

Report

Japanese Policy regarding Employment-like Working Styles

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Currently, the most pressing labor issue worldwide is new forms of employment that have appeared with the Fourth Industrial Revolution, and buzzwords such as sharing economy, platform work, and crowd work are on people's lips everywhere. A key feature of these developments is that they are progressing simultaneously in the United States and European Union as well as Asian countries such as Japan, China and South Korea so far. The Japan Institute for Labour Policy and Training (JILPT) holds an annual Japan-China-Korea labor forum, and at the conference held in Qingdao, China in November 2018, Chinese participants led a discussion on *New Forms of Employment* in which current status and measures in the three countries were debated. It was noted that such new business models are rapidly developing especially in China, where conventional industry regulations are not strong. The 17th EU-Japan Symposium organized by the Ministry of Health, Labour and Welfare (MHLW) and the European Commission, which was held in Brussels on July 4, 2018, also focused on the theme of *New Forms of Employment*, and strong interest on the part of the EU (European Union) is evident as well.

Globally speaking, the EU is one step ahead in terms of survey and research, and policy measures of this area. A report titled *New Forms of Employment*, published in 2015 by the European Foundation for the Improvement of Living and Working Conditions (Eurofound), a labor policy research institute in the EU, clarified a variety of work forms among both employees and non-employees in twenty-eight EU countries, igniting policy measures at the EU level.

Also, in Germany, a debate known as “Arbeiten 4.0 (Work 4.0)” is underway about changes in employment and society caused by the Fourth Industrial Revolution, and new labor law policies to cope with them.

In contrast, China was originally a nation of the socialist economy and regulations on the market economy are limited, putting the country in a position to promote the sharing economy and the platform economy proactively across the board. Concerning ride-sharing platforms, which have frequently led to lawsuits in Western countries on the employee or non-employee status of drivers, China has released a notification stating that conditions would be governed by contract agreements between the involved parties. It is interesting that countries that have always had a capitalist system tend to tighten regulations on labor markets, while China, which shifted from a socialist to a capitalist economy only about one generation ago, is more cautious about regulating and controlling markets.

Under such circumstances, Japan has also begun pursuing policy measures to these issues. A turning point came with the Action Plan for the Realization of Work Style Reform, which was approved at the Prime Minister's Office in March 2017. Under the title “Promotion of Flexible Work Styles,” the plan calls for promotion of employment-type telework, non-employment type telework, side jobs and multiple jobs. With regard to non-employment type telework in particular, the plan points out that there is ongoing rapid expansion of crowdsourcing, job introduction service through the Internet, and that workers are facing various troubles with ordering

parties or intermediate agents such as unilateral changes in job contents or overwork associated with them, unreasonably low remuneration or delayed payment thereof, unauthorized diversion of copyrighted works temporarily delivered during the proposal process. The plan states, “Considering work styles, which are like employment, such as non-employment-type telework are more increasing, we will grasp the present situation and discuss necessity of legal protection as a mid-term or long-term agenda, establishing a conference consisting of intellectuals.”

In response to this, the MHLW convened the Discussion Committee on Flexible Working Styles in October 2017, summarized its discussions in a report in December of the same year, and formulated the *Guidelines for the proper implementation of self-employed type teleworking*. These guidelines define an “intermediary or agent” as (i) a party that is entrusted work by other parties, and submits orders for the work to self-employed type teleworkers as a business activity, (ii) a party that mediates between self-employed type teleworkers and ordering parties and arranges teleworking as a business activity, and/or (iii) a party that operates a service enabling ordering parties and contractors to directly place and accept work orders via the Internet (“crowdsourcing”) as a business activity. In addition to the preparation and preservation of documents clearly specifying contract terms, the guidelines call for clear specification in advance of the contents of the work offer and any relevant matters to be noted at that time in detail. In the case of crowd work, there is a so-called competition-type model in which a proposal is selected from among multiple submitted proposals and remuneration is paid. The guidelines thus call for clearly stating that this model is being employed, prohibit disclosing or using intellectual property pertaining to non-adopted proposals without the consent of the party submitting the proposal, and state that it is not desirable to instruct the applicant submitting the adopted proposal to make significant changes to the work ordered after delivery.

The most notable among these guidelines is a new clause, “Termination of Contracts.” Assuming

that the “abuse of the right to dismiss” theory does not apply because the self-employed type teleworker is not an employee, the clause states that “if the ordering party cancels the contract for its own reasons without the other party’s breach of contract, etc., the ordering party must compensate the self-employed type teleworker for damages caused by the cancellation of the contract,” and that “when an ordering party that is in a continuous business relationship wishes to terminate an order to a self-employed type teleworker, the ordering party must promptly give notice to that effect and cite the reason thereof.”

However, these guidelines are only an administrative notification, and have no legal effects. If employment-like working styles account for a large proportion of the workforce in the future, to “discuss necessity of legal protection as a mid-term or long-term agenda” as called for in the action plan will become more important. In this sense, the guidelines are no more than a stepping stone on the way to true legal protection.

In parallel to this, the MHLW convened the Meeting on Employment-like Working Styles in October 2017, holding interviews with related parties and organizations to obtain a picture of the actual situation in Japan and other countries, with a report summarizing the findings issued in March 2018. This report was presented to the Committee on Basic Labour Policy of the Labour Policy Council (an advisory panel to the MHLW) in April 2018, followed by interviews and discussions in the committee, and in September of the same year the committee issued a report entitled *Addressing Evolving Working Styles in an Evolving Era*. The following October the Meeting on Points of Controversy with Regard to Employment-like Working Styles was established, and is engaged in deliberations.

The Committee’s report says that various approaches can be conceived concerning employment-like working styles, including (i) ways of proactively extending protection through broader interpretation of the scope of worker status in individual cases, (ii) ways of redefining (extending)

the concept of workers under the Labor Standards Act, and (iii) ways of preparing systems to extend and provide protection under labor-related laws and ordinances to those in employment-like working styles. Let us examine a bit on some of the options suggested in this report.

First is (i) extended current interpretation of worker status under the Labor Standards Act. This will take the form of extension of Labor Standards Act protection to the extent that worker status is recognized under the current Labor Union Act. In this case, worker status under Japan's labor protection laws is basically interpreted as a uniform concept, so it would be recognized in all areas including worker's work-related accident insurance, working hours regulations, minimum wage regulations and dismissal regulations. However, there may be questions as to whether such regulations can be permitted through "interpretations" of laws such as Labor Standards Act. In the first place, even if administrative bodies have altered "interpretations" unilaterally, it is the judiciary that has the authority to interpret the law ultimately, and there is no guarantee that the courts will easily accept the new administrative interpretation.

The next option, then, is (ii) extension through redefinition of the concept of a worker under the Labor Standards Act. A clear legislative amendment would probably take the form of defining workers under labor protection laws such as Labor Standards Act with, for example, the same standards governing workers in the current Labor Union Act. In this case, too, because uniformity of the worker concept is maintained, the scope of "workers" under labor protection law remains constant.

However, there is bound to be hesitancy about extending entire regulations from which quite a few

employed workers should be exempted under certain conditions, such as working hours restrictions, to new forms of employment in principle. There is also the question of whether to apply existing worker protection equally, without any distinction as to what problems affect people in engaged in new forms of work, and what kinds of protection are required. Therefore, the option emerges of (iii) applying provisions of individual labor laws as needed, on the premise that those protected are not deemed workers under the Labor Standards Act. Specific contents of protection that can be envisioned include: clear indication of working conditions, advance notice of termination, minimum remuneration, guaranteed payment of remuneration, health and safety, freedom from harassment, work-related accident insurance, employment insurance, agency business regulation, an individual dispute resolution system and so forth.

Extended application of each item of laws to a broader scope of workers would be carried out by revising each labor law, but another possible approach is consolidating these and (vi) legislative introduction of a new worker concept to which only worker protection in specific fields is applied. In fact, current Industrial Homework Act defines certain individual contract workers who are not covered by the Labor Standards Act as "homeworkers" and prescribes special protection such as health, safety, and minimum piece rate. In this sense, this option can be considered a legislative proposal that would extend the scope of application of Industrial Homework Act, currently limited to the manufacturing and processing of goods, to platform workers and so forth, and radically restructure the law with emphasis on protection under the labor contract law.

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