

JAPAN LABOR BULLETIN

ISSUED BY THE JAPAN INSTITUTE OF LABOUR

Vol.37 - No.04

April 1998

CONTENTS

General Survey

- ▶ The Japanese Economy in Worse Shape
- ▶ 1997 White Paper on Working Women

Working Conditions and the Labor Market

- ▶ First Fall in Retirement Allowance: the Preliminary Results of the 1997 Survey on Wages

International Relations

- ▶ Outline of Workshop on International Migration and Labor Markets in Asia

Labor-Management Relations

- ▶ Unionization Rate Drops to 22.6 Percent: The Difficulty of Organizing Non-Regular Employees

Special Topic

- ▶ Recent Legislative Developments in Equal Employment and Harmonization of Work and Family Life in Japan

Statistical Aspects

- ▶ Recent Labor Economy Indices
- ▶ Trends in the Total Annual Number of Working Hours(Enterprises with 30 or more employees in all industries)

General Survey

The Japanese Economy in Worse Shape

In recent years Japan has experienced severe recessionary conditions. Personal spending is down. According to the Management and Coordination Agency's Family Income and Expenditure Survey (*Kakei Chōsa*), the expenditure of all households on consumption in December 1997 was 5.0 percent below the figure for December 1996 in real terms. The expenditure level for the households of wage earners was down 4.8 percent over the preceding year. The real income reported by households of wage earners dropped 1.6 percent and disposable income decreased 2.4 percent in real terms over the same period. Growth in plant and equipment investment has held firm in manufacturing but is occurring at a slower pace overall.

Given the low levels of demand for finished goods, inventories in many industries are at a high level. Production in mining is slightly down. Profits are forecasted to fall considerably for medium-sized and small companies. This represents an overall drop in growth, and many firms have lost their confidence in the economy.

Employment has grown at a slackened paces and the rate of unemployment remains at a relatively high level. According to the Management and Coordination Agency's Labor Force Survey (*Rōdōryoku Chōsa*), the number of employees rose throughout 1997. The increase was more than one million in January and February 1997, but thereafter dropped to around 400,000 in November and December 1997. The unemployment rate in 1997 stood at 3.4 percent, the same highest-ever figure recorded for 1996.

With the economy in this state and a certain cautiousness concerning the financial system, credit has been restricted by the financial firms. In January 1998 MITI, the Ministry of International Trade and Industry surveyed 993 ordinary firms concerning their borrowings. Nearly half (47.5%) reported that in December 1997 they had had trouble securing or extending bank loans, faced the prospect of rising interest rates, or been asked to pay back loans earlier than had been planned as a result of financial institutions having failed. Only 29.8 percent of the firms reported such problems in January; The figure fell to 23.9 percent for February, before rising again to 43.7 percent in March as individual financial institution moved to squeeze assets and other securities to recover bank loans toward the end of March when they close their books for the financial year.

1997 White Paper on Working Women

Every year the Women's Bureau in the Ministry of Labour provides an overview of women in its annual White Paper on Working Women (*Hataraku Josei no Jitsujō*). Main theme focused on "juggling work and household." In addition to discussing the present situation of working women, the white paper also considers policy measures.

The white paper underlined three changes. First, the female workforce increased by 180,000 persons over the preceding year to reach 27.19 million in 1997. Second, the increase in labor force participation was particularly large among women in the 30-34 age bracket (up 1.1 percentage points) where the M-shaped labor force participation curve for woman bottoms out. Third, female part-timer numbered 6.92 million, up 600,000 from a year earlier.

As for the balance between home and work, the lowest-ever live birth rate (the average number of children born to a woman over the course of her lifetime) of 1.43 was recorded in 1997. Three issues were mentioned. First, changes are taking place in terms of how Japanese think about gender and the sharing of roles, but few men become very involved in family life. Second, the social system for nursing and childcare (e.g., nursery facilities) are not adequate. There is nowhere to take children when they are sick. The fees for nursery schools and day-care centers are high. Nursery schools are not flexible. Third, when the need to look after a family member arises, it is women rather than men who have to do so in some form or manner, often using up their annual paid leave.

Companies have dealt with some of these issues by institutionalizing a childcare leave system, a nursing care leave system, and a re-employment system. The report asks companies to take adequate care in these regards. One step might be to shorten duty hours, thereby enabling women to work more flexibly.

The white paper also recommended support be given to establishing a "family support center" (a kind of clearing house for those who offer childcare and those who want childcare). It calls for the consolidation of infrastructure of regional childcare and nursing care services and the establishment of a system which can cope properly with the diversified needs which working women have.

First Fall in Retirement Allowance: the Preliminary Results of the 1997 Survey on Wages

According to the preliminary tabulations from the 1997 data collected through the Comprehensive Survey on Wages (*Chingin Jijō Tō Sōgō Chōsa*) recently released by the Secretariat of the Central Labour Relations Commission, the model retirement allowance for men who retire at a compulsory fixed age of 60, including those who work with the firm which does not adopt the 60-years-of-age limit, was ¥ 28.568 million for those with college education engaged in clerical and technological jobs (down from ¥28.87 million in 1995), and ¥24.659 million for those with high-school education in administrative and engineering fields (down from ¥24.943 million in 1995). The retirement allowance asked for in this survey is for men who enter a firm immediately after graduating from school and later get the normal promotions. The figure includes the retirement pension from the corporation's pension scheme. The retirement allowance for 1997 was down 1.0 percent from that for 1995 for college-educated men in the clerical and technological fields, and was down 1.1 percent for high-school educated men in the same fields. The figure dipped for the first time since 1987, the earliest year for which valid statistical comparisons can be made. The decline is attributed to the increasing number of firms which have sought to restrict their overall outlay for personnel as part of a restructuring exercise.

The survey consists of two parts. One part focuses on wage conditions (and also covers working hours and holidays) and is conducted every year. The other part deals with retirement allowances, pensions, and the mandatory retirement system. It is administered every other year. The first part asked about wage payment for June 1997. The second part was concerned with the retirement pay system which was in place at the end of June 1997. The survey was sent to 511 firms with a workforce of at least 1,000 employees and a capitalized value of ¥500 million or more. Of the 511 large firms, 364 (71.2%) responded to the first part and 363 (71%) to the second part. The 511 firms are also the sample for the Commission's survey on labor disputes.

International Relations

Outline of Workshop on International Migration and Labor Markets in Asia

On January 29 and 30, the Japan Institute of Labour (JIL) organized a workshop on international migration and labor markets in Asia. This was the fourth annual workshop in series, and was attended by administrators and researchers from Japan and eight other countries in East and Southeast Asia, and by experts from the three sponsoring bodies, the Ministry of Labour, the International Labour Organization (ILO) and the Organisation for

Economic Co-operation and Development (OECD). The early sessions allowed for a discussion of country reports from each of the nine nations. The final afternoon was devoted to a special session on the International Movements of Highly Skilled.

In recent years the ASEAN countries have been absorbing foreign workers into metropolitan labor force in order to mitigate certain worker shortages. However, following Thailand's decision to float the Baht in July 1997 and the subsequent crises which developed in much of Asian, individual countries began to tighten their control over illegal foreign workers.

Malaysia decided to send one million illegal workers home and to phase out other foreign workers when their period of work per unit terminated. Malaysia will lay off 200,000 foreign workers in the construction sector. South Korea, which reported having 129,000 illegal workers in 1996, revised its Immigration Law and the Immigration Control Law in November 1997 and to enable unskilled foreign workers to work in South Korea after training for a specified period. However, the economic crisis in Asia resulted in the legislation not being implemented. Instead, South Korea decided to cut the number of foreign trainees it accepted by 80,000 and to require that 3,000 Filipino workers return home.

Because of the huge expenses involved in sending home illegal foreigners working as domestics, Thailand decided to ease restriction on such foreign workers. However, it has had to shelve such plans for the time being. The Philippines, the ASEAN country which sends out the largest number of workers is preparing a number of education programs to train for those who are having to return home, with the expectation that some will become entrepreneurs.

At the special session Professor Yasushi Iguchi of Kwansei Gakuin University pointed out that the "international migration of highly skilled persons was accompanied by technological transfer." He argued that the movement of these people would increase the utilization of local talent.

The soaring cost of relocating highly skilled workers has prompted some companies to establish joint-ventures or to utilize consulting services in the locale to which they have shifted. Professor John Salt from the University College London claimed that the active utilization of local expertise may decrease the need to send employees aboard, while also increasing the need for short visits to their overseas operations in the years to come.

Unionization Rate Drops to 22.6 Percent: The Difficulty of Organizing Non-Regular Employees

According to the Ministry of Labour's Basic Survey on Trade Unions (*Rōdō Kumiai Kiso Chōsa*) released on December 1997, the unionization rate was 22.6 percent in June 1997, down from 23.2 percent in June 1996 and 23.5 in June 1995. The rate continues a fall which began in 1976. Over several years before 1994, the unionization rate had fallen but the number of union members had risen. However, larger increases in the number of employees in recent years has pushed down the unionization rate. In part this reflected the fact that unionization of workers in the manufacturing sector did not offset the increase in the number of employees in the tertiary sector, a situation observable in many other advanced industrialized economies.

Beginning in 1995, however, this pattern underwent changes. The number of union members had decreased by about 80,000 persons over the year prior to June 1995, by another 160,000 to June 1996, and by 166,000 to June 1997, when the number of union members was 12.285 million. Given the stagnant economy firms have moved to decrease their employment of regular employees and to increase their use of part-time workers and other non-regular employees. However, Japan's enterprise-based union movement has not been able to respond adequately to unionize non-regular employees. In manufacturing, which accounts for 30.5 percent of all unionists, union membership fell by 105,000 persons a drop of (2.8%) over the year to June 1997.

The union membership rate at private companies by the size of employees stood at 58.4 percent for companies with 1,000 or more employees, at 20.1 percent for firms with 100-999 employees, and at 1.5 percent for those with fewer than 100 employees. The national center, Rengo (Japanese Trade Union Confederation) embraced 7.57 million unionists (61.6 percent of all unionists). Its membership declined by 85,000 persons during the year to June 1997. Zenrōren (National Confederation of Trade Unions), with 844,000 unionists (6.9 percent of organized labor) was down by 15,000 members. Zenrōkyō (National Trade Union Council) claimed 275,000 unionists (2.2 percent of organized labor) and had experienced a drop of 7,000 members.

Special Topic

Recent Legislative Developments in Equal Employment and Harmonization of Work and Family Life in Japan

Takashi Araki
Associate Professor of Law,
University of Tokyo



1 Introduction

Current Japanese Law takes two approaches to achieving equal employment opportunity between the sexes: a prohibition of and redress for discrimination based on sex, and legal assistance to facilitate employees' harmonization of work and family life. The former is mainly regulated by the Labor Standards Law (hereinafter "LSL"), the Equal Employment Opportunity Law of 1985¹ (hereinafter "1985 EEOL"), and the case law. The typical legislation for the latter purpose is the Child Care Leave Law of 1991 (hereinafter "CCLL").

In both arenas, remarkable legislative developments have occurred in the last three years. In 1995, the CCLL was revised and renamed as the Child Care and Family Care Leave Law (hereinafter "CCFCLL") and introduced family care leave, though the revised law will be effective as of April 1, 1999. In June 1997, the EEOL of 1985 was also drastically revised (hereinafter the "1997 EEOL"). The 1997 Revision has strengthened regulation against discrimination and abolished the women protection provisions in the LSL except for pregnancy and motherhood protection. A significant conceptual change concerning the equal employment policy has occurred there as examined below.

This article reviews these recent legislative developments concerning equal employment between men and women and harmonization of work and family life.

2 Background of the 1997 Revision of the EEOL

2.1 Features of the 1985 EEOL

In 1980, the Japanese government signed the Convention Concerning the Elimination of All Forms of Discrimination against Women adopted by the UN in 1979. In order to ratify the Convention, the government needed to make necessary adjustments in national legislation². After a heated debate on the new legislation's impact on the traditional male-centered work patterns and practices, the role of women in family and society, and the desirable balance between equality and protection, the EEOL was finally enacted in 1985.

Since the legislation was only possible through a compromise between labor and management or liberal and conservative parties, the EEOL took a reserved attitude towards intervening in established male-centered employment practices.

Prohibition of discriminatory treatment by the 1985 EEOL was limited to discrimination in vocational training, fringe benefits, mandatory retirement age, mandatory retirement by reason of marriage, pregnancy or childbirth, and dismissals (1985 EEOL Art. 9, 10, 11 [1997 EEOL Art. 6, 7, 8]). These prohibitory provisions are mandatory and nullify contracts which violate it. Damages caused by violating actions can be claimed in tort suits³.

By contrast, the 1985 EEOL refrains from direct intervention in the main arena of differential treatment between men and women, that is in recruitment, hiring, assignment and promotion. Instead, the Law merely provides that employers have a *duty to endeavor* to provide women with opportunities equal to those provided to men (1985 EEOL Art. 7 and 8). As for these matters, the Ministry of Labor can lay down guidelines with respect to the measures which employers shall endeavor to implement (1985 EEOL Art. 12). In fact, the Ministry of Labor issued such guidelines in 1986 and reinforced them in 1994.

2.2 Development of Women Employment

During the decade since the EEOL became effective, women's participation into labor market increased remarkably. The number of women workers in 1985 was 15,480,000, and in 1996 it was 20,840,000. The ratio of women workers in the Japanese workforce increased from 35.9 percent in 1985 to 39.2 percent in 1996⁴. Women workers' length of service has continuously increased and the scope of job categories where women enter has also been extended. The general opinion towards women engaging in work among people has changed. Affirmative attitude to the opinion that it is recommendable for a woman to continue working career after having giving birth was drastically increased from 16.1 percent in 1987 to 32.5 percent in 1995⁵. Thus, the 1985 Law had a significant impact on enhancing social consciousness towards equal employment between men and women.

However, discriminatory treatments were still witnessed. Especially recruitment and hiring discrimination against female graduates in the 1990s after the collapse of bubble economy was covered by the media and led to a realization of the limitations of the current regulations. Voices were raised that more stringent and effective regulations were necessary. Simultaneously, opinions that special protection for women in the LSL hinders the realization of equal employment between men and women were voiced not only by management but also by women workers. The Interim Report on the Deliberation in the Women's Committee, the

Council of Issues of Women and Young Workers issued on July 16, 1996 admits that, viewed from a comparative perspective, it is anomalous for the current Japan's regulations, on the one hand, to advocate equal employment for men and women and, on the other hand, to maintain special protection for women apart from protection for pregnancy⁶.

3 The 1997 Revision of the Equal Employment Opportunity Law

Upon the unanimously agreed proposal by the Council of Issues of Women and Young Workers, a tripartite advisory body, a draft to revise the EEOL and other related provisions in the LSL and CCFCLL passed in the Diet in June 1997. The revision will be effective as of April 1, 1999⁷.

3.1 The Change in the Basic Concept between 1985 and 1997 Law

3.1.1 Mixed Purpose of the 1985 Law

The 1985 Law had two seemingly contradictory purposes. One was to attain equal employment opportunity for women. The other was to promote in women's welfare and elevate the status of women workers (1985 EEOL Art. 1 and 2). From the viewpoint of the latter purpose, disadvantageous treatment for women vis a vis men should be prohibited, but the Law is not concerned with more favorable treatment of women.

Thus the Ministry of Labor's official interpretation was that, for example, whereas restricting recruitment to male candidates would violate the Law, restricting it to women (e.g. recruiting part-time jobs for women only) would not, because recruiting only for women would provide more employment opportunities for women. In this sense, the term "equal opportunity" meant not equal treatment of women and men but "one-sided equality" by providing women, whose employment opportunities are traditionally restricted, with the same opportunities as men. This one-sidedness was severely criticized in that it allowed the entrapment of women in low paying occupations to continue, and that it accordingly hindered the realization of true equality in the workplace.

3.1.2 Change of the Concept and Abolishment of Special Protection for Women

The 1997 EEOL changed the basic concept of the Law. The 1997 Law focuses on promoting equality between men and women. The purpose of improving the welfare of working women was deleted from the basic principle of the Law (Art. 2) and the relevant portion was deleted from the Law's official name⁸.

Accordingly, the 1997 Revision abolished special protection for women in terms of overtime, rest-day work and night work prescribed by the LSL. As a result, after April 1, 1999, women are generally to be subject to same regulations as men in terms of working hour

regulations.

Main Points of the 1997 Revision

	Current Regulation	1997 Revision (effective as of April 1, 1999 unless otherwise stated)
Equal Employment Opportunity Law		
recruitment and hiring	duty to endeavor providing equal opportunity	prohibition of discrimination
assignment and promotion	duty to endeavor providing equal opportunity	prohibition of discrimination
training and education	partial prohibition of discrimination	prohibition of discrimination
fringe benefits	partial prohibition of discrimination	partial prohibition of discrimination
mandatory retirement, resignation, and dismissal	prohibition of discrimination	prohibition of discrimination
preferential treatment of women	legal	illegal in principle
mediation procedure	commenced on both parties' agreement	commenced on one party's request
sanction against violation	(no provision)	publicizing violating company's name
positive action	(no provision)	support by the government
sexual harassment	(no provision)	duty of care for prevention
special employment management for pregnancy	duty to endeavor	legal duty (effective as of April 1, 1998)
Labor Standards Law		
regulation on overtime, rest-day work and night work	special protection for women	abolishing special protection for women
leave for multiple babies pregnancy	10 weeks	14 weeks (effective as of April 1, 1998)
Child Care and Family Care Leave Law		
night work	(no provision)	exemption upon workers' request

The abolition of the prohibition on night work and restrictions on overtime for women was a political deal between labor and management. Namely, labor accepted the abolition in exchange for bolstering the EEOL, that is making discrimination against women with regard to recruitment, hiring, assignment and promotion generally unlawful.

The 1997 EEOL also changed its policy concerning preferential treatment of women. Article 9 of the 1997 Law generally prohibits preferential treatment of women but allows it as an exception where it is adopted to rectify present hindrances to equal employment opportunity at the workplace. Therefore, practices which segregate men and women, such as recruiting part-time jobs for women only, will be prohibited. Only affirmative or positive actions⁹ to mitigate the current employment disparity between men and women are allowed under the 1997 Law.

Therefore, the 1997 Law is an outgrowth of the 1985 Law's dual purposes of equality and protection for women and a step toward a true law of equality by deleting the improvement of women's welfare from its purpose, abolishing the protective provisions applicable only to women workers in the LSL and the "one-sided equality" with regard to women.

3.2 From "Duty to Endeavor" to Prohibition

The most significant change made by the 1997 Revision was to prohibit discrimination concerning recruitment, hiring, assignment and promotion (1997 EEOL, Art. 5 and 6) as to which the 1985 EEOL simply set forth employer's moral duty to endeavor to provide equal opportunity to women as to men.

As for the duty to endeavor, some assert that the EEOL is a paper tiger since a violation of the "duty to endeavor" is subject to no sanctions. Others see the duty to endeavor as providing a solid basis for administrative guidance, a means more effective than criminal or civil sanctions in the Japanese social context.

In any event, after ten years' experience of the Equal Employment Law with an active administrative campaign, there was no overt opposition any longer against the introduction of the discriminatory treatment prohibition into the 1997 Law.

3.3 Dispute Resolution Procedures and Sanction against Violation of the Law

The 1985 Law was criticized as a paper tiger not only because the scope of prohibition against sex discrimination was narrow but also because the Law did not provide effective sanctions against violations. Unlike the LSL, the EEOL has no criminal penalties. Apart from an encouragement of voluntary resolution (1985 EEOL Art. 13) and administrative advice upon request (1985 EEOL Art. 14), the 1985 Law only establishes mediation procedures to cope with dispute arising thereunder. The Director of the Prefectural Women's and Young Workers' Office can refer the dispute to the Equal Opportunity Mediation Commission for mediation (1985 EEOL Art. 15). The Commission consists of three learned persons nominated by the Labor Minister (1985 EEOL Art. 17).

However, the mediation procedure was not utilized at all until 1994 because the procedure can only be commenced when both parties to the dispute agree to mediation. The first mediation procedure began in 1994 and a settlement proposal was made in February 1995. Since the settlement proposal has no binding effect, the parties refused to accept it and the dispute was not settled.

In the light of these poor results of the mediation system under the 1985 Law, the 1997 Law introduced modifications such that the mediation procedure can be commenced upon the application by one party, namely that of a worker. Furthermore, retaliatory treatment, including dismissal by reason of the worker's application for the mediation, is prohibited (1997 EEOL Art. 13).

More importantly, the 1997 Law introduced effective sanctions against violations of the Law. It provides that when an employer violates prohibition of discrimination in terms of recruitment, hiring, assignment, promotion, training and education, fringe benefits, and termination, and furthermore fails to comply with the Labor Minister's advice (1997 EEOL Article 25 Para. 1), the Labor Minister can publicize the fact (1997 EEOL Art. 26).

3.4 Sexual Harassment

Under the current Japanese law, sexual harassment is not understood as one type of discrimination. No provision prohibiting sexual harassment exists. Therefore, victims of sexual harassment in the workplace must seek damages in tort suits, or seek invalidation of legal action, such as a dismissal made in retaliation for rejection of sexual advances, on the theory that such action is against public policy¹⁰. The 1990s experienced a surge in the number of sexual harassment claims, partly due to legal activism by a group of lawyers. Since most of these cases concerned apparent infringements on human dignity or sexual freedom involving physical contact or even sexual assaults, courts naturally found tort liabilities¹¹. As for sexual harassment creating a hostile or offensive working environment, one district court¹² held that a co-worker's dissemination of a rumor concerning the plaintiff's promiscuity was an infringement of human dignity and deteriorated her working environment, and thus constituted a tort. The employer was also held liable for the employee's tort on a respondeat superior basis (Civil Code Art. 715¹³).

The 1997 EEOL introduced one new provision concerning sexual harassment. Article 21 Paragraph 1 provides that an employer must pay due attention in employment management to see that a woman worker's reaction to sexual speech or conducts in the workplace does not cause any disadvantages concerning terms and conditions of employment nor cause detriment to her working environment. Therefore, the employer has a duty of care to prevent sexual harassment in the workplace, whether it be of the *quid pro quo* type or the hostile working environment type. However, the impact of the new provision on sexual harassment suits remains to be seen.

4 Harmonization of Working Life and Family Life

4.1 Factors Which Necessitated Measures to Facilitate Harmonization

Harmonization of work and family life has been at the top of the labor legislation agenda in the 1990s¹⁴. Various factors triggered this legislative drive. First, with the low fertility rate causing an anticipated labor shortage, it was thought that women had to be encouraged to participate in the labor market. To that end, it was important to mitigate the difficulties which women were facing in bearing both family responsibilities and workplace duties. Where women still bear most of the family duties in Japan, this factor was especially important.

Second, the low fertility rate¹⁵ was thought to seriously damage the future social security system. The low fertility rate is said to be closely linked with an undesirable, but inevitable, choice on part of working women. Women who wish to continue their career tend to postpone childbirth, or even forgo having children entirely, because amidst the current Japanese practices it would be nearly impossible to be able to balance both work and family responsibilities simultaneously.

Third, Japan's rapid graying society gives rise to the problem of elderly care. Since socialization of the elderly care is underdeveloped in Japan¹⁶, working people currently shoulder the care of older family members. This factor also mandates that the harmonization measures be instituted.

Notwithstanding the foregoing factors, however, the most decisive was the need for true equality in employment opportunity between men and women.

4.2 Equal Employment Policy and Harmonization of Work and Family Life

Though an increasing number of women are participating in the labor market, a considerable number withdraw when they have their first child and resume working after their children are old enough to attend school¹⁷. Such a career break caused by childbirth is a disincentive for employers to hire women and to invest in their training and education, and is consequently a hindrance to real equality in employment between men and women.

Another aspect which required harmonization measures was the problem of the dual-track personnel system which emerged after the enactment of the 1985 EEOL. Although blatant discrimination against women has gradually faded through vigorous anti-discrimination campaigns by the government, the more complex problem of dual track system arose. Companies have introduced this "separate-track employment system," in which the employer provides workers with a choice of two or more career tracks. One track is the "general track" which involves routine jobs and no obligation for employees to comply with

transfer orders entailing changes of residence. The other track is the "integrated" or "career track" which denotes an elite management track. Employees in this latter category engage in jobs involving discretionary decisions and are subject to company-wide transfers entailing relocation.

Since the different treatment in accordance with the two tracks which have differing job content and responsibilities is based upon workers' own choice, it is not so easily classifiable as unjustified discrimination. Given that most women bear responsibilities, however, they are de facto led to choose the general track which is more compatible with their family lives. To guarantee a substantial choice for women, therefore, an institutional arrangement for harmonization of work and family life and an improvement of the social and employment environment are indispensable.

These factors led to the enactment of the Child Care Leave Law of 1991, and in 1995, this Law was revised and renamed as the Child Care and Family Care Leave Law to introduce family care leave rights.

4.3 Child Care Leave

The Child Care Leave Law of 1991¹⁸ provides a worker upon request with the right to leave to care for his or her child including an adopted one who is less than one year old. It is epoch making that the Law guarantees the right to both male and female workers. However, workers employed on a daily basis or by fixed term contract are excluded (CCLL Art. 2 No. 1).

As a general principle, the employer cannot reject requests for a leave (CCLL Art. 6 Para. 1)¹⁹.

Though the Child Care Leave Law does not require the employer to guarantee any payments during the leave, by the 1994 amendment of the Employment Insurance Law, 20 percent of the worker's regular monthly wages earned before taking leave is paid as a Child Care Leave Basic Allowance and 5 percent as a Returning Job Allowance from the employment insurance (EIL Art. 61-5).

During the child care leave, social security premiums for health insurance and welfare pension insurance can be exempted on the worker's request.

4.4 Family Care Leave

The CCFCLL of 1995 provides workers with the right to take family care leave, effective on April 1, 1999. A worker can request family care leave in order to care for a family member who is in a condition requiring constant care for two weeks or more due to injury, sickness, or

physical or mental disability (CCFCLL Art. 2 No. 2, No. 3; Enforcement Order CCFCLL Art. 1). The scope of "family member" in the Law includes the spouse²⁰, parents and child of the worker, parents of the worker's spouse (CCFCLL Art. 2 No. 4) and the worker's grand parents, siblings and grandchildren on the condition that they reside with and are dependents of the worker (Enforcement Order CCFCLL Art. 2). The period of a family care leave cannot exceed three months (CCFCLL Art. 15). The right to family care leave can, in principle, be exercised only once per one family member (CCFCLL Art. 11 Proviso).

As a principle, the employer cannot reject requests for a family care leave. Exceptions are allowed when the employer concludes a written agreement with a majority representative at the establishment and the worker in question falls under one of the following: 1) a worker who has been employed for less than one year by the employer; 2) those the Enforcement Order of the CCFCLL designates, such as a worker whose employment relationship will apparently end within three months from the date of the request for the leave and a worker whose weekly work days are two days or less (CCFCLL Art. 12 Para. 2; Enforcement Order CCFCLL Art. 23).

The CCFCLL does not require the employer to guarantee any payments during the leave. Unlike child care leave, the current law provides neither social security benefits for the period of family care leave nor social security premium exemption.

4.5 Exemption from Night Work upon Request

Since the 1997 revision of the EEOL abolished the night work prohibition of workers, it was feared that a working couple both ordered to perform night work would be unable to care for their child or a family member in need of care. Therefore, the 1997 revision inserted into the CCFCLL a night work prohibition applicable to a worker who is responsible for child care or family care.

Article 16-2 of the CCFCLL provides that the employer cannot order night work (defined as between 10:00 pm and 5:00 am) to a worker who raises a child not yet in elementary school when the worker requested the night work exemption for the purpose of raising his or her child. However, this provision does not apply if the night work exemption interferes with the normal operation of the enterprise. This right is not given to the following: 1) a worker who has been employed for less than one year by the employer; 2) a worker whose family member can ordinarily take care of the child; and 3) those the Ministry of Labor Ordinance designates (CCFCLL Art. 16-2 Para. 1).

A worker who requests a night work exemption must designate the period of the

exemption longer than one month but no longer than six months in one instance (CCFCLL Art. 16-2 Para. 2). The number of times the request can be made is not limited. Therefore, the worker eligible for the night work exemption can request the exemption multiple times. The designation of the exempt period must be made one month prior to the first date thereof.

The same applies to a worker who cares for a family member in need of such care and where he or she requests the exemption from night work for the purpose of taking care of the family member (CCFCLL Art. 16-3).

5 Evaluation of the 1997 EEOL and the Equal Employment Law Development

Criticism of the 1985 EEOL can be summarized in the three following points²¹: 1) its one-sided support of women permitted women to be kept in lower-paying jobs; 2) the 1985 law did not prohibit discrimination in terms of recruitment, hiring assignment and promotion, but merely set forth a duty to endeavor; and 3) the Law lacked an effective dispute resolution mechanism.

The 1997 EEOL responded to most of these criticisms. First, though the 1997 EEOL still maintains its position prohibiting discrimination by reason of being a woman and has not reached a genuine discrimination prohibition law for both sexes, it prohibits preferential treatment for women when it fixes job categories for women or maintains women's job segregation by sex. Second, discrimination concerning recruitment, hiring assignment, and promotion is prohibited. Third, mediation procedures can be commenced by the request of one party and, as a sanction against violations of the EEOL, publicizing the violating company's name was introduced. Therefore, the 1997 revision made significant progress in the equal employment policy in Japan²².

Japan's equal employment policy concerning the elimination of sex discrimination began with a modest intervention entailing a duty to endeavor rather than outright prohibition, which would entail drastic modifications of current practices. Through administrative guidance and campaigning, a gradual but steady modification of societal and companies' consciousness toward equal employment was sought. It should also be noted as a feature of Japan's equal employment policy that the policy harmonizing work and family life has developed simultaneously with the anti-sex discrimination policy. This might be evaluated as a method in a consensus-oriented society like Japan for redressing practices that are deeply-rooted but deemed socially inappropriate²³. After the ten years' experience under the 1985 EEOL, the 1997 Revision witnessed no overt opposition against prohibiting discriminatory treatment in all stages of employment.

One-sidedness in the promotion of women's status in the 1985 EEOL was weakened and

the character of the equal employment law for both sexes is emerging. As for the harmonization policy, the CCLL and CCFCLL already provide the right to take leave for both men and women. Therefore, the 1997 EEOL which maintains regulations addressed to women may be evaluated as a transitional stage towards a genuine equal employment law for both sexes.

Notes:

- 1 See Yasuo Suwa, The Equal Employment Opportunity Law, 24-7 *Japan Labor Bulletin* 5 (1985); Akira Watanabe, Ordinance and Guidelines for Implementing the Equal Employment Opportunity Law, 25-4 *Japan Labor Bulletin* 5 (1986); Kazuo Sugeno, The Impact of the Equal Employment Opportunity Law at its First Stage of Enforcement, 26-10 *Japan Labor Bulletin* 5 (1987); Sachiko Imada, Female Labor Force after the Enforcement of the Equal employment Opportunity Law. 36-8 *Japan Labor Bulletin* 5 (1996).
- 2 Though the Labor Standards Law prohibited wage discrimination by reason of sex since 1947, there were no statutes prohibiting discriminatory treatment and the issue was entrusted to the case law development.
- 3 However, unlike the LSL, the EEOL is not sanctioned by criminal provisions.
- 4 *Rōdōshō Josei-kyoku* (Ministry of Labor, Women's Bureau), *Kaisei Danjo Koyō Kikai Kintō Hō no Kaisetsu (Commentary on the Revised Equal Employment Opportunity Law)* 2 (21-seiki *Shokugyo Zaidan*, 1997).
- 5 Id at 3.
- 6 Id at 144.
- 7 After April 1, 1999, the numbering of the provisions of the EEOL will be changed. Therefore, readers should be careful as to whether the article number is that of the 1985 EEOL or that of 1997 EEOL.
- 8 Official title of the 1985 Law is "Law Respecting the Improvement of the Welfare of Women Workers, including the Guarantee of Equal Opportunity and Treatment between Men and Women in Employment." By the 1997 Revision, the Law was renamed as "Law Respecting the Guarantee of Equal Opportunity and Treatment between Men and Women in Employment."
- 9 Ministry of Labor plans to clarify preferential measures which are allowed under the 1997 Law by issuing guidelines and official notices.
- 10 Ryuichi Yamakawa "Personal Rights" in the Workplace: The Emerging Law Concerning Sexual Harassment in Japan, 36-9 *Japan Labor Bulletin* 5 (1997).
- 11 The *New Fujiya Hotel* case, 580 *Rōdō Hanrei* 17 (Shizuoka District Court, Numazu Branch, December 20, 1990); The *Kanazawa Sexual Harassment case*, 707 *Rōdō Hanrei* 37 (Nagoya High Court Kanazawa Branch, October 30, 1996); the *Tokyo Sexual Harassment case*, 707 *Ro-do- Hanrei* 20 (Tokyo District Court, December 25, 1996).
- 12 The Fukuoka Sexual Harassment case, 607 *Rōdō Hanrei* 6 (Fukuoka District Court, April 16, 1992).
- 13 Article 715 of the Civil Code provides that an employer is liable in tort for the illegal conduct of its employees if such conduct is carried out in the course of the employee's duties.
- 14 See generally, Michiyo Kurokawa, The Harmonization of Working Life and Family Life: Japan, 30 *Bulletin of Comparative Labour Relations* 45 (1995).
- 15 In 1990, the rate hit its lowest, 1.57 and in 1995, it further decreased to 1.43.
- 16 In 1997, the Family Care Insurance Law was enacted. This marked the first step of the socialization of family and elderly care.
- 17 Ryuichi Yamakawa, Recent Developments Regarding Child and Elderly Care Leave in Japan, 33-10 *Japan Labor Bulletin* 10 (1994).
- 18 As for the details, see Yamakawa, id.
- 19 It is prohibited for the employer to dismiss a worker by reason of the worker requesting a child care leave or having taken the leave (CCLL Art. 10). However, unlike the LSL, the CCLL does not prescribe criminal sanctions against violations.
- 20 A "spouse" in the CCFCLL includes that in a common-law marriage.
- 21 Mutsuko Asakura, The Equal Employment Opportunity Law in the Second Stage, 1116 *Jurisuto* 51 (1997).
- 22 As for a critical view on the 1997 EEOL revision, see Fujio Hamada, Kaisei Danjo Koyo Kikai Kinto Ho no Kadai (Issues of the Revised Equal Employment Opportunity Law), 451 *Nihon Rōdō Kenkyū Zasshi* 27 (1997).
- 23 As for the similar observation, see Loraine Parkinson, Japan's Equal Employment Opportunity Law: An Alternative Approach to Social Change, 89 *Columbia Law*

Review 604 (1989).

Statistical Aspects

Recent Labor Economy Indices

	January 1998	December 1997	Change from previous year
Labor force	6,693 (10thousand)	6,726 (10thousand)	51 (10thousand)
Employed	6,455	6,508	35
Employees	5,385	5,420	15
Unemployed	238	218	16
Unemployment rate	3.6%	3.2%	0.3
Active opening rate	0.64	0.67	0.03
Total hours worked	142.3 (hours)	157.7 (hours)	0.7*
Total wages of regular employees	266.2 (¥ thousand)	270.0 (¥ thousand)	0.6*

Notes: 1.*denotes annual percent change.

2.The data for "total hours worked" and "total wages of regular employees" are for firms with 5 to 30 employees.

Source: Management and Coordination Agency, Ministry of Labour.



Source: Ministry of Labour, Monthly Labor Survey

Notes: (1) The revised Labour Standards Law (LSL), which come into effect in April 1988 stipulates the statutory working hours would gradually reduced to 40 hours a week.

(2) The LSL, which had the goal of establishing the 40-hour workweek, was further amended in April 1994 to allow smaller enterprises to postpone their instigation of the 44-hour workweek until 31 March 1997.