PART II

The Scope of Labor Law and the Notion of Employees

Labor Law Coverage and the Concept of 'Worker'

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1. Introduction

In almost all industrialized countries, labor laws were originally intended to protect workers in the manufacturing sector. Therefore, the prototypical person covered under labor protective laws has been a blue-collar employee. However, the transformation of the industrial structure, which has placed more importance on the service sector, combined with the growing number of white-collar employees, have made obsolete the centrality of blue-collar employees in labor protective regulations. As a result, how labor law coverage is determined and how the concept of employee is defined have become highly controversial issues.

This is also a problematic issue in Japan. First, concerning the definition of "employee," or, as stipulated in Japanese law, "worker," it should be noted that in contrast to most other countries Japanese labor law contains statutory provisions. Both individual labor relations law and collective labor relations law — the main substance of Japanese labor law — contain their own definition of "worker," and their coverage is limited only to the "worker."

In the area of individual labor relations law, Article 9 of the Labour Standards Law, the basic law in this area, prescribes that "worker" shall mean one who is employed at an enterprise or place of business and who receives wages therefrom, without regard to the type of occupation. The concept of "worker" as embodied in the LSL has been understood to be the same as that in other labor protective laws, such as the Minimum Wages Law, the Industrial Safety and Health Law, etc.

In the area of collective labor relations law, Article 3 of the Trade Union Law defines a "worker" as "one who lives by his/her wage, salary or other remuneration assimilable thereto regardless of the kind of occupation."

The purpose of the TUL is different from that of the LSL, and consequently the concept of "worker" in both laws is not the same. For example, since the purpose of the TUL is to guarantee to workers the right to organize trade unions, to bargain with their employers and to resort to industrial actions as a measure to protect their professional interest, the scope of the TUL can and should be demarcated widely, e.g. to cover the unemployed, professional baseball players, etc. But the LSL regulates the terms and conditions contained in work contracts, so that the concept of "worker" in the LSL concerns only those individuals who have already established employment relations.

2. Defining the Meaning of 'Worker'

A particularly controversial issue is whether or not an individual is a worker covered under the LSL. Once someone is deemed to be a "worker," that individual has legal protection, while, on the other hand, if a decision is rendered that the individual does not qualify as a "worker," then he/she has no rights..

To date the courts have resolved many disputes regarding various types of workers; e.g. directors who perform the same work assigned to employees, drivers who use their own trucks to transport goods a customer has consigned through a transport agency, independent contractors such as carpenters, entertainers, canvassers, workers who perform a highly specialized job like a systems engineer, teleworkers, etc. As indicated above, the terms used in Article 9 of the LSL are ambiguous, making no distinction between the concept of who is and who is not a "worker." To date, the courts have ruled on a case-by-case basis, and consequently

judgments depend on the merits of individual cases.

However, judges tend to rely on certain characteristics when determining whether someone qualifies as a "worker."

(1) Can the individual refuse, in practice, to accept the work
(2) Whether and to what extent the individual can decide when and where to work
(3) To what extent does the employer supervise and control the work
(4) Can the individual outsource the service to others
(5) Are the work rules regarding discipline applicable to the individual
(6) Which party — worker or employer — must bear expenses for materials or devices used to complete the job
(7) Does the individual receive remuneration for the accomplishment of the service, or only for the results
(8) Is income tax deducted from the salary

While the factors that are taken into account have become clear, it is by no means certain which factors take precedence, even if scholars who have analyzed case law note that factors (2) and (3) have been given more relevance.

According to prevailing academic opinion, the main characteristic of a worker covered under the LSL is the existence of a subordinate relationship with an employer. The concept of "subordination" or "dependence" is also very familiar in European Continental countries, where, as in Japan, it has been repeatedly stated that labor laws were created to protect the "subordinate" worker. Therefore, in labor protective regulations, the protection for independent work does not exist.

But even this is ambiguous. Obviously, normal employees — blue-collar or white-collar — who perform their service in a factory or office, are protected as a "worker" under labor legislation. But working styles have become greatly diversified, and accordingly so has the accompanying level of subordination. For instance, employees in a sales section are usually engaged in activity outside the office to deal with customers, rendering their work less susceptible to supervision. Moreover, employees in research departments section have usually wide discretion to undertake research, and their wages are closely related to their results and achievements. It is difficult to view these employees as being in a subordinate position vis-à-vis their employers.

In short as working styles become more diversified, the more difficult it becomes to determine whether a relationship of subordination exists between the worker and the firm which utilizes his/her labor power.

It may be true that the case-by-case approach adopted by the courts makes it possible to attain a more appropriate resolution of the litigation in question. But it is extremely difficult for both the parties to predict whether or not an individual who performs the service is deemed to be a worker under the labor laws. Hence, it may be the lack of legal stability and transparency that can cause problems. For example, an independent contractor may decide to suddenly take action against a firm with which it has a relationship, asserting that it is an employee and can claim overtime payments recognized under the LSL (Article 37). On the other hand, a worker with weaker bargaining power who is forced to adopt the form of a self-employed entity in order for the other party to evade the increased costs incurred by coverage under labor protective regulations may want the legal protection offered for those placed in a subordinate position in the process of the performance his/her job. Of course, case law stipulates that the characteristics of a "worker" should be based upon real circumstances, regardless of the name the parties give to their contract. In this sense, from the theoretical viewpoint, a so-called "fake" worker is not allowed to exist, so that any individual can enjoy the status of worker as long as he/she meets the conditions mentioned above. But, as it is impossible in advance to determine the outcome of legal action, most people do not go this route because of the possibility they may lose.

3. How to Solve This Dilemma

To come up with a suitable definition of "worker," it is necessary to clarify the criteria of a

"worker." As long as the fact-depending approach is maintained, the predictability should be sacrificed. One possible measure to avoid such problems is to adopt another approach, which permits the parties to determine definitely whether or not the contract is a contract of employment covered under the labor protective laws. If the parties concerned do not stipulate that their contract is a contract of employment but instead a contract for service/independent contract, this contract would definitely be viewed as a contract for service/independent contract. A judge could not *ex post* modify the arrangement laid out by the parties. In this way, the legal instability caused by the overall judgement of various criteria of a "worker" would be removed.

But there is a risk; the party with stronger bargaining power may compel the other to accept a contract for service/independent contract, solely to evade labor protective regulations. Therefore this approach cannot be approved easily without sound proof guarantees that the worker truly and freely entered into it.

In this regard, attention should be paid to one Supreme Court decision. Article 24 of the LSL provides that wages must be paid in full except in statutory limited cases. Case law has even stated that an employer is prohibited from offsetting the worker's wage claim against the amount of damages caused by a worker's act[1]. However, recently the Supreme Court ruled that, as opposed to a unilateral offset by an employer, an offset the worker freely agreed does not violate the full-payment principle if there exists a reasonable ground.[2] The provisions of the LSL are, in principle, mandatory, but this decision detracted from the mandatory nature of the LSL by stating that voluntary agreement by the worker takes precedent. The extent to which this ruling can be extended to cases other than those involving full payment of wages is still being debated.

In this respect, it is also important to take into consideration the information gap between the worker and the employer when acknowledging a worker's agreement. In the area of civil laws, to resolve various problems caused by the differences in bargaining power or the information gap between enterprises and consumers, a law related to consumer contracts was enacted in 2000. Although the application of this law expressly excludes a contract of employment, the problems it addresses have much in common with those found in a contract of employment in that, as the weaker party of the contract concluded with an enterprise, a worker can be compared to a consumer. That's why the provisions included in this law regarding information should be, by analogy, transferred to labor law. For example, an agreement worker gives to a deterioration in working conditions should be null and void if the enterprise provides him/her with the relevant information in advance.

In some countries, the integration of a worker into the business or the organization has been regarded as the principal factor in determining if one is an employee. Also in Japan, some academics have argue similar opinions. But it seems to me that such an approach has not succeeded in resolving the transparency or predictability problem.

Italy is probably unique in that it has tried to grapple squarely this problem. Recently, to reduce the number of conflicts in this matter, a new law introduced a "certification" procedure used to classify a "worker," (for more details, see the Italian National Report).

4. Is It Possible to Extend Labor Protective Regulations to Non-workers?

As a "gray zone" between "subordinate" workers and independent ones comes into existence, a new problem is emerging. Some of the self-employed such as independent contractors are economically dependent, but are excluded from labor law protection. For example, a teleworker's remuneration is usually low and he/she deals with a particular company. However it is unlikely that a teleworker qualifies as a "worker" under the LSL. There are a number of reasons for this. Teleworkers usually work at home; even if there is an economic compulsion, they can accept or refuse freely to conclude or continue a contract; they have discretion over how, when, and where the work is carried out; they purchase equipment such as

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[1] The *Kansai Seiki* case, Supreme Court (Nov.2, 1956)10 Minshu 1413; the *Nihon Kangyo Keizaikai* case, Supreme Court (May. 31, 1961) 15 *Minshu* 1482.

[2] The *Nisshin Seiko* case, Supreme Court (Nov. 16, 1990) 44 *Minshu* 1085.

computers at their own expense.

However, it would not be appropriate to exclude teleworkers completely 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.

From this perspective, some legal scholars say that "economic" subordination or dependence should be taken into account when classifying a person as a "worker." It may be true that the economic situation of a worker is a more appropriate indicia for assessing whether or not one needs labor protection. But how "economic" subordination is determined still remains unclear.

According to recent research I conducted, many franchisees proved to be in the midst of a harsh economic climate and working conditions were severe, even if, legally speaking, they are considered to be company owners. The owners of franchisees usually are proprietors or leaseholders of their shops and pay a license fee to their franchisers. The franchiser provides the franchisee with know-how and other information and at the same time controls the franchisee's business. Of course, the franchise owners are not employees, on the contrary they employ people. However, they run a high risk, while on the whole receiving low remuneration. Such a "high risk and low return" situation may in fact need more protection than the "low risk and low return" situation typical of normal employees. But through my research I discovered that many franchise owners prefer working without restrictions than working under paternalistic protection. Therefore, legal intervention in this case may be unnecessary, even if the working conditions are very harsh and economic situation miserable. This is an example that the needs of workers are various and complex, and the expansion of the total labor protective laws towards economic dependent and legally independent workers is not always welcomed by such workers.

Nevertheless, the coverage of labor laws needs to be expanded, even if the scope and the provisions depend on the individual and the type of worker.

The question of how to remove the inequalities offered by legal protection between a "worker" and a "non-worker" is attracting the attention of labor law scholars. In Japan, until a few years ago, this subject had been largely neglected because it was thought that a contract concluded by a non-worker should be subject to civil or commercial laws.

Now however, it is obvious that a significant number of independent contractors perform services in economically dependent conditions. Since they are non-workers, they are excluded from legal protection embodied in the LSL and other labor related laws. Certainly, even under current laws, a "non-worker" is not always excluded from legal protection. For example, the Workmen's Accident Compensation Insurance Law recognizes certain categories of the self-employed as being able to receive compensation (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. Now the methodology of legal regulations — by which legal protection is in principle reserved for someone defined as a "worker" and is extended in an exceptional way to those in a situation similar to a "worker," such as a homeworker — should be called into question.

Today a few labor law scholars assert that some provisions within existing labor legislation can and should be applied to self-employed workers. A comparative study shows that some anti-discrimination laws concerning race and sex, occupational safety and health, and protection of fundamental human rights etc. should be enacted for any type of worker, dependent or independent.

Moreover we may need to examine the possibility of expanding labor protective regulations to unpaid workers. Of course, as the definition of worker includes "wages," unpaid workers cannot be considered a worker under either the LSL or TUL. However, some provisions included in labor protective laws are intended to protect the worker against the risk caused by performing the service in a subordinate situation. Theoretically speaking, these provisions can be extended to unpaid workers, if such workers are engaged in their activity under some control of the person for whom they perform the service. In this case, the fact that unpaid workers do

not receive a wage does not matter. As far as unpaid workers are engaged in socially useful activities, it is fair that the state afford legal protection to such workers in some relevant matters.

In the future, we should theoretically analyze which sections of the existing labor laws concern “employee” status or personal or legal “subordination,” which sections can be subject to the derogation from the mandatory legal provisions through agreement between individual employees and what the requirements for the derogation are, whether some sections are related to economic dependence or economic realities and can be expanded to legally independent but economic dependent workers; and whether there is a common principle which can be expanded to every socially useful activity, including unpaid work.