

# Legal Issues Surrounding Employment-like Working Styles: Disguised Employment and Dependent Self-employment

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Employment-like working styles have been adopted in various fields for some time. Recent trend such as the progress of corporate outsourcing, the digital economy, and artificial intelligence (AI) has prompted growing expectations for persons in such working styles to play a key role in driving Japan's economy. This blurs the line between workers and the self-employed, but at the same time highlights the discrepancies between them in terms of the protection that they receive. While workers enjoy legal protection regarding working hours, wages, dismissal, occupational safety and health, and compensation for work-related injury, the self-employed receive no such protection except for homeworkers. This paper draws on recent results from fact-finding surveys and stances adopted by the ILO and in various countries with the aim to investigate the fundamental approaches toward protection for persons who work mainly personally conducting tasks that have been entrusted to them by a company for remuneration, under a service contract that is not an employment or labor contract. More specifically, it is intended to examine two problems of disguised employment and dependent self-employment, defining the working situations and issues faced by persons in employment-like working styles. Regarding the issues of disguised employment, it discusses potential means of preventing employers from evading the application of labor laws and regulations by using legal form other than labor contract; regarding those of dependent self-employment, it addresses the necessity of protection, its scope of eligibility, related policies, and contents of protection.

- I. Overview of the issues
- II. Types of persons in employment-like working styles and their working situations
- III. Disguised employment
- IV. Dependent self-employment
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## I. Overview of the issues

Employment-like working styles have been adopted in various fields for some time. Recent trend such as the progress of corporate outsourcing, the digital economy, and artificial intelligence (AI), has prompted an increase in the number of persons adopting such working styles and growing expectations for such persons to play a key role in driving Japan's economy.<sup>1</sup> This blurs the line between workers and the self-employed, but at the same time highlights the discrepancies between them in terms of the protection that they receive.

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While workers<sup>2</sup> enjoy legal protection regarding working hours, wages, dismissal, occupational safety and health, and compensation for work-related injury, the self-employed receive no such protection except for homeworkers. The unreasonable disparities between the measures for workers and those for the self-employed need to be eradicated as far as possible in order to protect a greater number of persons from the potential disadvantages of choosing an employment-like working styles.

While issues concerning employment-like working styles have been a topic for discussion in Japan for some time,<sup>3</sup> earnest debate first began once the government addressed the situation of non-employment type teleworking and other such employment-like working styles and listed investigating the necessity of legal protection as a mid-to-long term target in its “Action Plan for the Realization of Work Style Reform” in March 2017. The Ministry of Health, Labour and Welfare (MHLW) responded in October 2017 by convening the Meeting on Employment-Like Working Styles, which compiled a report in March 2018—referred to here as the “Employment-Like Working Styles Meeting Report”—clarifying and analyzing the state of employment-like working styles and defining the relevant issues.

In light of said report, the Committee on Basic Labour Policy of the Labour Policy Council (an advisory panel to the MHLW) produced a report in September 2018 stating that “due to the growing adoption of employment-like working styles, labor administration must address the measures to cover a broader range of diverse working persons, rather than focusing exclusively on the conventional definition of workers under the Labor Standards Act, it is important to take into account the diverse nature of employment-like working styles by considering points such as the issues that require administrative intervention, the causes behind such issues, the necessary scope of eligibility for protection, the differences by industry or job type, and the backgrounds and causes behind the growth in such working styles.” The MHLW has since established the Meeting on Points of Controversy with regard to Employment-Like Working Styles, which published a preliminary review of its findings—referred to here as the “Interim Report”—in June 2019, and resumed its deliberations last autumn.

The stance of the International Labour Office (ILO) suggests that the legal issues of employment-like working styles can be divided into two types: disguised employment and dependent self-employment. Firstly, disguised employment refers to cases in which work is conducted under a service contract or other such civil agreement in order to ensure that the person conducting the work is not classed as a “worker” and therefore unable to receive the protection of labor laws or insurance (“labor laws, etc.”) that they should be entitled to. In other words, it is an employment arrangement disguised as a civil law relationship by using a legal form other than a labor contract in order to evade the obligation to protect a worker. Secondly, dependent self-employment is used to describe cases in which persons are classed as self-employed—and thus do not benefit from the protection of labor laws, etc.—but are in some way subordinate to and dependent on the ordering party (referred to here as the “client”) in the work arrangement and therefore lack protection to ensure appropriate remuneration and working conditions, as well as compensation for employment injury or other such social security.<sup>4</sup>

This paper draws on recent results from fact-finding surveys and the stances of the ILO and in various countries to investigate the fundamental approaches toward protection for persons in employment-like working styles. The following sections will define the types and employment situations of persons in employment-like working styles, and use this as a basis to address the problems of disguised employment and dependent self-employment and the respective approaches to these issues—namely, considering potential means of preventing employers from evading the application of labor laws, etc., by using legal forms other than labor contracts, and addressing the necessity of protection, its scope of eligibility, related policies, and contents of protection.

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## II. Types of persons in employment-like working styles and their working situations

### 1. Definitions and types

There is no clear definition of persons in employment-like working styles. While there are various terms in Japan for such working styles—such as “freelance workers,” “independent contractor” (*kojin ukeoi jūjisha*) or “outsourcing workers” (*itakugata shūgyōsha*; lit. persons who are entrusted with work by a client)—these generally all refer to persons who work mainly personally, conducting tasks that have been entrusted to them by a company for remuneration, under contracts for the provision of services (“outsourcing contracts”) that are not employment or labor contracts (“labor contracts, etc.”).<sup>5</sup> That is to say, the fundamental factors that constitute an employment-like working style are that work is conducted (i) under a contract other than a labor contract, etc., (ii) on request from a company, (iii) for remuneration, and (iv) mainly personally. This definition therefore excludes retailers who directly provide consumers with products or services, business operators who employ multiple full-time workers, and volunteers who provide services without remuneration.

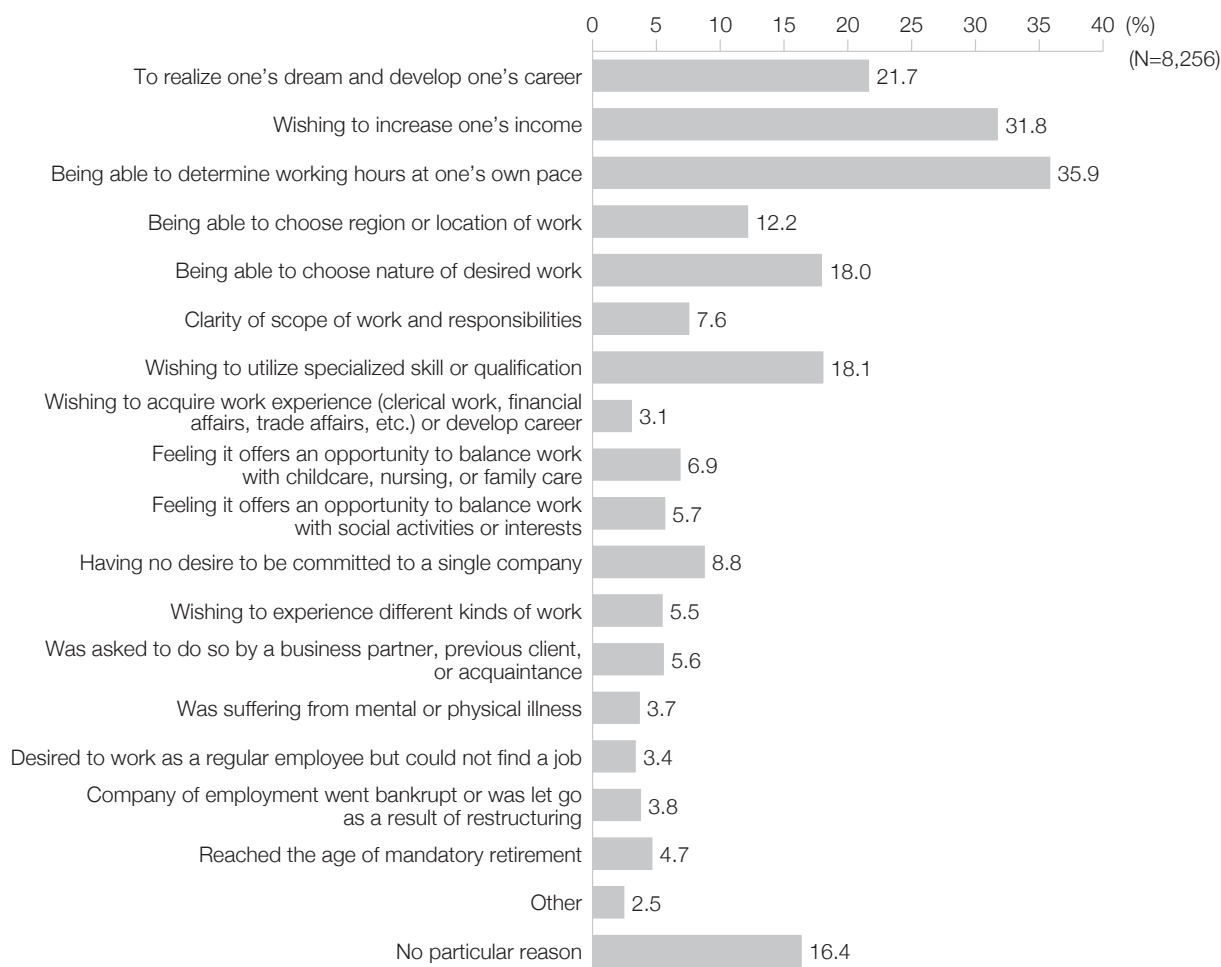
While the foremost characteristic of employment-like working styles is their diversity, it is possible to divide them into several categories based on their respective features. In my related research, I have adopted the following broad classifications: (i) “type of specialist,” covering persons who have a certain amount of freedom in how to pursue their tasks, such as carpenters and other such persons engaged in construction-related work, or actors, musicians and other such performers, (ii) “type of semi-self-employment,” covering persons who bear the costs for the equipment or other such expenses necessary in pursuing their work, such as drivers using their own vehicles or bread producers and sellers, (iii) “type of outsourcing work,” covering persons who have a certain amount of freedom to determine when or where they work but receive instructions on work content from the client, such as NHK subscription fee collectors or those who engage in product maintenance, (iv) “type of franchising,” covering franchisees such as convenience storeowners, i.e. franchised retail store owner (v) “non-employment type telework,” covering persons who work at home and other such freelance workers such as media-related writers or journalists, and (iv) “type of crowd work,” covering persons working for themselves who secure their work through online platforms.<sup>6</sup> This is by no means an exhaustive list of the types of employment-like working styles, and these categories may also encompass persons who can be classed as employees in light of their actual working situation.

A number of surveys have been conducted on the employment situations of persons in employment-like working styles.<sup>7</sup> Recent examples include the “Survey on the Actual Conditions of Outsourcing Workers,” (the “Survey of Outsourcing Workers”) conducted in December 2015 by a research team in which I was involved,<sup>8</sup> JTUC-Rengo and RENGO-RIALS joint survey conducted in May 2017, entitled “The Diversification of Working Styles and Legal Protection: A Report on Survey Research on the Current Situation and Challenges of ‘Ambiguous Employment Relations’” (the “RENGO-RIALS Report”),<sup>9</sup> and the “Survey on the Employment Situation and Attitudes of Independent Self-Employed Workers (Advance Report),” an online survey conducted in December 2017 by the Japan Institute for Labour Policy and Training (the “JILPT survey”).<sup>10</sup> Reports from research groups based on recent fact-finding surveys also include the Ministry of Economy, Trade and Industry’s “Report of the Working Group on ‘New Working Styles Not Bound by Employment Contracts’” (2017) and the Japan Fair Trade Commission’s “Report of the Study Group on Human Resources and Competition Policy” (2018).

### 2. Employment situations and issues

As a detailed description would be too lengthy, this section focuses on a basic outline of the employment situations of persons in employment-like working styles.

While various surveys have been conducted on the numbers of persons in employment-like working styles, there are significant disparities in the estimated figures, due to differences in the way in which survey subjects are defined. According to the Interim Report of the MHLW’s Meeting on Points of Controversy with

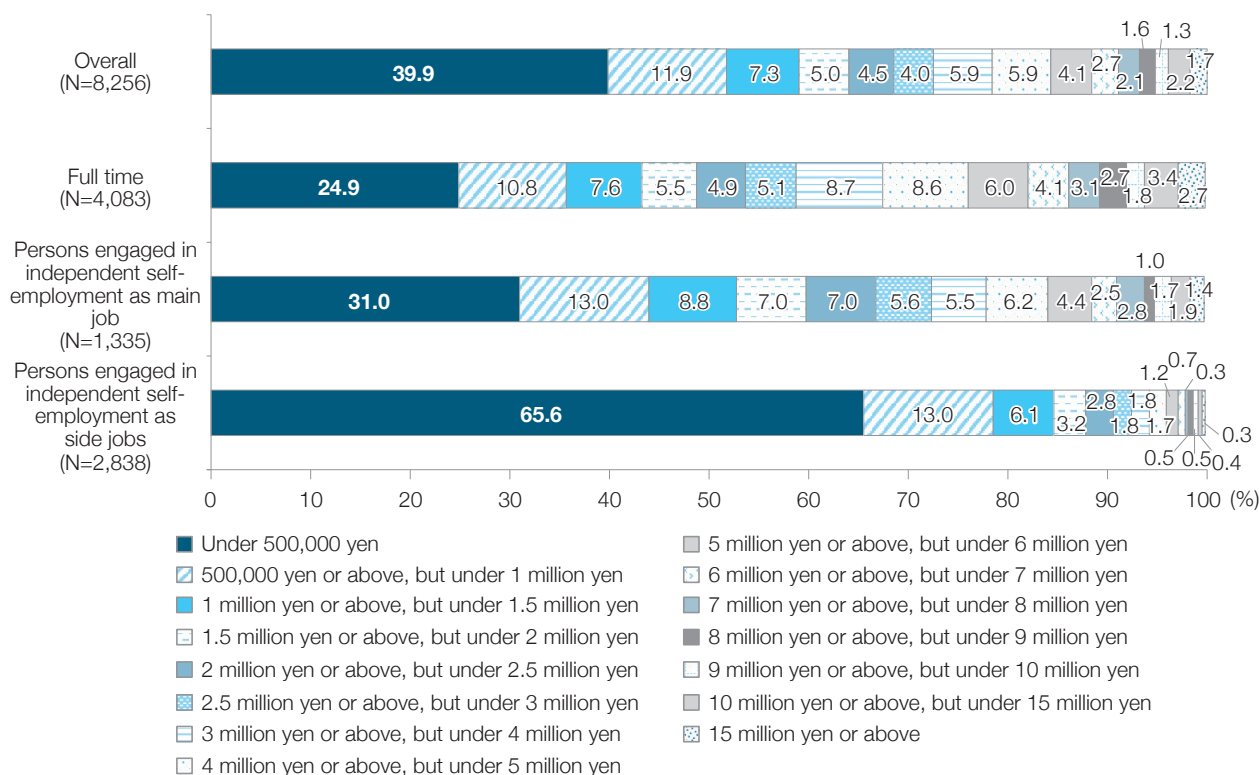


Source: Prepared by the Employment Environment and Equal Employment Bureau of MHLW, based on JILPT, "Survey on the Employment Situation and Attitudes of Independent Self-Employed Workers 2017 (Online Survey)".

Figure 1. Reason for becoming an independent self-employed worker (multiple responses)

regard to Employment-like Working Styles, the overall number of "persons who work mainly personally to provide services requested by a client and receive remuneration for those services" is estimated approximately 2.28 million persons (of whom around 1.69 million persons do so as their main occupation, and around 590,000 persons do so as a side job). It is also estimated that of those around 2.28 million persons, around 1.7 million persons "mainly work with enterprises as their direct clients" (with around 1.3 million persons doing so as their main occupation, and around 400,000 persons as a side job, Interim Report, p.3). These 1.7 million persons are essentially the type of workers addressed in this paper.

Looking at the reasons why persons choose employment-like working styles, in the JILPT survey (2017) the main commonly selected reasons were "being able to determine working hours at one's own pace" (35.9%), "wishing to increase one's income" (31.8%) and "to realize one's dream and develop one's career" (21.7%) (Figure 1). In the "Survey of Outsourcing Workers," the most commonly selected responses were "being able to utilize one's experience and skills" (48.0%), "having the freedom to determine one's working hours" (42.9%) and "being able to engage in a worthwhile job" (36.2%). At the same time, 13.4% selected "because there were no other jobs available to me." While there are slight differences by industry, age, or whether a main job or side job, such results show that persons generally select such working styles due to the



Source: Prepared by the Employment Environment and Equal Employment Bureau of MHLW, based on JILPT, “Survey on the Employment Situation and Attitudes of Independent Self-Employed Workers 2017 (Online Survey)”.

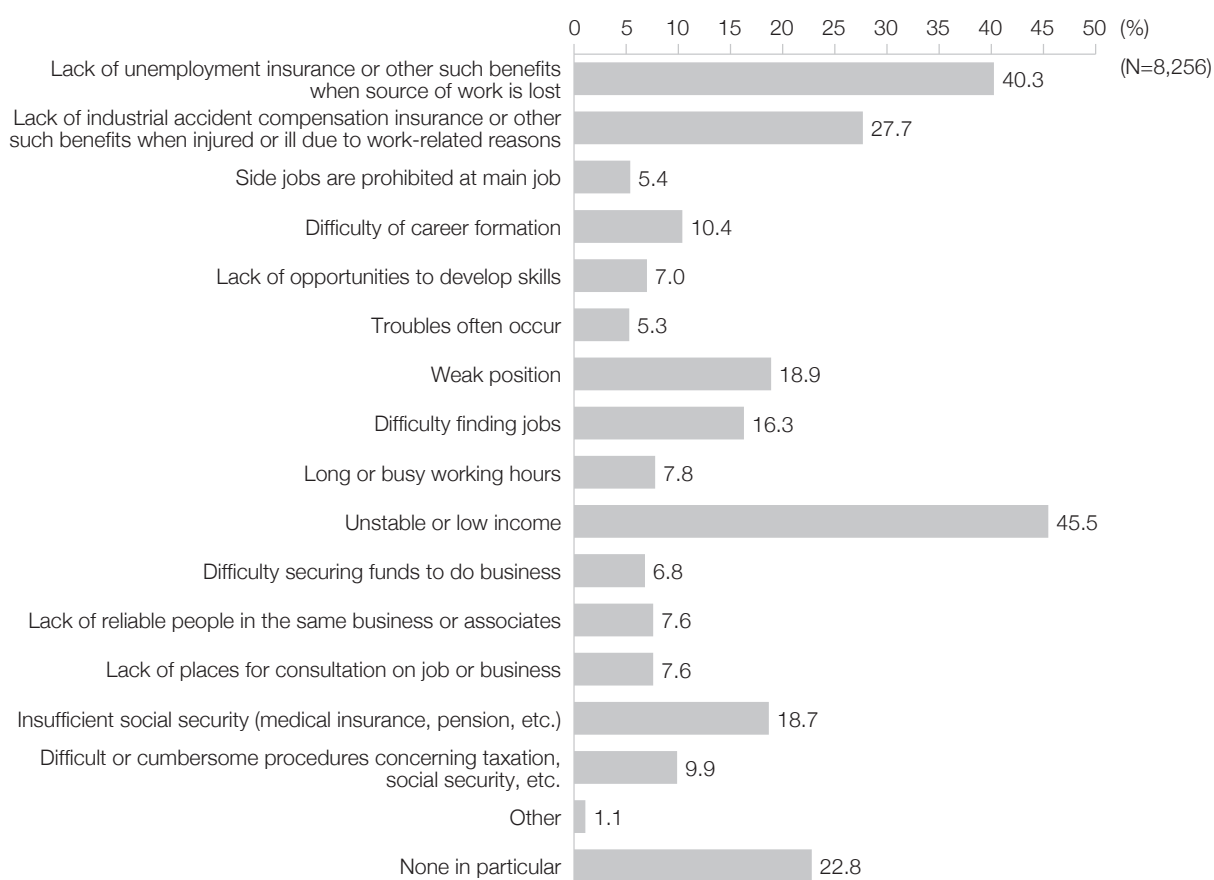
Figure 2. Total payment received for work in independent self-employment (at face value)

freedom to manage their own time or engage in work that they find worthwhile, but there are also those who do so due to a desire to raise their income or because they are unable to find work otherwise.

The JILPT survey (2017) results on the number of clients per annum show that the greatest percentage of respondents work with “one company” per year (42.9%), followed by those who work with “two companies” (16.7%). The “Survey of Outsourcing Workers” also shows a high percentage (31%) of persons who work with one client. At the same time, 21.2% of respondents work with 10 clients or more, suggesting that a division can be drawn between those who work exclusively with one company and those who work with multiple clients.

Looking at the amounts of remuneration received, in the JILPT survey (2017) the most commonly selected response was “under 500,000 yen” (39.9%), with a particularly high percentage (65.6%) of those who pursue such work as a side job (“persons engaged in independent self-employment as a side job”) selecting that response. For those who engage in such work full time, the percentage of those who selected “under 500,000 yen” is low (24.9%) in contrast with the overall percentage, while the percentages for “3 million yen or above, but under 4 million yen” to “15 million yen or above” are comparatively high (Figure 2). This indicates another division—namely, between those receiving low and those receiving high amounts of remuneration.

The issues involved in continuing such working styles, in order of the percentages of JILPT survey (2017) respondents who selected them are: “unstable or low income” (45.5%), “lack of unemployment insurance or other such benefits when source of work is lost” (40.3%), and “lack of industrial accident compensation insurance or other such benefits when injured or ill due to work-related reasons” (27.7%). In the “Survey of Outsourcing Workers,” the greatest percentage of the outsourcing workers surveyed were concerned about “securing a stable supply of work” (34.8%), followed by “the low levels of remuneration” (30.1%) and “work



Source: Prepared by the Employment Environment and Equal Employment Bureau of MHLW, based on JILPT, “Survey on the Employment Situation and Attitudes of Independent Self-Employed Workers 2017 (Online Survey)”.

Figure 3. Problems faced in continuing as an independent self-employed worker (multiple responses)

being stopped or reduced on the unilateral decision of the client” (13.5%) (Figure 3).

Looking at results regarding problems experienced in work, in the JILPT survey (2017), the most commonly selected response was “no problems” (50.1%), and of the problems experienced, the most commonly selected was “disputes regarding work content and scope” (14.6%), followed by “unilateral changes to the specifications” (9.3%) and “unilateral changes to the work period or deadline” (7.8%), in that order. Similarly, the most commonly selected response in the “Survey of Outsourcing Workers” was “there has been no problems” (67.6%), while of the experienced problems, the most commonly selected was “amount of remuneration” (12.3%) followed by “work being stopped or reduced on the unilateral decision of the client” (10.4%).

Drawing on data from the JILPT survey (2017) and an MHLW interview survey of relevant parties and organizations (2018), the Employment-Like Working Styles Meeting Report lists the following areas in which protection should be considered: (i) clarifying the contractual conditions of outsourcing arrangements, (ii) determining and changing contract content, defining the rules on the termination of contracts, and guaranteeing the implementation of contracts, (iii) optimizing remuneration amounts, (iv) improving skills and developing careers, (v) combining work with childbirth, raising children, caring for relatives and other such commitments; long-term family care (vi) preventing sexual or other such harassment from clients, (vii) providing support in the event that a person suffers a work-related injury or illness, loses their source of work, or other such cases, (viii) offering consultation services and other such assistance in the case of disputes, and

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(ix) other support such as matching people in employment-like working styles with clients, or social security.

### III. Disguised employment

#### 1. Misclassification

The classification of work relationships is the “central, defining operation of any system of labor law.” This is because labor laws cannot be applied unless it has been clarified whether the person in question is classed as a worker. In the majority of legal systems around the world, there is a “binary divide” between employment and self-employment, and “employment” is the fundamental factors required for the application of labor laws and regulations. Defining employment and classifying work relationships as “employment relationships” is therefore a key part of protecting workers.<sup>11</sup>

The ILO states that disguised employment “lends an appearance that is different from the underlying reality, with the intention of nullifying or attenuating the protection afforded by law.” This may involve client companies concealing their identity as “employers” by hiring workers through a third party or by engaging service providers under civil contracts instead of labor contracts, and at the same time directing and monitoring service providers on their tasks in such a way that is incompatible with said service providers’ independence as self-employed people. In such cases, the service providers will be mistakenly classified as independent self-employed workers, even though they are, in fact, in employment relationships.<sup>12</sup>

Classifying what is essentially an employment relationship as a different legal form is known as “misclassification.” Disguised employment is characterized by the way in which employers intentionally misclassify an employment relationship in order to evade the obligation to protect workers. This brings us to the question of how we can prevent such employers from avoiding the application of labor laws by passing employment relationships off as civil contracts or other such forms—in other words, how such misclassifications can be corrected.

Misclassification is typically corrected by applying the labor laws, etc. that have been evaded due to an employment relationship being disguised using a civil or other such contract. Namely, correcting a misclassification means switching an unduly adopted legal form to the proper one against the will of the party that adopted it, in order to ensure that the laws that have been evaded by disguising the employment relationship are applied—a concept referred to as “coercion of legal form.”<sup>13</sup> As courts in Japan seek to objectively determine whether a person is classed as a worker (“worker status”) in light of how the contract they are under is implemented in practice—regardless of what types of contracts has been adopted by the parties involved, it can be suggested that the legal process of correcting misclassifications is conventionally conducted by the courts.<sup>14</sup>

Proving worker status in a judicial process is the task of the worker (plaintiff) and the public organization that holds jurisdiction over the application of the labor laws, etc. However, in the event of a gray area where a number of factors indicate the characteristics of both a worker and an independent self-employed person, proving worker status or the existence of a labor contract is often difficult. It is important to note that there are two differing stances toward solving this problem. The first is focused on expanding the concept of worker status—namely, it is suggested that the scope of eligibility for protection should be extended by reviewing the concept of what constitutes a worker as eligible for the application of labor laws (“the concept of worker”), given that said concept can be too narrow when the actual economic situation of the person engaged in work is considered. Secondly, there is the stance that emphasizes preventing misclassification, by establishing a system for workers in disguised contract relationships to easily and promptly prove their worker status. These stances address problems of different dimensions. The essential problem of preventing misclassification is addressed by the latter.

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## 2. A system of preventing misclassification

In working relationships in which the parties involved have differing levels of bargaining power, where a client selects a contract for the provision of services other than a labor contract despite the fact that there are no reasonable grounds for doing so according to the objectives of labor laws, etc., said choice of contract form is an abuse of the legal form by the client. In such cases, the client must be treated as a person who has formed a labor contract, regardless of the form of the original contract.<sup>15</sup>

The ILO addressed such a problem with the proposal of a system of preventing misclassification, set out in its Employment Relationship Recommendation (No.198) of 2006. This states that judgments on the interpretation of a contract should be guided by facts relating to the actual performance of the contracted work, as opposed to what is written in the “contract”—a principle known as the “primacy of facts.”

As a policy approach helpful in preventing misclassification, the recommendation also proposes “providing for a legal presumption that an employment relationship exists where one or more relevant indicators is present.” While the indicators that may trigger such a presumption may differ from country to country, the ILO notes that a considerable number of countries adopt such a legal instrument.<sup>16</sup>

In Japan, Article 9 of the Labor Standards Law defines “worker” in employment relationships as one who is employed at an enterprise or office and receives wages therefrom, without regard to the kind of occupation. And Article 3 of the Labor Union Act defines “worker” in collective labor relationships as those persons who live on their wages, salaries, or other equivalent income, regardless of the kind of occupation. Both each define the “workers” to whom they apply, and workers in employment relationships are interpreted as synonymous with that definition under the stipulations of certain labor laws and regulations (such as the Industrial Safety and Health Act, Article 2, and the Minimum Wage Act, Article 2). The courts also generally adopt this interpretation (The *Yokohama Minami Rokishocho (Asahi Shigyo Inc.)* case, Supreme Court [Nov. 28, 1996], 1589 *Hanji* 136).<sup>17</sup> Moreover, judicial precedents and labor administration treat “subordination to and dependence on an employer” (*shiyō jūzoku kankei*; referred to here as “subordination to an employer”) in employment relationship as the essential condition for fulfilling the concept of worker, and determine worker status on the basis of two fundamental requirements<sup>18</sup>: whether the person carries out work according to the instructions and under the control of employer and whether the person receives remuneration for their labor. More specifically, the key factors taken into consideration are (i) the freedom to accept or refuse a work request, (ii) the extent to which orders are given regarding the content of the work and how it is carried out, (iii) whether the work is carried out within specific working hours or at a workplace specified by an employer, (iv) whether the service provider can be freely replaced with another person, and (v) the methods of calculating and paying remuneration. Additionally, the following factors are referred to in reinforcing decisions: (vi) whether the person is qualified as business trader in terms of equipment or tools for the work, and whether they pay expenses, (vii) exclusivity with a certain client, and (viii) whether work rules or fringe benefit are, or is applied to. A combination of a number of factors is therefore taken into consideration.<sup>19</sup>

However, while such judgment criteria have been established, differences are permitted from case to case in their application and the levels of importance attached among the various factors for consideration depending on the nature of the work in question or the essence or objectives of the applicable protection norms. It is therefore considerably difficult to accurately predict a court judgment.<sup>20</sup>

Given the present circumstances, preventing misclassifications requires clarifying the scope of worker status and taking steps to alleviate the burden of proof on workers (plaintiff) or administrative organizations. A potential approach to doing so would be to introduce a regulation listing the factors considered to determine worker status and prescribing that a person is presumed to be a worker if they fulfill a number of those factors, as proposed in Recommendation No.198.

However, it is not easy to determine which factors should be listed as the various aspects upon which presumption of worker status should be based. There is a particular risk that, if listed as a basis for



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presumption of worker status, certain factors (such as integration into the organization of the client enterprise) may expand the scope of the worker concept rather than clarifying it, and distinguishing such factors would be problematic.

## IV. Dependent self-employment

### 1. Reexamining the traditional concept of worker

The labor laws of Japan divide persons who provide services into two types: workers and the self-employed. Labor laws and labor insurance (industrial accident compensation insurance and employment insurance) are essentially not applied to those who are classified as self-employed.

The concepts of workers and labor contracts have been developed in the process of various complex developments since the Industrial Revolution. From the perspective of legal classification, workers are associated with the concept of subordination to and dependence on a company. Each country's concepts of workers and labor contracts are based on the premise of a distinctive vertical power relationship between an employer and their employee, such as the concept of *persönliche Abhängigkeit* ("personal dependency") in German law.

In Japan, it is also the case that—while there are persons engaged in work in home-based industry under the putting-out system and other such contractor-like employment—"subordination to an employer," centered on the way in which an employer directs or controls the person, is a fundamental requirement of the concept of worker.<sup>21</sup> The concept of worker thereby came to represent those persons who receive comprehensive social protection covering various aspects such as working hours, dismissal, or compensation in the event of industrial accidents.<sup>22</sup>

However, along with the significant changes that have occurred in corporate organizations over the past several decades, there has been a rise in employment practices that have unsettled the concept of an employment relationship as a relationship between two parties and weakened the efficacy of the criteria for determining worker status that is based on a strict hierarchical control. Such changes have prompted awareness of the narrow nature of the traditional concept of worker based on subordination to an employer.<sup>23</sup>

As employment in contemporary society becomes ever more diverse, it is important to ensure that the concept of worker—namely, the concept defining who should be protected as a worker—is a sufficiently comprehensive and up-to-date notion adapted to the current changes in the world of work.<sup>24</sup>

Leaving aside cases of collective labor relations, courts in Japan determine worker status on the basis of the combination of a range of factors according to the distinctive characteristics of each case, while at the same time essentially looking for the existence of a relationship by which the person is directed or controlled. This approach aims to allow for a flexible interpretation of worker status. However, this emphasis on the existence of a direction and control relationship, is not sufficiently comprehensive given the recent changes in employment practices.

### 2. The necessity of protection

The ILO report on non-standard employment (2016) lists disguised employment and dependent self-employment as a category of "non-standard employment" alongside temporary employment, part-time employment, and temporary agency work and other such multi-party employment relationships and states that such employment does not constitute decent work—that is, it lacks the qualities of employment in which a person can feel fulfilled and be guaranteed their human rights.

So, why is dependent self-employment classed as a type of non-standard employment, though from a legal perspective, it cannot be treated in the same way as forms that are employment relationships? The ILO's report determines that legal policy measures are necessary due to several factors—namely, that disguised employment and dependent self-employment are covered under specific regulations and are eligible for partial

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protection in a number of countries and regions, that these two working styles have emerged as the result of new business practices over the past decades and companies selectively use self-employment alongside other types of non-standard employment as a means of shifting risk, and that the self-employed continue to be in some way dependent on companies.<sup>25</sup>

While the self-employed are expected to play a key role amid the changes in corporate organizations, the diversification of employment types, and the progress of the digital economy, in Japan the self-employed are essentially excluded from protection under labor laws or labor insurance. This is because even those self-employed who have similar financial circumstances to those of a worker were not considered to be workers on the basis that they “operate an independent business.”<sup>26</sup>

The fact that a considerable number of self-employed persons have some form of subordination to and dependence on their client serves as a basis for considering the necessity of protection for persons in employment-like working styles. Excluding the self-employed from legal protection based on the dichotomy between workers and the self-employed means operating on the questionable premise that the self-employed always provide services at their own risk and on their own account.

Murakami (2018) uses data from the “Survey of Outsourcing Workers” to categorize those workers according to their subordination to and dependence on the ordering party in a work arrangement. Drawing on this analysis, he notes differences between the “high-level dependence group” and the “low-level dependence group,” in terms of work type, means of acquiring work, monthly income acquired through outsourced work, the existence of written working conditions, and levels of satisfaction.<sup>27</sup>

In cases where a person receives work from a certain client exclusively or on an ongoing basis, the resulting difference in bargaining power may prevent him or her from securing appropriate contract conditions or reasonable remuneration, such that the company’s risk is unduly transferred to said dependent self-employed person. If such persons do not receive the same level of protection enjoyed by regular workers, and there is no system of social security to distribute the social risk appropriately, individuals will not feel motivated to choose such autonomous ways of working.

In terms of the potential impacts on the labor market, this impedes fair competition between companies who employ workers and therefore cover the business operator (employer)’s share of social insurance and those who avoid doing so by utilizing self-employed service providers. If such an imbalance is left unaddressed, “bad money drives out good”—namely, good companies may be pushed out of the market by unfair competition.

### 3. Eligibility for protection

In considering the legal issues, it is necessary to address those self-employed who have a certain level of subordination to and dependence on their ordering parties, as opposed to seeking one approach to apply across the board. That is, eligibility for protection should be limited to those persons in employment-like working styles who are to some extent subordinate to and dependent on their clients. Let us tentatively refer to such persons with quasi-subordinate status as “worker-like persons.”

While opinion is divided as to specifically which kinds of self-employed should be eligible for protection, the Interim Report published in June, 2019 defines those eligible for protection as “persons who are commissioned by clients to provide services, mainly as individuals, and receive remuneration for the work.” However, the Interim Report also states that the specific scope of eligibility for protection should be defined for each type of protection with consideration also given to economic dependence and other such aspects.

So, what kinds of criteria need to be established in order to determine specifically whether a person can be classed as a “worker-like person”? While there may be no clear-cut answer to this question, possible criteria would include exclusivity with a certain client, continuity of business with a certain client, and the proportion that the remuneration from a certain client accounts for within the worker-like person’s total income.

However, if decisions regarding whether a self-employed is a worker-like person are to be made on the

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basis of a combination of several factors, decisions will differ depending on the various factors the judge assigns the greatest importance, making judgements less foreseeable. This leaves us with the same problem as that faced in determining worker status—the lack of clarity regarding eligibility for protection. In order to prevent this, it is important to eradicate ambiguity as far as possible when defining who is eligible and establish a comprehensive definition that allows for the response to changes in the employment environment.

#### 4. The state of protection policy

The state of and approaches toward protection in various countries can be broadly divided into three types: (i) redefining (expanding) the concept of worker, (ii) maintaining a single concept of “worker” but at the same time partially expanding protection under labor laws, etc. to certain self-employed persons (defining a third category, etc.), and (iii) using a definition other than that of the worker concept to define the scope of people to whom the protection of certain laws or regulations should be applied.<sup>28</sup>

The Interim Report (2019, 11) also states that “there are currently three main approaches for considering the state of protection under labor policy for persons who are not recognized as workers.” These approaches, which are thought to have been developed in light of the trends in those adopted in other countries, are mentioned in the report as follows: (i) expanding the scope of protected worker status, (ii) defining self-employed persons in need of protection as occupying an intermediate category between workers and the self-employed, and partially applying labor-related laws to cover them, and (iii) introducing necessary measures for self-employed persons who require a certain level of protection, considering the contents of protections, rather than expanding the notion of worker status.

The first option—that is, expanding the concept of “worker”—can be pursued both through the interpretations of the courts and through legislation to redefine the concept. Examples from other countries of the concept being expanded through interpretation include the broad interpretation of workers adopted in the US by using an economic reality test when applying the Fair Labor Standards Act.<sup>29</sup> In Japan, the Supreme Court has adopted broader interpretations of the concept of worker under the Labor Union Act than that prescribed in the Labor Standards Law (the *INAX Maintenance* case, Supreme Court [Apr. 12, 2011] 2117 *Hanji* 139, and the *Victor Service Engineering* case, Supreme Court [Feb. 21, 2012] 66–3 *Minshu* 955). While the Supreme Court consider a combination of a number of factors when determining worker status under the Labor Union Act, it places particular emphasis on whether the client has incorporated the service provider into the structure of their enterprise as an essential part of their labor force, and whether the client has unilaterally determined the content of the contract.

Looking at the academic theories, there are innumerable arguments advocating the expansion of the concept of worker through interpretations,<sup>30</sup> but recently theories have also arisen to propose that the concept be redefined (expanded) through legislation. For instance, there is the theory that in place of adopting subordination to an employer as a judgment criteria, workers should be broadly interpreted as those persons who provide their labor to others for remuneration and are unable in practice to negotiate with the other party on an equal level, and that this should be clarified with legislation.<sup>31</sup> Alternatively, there is the theory that the worker concept as defined in the Labor Union Act should also be applied to employment relationships, and the concept of worker under Article 9 of the Labor Standards Law should be defined as “natural persons who are utilized as an essential part of the labor force for pursuing the operations of the other party and earn a livelihood by receiving income in return for said labor” and that that definition should be flexibly interpreted when applying aspects such as dismissal rules or minimum wage systems.<sup>32</sup>

The second approach—partially expanding protection to cover a third category—has already been adopted by a number of countries.<sup>33</sup> Examples of this include the notion of a “Worker”—worker whose notion is broader than employee—as defined in the UK,<sup>34</sup> the concept of *Arbeitnehmerähnliche Personen* (“employee-like persons”) in Germany,<sup>35</sup> and the concept of “persons in special types of employment”<sup>36</sup> in South Korea. These each refer to an intermediate category between employees and the independent self-

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employed—referred to here as “the third category”—and labor laws, etc. are partially extended to apply to said category. To be classed in the third category, the person generally has to be “economically dependent” on the client, but the specific definition does differ from country to country.

Practical examples of the third approach—adopting a definition other than the concept of worker for determining eligibility for protection—include the UK Equality Act of 2010 and the German Artists’ Social Security Act (*Künstlersozialversicherungsgesetz*). The UK Equality Act, Section 83 (2), defines those eligible as persons who are “under a contract of employment, a contract of apprenticeship or a contract personally to do work.” Persons who are engaged under a service contract are also eligible for said act to be applied provided that they are obliged to personally conduct their work or tasks.<sup>37</sup> The German Artists’ Social Security Act is a social insurance system for artists and writers not under employment relationships, allowing such persons to enroll in pension insurance and health insurance schemes for employed people.

The three approaches are not mutually exclusive. Whether legislators adopt one or a combination of the approaches depends on the state of the law in the relevant country. It appears to be necessary for Japan, for the present, to give the self-employed requiring protection (worker-like persons) a different legal status to that of workers as it is presently defined, and on that basis to adopt some form of measures that involve partially expanding the application of labor laws, etc. in areas where protection is required, or, to develop legislation to expand the scope of eligibility for application of the Industrial Homework Act, because a homemaker has such a quasi-subordinate status as “worker-like persons.” While this stance is close to that of introducing a third category, it seems advisable to define such a third category according to the essence and objectives of the laws and regulations being applied, rather than setting out a definition that is applied across the board, if a third category is to be introduced, its criteria need to be both clearly defined and comprehensive.<sup>38</sup>

That is not to entirely refute the first and third approaches noted above, but said approaches do seem to entail a number of issues to be considered. The first approach—expanding the concept of worker—is indeed a task that needs to be addressed as employment today becomes ever more diverse. And yet, given that the concept of worker is the fundamental concept of labor law, it is essential that any new concept be carefully developed with reference to the concepts adopted in other countries.

Looking at the specific issues, if, for instance—as suggested in some academic theories—emphasis is placed on economic dependence rather than subordination to an employer as the essential requirement for worker status, the concept of worker will take on a broader definition, leading to increasing ambiguity in the distinction between a worker and an independent self-employed person. Alternatively, if, as other theories propose, worker status is flexibly interpreted according to the content of protection, such as dismissal rules or a minimum wage system, the concept of worker will lose its consistency, in turn potentially resulting in confusion on the scope of eligibility or actual application of protection norms.

If the third approach is to be adopted, it needs to be treated as a policy for developing special laws to provide comprehensive protection of worker-like persons, rather than expanding each criteria of labor law, etc. For instance, in the case of steps to ensure the prevention of harassing behavior to service providers, this could entail creating a separate definition of the persons to whom such protection should apply other than that of a worker and enacting a special law on harassment prevention. While this approach is not entirely unadvisable, it is possible that the scope of eligibility of such special laws would stretch beyond worker-like persons, and in such an event it is necessary to carefully consider the objectives of and grounds for protection.

Moreover, as may be the case for crowd workers, who receive work through online platforms, it may be difficult not only to define worker status but also to determine what the employer is. This has also been a lively topic of academic debate in recent years.<sup>39</sup> In order to properly address the issues of work through online platforms as well as topics such as franchising, the author finds it necessary to conduct further survey research, and apply the results to clarify the issues.

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## 5. The content of protection

In determining what kinds of protection worker-like persons require, it is necessary to address each type of protection individually. Legislators deciding the kind of protection required would need to consider comprehensively a number of factors, including the differences between the protection received by workers and that received by worker-like persons, whether such differences are based on reasonable grounds in light of the essence and objectives of the protection, what the parties involved need from the protection measures, and whether it is appropriate for the costs of protection to be borne. When doing so, it is also necessary to consider the possibility for the current system to be applied to worker-like persons. And when considering the specific content of protection measures reference should be made to not only the individual labor laws and social security laws, but also the Industrial Homework Act, the Act against Delay in Payment of Subcontract Proceeds, Etc. to Subcontractors (the Subcontractors' Act), and the "Guidelines for the Proper Implementation of Self-Employed Type Teleworking."<sup>40</sup>

There is a wide range of areas for protection that need to be considered, but here we will focus on the following: (i) contracts for worker-like persons, including the conclusion, defining and changing of content, and termination of such contracts, (ii) guarantee of appropriate remuneration, (iii) working conditions, (iv) social security, etc., and (v) dispute resolution systems. Other areas such as collective labor relations, anti-harassment measures, support for combining work with childbirth, child-rearing and other such commitments, vocational skills development, and securing employment opportunities are also important but are too numerous to be addressed here.

### (A) Contracts (concluding, defining and changing content, and termination)

Many outsourcing contracts do not include clear specifications on aspects such as the conclusions of the contract, the work content, amount of remuneration and other such particulars, or the conditions for changes to the contract. As a result, worker-like persons lack clarity regarding at what point their contractual obligations arise and to the extent of their obligations. The problem is that ambiguity regarding the timing at which the contract was concluded, or the work content on which tends to allow the client in its superior bargaining position to make unilateral decisions. It is therefore important to ensure the timing of contract conclusion and clearly defined contract content, in order to ensure that worker-like persons have contractual protection.<sup>41</sup>

Ensuring the creation of a written contract is an effective means of clarifying that a contract has been concluded and specifying its content. The Employment-Like Working Styles Meeting Report notes that in publishing and animation production industries there is no express contract in writing, thereby easily prompting issues such as disputes between the client and the person conducting the work regarding the amount of remuneration provided. Under the Subcontractors' Act—which is applied in the event that a certain amount of outsourcing transactions are made, the client's capital exceeds 10 million yen, and other such conditions are met—the client is obliged to provide the subcontractor undertaking the work with written specifications regarding items such as the details of work of the contract, the amount of subcontract proceeds (the payment to be made for the work by the subcontractor), and the date of payment. However, the Subcontractors' Act is only applied to a fraction of outsourcing contracts. In order to ensure that clear specifications are provided regarding the conclusion of contracts and their content, it is necessary to consider, based on the measures set out in the Subcontractors' Act, taking steps such as making it obligatory to clarify the particulars of the work for which subcontractors are sought and to specify and retain contract conditions in writing.

Allowing clients the authority to unilaterally terminate a contract not only compromises worker-like persons' livelihood stability but may also allow the other party superior bargaining power. The results of the JILPT survey (2017) also show that 13.6% of respondents selected "rules prohibiting the other party in a transaction from terminating a contract without reasonable grounds" as an area that they felt should be developed or improved in the future.

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Japanese workers are protected under the restrictions on dismissal and the system of advance notice of dismissal under Articles 19 and 20 of the Labor Standards Act respectively and the regulations on dismissal under Articles 16 and 17 of the Labor Contracts Act. In contrast, in the case of outsourcing contracts, Article 641 of the Civil Code recognizes a client's right to cancel a contract at any time before the work has been completed provided damages are compensated, while Article 651, paragraph 1, of the Civil Code prescribes that a mandatory (party commissioning work) may cancel a contract at any time.

In practice, outsourcing contracts generally include provisions by which the contract can be cancelled with immediate effect at any time on the grounds of a breach of contract (the "immediate cancellation system") and provisions by which the contract may be cancelled on any grounds provided a certain period of notice is given (the "system of cancellation at will"). There are various grounds for termination due to breach of a contract, ranging from those that are simply prescribed to those that are set out in considerable detail.<sup>42</sup> These include provisions similar to work rules prohibiting damage to the outsourcing party's reputation or credibility, and there have been cases in which contracts have been cancelled on the basis of trivial violations (The *NHK Chiba Broadcasting Station* case, Tokyo High Court [Jun. 27, 2006] 926 *Rohan* 64).

Given clients' superior position on cancelling contracts, legislators need to consider limiting the grounds for immediate cancellation of a contract to reasons related to the nature of the work, and ensuring that contracts include provisions for guaranteeing a sufficient period of notice of cancellation and the indemnification of damages in the event of a cancellation at will.

#### (B) Guarantee of appropriate remuneration

Ensuring appropriate remuneration involves three issues: (i) seeking remuneration for periods in which work is not conducted, (ii) restrictions against significantly low amounts of remuneration, and (iii) guaranteeing the payment of remuneration. Here we will focus on the second and third.

Results of the JILPT survey (2017) and the interview survey conducted by the MHLW show that low levels of remunerations are among the top concerns of worker-like persons. While for workers, wages that are below the local minimum wage are invalid, there is no such protection for the self-employed. The RENGORIALS Report (2017) demands the introduction of a minimum remuneration system, with its questionnaire survey showing that 37% of persons who exclusively engage in crowd work believe in the necessity of such a system.<sup>43</sup> Some academic theories posit that establishing such a minimum remuneration system is necessary to guarantee the survival of outsourcing workers as well as to ensure fair competition between companies.<sup>44</sup>

However, establishing a system for worker-like persons that is equivalent to the minimum wage system is not easy in practice. This is because while the amounts of minimum wages are determined in time units, in many cases the amounts of remuneration for worker-like persons are decided in accordance with total output. And even if remuneration is determined in time units, in many cases it will be unclear as to what portion of the remuneration serves as the remuneration for the services, because the remuneration for the management is typically included in the remuneration in general. The Industrial Homework Act prescribes a system for minimum remunerations for labor, but such a system is not easy to practically apply. Similarly, the RENGORIALS Report proposes frameworks that encourage crowdsourcing enterprises and associations of such enterprises to voluntarily determine minimum remuneration amounts, as opposed to approaches based on strict regulations such as a minimum wage system.<sup>45</sup>

Given the diversity of work that worker-like persons engage in and the considerable differences in work performance from worker to worker, it is also important to include the option of introducing measures that encourage the parties involved to determine between themselves remuneration amounts that are appropriate in light of factors such as the market prices for similar work by the self-employed, the level of difficulty of the work, how much time has been given for the work to be completed, and the level of ability of the person engaging in the work.

Ensuring the effectiveness of claims for wages is covered in the Labor Standards Act, Article 24, which

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prescribes general principles on payment in currency, regular payment, monthly payment, full payment, and direct payment of wages, while the Act on Security of Wage Payment establishes a system for reimbursing wages in the event that an employer becomes unable to pay them due to corporate bankruptcy or other such reasons. Excluding cases where the Subcontractors' Act is applied, there are no guarantees for the payment of remuneration for the self-employed. And yet there seems to be no reasonable grounds for separate treatment of worker-like persons—who depend on remunerations for their livelihood—with respect to ensuring the effectiveness of claims for remuneration. While the content of protection differs according to the provisions of the subcontracting or outsourcing contracts, given that the majority of problems are related to establishing the date of payment after the work has been carried out, it may be advisable to introduce a system for ensuring the payment of remunerations within a certain period, regardless of whether the content of the work has been checked, with reference to measures such as those on delays in payments as prescribed in the Subcontractors' Act.

### (C) Working conditions

Issues regarding working conditions include: (i) regulating working hours, (ii) ensuring safety and health during work, and (iii) prohibiting the predetermination of compensation for damages. Here we will address just the first and second issues.

The results of the JILPT survey (2017) demonstrate that a high percentage of respondents selected “the freedom to choose how long, when, and where to work, etc.” as a reason for choosing an employment-like working style. There does not appear to be a significant demand for the regulation of working hours among worker-like persons. The percentage of respondents who selected “being busy, with long working hours” as one of the problems faced in engaging in such work was relatively low (7.8%). However, it is possible that such persons may work long hours depending on where they work and what industry they work in. As long working hours may arise—particularly in the case of persons permanently “stationed” (conducting their work) at the premises of the client or due to the nature of certain types of work such as transportation services—it is necessary to refer to the Industrial Homework Act to consider the possibility of introducing measures to curb long working hours in such cases.

In examples from other countries, the application of industrial health and safety laws is not necessarily limited to workers. For instance, in the UK, the Health and Safety at Work etc. Act 1974, Section 3, prescribes that an employer is obliged to “conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that *persons not in his employment who may be affected thereby* are not thereby exposed to risks to their health or safety.” (Italics added)

In Japan, the Industrial Safety and Health Act limits the scope of eligibility for its protection to workers, and prescribes that where multiple levels of subcontracting are involved in construction or other industries, the party that ordered the earliest contract shall be obliged to take health and safety measures as the “principal employer” (*motokata jigyōsha*). However, this is a provision intended to protect the workers employed by the relevant subcontractors. There are no reasonable grounds for excluding worker-like persons when pursuing the introduction of measures to prevent danger or health hazards from equipment, machines, or other such items used in work.

Judicial precedents have also established the legal theory that the “prime contractor” (*motouke kigyō*) bears the obligation to consider the safety of the subcontractors' workers (Supreme Court [Nov. 8, 1990] 1370 *Hanji* 52). This theory that the prime contractor is obliged to consider the safety of subcontractor workers is based on the fact that, in practice, prime contractors generally direct and control the subcontractor workers, such that in effect they are receiving the provision of labor from said workers. And yet this does not mean that prime contractors bear the obligation to consider the safety of worker-like persons. It is therefore necessary to draw reference from the examples of other countries, and consider partially applying the Industrial Safety and Health Act to worker-like persons.

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(D) Social security, etc.

There are a number of discrepancies between the treatment of workers and that of the self-employed in the current systems regarding injury or illness (employment injury and personal injury or illness), unemployment, pregnancy and childbirth, child-rearing and family care, and life in old age. For example, the self-employed are ineligible for industrial accident compensation insurance benefits for work-related injuries or illnesses and are only eligible for a “special enrollment insurance system,” in which person in work enroll voluntary and pay the premiums, in industrial accident insurance as an independent contractor (*hitori oyakata*) or other such self-employed business operator. While the self-employed are also obliged to enroll in the national health insurance and national pension schemes under Japan’s concept of “the universal health and pension,” these scheme have their disadvantages in comparison with the pension and health insurance schemes in which workers are enrolled. For instance, when a worker takes leave of absence due to a non-work related injury or illness (known as “personal sick, sick leave”), they are able to receive an “injury and illness benefit (*shobyō teatekin*)” to support their livelihood during their leave, and while in contrast, there is no such system for the self-employed who are under the national health insurance system.

While those workers who are eligible receive unemployment benefits when they are put out of work, there are no unemployment benefits for self-employed who have lost their source of work. The only support available in such cases are the public mutual aid systems, such as the Small Enterprise Mutual Relief System. The self-employed are also unable to receive employment insurance allowances to support their livelihood during periods of child-rearing or family care leave, as are available to workers.<sup>46</sup>

As we have seen, there are four key tasks to be addressed: (i) compensation for work-related injury or illness, (ii) injury and illness benefit for leave due to non-work related illness, (iii) income security in the event of loss of source of work, and (iv) income security during child-rearing or family care leave.

There are no clear figures on the rate of injury or illness among persons in employment-like working styles, but there are a considerable number of judicial precedents of persons working under subcontracting, outsourcing or other such agreements claiming industrial accident insurance benefits (the *Yokohama Minami Rokishocho (Asahi Shigyo Inc.)* case, Supreme Court [Nov. 28, 1996] 1589 *Hanji* 136, and the *Fujisawa Rokishocho* (injury of a carpenter) case, Supreme Court [June 28, 2007] 1979 *Hanji* 158). Questionnaire survey results also show a comparatively large percentage (27.7%) of persons who selected “there is no industrial accident compensation insurance in the event of work-related injury or illness” as a problem faced in pursuing work (JILPT survey 2017). Interest in compensation for industrial accidents is particularly high among persons engaged as performers, or in transportation services or construction work. In September 2009, the Japan Council of Performers Rights & Performing Arts Organizations (*Geidankyo*), an association representing performers’ organizations and their members, issued a request to the national government for the establishment of an industrial accident compensation system for performers.

Looking at examples from other countries, in France a law was enacted in 2016 to enable industrial accident compensation for crowd workers, by obliging a platform to bear the costs of industrial accident insurance premiums in the event that a worker’s remuneration received from said platform exceeds a certain percentage of their total income.<sup>47</sup> South Korea’s Industrial Accident Compensation Insurance Act also enforces the application of industrial accident compensation insurance on clients who utilize “persons in special types of employment.”<sup>48</sup>

This trend seems to indicate that Japan also needs to provide some form of compensation for work-related injury or illness. So, what kind of specific measures are required? The predominant academic theory advocates the expansion of the current special enrollment insurance system to include persons in employment-like working styles in the scope of eligibility.<sup>49</sup> In this case, there are several tasks to address, such as determining the amounts of insurance premiums and content of benefits for persons in employment-like working styles, and the establishment of a special enrollment organization, because those who wish to enroll in this insurance must belong to a special organization. An opposing theory suggests obliging clients to enroll in industrial



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accident compensation insurance, alongside establishing an independent industrial accident compensation system under which clients must cover a portion of the insurance premiums.<sup>50</sup>

The risk of becoming out of work is not only an issue that needs to be addressed for workers. Even if self-employed persons plan for blank periods in their work schedule as part of their business activities, a considerable number of them immediately face difficulties in their daily livelihoods if they do not receive remuneration. In such cases, self-employed persons who are out of work may accept extremely low paid work. As noted above, as much as 40.3% of the JILPT survey (2017) respondents selected the “lack of unemployment benefit or other such benefits when source of work is lost” as a problem faced in pursuing work. This shows a considerable demand for measures to provide income security for worker-like persons who are out of work.

At the same time, the stance on security against unemployment risks for the self-employed is significantly divided, even outside of Japan. From a theoretical perspective, there is the issue of whether it is appropriate to handle the unemployment of the self-employed on the same basis as that of workers. Expanding the scope of eligibility of the employment insurance system, for instance, prompts a number of questions, such as whether enrollment should be voluntary or mandatory, or whether the cost of premiums should be borne entirely by the insured person or partially covered by the outsourcing party.

#### (E) Dispute resolution systems

The Interim Report states that dispute resolution support needs to be considered alongside measures to clarify contract conditions and other such steps to ensure the prior prevention of disputes, and that precedence needs to be given to pursuing the possibility of an effective dispute resolution system.

In addition to dispute resolutions by the courts, workers are able—and do in a number of cases—to turn to procedures for simplified and expedited dispute resolution such as the labor tribunal system conducted by the courts, the systems for consultation and mediation regarding individual disputes provided by their Prefectural Labor Bureau, or the individual dispute resolution system run by the Labor Relations Commission. In contrast, for the self-employed, the systems other than dispute resolution by the courts are highly limited. This difference is significant, and it is necessary to consider legislative solutions and other such measures to address it.

## V. Conclusion

While employment-like working styles may appear to be synonymous with self-employment, and it is therefore argued that persons in such working styles should be covered under conventional economic law (competition law, antitrust law, or antimonopoly law) and other such regulations, persons in such working styles may in practice be pursuing similar ways of work to those of employed workers. It is necessary to investigate the development of legal and policy protection to ensure that such persons do not face unreasonable disadvantages in comparison with employed workers. In doing so, it is important to discuss the approaches that should be taken toward eligibility for protection, the state of protection policies, and the content of protection, in order to help persons who engage in such working styles to feel safe and fulfilled in their work and potentially play a role in boosting the national economy.

This paper narrowed its focus to the most fundamental aspects in investigating the legal policy issues, and there are a number of topics that remain to be addressed. One of these is the potential measures for crowd work and other such work through online platforms. As briefly noted, this entails the question of which party—the client or the platform—should be seen as the employer, among a number of other issues to address. It will be important to explore such topics in the future in the light of data from a detailed survey of the actual situation.

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the special feature “Work Style Reform Series 3: Other Implementation Plans” in its May 2019 issue (vol.61, no.706) with additions and amendments in line with the gist of *Japan Labor Issues*.

## Notes

1. “Future of Work 2035: For Everyone to Shine” Panel, Ministry of Health, Labour and Welfare, “*Future of Work 2035: For Everyone to Shine*” Report (Tokyo: 2017), 9, <https://www.mhlw.go.jp/file/06-Seisakujouhou-12600000-Seisakutoukatsukan/0000152705.pdf>.
2. The “worker” here is the translation of “*Rodo-sha*” who is employed at a business or office and receives wages therefrom, regardless of the type of occupation as defined by the Article 9 of the Labor Standards Act. Since the translation by the Ministry of Justice uses the word “worker” for “*rodo-sha*,” this article follows the official translation. As many academics use the word “employee” for “*rodo-sha*,” “worker” here is a synonym for employee. The “self-employed” is an independent person who is not deemed a worker (employee). Homeworkers are self-employed, but basically protected by the special legislation called the Industrial Homework Act.
3. Koichi Kamata, *Keiyaku rodo no kenkyu: Auto soshingu no rodo mondai* [Study on contracted work: Labor issues of outsourcing] (Tokyo: Taiga Shuppan, 2001), 3–7; Yoichi Shimada, “Koyo ruiji no romu kyokyu keiyaku to rodo ho ni kansuru oboegaki” [A memorandum on employment-like labor supply contracts and labor law], in *Shin jidai no rodo keiyakuho riron: Shimoi Takashi sensei koki kinen* [Theory of laws on labor contracts in the new era: To commemorate the 70th birthday of Professor Takashi Shimoi], ed. Ken’ichiro Nishimura, Noriaki Kojima, Tomoyuki Kato, and Takayasu Yanagiya (Tokyo: Shinzansha, 2003), 36; Shinya Ouchi, “Juzoku rodosha to jie-i-rodosha no kinko o motomete” [Seeking equilibrium between dependent workers and self-employed workers], in *Rodokankei ho no gendaiteki tenkai: Nakajima Shigeya sensei kanreki kinen ronshu* [Contemporary developments in labor relations law: To commemorate the 60th birthday of Professor Shigeya Nakajima], ed. Michio Tsuchida, Takashi Araki, Fumiko Obata, et al. (Tokyo: Shinzansha, 2004), 54–56; Takayasu Yanagiya, *Gendai rodo ho to rodosha gainen* [The concept of workers in contemporary labor law] (Tokyo: Shinzansha, 2005), 307–311.
4. ILO (International Labour Office), *Non-Standard Employment around the World: Understanding Challenges, Shaping Prospects*, (Geneva: International Labour Office, 2016), 36. [https://www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/-publ/documents/publication/wcms\\_534326.pdf](https://www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/-publ/documents/publication/wcms_534326.pdf). Regarding the developments in discussions at the ILO, see Koichi Kamata, “Koyo ruiji no hatarakikata to rodo hosei no kadai” [Employment-like working styles and issues in the labor law system], *Work & Life, Sekai no rodo* (May 2018): 2–4.
5. MHLW, *Kongo no rodo keiyaku hosei no arikata ni kansuru kenkyukai hokokusho* [Report of the Study Group on the Future of the Laws on Labor Contracts] (Tokyo: MHLW, 2005); MHLW-commissioned research, *Kongo no zaitaku shugyo no arikata kentokai hokokusho* [Report of the Meeting on the Future of Home Work] (Tokyo: MHLW, 2014).
6. Koichi Kamata, “Itaku-gata shugyosha no hoteki kadai to hogo no arikata” [The legal issues and state of protection of outsourcing workers], in *Gyomu-itakugata shugyosha no shugyo jittai to hoteki hogo no arikata: Kakenhi kiban kenkyu (c) kenkyuseika hokokusho* [The employment situation and state of legal protection of outsourcing workers, research report supported by a Grant-in-Aid for Scientific Research, Basic Research (C)], ed. Koichi Kamata (Unpublished Report 2018), 8–9.
7. Prior studies include: Yanfei Zhou, “Kojin ukeoi no rodo jittai to shugyo sentaku no kettei yoin” [Determinants of job selection by individual outside contractors and their working conditions], *JCER Economic Journal* 54 (2006): 63–89; MHLW-commissioned research, *Kojin ukeoi shugyosha ni kansuru kenkyukai hokokusho* [Report of the Study Group on Independent Contractors] (Tokyo: MHLW, 2010); MHLW-commissioned research, *supra* note 5 (2014).
8. A tabulation of the survey results is published in Kamata, *supra* note 6, 31–39.
9. RENGO-RIALS (Japanese Trade Union Confederation Research Institute for Advancement of Living Standards), “The diversification of working styles and legal protection: A report on survey research on the current situation and challenges of ambiguous ‘employment relations,’” the JTUC-Rengo and RENGO-RIALS joint research report, survey on current working situation of independent contractors and crowd workers (Tokyo: RENGO-RIALS, 2017), <https://www.rengo-soken.or.jp/work/201712-01.pdf> (in Japanese).
10. JILPT, “Flash report on ‘Survey on employment situation and attitudes of independent self-employed workers, an online survey’” in MHLW’s full text of *Reference material for Employment-Like Working Styles Meeting Report* (Tokyo: MHLW, 2018), 23–51, <https://www.mhlw.go.jp/file/04-Houdouhappyou-11911500-Koyoukankyokintoukyoku-Zaitakuroudouka/0000201102.pdf>.
11. ILO, *supra* note 4, 261.
12. ILO, *supra* note 4, 9.
13. Regarding the significance of the “coercion of legal form,” see Kamata, “Keiyaku no seishitsu kettei to hokeishiki kyosei (ichi)” [The determination of the nature of contracts and the coercion of legal form (1)], in *Ryutsu Keizai Daigaku Hogakubu kaiko kinen ronbunshu* [Collected essays to commemorate the founding of Ryutsu Keizai University Faculty of Law] (Ryugasaki: Ryutsu Keizai University Press, 2002), 92–93.
14. Kamata, *supra* note 13, 75–76.
15. Koichi Kamata, “Rodo kijunho jo no rodosha gainen ni tsuite” [Concept of a worker under the Labor Standards Act], *Chuo Law Review* 111, no.7–8 (2005): 65.

16. ILO, *supra* note 4, 264–265.
17. A number of academic theories argue that the worker concept should be interpreted relatively, according to the essence and objectives of each labor law. For instance, Tomoko Kawada posits that “workers” as defined under the Labor Contracts Act differ from “workers” as defined under the Labor Standards Act in “Kojin ukeoi/itaku shugyosha no keiyakuhojo no chii” [The status of Independent contractors in the Law of Contract: Focusing on midterm cancellation and refusal of contact renewal], *Journal of Labor Law* 118, 2011 at 19–21. See also Hisashi Takeuchi (Okuno), “Rodosha no gainen” [The concept of a worker] in *Rodoho no soten* [Issues in labor law], ed. Michio Tsuchida and Ryuichi Yamakawa, special issue, *Jurist: Issues in jurisprudence series no.7* (March, 2014): 4.
18. Under Japanese labor law, a worker is defined as a person who is subordinated to another party of contract, regardless of the type of contracts. Therefore, a concept of worker is including not only a person who provides labor under an employment contract (employee), but also a person who provides services under a service contract other than the employment contract.
19. Kazuo Sugeno, *Rodoho* [Labor law], 11th ed. (Tokyo: Kobundo, 2016), 176; Yoko Hashimoto, “Kobetsuteki rodokankei ni okeru rodosha” [Workers in individual labor relations], in *Rodo hanrei hyaku sen*, 9th ed. (Tokyo: Yuhikaku, 2016), 5.
20. There are innumerable judicial precedents and academic theories on worker status. Judicial precedents are analyzed in detail by Yoko Hashimoto in RENG0-RIALS, *supra* note 9, 99–119.
21. Takashi Araki, *Rodoho* [Labor law], 3rd ed. (Tokyo: Yuhikaku, 2016), 53–58; Ryuichi Yamakawa, *Koyo Kankei ho* [Employment relations law], 4th ed. (Tokyo: Shinsei-sha, 2008) 23–25; Mizumachi, Yuichiro, *Rodoho* [Labor law], 7th ed. (Tokyo: Yuhikaku, 2018), 64–72.
22. Koichi Kamata, “Rodosha gainen no seisei” [The evolution of the concept of an “employee” in Japanese labour law, in comparison with the English and German labour law], *Japanese Journal of Labour Studies* 54, no.7 (July 2012): 5–15.
23. Michio Tsuciada, *Rodo keiyaku ho* [Labor Contracts Act], 2nd ed. (Tokyo: Yuhikaku, 2016), 57–58; Araki, *supra* note 21, 58–60.
24. ILO, *supra* note 4, 261.
25. ILO, *supra* note 4, 20–21.
26. At the Imperial Diet House of Representatives Labor Union Bill committee (December 12, 1945), government delegate Takahashi argued that while sharecroppers (tenant farmers) have extremely similar financial situations to those of workers, they should not be classed as workers “because they operate an independent business.”
27. Yoshiaki Murakami, “Hacchusha no juzokusei no sui jun o kettei suru yoin ni kansuru bunseki” [Analysis on factors determining the level of dependence on a client (ordering party)], in Kamata, *supra* note 6, 40–60.
28. Regarding legal approaches to the protection of workers in employment-like working styles, Araki, *supra* note 21, 60, advocates the “expanding the notion of worker approach” and the “legislative protection approach.” Of the approaches introduced here, (i) corresponds with the expanding the notion of worker approach, and (ii) and (iii) are the equivalent of the legislative protection approach. Shinobu Nogawa argues in his *Rodoho* [Labor law] at 166 (Tokyo: Nippon Hyoronsha, 2018) that the integration of individual labor relations laws as a third approach alongside the expanding the notion of worker approach and the legislative protection approach. Shinya Ouchi, divides self-employed workers into (i) “the disguised self-employed,” who are in fact employed, (ii) “semi-dependent workers,” who are financially dependent on a particular company, and (iii) “genuinely self-employed,” and suggests that reference should be made to cases in which protection similar to that offered under labor laws is partially extended to cover “semi-dependent workers,” in *Al jidai no hatarakikata to ho* [Working styles and law in the age of AI] (Tokyo: Kobundo, 2017), 203–204.
29. ILO, *supra* note 4, 263; Hiroya Nakakubo, *Amerika Rodoho* [American labor law], 2nd ed. (Tokyo: Kobundo, 2010), 264.
30. For recent theories, see Hiroyuki Minagawa, “Rodoho jo no rodosha” [Workers as defined under labor law], in *Rodo ho no kiso riron* (Koza: Rodoho no saisei, dai 1-kan) [The basic theories of labor law (Course on regeneration of labor law, vol.1)], ed. by Japan Labor Law Association (Tokyo: Nippon Hyoron sha, 2017), 79–93; Takeuchi (Okuno), *supra* note 17, 4–5.
31. Miki Kawaguchi, *Rodosha gainen no saikousei* [The reconstruction of the concept of a worker] (Osaka: Kansai University Press, 2012), 403.
32. See Akira Hamamura in RENG0-RIALS, *supra* note 9, 204–205.
33. ILO, *supra* note 4, 36–39.
34. The UK laws and regulations applied to “workers” include the Employment Rights Act 1996, Section 230 (3), the Working Time Regulations 1998, Regulation 2 (1), and the National Minimum Wage Act 1998, Section 54 (3).
35. Collective Agreement Unity Act (Tarifvertrag Einheitsgesetz), Labour Court Act (Arbeitsgerichtsgesetz), Federal Holiday Act (Bundersurlaubsgesetz), and Workplace Protection Act (Arbeitsschutzgesetz) are applied to employee-like person. Employee-like persons are defined in Article 12 (a) of the Collective Agreement Unity Act.
36. South Korea’s Hanguk san-eop jaehae bosang boheombeop [Industrial Accident Compensation Insurance Act, Article 125] (Teugsu hyeongtae geunro jongsaja-e daehan teugrye) [(Special case for “Person in Special Types of Employment”)] prescribes that those people providing labor in a similar capacity to workers, who require protection in the event of a work-related accident, shall be eligible for the application of the Industrial Accident Compensation Insurance Act even if they are not workers.
37. Simon Deakin and Gillian Morris, *Labour Law*, 5th ed. (Oxford: Hart Publishing, 2009), 575.
38. In RENG0-RIALS, *supra* note 9, at 120, Yoko Hashimoto shows her disapproval about introducing the third category because it would need the differentiation between persons in the third category and the self-employed, make the current difficult

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determination more complicated, and also, it is based on the premise that current judgment on worker status under the Labor Standards Act (Labor Contracts Act).

39. See Katsutoshi Kezuka, “Kuraudo-waku no rodohogaku jo no kento kadai” [Issues regarding crowd work to study in terms of labor law], *Quarterly Labor Law (Kikan Rodoho)* 259 (Winter 2017): 53–66. Regarding the working situation of crowd workers, see RENGORIALS, *supra* note 9.
40. The materials provided at the MHLW’s Meeting on Points of Controversy with regard to Employment-Like Working Styles (third session onward) are a useful source of reference regarding the deliberation on the individual types of protection content.
41. Ouchi, *supra* note 28, at 192, argues that the contracts of workers in self-employment-like working arrangements should be optimized through special legislation.
42. Koichi Kamata, “Romu sabisu no horitsu kankei: Gyomu itaku keiyakusho o sozai toshite” [Legal consideration related to labor services: Focusing on outsourcing agreements] in *Rodo to Kankyo* (Waseda Daigaku 21-seiki sosho: Kigyo shakai no henyō to hosozō, dai 6-kan) [Labor and its environment (Waseda University 21 century COE series: Shifts in corporate society and the creation of law, vol.6)], ed. Makoto Ishida and Tadashi Otsuka (Tokyo: Nippon Hyoron-sha, 2008), 81–82.
43. Hamamura, *supra* note 32; Masayuki Numata in RENGORIALS, *supra* note 9, 141.
44. Satoshi Hasegawa, “Itakugata shugyosha no hoteki hogo: Saitei hoshu hoshō, kaiyaku / keiyaku koshin kisei o chushin ni” [Legal protection for “outsourcing workers”: Especially in regard to minimum remuneration guarantee and renewal or termination of contract], *Journal of Labor Law* 130 (October 2017): 29.
45. Hamamura, *supra* note 32.
46. See MHLW, Seifuti net no genjo (imeji) [The current state of safety nets (image)], reference material no.9 of the 6th Meeting on Points of Controversy with regard to Employment-Like Working Styles, <https://www.mhlw.go.jp/content/11911500/000484233.pdf> (in Japanese).
47. Toshiharu Suzuki, “Furansu ni okeru kuraudowaku no genjo to hoteki kadai” [The current state and legal issues of crowd work in France], *Quarterly Labor Law (Kikan Rodoho)* 259 (Winter 2017): 90–92.
48. Ken’ichi Tanaka, “Itakugata shugyosha no saigai hoshō” [Industrial accident compensation for outsourcing workers], *Journal of Labor Law* 130 (October 2017): 37–38.
49. Masahiko Iwamura, “Rosai hoken seisaku no kadai” [The issues on policy of industrial accident insurance], in *Kenko / anzen to katei seikatsu* (Koza: 21seiki no rodoho, dai 7-kan) [Health, safety and family life (21st labor law course, vol.7)], ed. Japan Labor Law Association (Tokyo: Yuhikaku, 2000), 37; Ken’ichiro Nishimura, “Rosai shokugyo-byō no henyō to rosai hoken” [Shifts in industrial accidents and occupational diseases and industrial accident compensation insurance], in *Shotoku hoshō ho* (Koza: Shakai hoshō, dai 2-kan) [Income Security Law (Series on Social Security Law, vol.2)], ed. Japan Association of Social Security Law (Kyoto: Horitsu Bunka Sha, 2000), 202.
50. Satoru Aono, “Tokubetsu kanyū seido ni okeru gyomu jo gai nintei” [The acknowledgment of work-related or non-work related circumstances special enrollment system], in *Rosai hoken jo no tokubetsu kanyū seido ni kansuru shomondai no kento* [Investigating the various problems regarding the special enrollment system under the Industrial Accident Compensation Insurance Act], Project Report by the Japan Federation of Labor and Social Security Attorney’s Associations (Tokyo: Japan Federation of Labor and Social Security Attorney’s Associations, 2011), 37; Tanaka, *supra* note 48, 39–41.

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