

This five-year series systematically outlines the basis of labor situations and analysis in Japan, covering five field topics.

▶▶ Human Resource Management

▼ Labor-Management Relations

▼ Labor Market

▼ Labor Administration and Legislation

▼ Social Security System

Termination of Employment Relationships in Japan (Part III):

Mandatory Retirement Age System

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In the final article on the topic of termination of employment relationships in Japan, we discuss the mandatory retirement age system.*

I. The history and significance of the mandatory retirement age system

Behind the background to the creation of the mandatory retirement age system, there was consideration that work performance might decline with age. When economic society increasingly industrialized and secondary industry took a central role in society, it became necessary for companies to maintain the quality of their labor force in order to bring high-quality products to market consistently. Apparently, consideration was also given to the increased risk involved in ensuring the safety of employees as they got older. Companies therefore sought to maintain the composition of their internal labor force. They replenished their supply of young personnel while also establishing a mandatory retirement age system to ensure that employees who have reached a certain age leave employment.

Factors with particularly strong influence on the widespread adoption of mandatory retirement age systems were economic recession and natural disaster—namely, the recession after the *Taisho* bubble economy brought by World War I, the Great Depression in 1929, and the recession after World War II as well as the Great Kanto Earthquake in 1923. As these events dealt a blow to the markets, companies were forced to take measures to reduce their surplus personnel. Amid the social conditions in the postwar period, companies are thought to have adopted the mandatory retirement age system,

supported by labor union struggles against dismissals, and also responding to protective labor legislation.

The mandatory retirement age system is still used with the purpose of optimizing the composition of internal labor force as described above, ensuring companies stable workforce, while providing employees with employment security. From the perspective of typical Japanese employment practices, mandatory retirement age systems are company systems that support long-term employment. Moreover, as companies have adopted the practice of seniority-based wage system over the years, they have also maintained the mandatory retirement age system as a means of addressing potential increases in personnel expenses. Nowadays, as factors such as the decline in the working population and changes in its age composition have necessitated raising the age from which pensions are paid, labor policies have been set out to ensure the establishment of legal provisions that prescribe possible mandatory retirement ages and measures for extending the mandatory retirement age or offering alternatives.



II. The legal treatment and actual state of the mandatory retirement age

Article 8 of the current Act on Stabilization of Employment of Elderly Persons (ASEEP) prescribes that employers must not set the mandatory retirement age below 60 years of age. This provision is also interpreted as a mandatory rule under private

law, so that a mandatory retirement age under 60 is considered null and void (in such cases, it is considered that no mandatory retirement age has been stipulated).

Moreover, under Article 9 of said Act, employers who fix a mandatory retirement age of under 65 are obliged to take measures to secure stable employment for employees until 65. More specifically, there are three measures:

- (i) Raising the mandatory retirement age
- (ii) Introducing a continued employment system
- (iii) Abolishing the mandatory retirement age

These measures are obligations under public law and are not considered mandatory under private law,¹ but there have also been strong claims that they can be interpreted as mandatory rules under private law.

Despite such conflict in the theory, employers who do not take such measures in any way may be liable for damages on the basis that their behavior was illegal. In the case of above-mentioned measure (ii), current law specifies that continued employment must be offered to all employees, and employers are not permitted to screen those who opt for it.² It is also prescribed that for employers that have an affiliated company, continued employment at such an affiliated company also falls under such a continued employment system as set out in measure (ii).

Drawing on the Ministry of Health, Labour and Welfare's report on the "Status of Employment of Elderly Persons in 2017" to look at the introduction of measures for securing employment until 65 years of age, we can see that 99.7% of companies with 31 or more employees (approx. 156,000 companies) had already introduced measures for employment

security as of June 1, 2017. As for the employment security measures introduced, the breakdown was, in the descending order, (ii) 80.3%, (i) 17.1%, and (iii) 2.6%.

In the case of the most commonly adopted measure—namely, continued employment systems—70.0% of companies had introduced a system of continued employment to age 65 and above for all those who opt for it, while 30.0% of companies had introduced a system of continued employment to age 65 and above for employees who meet certain criteria.³ In 94.1% of companies, continued employment is only within the same company, while in 5.9% of companies continued employment can be offered at an affiliated company.

As for companies with advanced efforts, 75.6% of companies offer employment until age 65 or above to all those who opt for it, and moreover, 22.6% of companies offer employment to age 70 or above.

III. The legal nature of the mandatory retirement age system and recent form of disputes

The mandatory retirement age system prescribes retirement upon reaching a certain age and does not preclude the termination of an employment contract midway through the contract term. It is not a provision determining the duration of employment. It is therefore considered as a special agreement prescribing grounds for terminating an employment contract relationship. Because the mandatory retirement age system terminates an employment contract relationship on the basis of age, its legality has been the topic of debate over the years. Among the theories, some argue that the mandatory

1. Under Article 10 of the Act, it is prescribed that where employers violate the provision, public administration will respond with guidance, advice, or recommendations and publication of failure to follow the recommendations.

2. A continued employment system refers to a system of continuing to employ an elderly person currently employed after the mandatory retirement age, if said elderly person wishes to be employed. This consists of re-employment system and employment extended system.

3. Moreover, the continued employment system prior to the 2012 amendment to the Act, which restricted those to whom it applied by setting certain criteria and setting a certain age of 61 years of age or above in connection with the incremental raise in the pensionable age from which pension payment starts, has been legally permitted as an interim measure on condition of the conclusion of a labor-management agreement specifying criteria for selecting those to whom the system applies, as prescribed prior to the amendment of the Act [2012 Amendment to the Act, Supplementary Provisions, Paragraph 3]. When determining the criteria, companies need to ensure that factors such as motivation and ability can be measured concretely as far as possible, necessary ability is defined in objective terms, and it is possible to anticipate the possibility of fulfilling the criteria. [Promulgation by the Director-General of the Employment Security Bureau, No. 1104001, November 4, 2004].

retirement age has no legal rationality, goes against the principle of employment security, and violates public policy (Civil Code, Article 90), making it null and void. However, Japan's long-term employment system is centered on the practice of seniority-based positions and wages, and the mandatory retirement age system is generally considered to be reasonable, given its capacity to provide employment security up until a certain age and allow for internal labor force reshuffles. Court rulings have also judged the mandatory retirement age system to be valid (The *RF Radio Nippon* case, Tokyo High Court [Aug. 8, 1996] 701 *Rohan* 12).

In recent years, legal disputes have arisen regarding continued employment or re-employment described above.

In the *Tsuda Electric Meters* case (Supreme Court, First Petty Bench [Nov. 29, 2012] 1064 *Rohan* 13), an employee past mandatory retirement age, who fulfilled the criteria for the continued employment system as defined prior to the amendment to the Act, was notified of the termination of contract on the basis of the expiry of his one-year contract period as a temporary contract employee (*shokutaku*). In response, said employee asserted his right to remain in employment beyond that point. Citing the *Toshiba Yanagi-cho Factory* case (Supreme Court [Jul. 22, 1974] 28 *Minshu* 927) and the *Hitachi Medico Co.* case, (Supreme Court, [Dec. 4, 1986] 486 *Rohan* 6), the Supreme Court applied the "refusal to renew a fixed-term contract" theory (see Part II in this series), judging it reasonable to consider that an employment relationship equivalent to re-employment continued to exist. Under the amended ASEEP, the continued employment measures apply to all employees who opt for them. It is permitted to set certain criteria regarding the employees to whom the system applies under the Act prior to amendment. Considering the distinctive characteristics of the case, however, the employee could be said to have significant reasonable expectations to be allowed to continue employment. It is understood, therefore, that the court chose to relieve the employee by applying the "refusal to renew a fixed-term contract" theory.

In the *Toyota Motor* case (Nagoya High Court

[Sept. 28, 2016] 1146 *Rohan* 22), the court accepted the employee's claim for the payment of damages on the basis of illegal act (tort) by the employer. In this incident, the commonly-accepted view was that offering labor conditions for re-employment that are markedly lower in comparison with the prior employment is a violation of the objectives of ASEEP (in effect, as the wage level was such that it guaranteed approximately 85% of the pension payment, it was deemed not to be a violation of the objectives of the Act). In addition, although in the case of re-employment it is permitted to provide work duties that differ from those pursued prior to mandatory retirement, in the event that the work is of a different nature, such as work that entails a completely different type of duties, the employment is effectively considered to be regular dismissal and new hiring, lacking substance as continued employment. The judgment ruled that providing such different work duties is not permitted unless there are grounds for justifying regular dismissal, such as lack of competence in the prior job type. (In this case, the employee had previously been engaged in a clerical work but was offered cleaning work on re-employment.) Ultimately, the court approved the payment of damages (more specifically, "consolation money" [*isharyō*]) to the plaintiff employee to the sum of the amount that he would have received if he had been re-employed for one year as a part-time employee. It was judged on the basis that the work offered at the point of re-employment did not qualify as an opportunity for continued employment, and was a clearly illegal act against the gist of the objectives of ASEEP, meaning that it constituted both a failure to meet the obligations of the employment contract and illegal act. This case, and its effectively narrow interpretation of the objectives of continued employment under ASEEP, may influence the actual practices adopted by companies in the future.

As shown above, the interpretation of ASEEP may provide various legal relief measures for elderly employees. Although Japan has not introduced an act on the prohibition of age-based discrimination, it can still be suggested that efforts are being made to secure employment opportunities for elderly

people, in response to factors such as the changes in the size and makeup of the working population and pension policies. If typical Japanese employment practices are to change in the future, Japan's system of employment and labor law and the various interpretations of the laws and theories of legal principles—including the state of the mandatory retirement age system and ASEEP—will also be forced to adapt to those changes.

* This is a series of three articles on the topic of the termination of employment relationships in Japan. Part I (April-May issue, vol.2, no.6) looks at resignation and termination of employment

contracts by mutual consent. Part II (June-July issue vol.2, no.7) covers dismissal and refusal to renew a fixed-term contract.

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