

November 9, 2020

4th JILPT Tokyo Comparative Labor Policy Seminar 2020

*Labor Law Policy in the
Era of Digitalization and
New Forms of Work*

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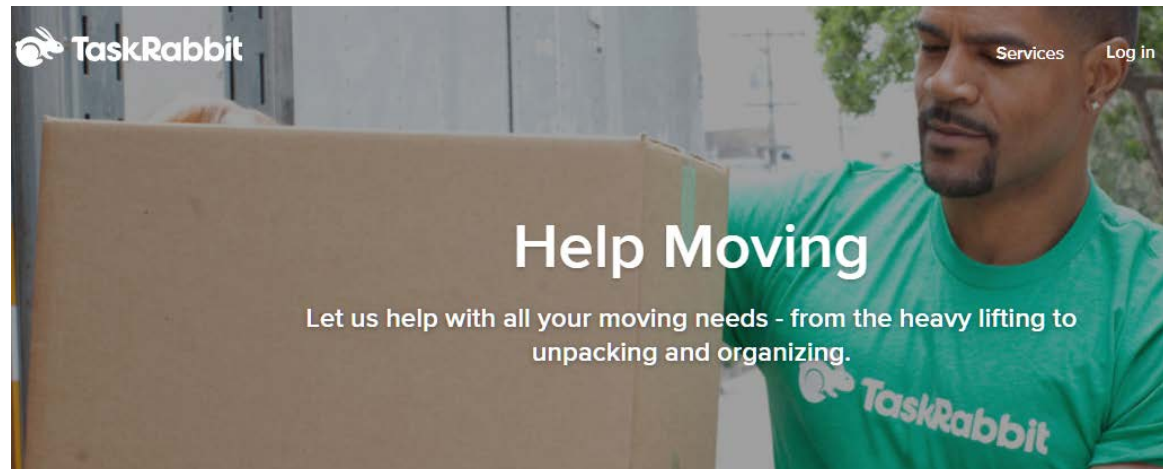
Digitalization and Platform Work



Crowdwork



Work on-demand via apps



New forms of work ⇒ Flexibility

For Employer (User): Just-in-time workforce

For Worker?



autonomy (freedom to choose when, where, and how long to work), work-life balance, additional earnings



Job insecurity, low and insecure payment, social/professional isolation, higher stress, work intensity, privacy violation, lack of worker representation and reliable dispute resolution system

Free from control and direction of time, place, manner of work ⇒ Are they “employees”?

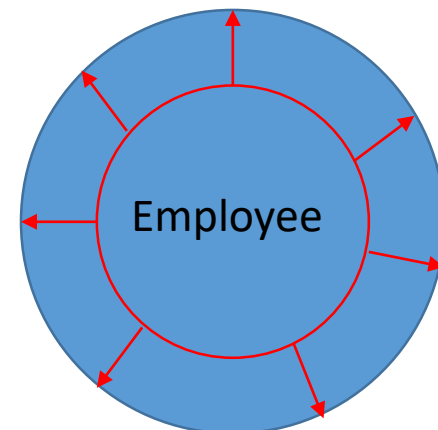
4 approaches to protect “non-employee workers”

(1) Expanding the notion of employee

- Cal. Supreme Court (Dynamex Operations West case, Apr. 30, 2018) adopted “ABC Test” → CA state law (“AB5”) took effect on Jan. 1, 2020

To establish independent contractor status, the employer must prove

- A) the individual is free from direction and control;
 - B) the service is performed outside the usual course of business of the employer; and
 - C) the individual customarily engages in an established business, trade, or profession that is independent of the employer’s business.
- But, control test, subordination test or dependency test remains the key concept in many countries



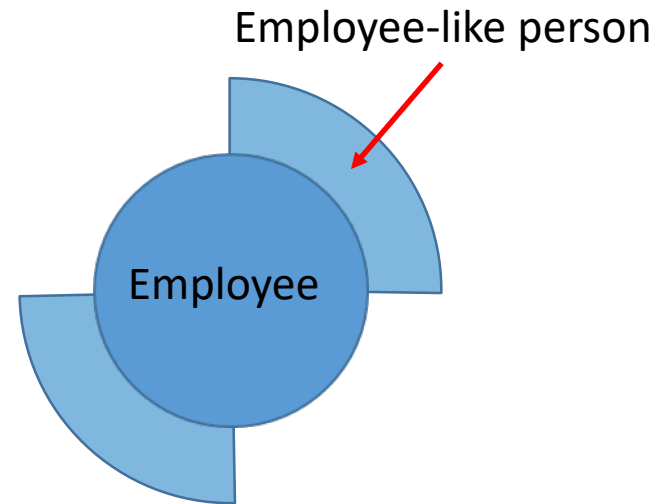
(2) Introducing an intermediate category between employee and self-employed

Germany (employee-like person [*arbeitnehmerähnliche Person*])

UK (worker whose notion is broader than employee)

Canada (dependent contractor)

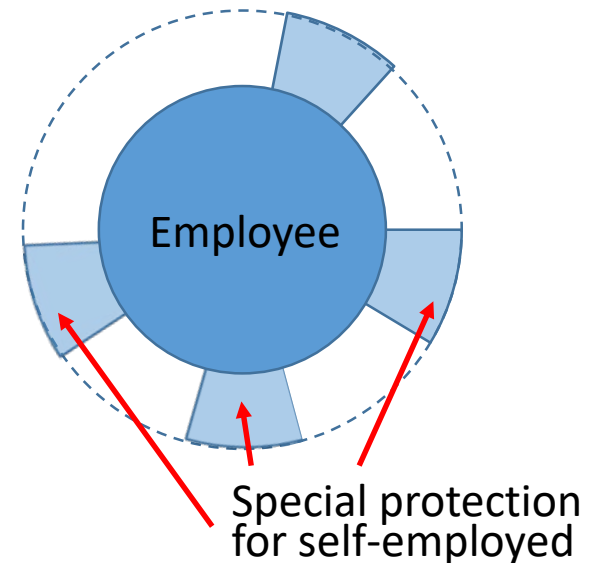
- Pros and cons



(3) Legislative measures to provide necessary (special) protection

Japanese Workers' Compensation Insurance Act: special enrolment scheme for self-employed

French "El Khomri" Law: special protection for platform independent worker (*travailleurs indépendants*)



(4) Legal protection outside the scope of labor law and non-legal measures

1) Legal protection provided by other laws than labor law

Civil law, Economic law

Japanese economic law

EU Proposed “Regulation on promoting fairness and transparency for business users of online intermediation services”

2) Eliminating possible conflict between collective labor law and economic law

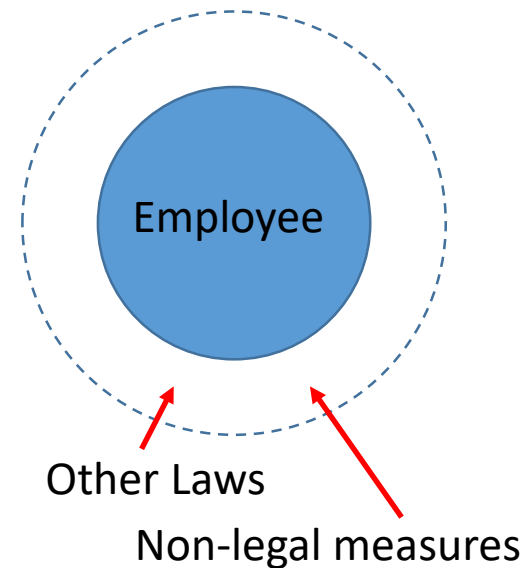
3) Utilization of soft-law and market reputation

Crowd-sourcing Code of Conduct (Germany)

Taylor Review (UK)

Turkopticon (reputation review)

(1) –(4) approaches are not mutually exclusive



Current Diversified Labor Law Regulations

Managerial exemption

White-collar exemption

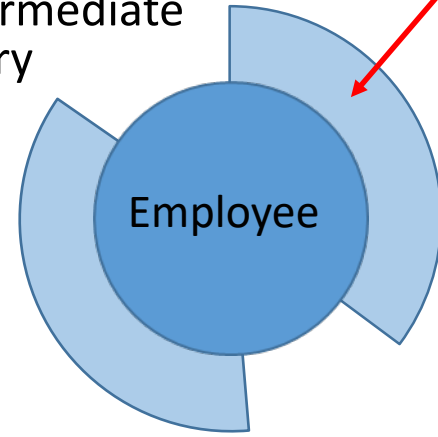
E m p l o y e e

Derogation by Collective Agreement

Resemblance?

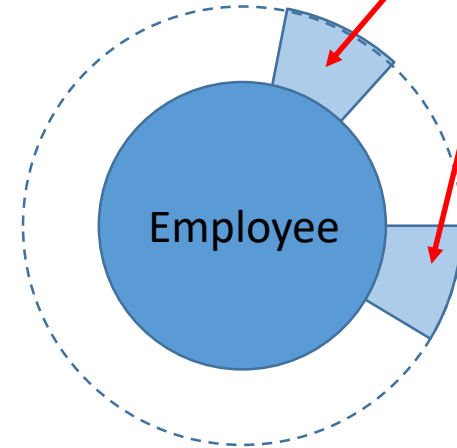
(2) Introducing an intermediate category

Employee-like person



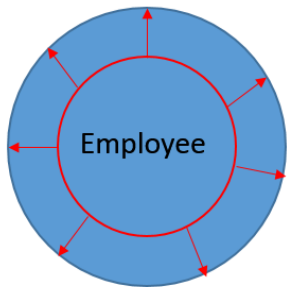
(3) Legislative measures to provide necessary (special) protection

Special protection for self-employed

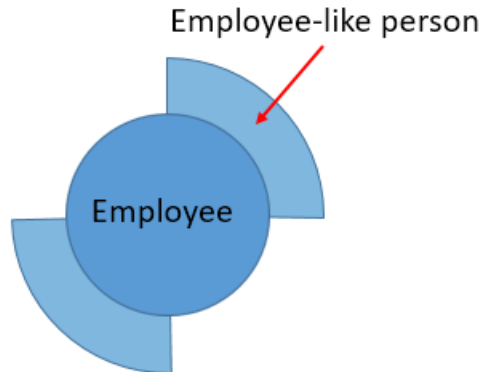


4 approaches to deal with new forms of work

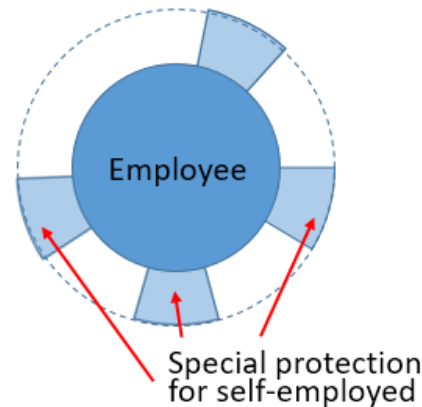
(1) Notion extension



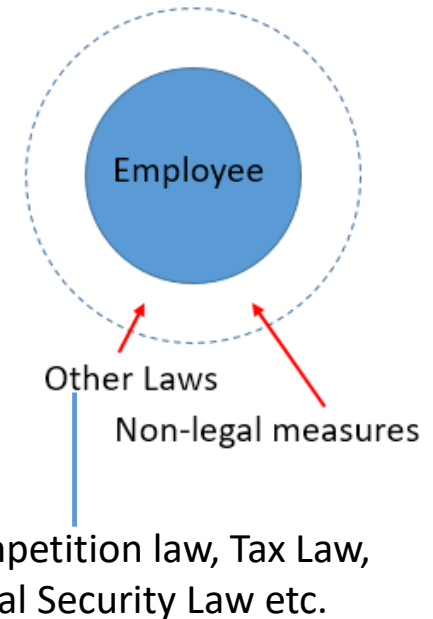
(2) Intermediate category



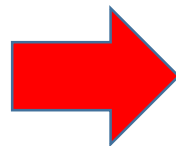
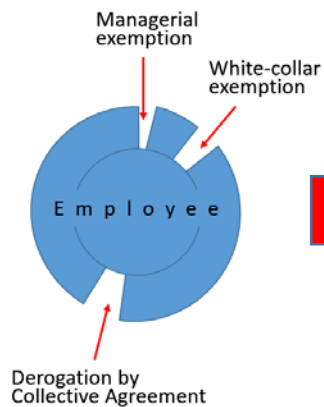
(3) Special protection



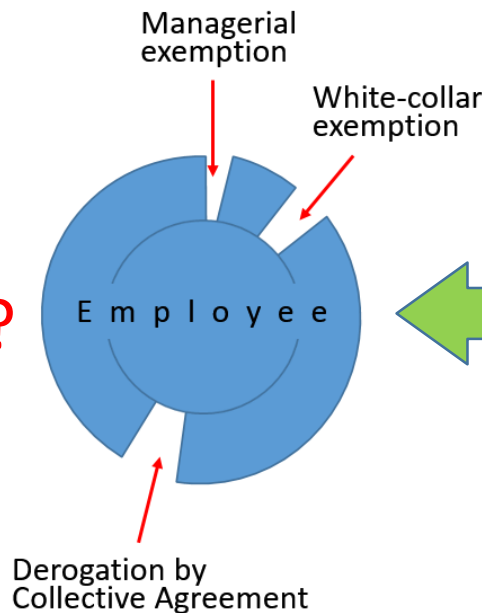
(4) Other measures than labor law



Current Labor Law



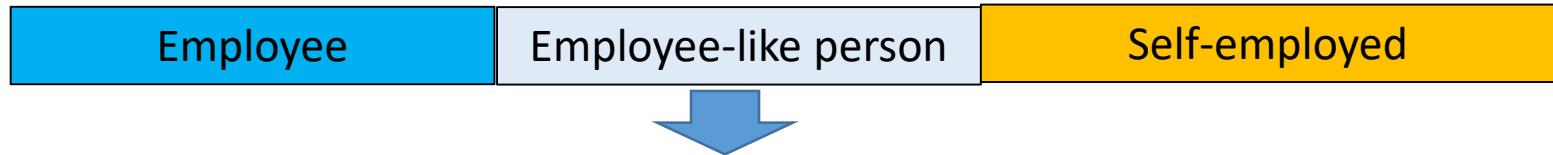
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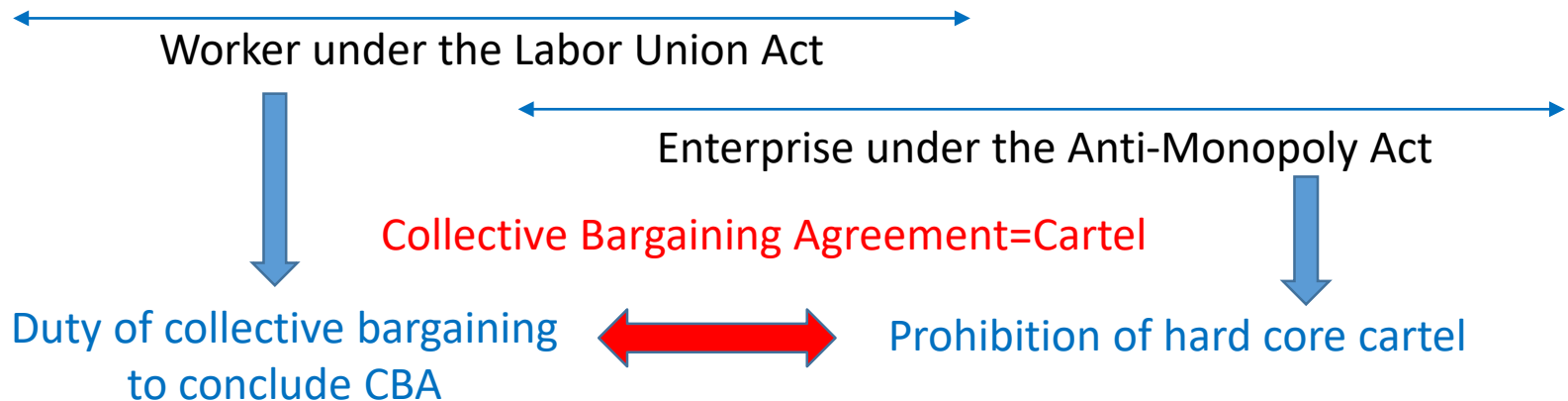
By enriching special protection

Blurred boundary between employee and self-employed

(1) Collective labor law and competition law: **Conflicting regulations need coordination**



In INAX (ceramic sanitary ware company) case in 2011, employee-like persons (“Customer Engineers” who conclude work contracts with INAX to repair toilets) organized a labor union and demanded collective bargaining with INAX. INAX refused to bargain with the union contending that CEs were not employees. Their work contracts explicitly stated that CEs are not employees but self-employed. However, considering the dependent nature of the CEs in reality, Japan’s Supreme Court recognized CEs as “workers” under the Labor Union Act, and held that INAX’s refusal to bargain collectively is illegal.

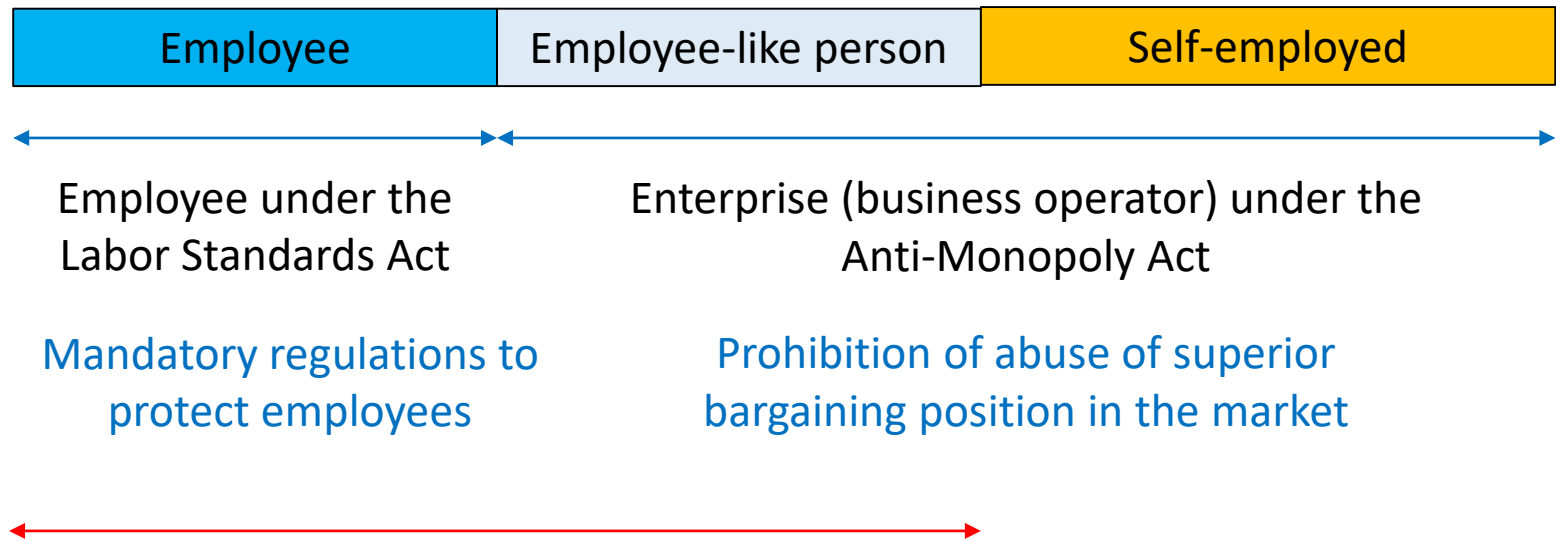


Fair Trade Commission’s 2018 report on Human Resources and Competition Policy:
As a general rule, FTC will not intervene in the areas that are regulated by labor laws.



Blurred boundary between employee and self-employed

(2) Individual Labor Law and Competition Law: Collaboration to protect weaker party



Whether to extend labor law regulations to “employee-like persons” is under discussion in the government study group in Japan

Conclusion

- To identify the needs of protection for new forms of work and employee-like persons
- To provide necessary protection by choosing appropriate measures in respective countries
- To developing adaptable Labor Law accommodating diversified workforce
- To coordinate labor policy with other related policies (economic law, social security law, tax law, etc.) and enhance the level of safety net for all who provide work individually