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CONTENTS

New Minister of Labour

On July 4, Prime Minister Yoshiro Mori's second Cabinet took office to form a tripartite coalition government which includes his own Liberal Democratic Party (LDP), New Komeito and the New Conservative Party. Yoshio Yoshikawa (LDP) was appointed Minister of Labour. Born in 1931, Mr. Yoshikawa is a graduate of Waseda University's School of Political Science and Economics. After serving as a prefectural assembly member in Niigata Prefecture for five terms, he became an Upper House legislator in 1983. Among his other posts, he has served as parliamentary vice-minister of the Science and Technology Agency and the Ministry of Justice, and as chair of the Committee on Agriculture, Forestry and Fisheries.

General Survey

White Paper on Gender Equality

Although huge progress has been made to achieve gender equality in Japan, further change is still needed in this regard. The goal of creating a society which will allow both men and women to respect each other's human rights and the full exercise of their individuality and ability is now seen in Japan as being a major priority in setting Japan's course for the 21st century. At a Cabinet meeting in June 2000, the Prime Minister's Office presented its *White Paper on Gender Equality.* This is the first report provided for under the Basic Law for a Gender-Equal Society (which was promulgated and put into effect in June 1999).

The report outlines the situation of women in various fields of society and their status in relation to human rights. It also documents achievements to date with regard to gender equality and presents plans to promote the social changes necessary to achieve gender equality.

As for political participation, the report shows that the ratios of women in (1) the Houses of Councillors and the House of Representatives, (2) national public service, and (3) the judiciary have increased. With respect to the workplace, home and community, the report notes (1) that women are getting married later, (2) that marriage results in women having a heavier workload than their husbands in terms of the housework, child-care, and family-care responsibilities, (3) that women's employment patterns are becoming more varied, and (4) that differences between men and women in the field of information technology are becoming less pronounced. A notable feature of this report is its mention of the current status of females

with respect to human rights. That discussion comments on (1) the situation concerning violence toward and the sexual harassment of women, (2) emerging problems in the media, such as obscenity on the Internet, (3) changes in the ratio of women working in various specialized fields due to the increasing enrollment of women in Japan's universities, and to the changed patterns of enrollment in terms of their field of specialization at university, and (4) persisting stereotypes concerning the roles of men and women among the older generations.

Finally, the report set an agenda of the tasks which need to be tackled. In particular it points to (1) the further participation of women in individual fields, (2) the securing of equal opportunities and equal treatment for women, particularly in terms of employment, and (3) the creation of a society that promotes and protects the human rights of women. The report emphasizes that improvements in these regards will depend on the Office for Gender Equality (which is located in the Prime Minister's Office) to take the initiative in (1) regularly monitoring the situation, (2) conducting surveys and research, collecting data and then organizing and providing information, and (3) strengthening cooperation among members of the public and between the government, local public bodies and NGOs.

Human Resources Management

Update on the Discretionary Work Scheme

A new discretionary work scheme under the 1998 revised Labour Standards Law came into effect in April this year. Coverage of the discretionary work scheme was expanded for white-collar employees in a workplace where important business decisions are made, if their duty is planning, investigation, and analysis on matters regarding management of the enterprise and if they have knowledge and experience of performing such duties. The discretionary work scheme before the amendment was applied mostly to professional workers. The jobs available for the former scheme are (1) research and development of new products and technology, (2) planning and analysis of information-management systems, (3) gathering information and editing in the mass media, (4) designing, (5) producers and directors in TV or movie production, and (6) jobs designated by the Minister of Labour. (See the November 1998 issue of the *Japan Labor Bulletin* for more details.)

Since the amendment came into effect in April, some companies have begun to utilize the new discretionary work scheme in managing their white-collar employees.

Hakuhodo Inc., the advertising giant, has 142 people employed under the new scheme.

They are union members who are engaged in management, legal affairs, advertising, secretarial work and research. Employment relations for these people is based on the employees' consent and the approval of their managers. It will now be up to individuals to decide when they come to and leave the office. However, they are required to stay at the office or at a clients' place for at least one hour a day and are not allowed to work at home. They are also required to fill in working hour record sheets showing when they arrived and when they left the office, and submit it to the personnel department on a monthly basis so that the company can keep a check on their working hours. At the same time, they are required to take a one-hour rest if they work for more than six hours a day, though it is up to the individuals when they actually take the break. To work on holidays requires the permission and approval of their manager.

To protect the health of each employee, Hakuhodo has set separate criteria to limit overtime. The number of hours worked at night, the number of days with night work, and the number of days-off is set, and employees who have exceeded the criteria are directed to report on the state of their health on a fixed-format sheet. The sheet is checked by doctors, and if necessary employees are asked to see a doctor. When employees exceed the stipulated standard and have not taken a replacement holiday, they are given a paid day-off the following month. The company also has an obligatory holiday scheme whereby employees have to take nine successive days off (five days off with pay and two weekends) twice a year.

Konica Corp., a photographic film maker, has applied the scheme to several dozens of its employees who are section heads at headquarters and are engaged in jobs which involve planning. The areas in which these employees work include personnel affairs, accounting, advertising and general affairs. To be eligible for the scheme, employees must be university graduates and have worked for Konica for 10 years or more.

Banyu Pharmaceutical Co., Ltd. has applied its scheme to 174 employees who belong to the planning sections in marketing and research planning at its headquarters. About 28 percent of its employees at headquarters are employee under the scheme. The company restricts its scheme to employees who have been employed two or more years with the company and have attained a certain job grade.

Sony Assurance Inc. applies its scheme to 12 section heads at its headquarters who are engaged (regardless of their actual title) in planning jobs. To apply, employees should be at a job grade immediately below manager and be able to carry out their jobs independently and autonomously. Employees under this scheme are allowed to work at home, provided it does not interfere with their work.

At Konica and Banyu, it is up to individuals to decide when they need to be in their offices, but the approval of their managers for their work plans is required when they do not turn up to the office or come to the office on holidays. At Sony Assurance Inc., on the other hand, such approval is not necessary. The three companies provide annual medical checkups for employees under the scheme, but do not grant special holidays.

The new discretionary work scheme for planning and for project-type work obliges firms to obtain the unanimous agreement of their worker-management committee and to pay due attention to the health of the employees concerned. This has underlined concerns as to whether the scheme would in fact work properly. However, the scheme is being applied in some companies in conjunction with the introduction of new wage systems such as the annual wage system (which is based on actual achievement), and it seems likely that it will be adopted by an increasing number of firms.

Meanwhile, when the number of workers who have damaged their health by working overtime (e.g., the number of suicides due to excessive work in recent years) is considered, it seems likely that worker-management committees will play a crucial role in making the discretionary work scheme work properly.

International Relations

Record Number of Foreigners Entering Japan Rekindles Debate within Keidanren

In 1999, 4,901,317 foreigners entered Japan (including re-entries), 344,472 (7.6%) more than in 1998. The figure exceeds the 1997 record by 231,803 (5%). People from Asia accounted for 2,978,960 entries (60.8%). One reason for the increase in the number of foreigners entering Japan seems to be the recovery of the South Korean and Southeast Asian economies.

On January 1, 2000, 251,697 illegal immigrants were in Japan, 46,949 (15.7%) below the highest figure recorded on May 1, 1993. The downward trend which has been documented since May 1993 is attributed by most observers to Japan's sluggish economy and the tight employment situation which has accompanied the economic downturn.

In June 2000, Keidanren (Japan Federation of Economic Organizations) presented a series of proposals, and argued that it was necessary for Japan to be positive in accepting foreign workers in order to maintain stable economic growth in an ageing society with fewer children. The proposals underline its conviction that making use of foreign workers in

specialized and technical fields is a natural and necessary response to globalization and to the need for a smooth transfer of technology to developing countries. Keidanren also argued that its approach will help improve the efficiency of Japanese business activities, enhancing their ability to add value, and to create new industries. The proposals call for concrete measures which would lend stronger support to overseas students seeking to find work in Japan.

The Japanese government has sought to maintain its basic policy of accepting foreign workers in professional and technical fields as much as possible, while dealing cautiously with unskilled workers. The influx of workers from Asia has raised concerns about the substantial social costs involved in settling foreigners in Japan. These costs include welfare, medical services and education. Furthermore, an increase in the number of foreigners arrested has buttressed a view among some that the acceptance of more foreign workers will increase the number of crimes by foreigners and thereby imperil law and order. On the other hand, there is also the opinion that while the number of arrests has substantially increased, the number of arrested people has not. This suggests that the increase in crime committed by foreigners is not due to the increase in ordinary immigration but to organized underground crime which has become more conspicuous.

In the second Basic Plan for Immigration Control which was released in March 2000, the government confirmed its policy of promoting and expanding the Foreign Trainee and Technical Internship Program for foreigners. However, these programs also raise concerns over issues involving the rights of foreign trainees and interns (such as their right to bring family members to Japan), their freedom of vocational choice, and so on. In recent years, the debate over human rights has coincided with the discussion of ways to cope with Japan's smaller families and the ageing of Japanese society. One outcome seems to be the full-blown push to accept immigrants into Japan.

Public Policy

New Corporate Breakup Rules and the Law Concerning Succession of Labor Contracts after Spinoffs

With the economic downturn continuing, many firms are realigning their operations. Strategies include corporate breakups in the form of management transfers, mergers and acquisitions. A problem involved with such restructuring is how to protect workers' rights and interests. A new system has now been established to deal with this issue.

Corporate breakups were formerly carried out via mergers and acquisitions or through management transfers, but these approaches had their shortcomings. With mergers, all the rights and duties were comprehensively taken over by the new firm, whereas management transfers required individual agreements from creditors which was a cumbersome procedure. To improve the situation, the Commercial Code was revised to facilitate corporate spinoffs. At the same time, many were worried that corporate spinoffs might lead to a deterioration in the working conditions of the employees involved. The enactment of a law to protect workers in such situations came to be seen as being necessary along with the revision of the Commercial Code. Accordingly, with the revision of the Code, legislation to protect workers was enacted. Vital points in a corporate breakup include the timing and the transfer of the labor contract of the employee to the spun-off company while protecting their rights. In this connection, companies are required to draw up the breakup plans and the breakup contracts in writing. This is seen as playing an important part in the working of the system.

Let us first outline the system of corporate spinoffs provided for under the Law Concerning Succession of Labor Contracts after Spinoffs. The revised Commercial Code specifies two types of corporate breakups: the spinning off of a division to form a new company and the takeover of a division by an existing company. This makes it possible for a firm to take over from another company which is spinning off its divisions, not the rights and duties of the company as a whole but only those rights and duties which relate to the affected part. It introduces as a new concept "partial comprehensive succession" to enable a company to spin off its divisions without the approval of individual creditors. The divisions affected by the breakup are restricted to those specified in the breakup plan (for the spinning off of a division into a new company) or in the breakup contract (in the case of takeovers) which must be drawn up beforehand. This means that the creditors' rights and duties in respect to the division to be separated, as specified in writing, are transferred as they stand to the new company or the existing company which is taking it over. To protect creditors and shareholders, stakeholders opposed to the breakup are given the right to request, within six months of the restructuring coming into effect, that the breakup be declared invalid.

Prior to the enactment of the revised Commercial Code, the Lower House added an amendment saying that before spinning off a division, a firm should consult with its employees, and that employment contracts should be clearly mentioned in the breakup plans and contracts as rights and duties to be transferred. Moreover, the Upper House adopted several collateral resolutions calling for (1) general recognition of the principle that workers' opinions which emerged in prior discussions should be respected; (2) appreciation of case law which rules that employees should not be dismissed simply because of corporate restructuring; and (3) consideration of measures and legislation to protect workers regarding

the transfer of labor contracts involved in mergers, acquisitions and takeovers.

The Law Concerning Succession of Labor Contracts after Spinoffs, in conformity with the revised Commercial Code, specifies the measures which firms must take to protect workers.

At least two weeks before the general shareholders' meeting at which the breakup plan is to be approved, the firm is obliged to give notice to employees that they are to be transferred to the other firm, and that employment contracts related to them will be protected in the spinoff or takeover agreement. Firms that have labor agreements must inform their labor union(s) that the terms of the agreement will be transferred to the other firm.

Employees engaged mainly in tasks assigned to the divested division will be transferred to the other firm. At the same time, employees who work mainly in the divested division but are not mentioned in the spinoff plan or takeover contract (and is thus in theory to be excluded from the transfer) may object in writing up to one day before the shareholders' meeting and be transferred to the other firm. On the other hand, employees who work mainly in other divisions but at the same time have tasks in the division to be divested and find themselves mentioned in the plan as an employee to be transferred may object in writing up to one day before the shareholders' meeting, and may refuse to be transferred. Incidentally, workers who are not engaged in any task in the division to be divested are not within the scope of the transfer. If they are to be involved, their consent is required.

The Law Concerning Succession of Labor Contracts after Spinoffs also provides for a succession of collective agreements. The agreements will be transferred to the spun-off company by stating the parts of the agreement to be transferred in the spinoff plan or takeover contract. As for parts of the agreement concerning regulations unrelated to labor conditions (such as those relating to union offices, the use of facilities such as message boards, etc.), the transfer of the whole or a part will be effected by a mutual agreement as stipulated in the plan or contract. In addition, if a worker to be transferred belongs to a labor union, it will be assumed that a labor agreement exactly similar to that affecting him at his former company has been concluded between the union and his new company.

In the Law Concerning Succession of Labor Contracts after Spinoffs, the Diet included a rider saying that firms should endeavor to gain the understanding and cooperation of workers involved in corporate breakups. Also, collateral resolutions more or less the same as with the revised Commercial Code were incorporated into the law. At the same time, additional conditions were cited. It should be clearly mentioned in the guidelines for spinoffs and takeovers that labor conditions will not be changed in any way that is unfavorable to workers.

It also provides for Ministry of Labour ordinances and guidelines to be established as objectively as possible to define employees who are considered to be mainly engaged in the tasks of divested divisions.

Costs of Vocational Training in the Workplace to be Subsidized by the Ministry of Labour

According to a survey by the Ministry of Education, Science, Sports and Culture (MESSC), the employment rate of high school graduates this spring was 88.2 percent, a decline of 1.7 points from the previous year. It was the lowest rate since the survey commenced in 1976. The number of graduates who did not have a job increased over the same period by some 2,000 to 32,000 (consisting of approximately 14,000 males and 18,000 females). At the same time, the employment rate for university graduates seeking work decreased by 0.9 point to 91.1 percent, the lowest figure since the MESSC and the Ministry of Labour jointly began surveying this matter in 1996. Thus, the estimated total number of recent graduates without jobs this year was 30,000, an increase of some 1,000 over the previous year's figure.

In response to the record high joblessness among new graduates, the Ministry of Labour has initiated countermeasures which include (1) the extension of eligibility for short-term, free employment vocational training programs for high school students, as well as allowing private firms (in addition to vocational colleges and private job training institutes) to conduct such training programs, and (2) subsidizing the vocational training provided by firms that have hired recent university graduates without jobs.

Where the scheme for allowing private firms to conduct job training is concerned, the government provides subsidies of about ¥60,000 per month per person as training costs, and job-seekers can in principle receive the training free. The training period to be covered by this scheme is three to six months, and the expected number of trainees will be 6,000, six times as many as in the previous year. The program is now available not only for university and two-year college graduates but also to high school and technical college graduates. It is aimed at those who have registered at a Public Employment Security Office but have not found a job. The graduates can choose where to receive training from among the firms seeking new employees.

The subsidy to defray the training costs of firms which have recently taken on jobless graduates will be financed by expanding the scope of the "Grants for Life Time Development of Vocational Abilities" which used to be granted to firms obliged to transfer their

middle-aged or elderly employees to different sections or to conduct training to help their employees keep up with technological innovation. Firms that begin a training program of up to six months by the end of September are eligible for subsidies to cover two-thirds of the training costs (three-quarters for small and medium-sized firms) up to a maximum benefit of ¥300,000.

Special Topic

Telework in Japan

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1.0 Introduction

Recent advances in computer technology and telecommunications have led to an increasing number of people engaged in telework. "Telework" is the term used for work that is performed outside the usual workplace, supported by electronic technology such as personal computers. "Teleworkers" are people who undertake such work. In Japan, teleworkers who have employee status are protected by labor laws. However, labor laws do not apply to teleworkers who do not have employee status. Consequently, various legal issues have arisen for non-employee teleworkers.

This paper will first clarify the kind of legal problems facing teleworkers without employee status in Japan, and will then examine regulations to solve these legal issues.

2.0 Current and Future Status of Telework

According to a survey carried out by the Japan Institute of Labour in 1997, the number of teleworkers without employee status is estimated to be around 174,000. These teleworkers are mainly in the publishing, printing and information service sectors, performing work such as word processing, data input, design, programming, translation and system design. The 1997 survey found that those who typically engage in telework were females with young children who had assumed the responsibility for child care in their family. The survey also found that teleworkers have a relatively high educational background, that they had work experience as employees, and that they had left their previous job for personal reasons, such as marriage, childbirth or child care.

It is expected telework will become a common work style. There are several reasons for this. First, telework makes it possible to balance work with personal needs or family life. Secondly, telework can create job opportunities. This is particularly applicable to the handicapped and the elderly who thus far face difficulty in searching for and finding jobs because of their restricted physical mobility. Furthermore, working at home can relieve the burden of commuting, and improve the quality of life.

Today's enterprises are departing from traditional ways of working that involved regular employees working together in the same workplace at the same time. Flextime systems, employing temporary workers, and outsourcing are becoming commonplace. Associated with these changes are developments in the area of personnel management reflecting a move away from a seniority-based evaluation system toward a results-oriented one. These developments have resulted in an increase in the number of enterprises that intend to utilize telework, particularly in highly professional fields.

3.0 Legal Problems Related to Telework

Legal problems related to telework can be divided into two types. The first concerns the content of the contract between the teleworker and the ordering enterprise. The second type of legal problem concerns matching supply and demand.

3.1 Problems Regarding the Content of Contracts

Four problems can be identified in relation to telework contracts. First, the terms and conditions of contracts may not be sufficiently precise or detailed at the time of concluding. Regulations regarding labor contracts are contained in the Labour Standards Law (LSL) which requires employers to provide a clear statement of working conditions (Article 15), and to inform the workers of the collective agreements and work rules indicating working conditions (Article 106, Paragraph 1). However, this kind of regulation is lacking for teleworkers. Since the law does not stipulate that the terms and conditions of telework contracts need to be clear, there exists some danger that disadvantageous conditions may be forced ex post facto on the weaker party of the contract, the teleworker, by the ordering enterprise. It has been reported that such problems have already occurred, particularly in determining the amount of reward.

Secondly, many telework contracts contain inappropriate terms and conditions. An interim report on telework problems published by the Ministry of Labour in 1999 cited some examples. One enterprise forced a teleworker to accept a performance of service without payment to compensate for damage the teleworker had previously caused by a delay or a

defect. The enterprise inserted a clause according to which the teleworker was responsible for any damage arising from delays, regardless of negligence on the part of the teleworker. The enterprise broke off the contract unilaterally after continuous revisions. The terms of completion of the contract had been set so that they could not be achieved without excessively long labor.

As far as the contents of labor contracts are concerned, there are protective regulations, such as the setting of minimum wage by the Minimum Wages Law, the ban on predetermined indemnity by Article16 of the LSL, and the requirement that 30 days' advance notice be given in the case of dismissal under Article 20 of the LSL. However, these protective regulations do not cover teleworkers that do not have an employee status.

Certainly, at least in regards to the determination of reward, it may be basically a question of freedom of contract, and accordingly the law should refrain from regulatory intervention in this matter. However, in the case of telework contracts, there may be a notable gap in the level of information held by the contractual parties. This would mean that the justification for entrusting the determination of reward totally to the contractual parties is insufficient, if not entirely lacking, since the party with more information could be in a position to exercise freedom of contract in an unjustly advantageous manner. Such a situation justifies legal intervention to correct the imperfect functioning of freedom of contract.

The third problem concerns health protection for teleworkers. It has been reported that teleworkers suffer from a high incidence of eye fatigue, lumbago and stiff shoulders as a result of engaging in computer work over long periods of time. This problem is not isolated to teleworkers; it also occurs in those employees who work in business offices using a computer for long periods. In Japan, these occupational safety and health matters are covered by the Doctrine of Duty to Care for Safety and Health, outlining the employer's responsibility to care for the physical and mental well being of its employees. However, teleworkers without employee status, by definition, do not have an officially recognized “employer” who is responsible for their health. Inevitably, occupational health problems are the responsibility of teleworkers themselves*. Moreover, from the viewpoint of privacy protection, it may not be acceptable for an enterprise to exercise a duty of care for teleworkers whose workplace may be located in family or private space.

Nevertheless, an ordering enterprise will have to pay some attention to the health of its teleworkers. For example, setting terms of delivery of the telework that are difficult to meet may seriously influence the health of teleworkers, forcing them to work for a long time and/or late at night. Of course, the settlement of the terms of delivery can be freely determined by

agreement, and a teleworker may refuse to conclude any contract with harsh terms.

The situation for workers with employee status is very different. They enjoy the legal, somewhat paternalistic, protection of the LSL. For example, if an employer intends to order overtime work, Article 36 requires that an agreement be concluded between the employer and the representative of the majority of workers in the workplace, even if individual workers accept overtime work. Article 37, Paragraph 3, requires an employer to pay increased wages for night work (work performed between 10:00 p.m. and 5:00 a.m.) and this regulation can deter employers from requiring excessive overtime work. Considering the careful attention given to employees' long hours of work or night work, as described above, and the other health-related responsibilities of employers prescribed by the law, it can be said that more care should be taken of the health of teleworkers without employee status.

The final problem relating to telework contracts concerns privacy protection for teleworkers. Current information technology has made it easy to register, conserve, diffuse, publish, modify and even distort personal data. Given that telework must be accomplished with the use of a computer and e-mail, special care should be taken of the personal data of teleworkers.

3.2 Problems Matching Supply and Demand, and the Intermediary Agency

First, it should be noted that the skills or abilities of teleworkers do not always satisfy the needs of the ordering enterprises. Failure to achieve a match between the teleworkers' skills and the telework tasks required by the enterprise creates problems for both parties. For example, if a teleworker's skills are not at a sufficiently high level, the enterprise may be compelled to reduce the reward previously promised in accordance with the quality of the result. This, in turn, is a cause of discontent for the teleworker, whose stability of income becomes insecure.

Secondly, in the underdeveloped telework market the mechanisms for matching supply and demand do not function properly. Therefore, both teleworkers and ordering enterprises have no choice but to resort to personal connections. For example, the main source for finding telework is an introduction by friends and acquaintances. Moreover, many telework contracts are concluded between teleworkers and their previous employers. These facts explain why telework contracts have not been widely diffused.

Despite this, some telework agencies have been established, often by teleworkers themselves. These agencies collect orders from various enterprises and redistribute the work to individual teleworkers. An agency system is to the teleworkers' advantage, because it can

secure a more stable supply of work and augment the quantity of orders. Furthermore, ordering enterprises benefit from this system because the agencies usually check the results of each teleworker's output before handing it over to the ordering enterprise. This provides a strategy for quality control.

However, one problem is inherent in the agency system. The contractual relationship between the ordering enterprise, the agency, and the teleworker is so complex that it is difficult to identify who should assume responsibility for legal problems regarding a contract. For example, which party should assume responsibility for a delay: the agency or the teleworker? In addition, the possibility of exploitation by an intermediary person must be taken into account. In normal labor contracts, Article 6 of the LSL regulates this matter.

A third problem is that ordering enterprises, which often expect a high level of ability and specialization from teleworkers, experience dissatisfaction when the quality of work is uneven. This problem derives mainly from the fact that it is difficult for teleworkers to acquire the necessary information on the needs of ordering enterprises. Even if the information can be acquired, teleworkers have few opportunities to obtain the training necessary to raise their level of ability and skill to that requested by the enterprises. In addition, because there is no system to evaluate the ability of teleworkers, both ordering enterprises and teleworkers become dissatisfied; in particular, many teleworkers complain that their customers underestimate their abilities.

4.0 The Concept of 'Worker' in the LSL: Coverage of Protective Regulation

Article 9 of the LSL prescribes that "worker" shall mean one who is employed at an enterprise or place of business and receives wages therefrom, without regard to the type of occupation. The characteristic of the regulations of the LSL, which is also common to other so-called labor protective laws such as the Minimum Wages Law, is to apply a series of uniform legal protective measures to people defined as "workers." Article 9 determines the range of people to whom the LSL is applicable, and those who are not defined as "worker" in the LSL are excluded from the legal protection embodied in this law.

The terms used in Article 9 of the LSL are so ambiguous that they do not distinguish "worker" from "non-worker." However, case law governing Article 9 provides some critical factors to determine the qualifications of "worker." These factors include: whether he/she can refuse in practice to accept the work; whether and to what extent he/she can freely decide on when and where to work; whether and to what extent the employer supervises and controls the process of accomplishing the work; whether he/she can entrust to others the order received; which party − worker or employer − must bear expenses for materials or utensils

used in accomplishing the work; and whether remuneration is paid for the accomplishment of the work itself or only on completion.

Judging from the case law mentioned above, it is unlikely that a teleworker qualifies as a "worker" in the LSL. There are a number of reasons for this. Teleworkers usually work at home; they can accept or refuse an order freely, in the sense that there is no "legal" rather than economic compulsion for a conclusion or continuation of a contract; they have discretion over how, when, and where the work is carried out; they purchase telework equipment such as computers at their own cost.

It would not be appropriate to exclude people who are engaged in telework from legal protection on the grounds that they fail to qualify as a "worker" under the LSL. The justification for labor protective regulations is grounded in the substantial inequality of the contractual parties, employer and employee. Therefore, it is indefensible that legal protection is denied to teleworkers who are in a position similar to normal wage-workers in that a contract is concluded between people whose bargaining powers are notably different.

Indeed, even under actual laws, a "non-worker" is not always excluded from legal protection. For example, the Workmen's Accident Compensation Insurance Law recognizes special admission into workers' accident compensation insurance for certain categories of the self-employed (Article 27 et seq.). Moreover, although homeworkers were not considered "workers" under the LSL, in 1970 the Industrial Homework Law was enacted, extending some degree of legal protection to homeworkers. Teleworkers who are engaged in industrial production at home may qualify as homeworkers and thereby enjoy legal protection. However, many teleworkers, who work in the service sector or are engaged in information-related activities, are not covered by the Industrial Homework Law. The methodology of legal regulations, by which legal protection is in principle reserved for people defined as a "worker" and is extended in an exceptional way to some people in a situation similar to "worker," such as the self-employed and the homeworker, should be called into question.

When the LSL was enacted in 1947, the object of legal protection was principally blue-collar workers in manufacturing sectors. It was not difficult to treat these workers as a uniform entity as they shared similar economic and social situations. As workers' economic conditions have generally improved and their interests have diversified, their need for legal protection and their economic necessities have become more divergent. Some workers now have bargaining power equal to that of their employers. In this situation where there is an equal balance of power and information between employee and employer, and consequently where the application of freedom of contract may not cause serious problems, it would be

appropriate to deny the application of the LSL. On the other hand, legal protective regulations should be extended to workers such as teleworkers who are not covered by the LSL, notwithstanding their notable disparity in bargaining power compared with the other contractual party. This means there is a need to rearrange the application of the LSL based on protection for workers.

It should be noted that LSL regulations are accompanied by administrative supervision of the employer and penal sanctions for any employer who contravenes the rules prescribed by the law. In the current legal context, difficulties arise in the application of such regulations to teleworkers because they are not in an employment relationship, and in this sense they do not have an "employer." Needless to say, it would not be appropriate to place the same level of responsibility for complying with protective laws on the ordering enterprise that contracts the teleworker as on an enterprise that hires workers in a labor contract.

There is support among Japanese labor law scholars for a new, flexible approach to labor regulations. According to this view, labor protective law regulations do not necessarily need to be accompanied by administrative supervision or with penal sanctions. Some matters, for example, the ban on predetermined indemnity, do not require severe control or sanction. In addition, for white-collar employees whose future career is in practice secured, there must be room for deregulation, such as contracting out. This new legal trend is a good one; the LSL and other labor protective laws should be revised in the direction of such deregulation or flexible employment options. Currently, introduction of regulations that do not include administrative supervision and penal sanctions into the Japanese labor law system is under discussion. This new approach to regulation can be called a private law-oriented regulation, in the sense that provisions laid down by the law are enforced only by the contractual parties, or a civil court judge in cases where conflict arises.

In April 2000, a law relating to consumer contracts was enacted in order to resolve various problems that have been caused by differences in bargaining power or information gaps between enterprises and consumers. Although the application of this law specifically excludes labor contracts, the problems addressed by this new law have much in common with those of labor contracts in that, as the weaker party of the contract concluded with an enterprise, a worker can be compared to a consumer. The consumer contract law will become a model for legal regulations for the contract of telework and may cause an active discussion of modifications to legal regulations for labor contracts.

5.0 Implications of ILO Conventions

While not yet ratified by Japan, the International Labour Organization (ILO) Convention

No.177, titled the "Convention concerning Home Work," adopted in 1996, should be helpful to the discussion of placing legal regulations on telework. This convention is aimed at people without employee status (Article 1 (b)).

First, it should be noted that this convention requests each nation to promote equality of treatment between homeworkers and other wage earners (Article 4). The precedent for these provisions can be traced back to Convention No.175 adopted in 1994, which intends to establish equal treatment between part-time workers and full-time workers. Both conventions aim to improve the position of under-protected workers, extending them a protection thus far reserved for full-time workers or workers with employee status.

Of course, it is difficult to apply equal treatment of some conditions and terms to teleworkers based only on Convention No.177. However, this convention provides the justification for a legal intervention aimed at improving the working conditions of teleworkers and the alignment of the level of legal protection of teleworkers to that of other workers.

In this light, what matters is the right to organize. To improve the economic or social position of teleworkers, it is vital for them to collaborate. In fact, Convention No.177 requires the promotion of equal treatment in relation to "the homeworkers' right to establish or join organizations of their own choosing and to participate in the activities of such organizations." These provisions in particular have made it difficult for Japan to ratify this convention. According to the prevalent theory in Japanese labor law, the right to organize and the right to act collectively, both of which are guaranteed under Article 28 of the Japanese Constitution, would be denied to workers without employee status. However, this theory is not self-evident. At least from an economic point of view, it is difficult to distinguish an employee from a self-employed person or a tiny enterprise whose existence is dependent on trade with larger enterprises. It is time to re-examine the dogma that attaches employee status to the right to organize and the right to act collectively, and extend those rights to workers other than those with employee status.

Article 4 of this convention requires the promotion of equal treatment in relation to "protection against discrimination in employment and occupation; protection in the field of occupational safety and health; remuneration; statutory social security protection; access to training; minimum age for admission to employment or work; and maternity protection." While regulations on "minimum age for admission to employment or work" may be easily introduced into Japanese law, regulations on "statutory social security protection" will be difficult to fulfill because it would require a radical revision of the Japanese social security system, under which the contribution of the employer is taken for granted.

6.0 Conclusion

Considering the problems faced by today's teleworkers, there is an imperative to improve their legal situation. Under the current labor law system, particularly the regulation system of the LSL, it is difficult to extend the same or similar legal protection that workers with employee status enjoy to teleworkers without employee status. For this reason it is important to continue examining the teleworker problem from a general perspective based on a completely new concept of labor protective laws, which will enable the introduction of more flexible and more appropriate legal regulations in Japanese labor law.

Note: *However, it should be noted that according to the Supreme Court decision, the duty to care for safety is recognized when the parties have entered into relations involving special social contracts on the good-faith principle. On the basis of such reasoning, an ordering enterprise cannot necessarily escape the duty to care for the safety and health of teleworkers.

JIL News and Information

Looking Back on the IIRA World Congress in Tokyo
Tadashi Hanami, Past President of the IIRA

The International Industrial Relations Association (IIRA) held its 12th World Congress over five days from May 29, 2000 in Tokyo. From some 60 nations around the world, 1,121 researchers − far more than at any of the previous 11 world congresses − registered and participated in the congress, filling nearly all the seats at plenary sessions, workshops, special seminars and other activities. Participants were buoyed by the enthusiastic debate.

The number of applications for presentation also marked a record-breaking high: 110 papers were selected for presentation from among 437 papers which had been submitted to the congress organizers. In my capacity as President of the IIRA, I delivered the Presidential Address, "Universal Wisdom through Globalization." Having read through the selected 110 papers, I talked for some 40 minutes on academic research trends, noting the various issues in industrial relations and the problems of labor-management relations which are challenging today's researchers. The Address noted the shared recognition among researchers around the world that industrial relations everywhere now face drastic changes and challenges: employment instability, a decline in employment security, an increasingly volatile labor force, and the declining influence of labor unions. As a result, the framework for traditional industrial relations, which was centered around the unions, has been badly shaken and many existing industrial relations systems have begun to malfunction.

The intense interest arising from the awareness of this crisis facing the present industrial relations system has become the driving force motivating researchers to think carefully about the direction that industrial relations should take in the 21st century. This concern with the future was conspicuously reflected in many of the papers and in the subsequent discussions they stimulated. The shifts in employment from regular, core and stable or typical employment to that characterized by short-term, temporary, atypical, and non-regular employment is increasingly occurring as a general tendency throughout the world, observed not only in advanced industrial countries, but also, as a result of globalization, in many of the developing countries as well. Such shifts in employment patterns, together with the emergence of female labor and the astonishing development of information

technology, have created difficulties in maintaining a balance between work and family life. The conflict between work and an individual's personal life is another outcome. The end result has been the reinforcement of diverse forms of discrimination.

The question of how to balance labor flexibility with the need to protect the socially underprivileged emerges from the universal search for a more generally effective economic management system (including various forms of deregulated activity) which will maintain and even promote social fairness. There is a strong awareness that the promotion of labor flexibility and the provision of social security nets are the two tasks to be achieved not only by European countries but by all countries on a global scale.

Faced by such tasks, labor unions in developed and developing countries have experienced a decline in their roles and functions. This has resulted in a correspondingly strong interest in whether it is possible to reinvigorate unions, and a search for ways to do so. Meanwhile, a new style of labor-management relations is emerging. On the one hand, various types of labor suppliers have extended the labor force beyond the commonly accepted framework of ordinary employment. The new supply of flexible labor includes freelancers, consultants, the self-employed, and independent specialists, together with job-seekers, consumers and grass-roots groups including NGOs and NPOs. On the other hand, the development of global linkage of enterprises beyond national borders and an increasing number of multilaterally interacting business groupings and link-ups will require a recasting of the traditional tripartite relationship of government, workers and enterprises. If unions are to reinvent themselves, one task they will have in front of them will be that of forging a new identity within the multi-dimensional industrial relationships which are now emerging. Organizing non-typical workers will be a part of this big challenge.

Employment flexibility, globalization, and the IT revolution are not only the outcome of imminent fundamental changes in industrial relations in individual countries. They are also producing substantial change and challenge the way work is regulated internationally. There is now doubt about the ILO's tripartite principle, and about the universal applicability of a single, centrally administered set of international labor standards. The ILO's tripartite principle has come under increasing criticism because labor unions no longer represent a majority of workers either in the developed or the developing countries. Nevertheless, they are still regarded as “the most representative body of workers” and remain the actual representative at tripartite tables to the exclusion of, for example, various NGOs. At the same time, in the course of discussions concerning international trade and the social clauses in international labor law, doubt was cast on the applicability of Western standards in non-Western areas. In particular, the wisdom of perfunctory legalistic approaches, including

the mechanical application of certain social standards as universal laws and trade sanctions was questioned. Here, one sensed that there was a search for more flexible ways of implementing the clauses involving, for example, economic and technological assistance, advice, instructions and recommendations.

Held at a time of advancing globalization, the congress was convened in Asia for the first time since the Sixth Congress in 1983. A total of 286 participants attended from Asia as well as Africa, Oceania, Central and South America and the Middle East. The number balanced well the figure of 290 participants from North America and Europe, and effectively emphasized the importance of the perspective of the developing countries in discussions about industrial relations. In line with this atmosphere, Professor Luis Aparicio Valdez from Peru has been appointed president-elect of the IIRA, and will be the first president from a developing country. Mr. Tayo Fashoyin from Nigeria was elected the IIRA new secretary. The further globalization of this international academic association − which in the past has elected Westerners to its major posts − is another significant outcome of the Tokyo congress. As the second IIRA president from Asia, I feel a certain sense of achievement here.

Finally, as a Japanese participant looking back on the five-day congress, which was filled with the enthusiasm of many specialists from all over the world and their commitment to discussing the reform of labor-management relations amidst today's rapidly changing situation, I have come to feel that the approach to labor issues among Japanese researchers as a whole is somehow too restrained and lacking a sense of urgency and crisis consciousness. It is the somewhat extreme sense of urgency and crisis consciousness that is the impetus behind the strong interest in labor studies outside this country. That sense of urgency is also the source of the present vigor which continues to drive the IIRA forward.

(From next issue, a series of special editions which feature the Presidential Address and the Rapporteurs' General Reports to the IIRA World Congress will begin.)

Congress Participants' Appreciation

We are pleased to hear a lot of nice words about the 12th World Congress from around the world. Below are a few excerpts from the letters of appreciation we have so far received from the participants.

"It was the most successful, the best organized and most interesting conference, either international or in the US, that I have been to in many years."

"I thank you and all others who strove hard for the phenomenal success of the Congress. It was organized with such perfection that others will find it difficult to surpass the high standards set by the JIL."

"I thank you and your brilliant team for such a worthwhile and well-organized conference. I got such a lot out of it and was deeply impressed by the care that had gone into its planning and administration."

"From everywhere I hear praise and satisfaction. 'The Tokyo congress was the best.' That is what they say. Everything seems to have been as good as it possibly can. I have not heard anyone complain about anything. I have only heard people express satisfaction and admiration. You have given the world a splendid illustration how things can be truly well organized conference."

"Several people have already told me how much they enjoyed and how beautifully organized it was. I would not have expected anything else from you and your team! But standing ovations (which took place at the closing ceremony) are rare in the IIRA."

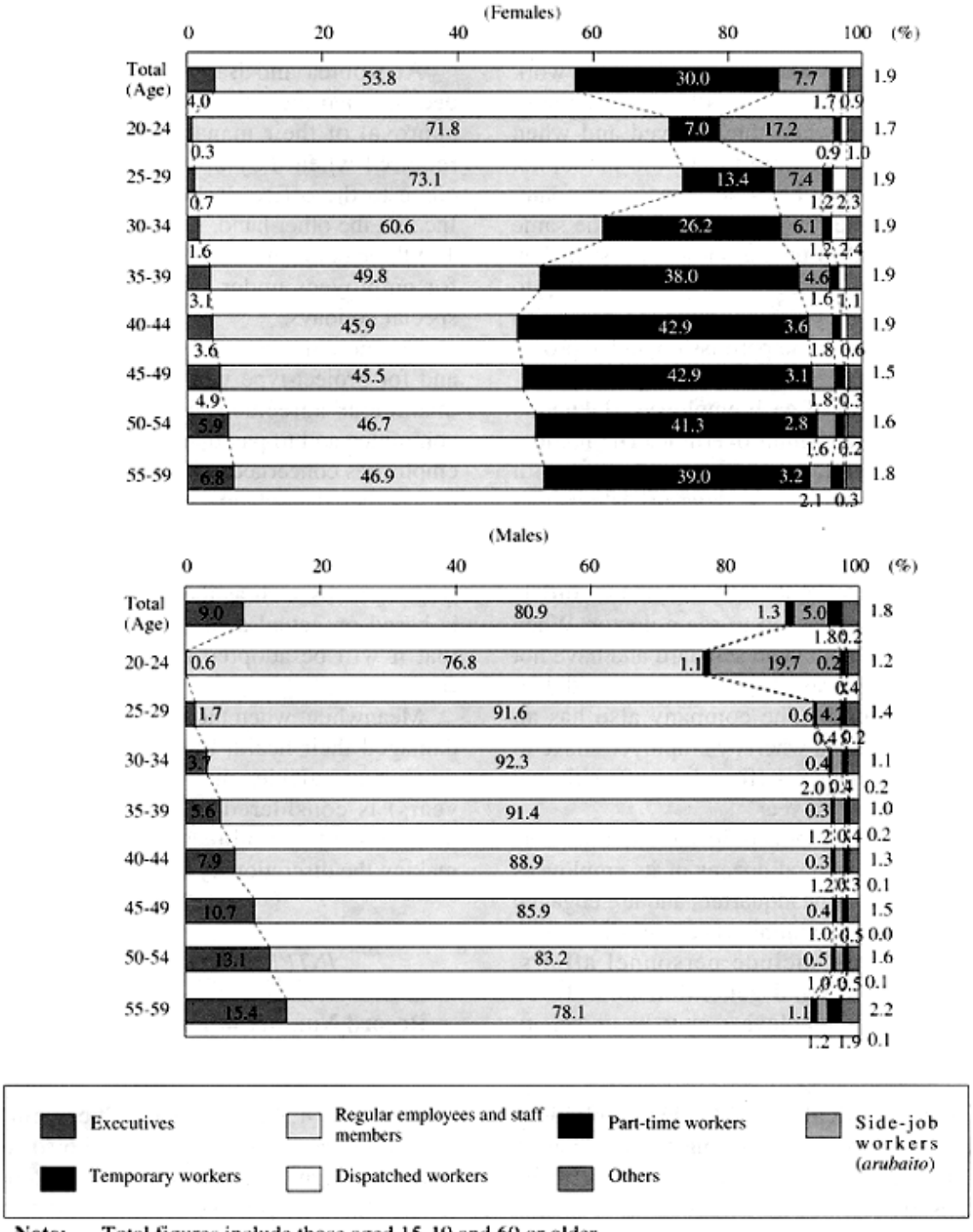
Statistical Aspects

Recent Labor Economy Indices

	May 2000	April 2000	Change from previous year
Labor force	6,831 (10 thousand)	6,786 (10 thousand)	-35 (10 thousand)
Employed	6,503	6,440	-29
Employees	5,374	5,289	32
Unemployed	328	346	-6
Unemployment rate	4.8%	5.1%	-0.1
Active opening rate	0.56	0.56	0.00
Total hours worked	148.0 (hours)	159.8 (hours)	1.5
Total wages of regular employees	(¥ thousand) 263.7	(¥ thousand) 266.4	0.6

Note: * Denotes annual percent change.
Source: Management and Coordination Agency, *Rōdōryoku Chōsa* (Labour Force Survey); Ministry of Labour, *Shokugyō Antei Gyōmu Tōkei* (Report on Employment Service), *Maitsuki Kinrō Tōkei* (Monthly Labour Survey).

Distribution of Employees by Employment Status, Gender and Age



Note: Total figures include those aged 15-19 and 60 or older.
Source: Statistics Bureau, Management and Coordination Agency, *Employment Status Survey*, 1997.