dignity. If a worker who has been subjected to power harassment consequently suffers from depression, the case may be eligible for Industrial Accident Compensation Insurance benefits as a work-related mental illness. Unlike sexual harassment, however, power harassment is not regulated by labor law as a statute, because the definition of power harassment is unclear, among other reasons. Currently the Ministry of Health, Labour and Welfare is responding to this problem with non-statutory measures. As well as promoting the voluntary resolution of disputes in the system for promoting resolution of individual labor disputes mentioned above, it has set up a website on power harassment. The website explains the definition and types of power harassment, and introduces measures for prevention and resolution, court precedents, and other information.[22] In this case, the response may be seen as one of providing information to promote employers' voluntary prevention of disputes and resolution after they have arisen, as well as spreading problem awareness vis-à-vis power harassment.

Finally, on maternity harassment, disadvantageous treatment of workers by employers on grounds of maternal leave, pregnancy or childbirth was originally prohibited under the Equal Employment Opportunity Act, while disadvantageous treatment on grounds of childcare leave was prohibited under the Child Care and Family Care Leave Act. However, as only disadvantageous treatment by employers was prohibited under these Acts, maternity harassment by superiors and coworkers could not be directly prohibited. This led to a growing need to take more proactive measures under labor law requiring employers to take measures to prevent maternity harassment and to respond after the occurrence of such harassment including the conduct by superiors and coworkers. The resultant legislative response occurred just recently. In March 2016, the Equal Employment Opportunity Act and the Child Care and Family Care Leave Act were amended to make employers responsible for taking measures to prevent maternity harassment and responding appropriately if it did occur. This obligation to take measures was modeled on a similar obligation concerning sexual harassment in the Equal Employment Opportunity Act.

With harassment in the workplace, not only is it unclear in what cases it would be illegal (this applies particularly to power harassment); it also has the characteristic that it is

[22] See the MHLW web page. https://no-pawahara.mhlw.go.jp/.

not limited to the format whereby employers exercise their personnel rights through dismissal and the like, but that superiors and coworkers are often the perpetrators. Therefore, as with the problem of long working hours, it is seen as difficult to respond to this problem through conventional labor law that has focused on conduct of employers. Imposing an obligation on employers to take measures such as preventing harassment including harassment by superiors and coworkers could be seen as one response to this characteristic. Nevertheless, there remain issues regarding more effective enforcement, such as rigorously instilling policies of prohibiting harassment in the workplace.

V. Future Tasks and Policy Perspectives

1. Understanding, Analysis, and Evaluation of the Present Situation

Until now, the problem of how to respond to violations of labor and employment laws seems not to have been studied systematically as an independent research and policy issue in itself. Therefore, we first need to understand and analyze the present situation of this problem by looking at specific details of labor law violations and how they have been addressed.

As stated earlier, the discovery rate of violations of the Labor Standards Act and other legislation under the system of labor standards inspection appears to be markedly high. Therefore, it would seem that one task for study would be to consider what sort of response should be attempted in order to implement labor law more effectively. In evaluating the present situation, however, further finding and analysis are needed in light of such factors as the matters governed by the violated law, the industrial sector, and the company scale.

Based on the above finding and analysis of the present situation, the next step would be to evaluate whether more effective implementation of labor law is required in light of violations of a specific law. If this is answered in the affirmative, we will need to study contents of response measures to further improve the present situation. When doing so, we will need to study a number of points, such as what has caused the present problems to occur, what should be done to address these causes, whether the present measures for implementing labor law provide a sufficient result, and whether we should consider introducing new measures in accordance with matters governed by the law. At the more realistic level, we also need to consider whether the organizations and systems involved in implementing labor law are adequate.

When attempting the study outlined above, it would be useful to ascertain the situation in other countries, as a kind of benchmark. In fact, this problem could even become a theme for joint international research.

2. Perspectives When Studying Response Measures

(1) The Perspective of Policy Mix

When studying the response to violations of labor and employment laws, and in turn, ways of implementing labor law in terms of policy through the process outlined above, a diversity of measures for policy response is assumed. This is because measures for implementing labor law are also diverse, as seen above. Moreover, since the responses and measures studied here are not necessarily mutually exclusive, they could be combined as appropriate, or interconnected with each other. In this case, the response to violations of labor and employment laws would have to be studied as a kind of policy mix.

Since the content of such a policy mix would be difficult to study fully in this paper, the perspectives of reactive response to violations of the law and proactive prevention of violations will now be examined. In particular, the latter of these has not been studied much in the past, and will therefore be discussed in slightly more detail.

(2) Reactive Response to Violations of the Law

When studying measures for responding to violations of labor and employment laws, two aspects need to be considered—namely, the problem of how to respond reactively to violations that have already occurred, and what response is required in order to prevent future violations proactively.

Firstly, studying the response to violations that have already occurred is important in terms of whether damages are adequately recovered, or whether the response has any effect on controlling future violations, and so on. On the other hand, a problem is how to appropriately find violations of the law. From this kind of angle, for example, a task for study would be how to enhance labor standards inspections and other systems of administrative agencies, including measures to ensure the accuracy of investigation and finding of violations, developing or securing the organizations and personnel needed for this purpose, and so on. In addition, it is significant that an increasing number of legislation have a provision for the system of publishing the names of violating companies. This measure has the novel character of responding to violations of law by reducing violators' reputations in society and markets, and benefits should arise from studying more effective ways of utilizing this.

Next, sanctions based on criminal penalties are thought to have particular significance against violations of convictable crimes and other malicious cases, but certain issues could be taken as subjects for study in this case. For example, study could be aimed at further enhancing lawsuit prosecution activity enabling firm convictions to be secured, and investigation activities such as evidence gathering. As for implementation through the resolution of disputes between private individuals, there has recently been progress in developing systems for resolving individual labor disputes, but from the public interest angle of implementing labor law, there must be room for study on ideas to make greater use of these such as enhancing accessibility of each system.

(3) Proactive Prevention of Violations

As stated above, once a violation of the law has occurred in a labor relationship and an individual has suffered damages as a result, it is often not easy to recover these in reality. For this reason, measures to prevent violations of the law are particularly important. Some suggestions for introducing new measures to promote the prevention of violations will be indicated below.

To prevent violations of any law, the first requirement is that everyone concerned has a proper understanding of that law. Means to this end include ensuring familiarity with the law, as stated above, and in particular, ensuring that employers have a detailed understanding of the content of legislation. More specifically, as well as spreading awareness through pamphlets and the Internet, it is beneficial to promote a more detailed understanding by holding seminars and training sessions.

Although these measures are of course effective, ways of further enhancing familiarity inside companies will need to be considered in order to directly familiarize management and workers in each workplace with the law. On this point, Article 106 of the Labor Standards Act already provides that employers must make known to the workers the substance of the Act and ordinances issued under it, as well as work rules and labor agreements. Here, "make known" means displaying or posting the details at all times in conspicuous locations in the workplace, distributing written copies, or using other methods prescribed in ordinances of the Ministry of Health, Labour and Welfare. Until now, this has been construed as meaning that the requirements of the law will be satisfied if this material is placed in a situation whereby workers can be easily aware of it.[23]

In the United States, on the other hand, many labor laws and ordinances require that posters giving an outline of the law must be posted, and these posters are provided free of charge by administrative agencies such as the U.S. Department of Labor[24] (see the Federal Fair Labor Standards Act poster stipulating minimum wages, overtime pay, etc., shown in Figure 2). While the content of the poster differs depending on the law in question, the outline of the law is shown in concise terms, with web page addresses and telephone numbers of the competent authority often given for those wanting to know more detail. In Japan, too, it might be a good idea to study familiarization methods that offer higher potential for creating awareness, from the viewpoint of raising understanding of labor legislation at workplace level and awareness of compliance with the same, thereby promoting the prevention of violations.

Also, to prevent violations of labor and employment laws, it would also be beneficial

[23] E.g., *Kihatsu* (Labour Standards Bureau Notification) No.45 of January 29, 1999.

[24] The US Department of Labor (DOL) website includes a page introducing statutes and regulations enforced by DOL that require notices to be posted (http://www.dol.gov/compliance/topics/posters.htm), and a page where employers, by inputting the relevant information required on the screen, can find applicable legislation and posters that must be posted (http://www.dol.gov/elaws/posters.htm), among others.

EMPLOYEE RIGHTS

UNDER THE FAIR LABOR STANDARDS ACT

THE UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION

FEDERAL MINIMUM WAGE

$7.25 PER HOUR

BEGINNING JULY 24, 2009

OVERTIME PAY At least 1½ times your regular rate of pay for all hours worked over 40 in a workweek.

CHILD LABOR An employee must be at least **16** years old to work in most non-farm jobs and at least **18** to work in non-farm jobs declared hazardous by the Secretary of Labor.

Youths **14** and **15** years old may work outside school hours in various non-manufacturing, non-mining, non-hazardous jobs under the following conditions:

No more than

- **3** hours on a school day or **18** hours in a school week;
- **8** hours on a non-school day or **40** hours in a non-school week.

Also, work may not begin before **7 a.m.** or end after **7 p.m.**, except from June 1 through Labor Day, when evening hours are extended to **9 p.m.** Different rules apply in agricultural employment.

TIP CREDIT Employers of "tipped employees" must pay a cash wage of at least $2.13 per hour if they claim a tip credit against their minimum wage obligation. If an employee's tips combined with the employer's cash wage of at least $2.13 per hour do not equal the minimum hourly wage, the employer must make up the difference. Certain other conditions must also be met.

ENFORCEMENT The Department of Labor may recover back wages either administratively or through court action, for the employees that have been underpaid in violation of the law. Violations may result in civil or criminal action.

Employers may be assessed civil money penalties of up to $1,100 for each willful or repeated violation of the minimum wage or overtime pay provisions of the law and up to $11,000 for each employee who is the subject of a violation of the Act's child labor provisions. In addition, a civil money penalty of up to $50,000 may be assessed for each child labor violation that causes the death or serious injury of any minor employee, and such assessments may be doubled, up to $100,000, when the violations are determined to be willful or repeated. The law also prohibits discriminating against or discharging workers who file a complaint or participate in any proceeding under the Act.

ADDITIONAL INFORMATION

- Certain occupations and establishments are exempt from the minimum wage and/or overtime pay provisions.
- Special provisions apply to workers in American Samoa and the Commonwealth of the Northern Mariana Islands.
- Some state laws provide greater employee protections; employers must comply with both.
- The law requires employers to display this poster where employees can readily see it.
- Employees under 20 years of age may be paid $4.25 per hour during their first 90 consecutive calendar days of employment with an employer.
- Certain full-time students, student learners, apprentices, and workers with disabilities may be paid less than the minimum wage under special certificates issued by the Department of Labor.

For additional information:

1-866-4-USWAGE

(1-866-487-9243) TTY: 1-877-889-5627

WWW.WAGEHOUR.DOL.GOV

U.S. Department of Labor | Wage and Hour Division

Source: US Department of Labor website.

Figure 2. Fair Labor Standards Act Poster Issued by the US Department of Labor

if there were systems for supervision within companies to ensure that violations do not occur. If there is a labor union with bargaining power inside a company, it can often serve this supervisory or monitoring function that has a role of preventing violations of the law, but this cannot be expected of companies where there is no union. On this point, if legislation for an employee representative system other than labor unions were drafted, it is conceivable that a monitoring function could be given to the employee representatives. However, since the role of employee representatives would not be limited to that, a more multifaceted study would be required.

It would also be beneficial for companies themselves to develop systems (organizations and procedures) for preventing violations of the law. Since the enactment of the Whistleblower Protection Act, some companies have established hotlines for employees to consult on or report labor problems (Naito 2009). If a situation involving labor law problems is recognized in the company as a result of consultation or reports using these hotlines, they could prove effective in preventing violations of the law and promoting early correction.

Besides the above, it might also be conceivable that legal incentives could be created to encourage companies themselves to take measures to prevent violations of the law. In the United States, for example, if an employer has developed a system for handling complaints about sexual harassment and a victim of sexual harassment failed to use the system without good reason, it is construed that the employer could be fully or partially exempted from employer liability for the sexual harassment in question.[25] This kind of measure for exemption of liability may be regarded as incentivizing companies to develop and implement their own systems for preventing sexual harassment. It would also be conceivable, for example, for such a system to be introduced in Japan (a similar idea has already been provided for criminal liability in Article 121 of the Labor Standards Act). Another possibility as a matter of statutory interpretation, with reference to the proviso to Article 715 paragraph 1 of the Civil Code, is that the employer is exempted form vicarious liability for the tortious conduct of the employees when the employer exercised reasonable care in appointing the employee or supervising his/her job activities (Yamakawa 2000, 26).

As an incentive that would encourage employers to prevent violations of the law, another measure could be to attach negative evaluation to violations of the law when the government issues various permits and licenses. This kind of measure is already being used, for example, in Article 6 of the Worker Dispatching Act, which provides that any person who has been sentenced to certain punishment for an offense under the provisions of the Act or of other related laws and ordinances may not be granted a license as a Worker Dispatching Undertaking. There must be room for study on the further application of this kind of system, such as applying it to the conditions for eligibility when applying for various subsidies relating to labor policies, in conjunction with the preferential treatment of companies that

[25] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. City of Voca Raton, 524 U.S. 775 (1998).

have taken desirable measures.

Meanwhile, as to the response to violations by subcontractors or subsidiaries on which their client or parent companies have a certain level of influence, it is also worth studying a system whereby this could be taken into account when those client and parent companies apply for various permits and licenses, or when tendering for or entering into public contracts, for example. Even without mandatory provisions of labor legislation, such companies are also expected to make efforts to promote compliance with labor legislation, including subcontractors and others, as part of their Corporate Social Responsibility (CSR) initiatives.[26]

VI. Conclusion

In this paper, the term “violations of labor and employment laws” has been defined as meaning an act of violation when certain prohibitive or instructive norms have been established by law against employers and others based on labor policy. The various responses to violations of labor and employment laws under existing labor policy have been identified and the present situation and responses in Japan have been introduced. Issues and perspectives connected with future directions for developing more effective measures to tackle violation have been indicated. Finally, because this problem has not been studied systematically in the past, it has been pointed out that the present situation of violations of labor and employment laws and the responses to them needs further research and analysis, followed by evaluation based on these as well as future system design as a matter of policy mix. In this sense, there is much room for more comprehensive study on this subject.

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[26] In CSR, efforts include ensuring compliance with laws and environmental standards by suppliers of raw materials and others, otherwise known as “supply chain management” (Tanimoto 2004, 274*ff.*).

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