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## General Survey

### **MHW Survey: Family Members Pressed to Balance Jobs and Nursing Care for Elderly**

In a move to introduce nursing care insurance for the elderly, calls for awareness of social realities and the needs of at-home care are rising. In July, the Ministry of Health and Welfare published a 1995 Survey on Socioeconomic Aspects of Population Movement. The survey, covering families in which elderly people 65 or older had died, was taken to learn how those elderly persons were bedridden, how families and relatives combined work and nursing care for their sick elderly members and what worried them in caring for the bedridden seniors.

Of the deceased elderly, the combined percentage of those who were both substantially and totally "bedridden" was 7.7 percent three years before their death, but that jumped to 53.8 percent, or half of the total a month before death. Thus, the survey showed that elderly people were bedridden for on average 8.5 months. Classifying those who cared for the bedridden elderly into three different categories, of the household member (the family member who lived with the sick elderly person), other household members who lived away from the sick elderly person, like the wife of the oldest son, and staff members at hospitals and clinics, the highest, or 66.8 percent were cared for by family members. Including the percentage of those who were taken care by relative other than the household member (5.5%), more than 70 percent of elderly patients relied on family members for care.

Nursing care for the aged is affected by the state of elderly's health and restricts the time of those who care for the sick elderly. Therefore, it is difficult for working persons to combine a job and at-home care. Of those family members and relatives who cared for elderly patients, 54.4 percent "had jobs" when starting at-home care, while 45.2 percent did not. Of those who "had jobs," the percentage of those who "quit work to care for a sick elderly relative" was 20.6 percent, that of those who "took a break or a leave of absence from work to care for a sick elderly relative" was 11.7 percent and that of those who "worked while caring for an elderly relative" was 63 percent.

Combining those who had not worked when they began to take care of a sick elderly relative and those who quit work or took a break or a leave of absence from work to care for a sick elderly relative, about 60 percent devoted themselves to the nursing care. Asked about what worried them in caring for the sick elderly, many "family members" and "relatives other than family members" expressed the view that they "felt much stress and had a heavy emotional burden" (52.7%), that they "could not sleep well"(52.7 %) and that they "could not be away from home" (41.8%).

Establishing a desirable nursing care system and a financial infrastructure (old-age care insurance system) is needed to free family members from the heavy burden of nursing care and to ease the difficulty resulting from combining work and at-home care.

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#### Announcement



Professor Akira Takanashi, former research director general of the Japan Institute of Labour was inaugurated as new chairman of the Institute as of July 12, 1996, following the retirement of former chairman, Professor Kotaro Tsujimura. Professor Takanashi is professor emeritus of Shinshu University, also serving as chairman of Employment Council (Ministry of Labour) and a public commissioner of Central Labour Relations Commission (Ministry of Labour). He graduated from the Faculty of Economics, the University of Tokyo. He has contributed greatly to the planning for the employment policy as well as research and education in the labor field.



The new research director general, Professor Tadashi Hanami, professor of law at Sophia University, graduated from the Faculty of Law, the University of Tokyo, and is internationally known as a specialist in labor law as well as in labor affairs in general. He has also been serving as chairman of Central Labour Standards Council (Ministry of Labour), and a public commissioner of Central Labour Relations Commission (Ministry of Labour). He was appointed in 1995 as president-elect of the International Industrial Relations Association.

## Working Conditions and the Labor Market

### **New Record: 2.37 Million Changed Jobs**

People seeking new jobs and jobless persons looking for a job reached 2.37 million and 990,000, respectively, a record high level since 1985, said the Management and Coordination Agency (MCA) in a report.

According to a special survey of the Labour Force Survey (conducted in February of each year, about 100,000 samples), those wanting to switch jobs numbered 7.35 million, an increase of 130,000 over the previous year. Of them, the number of those who were actually seeking new jobs was 2.37 million, an increase of 30,000 from the year before. Factors behind the growing number of those wanting to change jobs are the vigorous suitable-job hunt

particularly by young persons and the better-job search by those who settled for their last choice during the recession following the collapse of the bubble economy.

In this year's survey, the MCA for the first time queried those who changed jobs (employed persons who left work during the past year) about whether they had decided on their next job before quitting their previous job. Despite the severe employment situation, the majority, or 57.7 percent left their previous job before deciding on a new job, making it clear that they changed jobs readily.

Of those who are jobless, the number of those who want to work but who are not seeking jobs since there appears to be no suitable job available was 3.99 million, 130,000 more than the figure recorded in 1995. Of the 3.99 million, 990,000 were ready to work if they were not choosy about a job (potential job seekers), an increase of 90,000 over the year before. Behind the expanded growth of potential job seekers, it is considered, lies a rise in the number of people who gave up looking for a job because of the prolonged severe employment environment.

The increase of job hoppers and potential job applicants tends to make jobless persons surface temporarily during a business recovery since more job openings lead to the growing willingness of people to seek jobs. According to MCA's preliminary report on the Labour Force Survey, published on May 31, the unemployment rate in April rose to 3.4 percent, up 0.3 point from the previous month. The jobless rate returned to its highest monthly level from November 1995 to January 1996 since 1953, the first year in which the government was able to make a valid statistical comparison. The business outlook also involves other factors of uncertainty; the possibility is, however, that for the long term, the rising tide of job hoppers and potential job applicants will make it easy for workers to move to growth industries that are enthusiastic to employ workers and this will thus boost transformation of industrial structure.

## Labor-Management Relations

### An Overview of the Final Results of *Shunto* Wage Talks

At the end of June, the Ministry of Labour released its final report on its survey on wage hike demands and the results of negotiations for 1996 agreed upon at major private companies. The weighted average wage hike agreed upon using the number of union members as weight, was ¥8,712, or 3.6 percent, up ¥336, or 0.03 point from the year before, upsetting the trend of lower wage hikes for the first time in 6 years. The real wage increase rate, which was deflated by the -0.1 percent increase rate of consumer prices in 1995, stood at 3.0 percent.

The survey covered 286 companies with labor unions which are listed on the first section of Tokyo and Osaka Stock Exchanges, capitalized at ¥2 billion or more with 1,000 employees or more.

By industry, the highest wage increase was registered in construction with ¥12,635, followed by wholesale and retail trade (¥10,455) and newspapers and printing (¥10,111). In contrast, the lowest wage raise was posted in the steel industry at ¥4,685, followed by rubber products (¥6,884) and textiles (¥7,056). In terms of the increase rate, newspapers and printing won the highest pay raise of 3.42 percent, followed by electrical machinery (3.18%) and wholesale and retail trade (3.16%), while steelmakers received the lowest pay hike of 1.62 percent, followed by rubber products (2.26 percent) and services (2.35 %).

According to the final results, compiled by Rengo (Japanese Trade Union Confederation), the nation's largest national center, labor and management agreed upon a wage increase of ¥8,227, or 2.83 percent, up ¥201, or 0.02 point over a year earlier. The results of Rengo's survey are based on wage talks settled on May 29 at 1,269 of 1,403 affiliated labor unions.

Nikkeiren, meanwhile, compiled its final results of the wage increase talks settled on at 289 major companies. Labor accepted a wage increase of ¥8,627, or 2.81 percent, down ¥383, or 0.01 point from last year's level. The results of its survey covering 420 smaller-scale companies with 500 or fewer employees showed a wage increase of ¥6,842, or 2.72 percent, up ¥60, but down 0.02 point from the previous year.

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## **Scrap Protective Provisions for Women: Rengo Central Committee Calls for Strengthening of Equal Employment**

At its central committee meeting held in Takamatsu City on June 4, Rengo's leaders made a proposal calling for revision of the Equal Employment Opportunity Law (EEOL) and the Labour Standards Law (LSL) and won approval of its original proposal with some amendment. Calls for revision of the two Laws are most strongly characterized by the fact that Rengo seeks scrapping of protective provisions for women in the LSL and alteration of the current EEOL into a law with stronger binding power. Under the present EEOL, employers should attempt to provide women with equal opportunities in recruitment, employment, assignment and promotion. In its proposal, Rengo demands the Law be revised to forbid discrimination by sex in all stages of the employment process.

In line with this, Rengo for the first time set forth its proposal to eliminate the protective provisions for women (provisions on overtime, late-night work and work on holidays),

excluding maternity-related provisions. Under the present LSL, women can clock a maximum of 150 annual overtime hours. In Rengo's proposal, women will be allowed to work up to 360 annual overtime hours, and men, to work the same overtime hours for the time being.

Rengo decided to call for the scrapping of protective provisions for women in regard to overtime and work on holidays. It, however, expressed the view that it should be cautious on eliminating the protective provisions for women concerning late-night work and that it should maintain the present provisions. In response to the view expressed about being cautious on eliminating of the protective provisions regarding late-night work, the leaders amended their original proposal, stating that they "will begin to study, from a multifaceted perspective, elimination of the protective provisions on late-night work in consideration of the realities of male and female responsibilities as family members and changes in employment structure." They thus decided to continue their discussion over the proposal within the confederation. Zensen-domei (Japanese Federation of Textile, Garment, Chemical, Commercial, Food and Allied Industries Workers' Unions), however, voiced objection to Rengo's amended proposal, advocating relation of the protective provisions. They argued "We have a history of having won by striking prohibition of women's late-night work." To this, Jidosha-soren (Confederation of Japan Automotive Workers' Unions) stressed its position, contending that "men and women should stand on an equal footing to expand women's fields." Thus, in its unusual resolution by show of hands, Rengo witnessed the proposal, which affirms the continued discussion on the issues, passed by a majority.

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### **New Action Policy of Tekko-roren and Denki Rengo**

Labor and management are moving to review *shunto* wage talks, the nation's system of wage negotiations. In particular, there have emerged labor union moves toward a plural years-based agreement instead of annual-based negotiations on working conditions, namely a wage increase, thus constituting one of the focal points of debate at regular meetings of individual labor unions.

Tekko-roren (Japan Federation of Steel Workers' Unions) sparked the debate on the issue. After the settlement of its 1996 *shunto* wage negotiations, the federation raised the question that the labor movement should shift from an emphasis on wage hikes to an emphasis on rectification of the high-price structure resulting from the domestic-foreign price gap, noting that "we are now under pressure to review *shunto* including determination of working conditions as the nation will, from the mid- and long-term perspective, face lower economic growth, lower prices and high unemployment."

Major steelmakers turned ordinary profits into the black in fiscal 1995. This, however, was brought about by cost-cutting measures with personnel cuts at the core. In 1996 wage talks, management said that they need to make continuous restructuring efforts and were reluctant to increase wages. What management said was that imports of low-priced steel from South Korea drove the prices of Japanese steel down to almost a 20 years ago level and that a wage hike, which will lead to an increase in fixed expenses, will threaten the infrastructure of employment.

Responding to the structural development, Tekko-roren recognizes that they are now in an age in which they cannot expect large wage hikes even if they have better corporate performance. They think that they should endeavor to improve living standards by reducing prices, which are higher than those in other countries, rather than to increase wages. Regarding the relationship between the high cost-of-living structure and the *shunto* system, Tekko-roren pointed out that "even those industries and companies which are not backed by higher productivity fall into line with each other in raising wages to the average level, and a repeated shift of such costs to prices has led to the country's structure of high consumer prices." They thus call for the introduction of a mechanism which allows market principles of non-competitive fields to function properly by promoting thorough deregulation. Tekko-roren will continue to discuss the review of *shunto*, assuming that an agreement period will be set at 2 years for the time being. If labor moves to the new *shunto* system, they will do so in the 1998 *shunto* wage talks at the earliest. Within the federation, smaller-scale member unions in particular are strongly opposed to the new moves, arguing that "wage talks every other year will further widen the gap in wage increases between us and major unions."

Denki Rengo (Japanese Electrical Electronic & Information Unions) has also declared that it intends to tackle *shunto* reform, such as an overhaul of wages, employee treatment and employment systems as a whole. At its annual convention, the chairman of the organization declared that they will take a forward-looking stance of examining the introduction of *shunto* wage talks every other year. But many members expressed, in the discussion, that they should be cautious about introducing the new system.

At present, views supporting the new system are expressed by a few other industrial organizations and there will likely to be many twists and turns before labor unions actually shift to the new system.

## **An Outline on Measures to Cope with the Graying of Society Decided Upon at Cabinet Meeting - Promoting Continuous Employment until age 65 -**

At a Cabinet meeting held on July 5, the government endorsed an "outline on measures to cope with the graying of society" which sets comprehensive guidelines for preparing the nation for an aging population. To realize a more enriched and invigorated society while controlling the increase of taxpayers' burden in an aging society, the outline characteristically makes a systematic recommendation on a variety of measures and policies. The Outline particularly calls for the consolidation of an environment that provides employment opportunities for elderly citizens and the introduction of public nursing care insurance for the elderly.

Regarding employment of elderly people, the outline sets forth promotion of continuous employment of older persons until age 65. To implement this, the government should offer guidance to corporations which have not yet set their retirement age at 60 and should encourage companies to introduce a system of continuous employment beyond the typical retirement age of 60, the outline recommends. Deliberations on a bill concerning public nursing care insurance for the elderly were unfinished and are currently underway to clear the Diet. In response to this, the Outline suggests that "the government should vigorously endeavor to create a new elderly care plan based on the social welfare insurance plan which incorporates an appropriate share of public funds," noting that the introduction of the elderly nursing care plan involves the burden of pensions and medical insurance premiums plus nursing care insurance premiums. The outline also suggests that a "reverse mortgage system," under which elderly people are financed on the security of their own homes to receive a pension, be set up to complement income security for past-retirement life in the form of public pensions. Furthermore, it suggests that a supportive measure be studied to administer the assets of elderly people afflicted with senile dementia. Concerning social welfare services, material obstacles in every-day environments, such as uneven road levels, which pose problems for wheel-chair users and visually-disabled persons, should be removed through what the outline calls "barrier-free measures," to improve housing and promote creation of a community, and an employment environment that allows people to combine work and nursing care as well as child-rearing (a supportive measure for juggling at-home care and childcare with an outside job) should be consolidated, the outline recommends.

All these items in the Outline encompass a variety of administrative fields, such as welfare and labor administrations and need the close cooperation of these fields. Stressing this point, Prime Minister Ryutaro Hashimoto said, at a meeting to deal with the graying of society prior to decision of the outline, that individual ministries and agencies must be united to actively tackle measures to cope with the aging population, in order to build an enriched and vital society. He thus asked individual Cabinet ministers for their cooperation in this endeavor.



## Special Topic

### The Road Becoming More Traveled: the International Dimension of Japanese Labor Law

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#### I. Introduction

Labor and employment relations are becoming increasingly international in scope. In 1991, 18.7 % of Japanese companies were operating businesses in foreign countries. Since the sharp appreciation of the yen, foreign direct investment by Japanese companies has rapidly increased. With this tendency is an ever-increasing number of Japanese employees who are working overseas. Japanese employees working abroad for over three months for Japanese companies numbered over 265,000 in 1991.

Many foreign nationals also have come to work in Japan. In 1993, foreign nationals working in Japan with lawful residential status numbered about 300,000. Moreover, about an equal number of "illegal" foreign workers exist who are not permitted to work in Japan or who have overstayed their permitted period of stay. Most of them engage in unskilled work for which Japanese immigration law does not provide foreign nationals with status of residence. In addition, many foreign companies are also doing business in Japan, employing approximately 350,000 workers.

In this context, Japan is now facing a number of new issues arising from the internationalization of labor and employment relations. This article focuses on the individual labor law (employment law) and examines how Japanese or foreign law should be applied in cases involving an international dimension.

#### II. Various Aspects of International Employment Relations

##### 1. International Employment Relations Within Japan

International employment relations in Japan can be classified into two categories: foreign workers and foreign-affiliated companies. One of the most fundamental issues involving both categories is whether Japanese or foreign law should be applied to their employment

contracts. For example, should Japanese courts apply Japanese law or the law of an American state when a Japanese company discharges one of its American workers? This issue is significant when it is considered that Japanese employment law prohibits employers from discharging its employees without just cause, while many American states' laws allow employers to terminate their employment contracts at will.<sup>1</sup>

Likewise, a number of issues arise from employment disputes involving foreign-affiliated companies in Japan. A threshold procedural question is the jurisdiction of Japanese courts and administrative agencies over such companies. Although jurisdiction is acknowledged so long as they are operating in Japan, the answer is not as clear when they close their facilities and return to their home countries. Another issue is the possibility of extraterritorial application of foreign laws to foreign-affiliated companies in Japan, which may arise when a plaintiff brings an action in a country which has a statute with an extraterritorial reach. For example, the 1991 amendment to Title VII of the Civil Rights Act of 1964 of the United States is applicable to American employees in foreign branches and certain subsidiaries of American companies.<sup>2</sup>

## **2. International Employment Relations Outside Japan**

For Japanese employees working for Japanese companies within Japan, their employment takes an international dimension when they are transferred to foreign branches and subsidiaries,<sup>3</sup> or when they are on a business trip abroad. In such situations, the issue of choice of law arises regarding their employment conditions.

This is also the case with the issue of the extraterritorial application of Japanese labor and employment laws. For example, should the Japanese Labor Standards Law apply to employees of a Japanese company who work more than 8 hours a day on their business trips abroad? Under the Japanese Labor Standards Law, a worker is entitled to an overtime premium when he/she works more than 8 hours a day, while in some other countries there may be no such limitation on daily working hours.

As with foreign-affiliated companies in Japan, Japanese companies doing business abroad are sometimes involved in disputes with local workers. A recent example is the issue of employment discrimination by Japanese companies in the United States.<sup>4</sup> Although the criticism aroused by the Lantos Committee in 1991 has subsided, another problem has been raised regarding charges of sexual harassment involving Mitsubishi Motor Manufacturing of America. When a Japanese company abroad is a subsidiary of a parent company in Japan, the question arises whether a foreign court can exercise its jurisdiction over the parent company in connection with the challenged practices of the subsidiary.

### **3. Transnational Movement of the Workforce**

Another important issue remains with respect to the internationalization of the labor market. Workers of one country now often move to other countries. Thus, at present, the role of labor laws is not only limited to the regulation of each country's domestic labor market, but should also include regulation of the transnational movement of the workforce.

One vehicle for such regulation is a bilateral treaty or agreement on immigration control. However, regulation through domestic labor laws is necessary in order to prevent and remedy unfair practices in the processes of job search and recruiting. When such practices occur outside Japan, the issue arises as to whether Japanese labor law can be applied extraterritorially.

## **III. Approaches in Application of National and Foreign Laws in International Employment Relations**

### **1. Process of Applying Law in International Civil Litigation**

As the previous section indicates, international employment relations pose two types of questions: (1) issues of substantive law including procedural law such as jurisdiction of domestic courts, and (2) issues usually classified as conflict of laws. Although the resolution of these issues is quite important, Japanese labor law scholars have not given them much attention until recently. This section examines the contents of the rules regarding the conflict of laws in Japan.

It is convenient at the outset to clarify the process of applying law in international litigation. This process is divided into three steps. First, the court with which a plaintiff filed a suit must decide whether it has jurisdiction over the case. Second, if the first question is answered affirmatively, the court must determine which law to apply. Third, after the determination of the applicable law, the court proceeds to interpret and apply substantive law in the pending case.

Among these three steps, it is at the second step that the court must rely on rules regarding conflict of laws. There are two approaches or methodologies in this respect: (1) an approach based on choice of law rules and (2) an approach to determine the geographical reach of statutes. Traditionally, the former approach has been discussed in the area of international "private" law, while the latter approach has been used in the "public" law arena. However, since labor law is a mixture of both private and public law, such a distinction is problematic. In addition, although the dichotomy between private and public law has been criticized for decades, it is still uncertain as to how these two approaches are related to each other.

At present, the author proposes the following explanation. The choice-of-law approach presupposes the possibility of the application of foreign (private) laws, while the approach to determine the geographical reach of (public) statutes focuses only on domestic law. This indicates that underlying the former approach is the idea that a nation recognizes the applicability of foreign "private" law in the same manner as domestic law. Such a concept allows for the possibility of the conflict of applicable laws as well as the necessity for rules to resolve such conflicts.

On the other hand, a nation does not usually recognize the applicability of foreign "public" law in domestic courts. Thus, domestic courts are required only to determine the coverage of the domestic law, not make a choice between domestic or foreign law. Although the dichotomy between private and public law is no longer sustainable, the nature of a statute is still relevant in examining whether a nation recognizes a foreign statute in question. The system of enforcement may be important in determining the nature of the statute. Also, as long as there exist foreign statutes that cannot be applied by domestic courts, it is still useful to rely on the two approaches described above. The following is an examination of their respective contents.

## **2. Choice of Law in International Employment Relations**

### **(1) Framework under the Horei**

In Japan, the *Horei* (the Law Concerning the Application of Laws in General) is the most fundamental and comprehensive statute providing for the choice of law rules. From a theoretical point of view, Japanese international private law academics have followed the traditional German theory on the choice of law process. Under this traditional theory, the choice of law approach can be further divided into two steps: (1) the characterization of the nature of the issue and (2) the determination of the connecting factor, i.e., determination of the applicable law (*lex causae*) according to the choice of law rule on the issue characterized in the first step.

When a dispute arises between an employer and an employee regarding employment relations, the dispute may usually be characterized to be contractual. Article 7 of the *Horei* provides:

[(1)] As regards the formation and effect of a juristic act, the question as to the law of which country is to govern shall be determined by the intent of the parties.

(2) In case the intent of the parties is uncertain, the law of the place where the act is performed shall govern.

Since a contract, including an employment contract, is a "juristic act," the governing law

may be determined by the parties to the contract under paragraph 1 of Article 7 (party autonomy). According to paragraph 2, if the intention of the parties is uncertain, the law of the place where the contract was concluded shall govern.

With respect to employment contracts, there is criticism that the place of conclusion is not as relevant as the place where service is performed. Thus, several lower court decisions have managed to find the parties' implied intent to designate the law of the place of performance as the governing law.<sup>5</sup> However, in a case where an employee often goes on business trips to various foreign countries, the place of his/her ordinary performance of service should be more relevant.

## (2) Limitation on Party Autonomy

Some scholars contend that party autonomy should not apply to employment contracts, where there is a considerable difference in bargaining power between the employer and the employee. However, most courts and scholars have acknowledged the general applicability of party autonomy, reasoning that an employment contract is a private contract in which the will of the parties should be respected. Although they recognize the necessity to limit party autonomy to protect employees' interests, they rely on other theories for this purpose.

One such theory is called the "public order theory".<sup>6</sup> It has statutory grounds in Article 33 of the *Horei*, which provides that "the law of a foreign country shall not govern if the application of a provision is contrary to public order and good morals." The public order theory contends that labor laws of Japan constitute public order under this Article and that the parties to the employment contract cannot avoid the application of Japanese law by designating foreign law as the governing law. However, it is pointed out that "public order" under the *Horei* has been interpreted narrowly from the viewpoint of international comity and, therefore, is not sufficient for the protection of workers.

Another theory relies on the territorial application of public law to limit party autonomy. According to this theory, labor law, which is classified as public law, applies to the employment contract regardless of choice of law rules. Although the notion of "public law" has been questioned due to its vagueness, at least one lower court decision supported this theory.<sup>7</sup>

A third theory is called the "special connection of mandatory law (Sonderanknufugstheorie)." While the theory of the "territorial application of public law" calls for the application of public law independently from the choice of law, mandatory labor law under this theory is applied within the framework of the choice of law. This theory contends that mandatory law should be applied based on a different connecting factor than that which is used for the ordinary law of contract. More specifically, the place of performance of service,

which is more relevant for the employment contract than the place of contract conclusion, should be the connecting factor. There is criticism that there is no statutory provision supporting this theory.

Theories to limit the party autonomy in the employment contract are discussed by scholars on international private law. Their discussion sometimes tends to treat "labor law" as if it were a single codified body of law with a uniform nature. However, labor law is more complex and consists of a number of statutes and case law. For example, while issues regarding the employment contract such as transfers and dismissals are mainly covered by the Civil Code and case law, the Labor Standards Law regulates working hours, the payment of wages, child labor and so forth.

Since the Labor Standards Law is highly regulatory in nature and enforced through administrative supervision as well as criminal sanctions, it should be applied directly to employment relations within Japan regardless of the parties' choice of law or the nationalities of the parties to the employment contract. In other words, the application of the Labor Standards Law is based on an approach that focuses on the geographical reach of statutes, rather than the choice of law approach. On the other hand, party autonomy essentially applies to the law of employment contract, subject to some limitations in terms of public order.

Regarding several other statutes, it is unclear whether they are subject to party autonomy or whether they should be applied directly, regardless of the parties' choice of law. One example is the Equal Employment Opportunity Law. This law does not impose criminal sanctions if it is violated. In addition, its administrative supervision is weak: the Labor Minister or his/her delegates can only give advice and issue guidelines, instructions and recommendations. Moreover, the employer's duty to provide equal treatment to women regarding recruiting, hiring, assignment and promotion is merely a duty to endeavor to do so and in good faith. Women workers do not have a cause of action based on the employer's violation of this duty. Overall, the regulatory nature of the Equal Employment Opportunity Law is considerably weak. Thus, some scholars contend that it has the nature of private law and that party autonomy applies in principle.

### **3. The Geographical Reach of Japanese Labor Law**

#### **(1) Approach Focusing on the Geographical Reach of Statutes**

Another approach or methodology for determining which law to apply in international employment relations focuses on the geographical reach of statutes. Under this approach, the question turns on the interpretation of domestic statutes, not the choice between domestic or foreign law. For example, when a worker who usually works in Japan is transferred to a foreign workplace and works more than eight hours a day, the question is, as stated above,

whether the Labor Standards Law of Japan applies to that employee's employment relations abroad. In other words, the issue is the extraterritorial applicability of the Labor Standards Law.

The extraterritorial application of domestic law is subject to the principles of legislative jurisdiction in international law. Among the most traditional is the territorial principle that a nation can exercise its legislative jurisdiction within its territory. In some countries such as the United States, this leads to a presumption against extraterritoriality. To overcome this presumption, the court must find clear legislative intent of the statute's extraterritorial applicability.<sup>8</sup> In Japan, the presumption against extraterritoriality has not been firmly established. Also, there are other principles such as the nationality principle that can be a basis for extraterritorial application of the Labor Standards Law. Nevertheless, the possibility of extraterritorial application is determined through the interpretation of each statute. In this process of statutory interpretation, courts must find at least some legislative intent for extraterritorial application.

## (2) The Geographical Reach of the Japanese Labor Standards Law

The Labor Standards Law is enforced by means of powerful administrative supervision as well as criminal sanctions. Also, the Law provides workers with causes of actions under civil law such as overtime premiums. As to criminal sanctions, Article 1 (1) of the Criminal Code provides for the principle of territoriality, stating, "this Code shall apply to anyone who commits a crime within the territory of Japan regardless of his/her nationality." This applies to the criminal aspect of the Labor Standards Law. Since administrative inspection has the nature of the exercise of the public authority of the state, the administrative aspect of the Labor Standards Law also applies only territorially.

On the other hand, it is not clear whether the civil aspect of the Labor Standards Law is also subject to the territorial principle. Some scholars argue that as far as the civil aspects of the Law are concerned, courts should take the choice of law approach. According to this view, party autonomy under Article 7 of the *Horei* applies and parties to employment contracts can avoid the application of the Labor Standards Law. However, the civil aspects of the Labor Standards Law should not be separated from the criminal and administrative aspects. Enforcement through strong governmental intervention was its legislative intent. Thus, along with the criminal and administrative aspects, the civil aspects of the Labor Standards Law should apply only territorially.

However, it is necessary to examine the precise meaning of the territorial application of the Labor Standards Law. Article 7 of the Labor Standards Law provides that it applies to the "enterprise [*jigyō*] or place of business." The term "enterprise" has been interpreted to be "a

body of business operation which is carried out continuously as an interrelated organization at a specific place."<sup>9</sup> Thus, from the viewpoint of the territorial principle, the Labor Standards Law applies to the enterprises in this sense within the territory of Japan.

Also, Article 9 of the Labor Standards Law defines the "worker" which it protects to be a person "employed" at an enterprise as defined under Article 7. Thus, as long as a worker is employed at an enterprise within the territory of Japan, he/she is entitled to the protection of the Law even while working for that enterprise abroad. This pivots on the meaning of "employed" under Article 9. It is generally agreed that a worker is "employed" at an enterprise if he/she has an employment contract with the enterprise and is working under the direction and supervision of the enterprise.

In a case where a worker is on a business trip abroad, he/she continues to work under the direction and supervision of the enterprise with which he/she has an employment contract. Therefore, if such a worker ordinarily works at an enterprise in Japan, he/she continues to be employed at this enterprise even while working abroad for that enterprise on a business trip. In such a case, the Labor Standards Law applies to a business traveler whose ordinary place of work is in Japan. This may be called the work place doctrine.<sup>10</sup> On the other hand, if a worker is transferred to an enterprise in a foreign country and begins to work under the direction and supervision of the foreign enterprise, the Labor Standards Law does not apply.

Several other labor protective statutes have a provision regarding their applicability similar to that of the Labor Standards Law. For example, the Industrial Safety and Health Law and the Workers' Accident Compensation Insurance Law apply to an "enterprise," and the "worker" under these statutes is defined or interpreted to be the same as that in the Labor Standards Law. Thus, they apply to an enterprise within the territory of Japan. At the same time, the work place doctrine as described above will apply to these statutes as well.

#### 4. Conclusion

Despite the development of the international dimension of employment relations in recent years, scholarly research as well as judicial decisions have not yet thoroughly examined this phenomenon. There are a number of issues regarding the content of the two approaches to determine the applicable law. More fundamentally, the relationship between these two approaches has not been sufficiently analyzed. This article attempted to illustrate these issues and make a few proposals.

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## Statistical Aspects

### Recent Labor Economy Indices

	June 1996	May 1996	Change from previous year
Labor force	6,816 (10thousand)	6,770 (10thousand)	56 (10thousand)
Employed	6,590	6,530	31
Employees	5,367	5,326	41
Unemployed	226	240	24
Unemployment rate	3.3%	3.5%	0.3
Active opening rate	0.71	0.69	0.02
Total hours worked	165.0 (hours)	154.5 (hours)	1.4*
Total wages of regular employees	285.6 (¥ thousand)	283.6 (¥ thousand)	1.0*

Source: Management and Coordination Agency, Ministry of Labour.

Notes: 1.\*denotes annual percent change.

2.From February 1991, data of "Total hours worked" and "Total wages of regular employees" are for firms with 5 to 30 employees.

