

## Column

# Spread of the Novel Coronavirus and the Future of Japanese Labor Policy

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## I. Introduction

Fiscal 2020 was supposed to be a year when new labor policies were rolled out on many levels. In legal terms, at least, it actually began in this way. Under the Act on Arrangement of Relevant Act on Promoting the Work Style Reform enacted in June 2018, restrictions on overly long working hours, which had already been in effect at large corporations since April 2019, were expanded to apply to small and medium-sized enterprises (SMEs) starting on April 1, 2020. Another main feature of the Act, providing for non-regular workers to receive equal pay for equal work, came into force on April 1, 2020, for large corporations and dispatching agencies. Amendments to the Civil Code (law of obligations) passed in May 2017 went into effect on April 1, 2020, and in line with the amended extinctive prescription under the Code, Article 115 of the Labor Standards Act was also amended at the end of March 2020, to go together into effect on the same day (five years in principle, three years for the time being under supplementary provisions). Furthermore, as a result of amendments to laws including the Comprehensive Labor Policy Promotion Act in May 2019, employer's obligation to take measures against "power harassment" (workplace bullying generally at the hands of superiors) was enhanced in June 2020, and regulations on other forms of harassment such as sexual harassment were strengthened. However, while the above should have made fiscal 2020 an epoch-making year for labor policy, the year began amid the rapid spread of the novel coronavirus (referred to below as COVID-19), which

began growing in early 2020 and became a global pandemic, with emergency measures implemented one after another. This was a situation no one had imagined until just a few months ago, and today no one can predict how it will develop. While it is difficult to discuss the future of labor policy under such circumstances, this article will consider future directions in labor policy by analyzing the policies that have been launched as emergency countermeasures against COVID-19.



## II. Reappraisal and revision of employment security oriented policies in response to external shocks

Employment Adjustment Subsidy (EAS), which in recent years have been apt to be viewed negatively in light of the catchphrase "transition from excessive employment security oriented policies to labor mobility oriented policies," have once again been thrust into the spotlight as a crucial employment policy amid several moves to ease the requirement. With COVID-19 rampaging, calls for businesses to refrain from operating as a countermeasure against the spread have sharply reduced economic activity particularly in the service industry, and labor demand is shrinking. As a countermeasure, employment security schemes, in which the national government (i.e. its employment insurance funds) covers a large portion of allowance for absence from work for job retention, have already been implemented in continental European countries such as Germany and France (during the oil crises and the late-2000s

Global Financial Crisis). Now, this scheme has been introduced in the UK for the first time in history.

The criticism of “excessive employment security oriented policies” during normal, non-crisis times is that they excessively protect lifetime employment-oriented labor practices (in traditional industrial sectors that have relatively lower demand for workers) and curtail the proper redistribution of the workforce (to other sectors thought to require more labor) via labor mobility in the external labor market. It cannot be denied that such criticism had a certain degree of reasonableness, at least in theoretical policy terms, under normal circumstances, but it does not make much sense in the current states of emergency. Whether in the case of the oil crises in the 1970s, which originally spurred the establishment of EASs, or the Global Financial Crisis at the end of the 2000s, the problem was that economic shocks from abroad caused labor demand to contract sharply in sectors where a certain level of labor demand was expected to continue in the medium-to-long term. This leads to criticism of the contrasting path, *laissez-faire* adjustment via the external labor market, i.e. dismissing workers who are no longer needed for the time being, and then hiring workers when the crisis has passed and demand recovers (which is the path the US has consistently taken to this day), on the grounds that it is undesirable not only for the workers, but also for the companies in question.

In response to temporary economic shocks, a “not excessive” policy of maintaining employment through public financial support and waiting for labor demand to recover, is today standard operating procedure across virtually all developed countries, with the exception of the US. In Japan, in late February 2020 a first step was taken by expanding the scope of eligible business owners and relaxing requirements such as production index, employment index, and insurance coverage period. In addition to further easing of requirements, as the second set of measures, in April the subsidy rate was raised (for large corporations, from 1/2 to 2/3, or 3/4 if no workers are dismissed; for SMEs, from 2/3 to 4/5, or 9/10 if no workers are dismissed.) As the third set of measures, in May the subsidy rate was

raised to even 10/10 for SEMs. These resemble the special measures taken at the time of the late-2000s global financial crisis. What is especially noteworthy about the special measures taken this time is the elimination of the requirement for employment insurance coverage—previously considered an obvious restriction as employment insurance payments are the source of the required funding—and inclusion of subsidies for workers absent from work who are not covered by employment insurance. The removal of the requirement that workers be covered by insurance for six months or more, in the first round of measures, was in the same vein.

Underlying this is the development of measures to safeguard/secure non-regular workers. In the 1970s in Japan, where employment security oriented policies were implemented in the form of EASs, what society demanded were measures to maintain the employment of (male) regular employees supporting wives and children, assumed to be those regular employees’ dependents. It was not considered necessary to maintain the employment of housewives and students with part-time jobs. However, the nation’s employment and occupational structure have changed since the 1990s. There has been an enormous rise in the number of non-regular workers who depend on their wages for their livelihoods, causing restrictions on discontinuation of fixed-term contract workers’ employment and equal treatment and balanced or proportional treatment of non-regular workers to emerge as policy issues. One of the best-known policy consequences is the “equal pay for equal work” policy which went into effect in April 2020 for large corporations and dispatching agencies. Meanwhile, unlike during the oil crises of the 1970s, during the global financial crisis that struck in 2008, the fact that many non-regular workers were not covered by employment insurance came under severe criticism, and the requirement that workers expected to be with a certain employer for one year or more in order to qualify for unemployment insurance was loosened so that the period shrank to one month. Nevertheless, there are still many non-regular workers not covered by employment insurance, and even if covered, they often do not meet a requirement that they be

covered for a six-month insured period. As long as the social insurance system depends on contributions from the insured, the employment insurance system itself cannot be relaxed indefinitely. However, if employment adjustment subsidies for emergency situations cannot protect non-regular employees who require protection due to the state of the employment insurance program that funds these subsidies, then the system needs to be improved. In this sense, the relaxation of requirements for eligibility of workers under the current special measures can be considered as part of the policy direction of extending protections for non-regular workers.

### **III. The teleworking promotion effort and the challenges it highlights**

As a COVID-19 countermeasure, in early March 2020 a special subsidy for improvement of work conditions with regard to overtime, etc. (telework course) was established for small and medium-sized enterprises who newly introduced telework (working remotely from home, etc., usually by means of ICT [information and communications technology]). Prior to this, in late February of the same year, the government announced an initiative to promote teleworking and staggering commuting hours. Also positioned as a measure against COVID-19, it entails subsidizing half the cost of installing and running communications equipment for teleworking, and is aimed at small and medium-sized enterprises' newly introducing telework.

In fact, promotion of teleworking has been a government policy challenge for some years now. In particular, the March 2017 "Action Plan for the Realization of Work Style Reform" praised teleworking in that it "is an effective means of balancing childcare and nursing care with work and enabling various people to show their abilities because it imposes no geographical or time restrictions on workers." The plan went on to note that there were still extremely few businesses utilizing teleworking in Japan, and it was necessary to promote its adoption. In response to this, the Ministry of Health, Labor and Welfare (MHLW) convened a committee to study flexible work styles. Based on the committee's report,

in February 2018 it newly released the "Guideline for Telework (guideline for proper introduction and implementation of work from home exploiting information-telecommunications devices)" However, there is a strong tendency for Japanese companies to try to ensure that work proceeds smoothly by sharing the same space, fostering a sense of companionship, and sharing various information that cannot necessarily be put in the form of text, and teleworking did not take root despite these efforts.

In the midst of this situation, the COVID-19 pandemic suddenly struck. In late February 2020, the Novel Coronavirus Response Headquarters formulated the Basic Policies for Novel Coronavirus Disease Control, which urges "companies to encourage employees and other personnel to take leave if they have fever or other flu-like symptoms, and promote teleworking and staggering commuting hours, in order to reduce the opportunities for contact with patients and infected persons." Like this, "teleworking and staggering commuting hours" were called for in a request for cooperation in halting the spread of the virus delivered by Minister of Health, Labour, and Welfare Katsunobu Kato, Minister of Economy, Trade and Industry Hiroshi Kajiyama, and Minister of Land, Infrastructure, Transport and Tourism Kazuyoshi Akaba to Keidanren (The Japan Business Federation, Chairman Hiroaki Nakanishi), JCCI (The Japan Chamber of Commerce and Industry, Chairman Akio Mimura), Keizai Doyukai (The Japan Association of Corporate Executives, Chairman Kengo Sakurada), and JTUC-RENGO (The Japanese Trade Union Confederation, President Rikio Koza).

However, according to a survey conducted by the MHLW via the LINE messaging app in early April, only 5.6% of workers were engaged in telework, and this sheds new light on the fact that even with COVID-19 on the scene, the circumstances of Japanese workplaces are such that teleworking cannot easily be introduced. These circumstances and the underlying factors are as described above, but also, the issue of application of laws governing working hours to off-site work may be an obstacle to the introduction of teleworking. With this in mind, let us look at a brief overview of recent developments.

The Labor Standards Act stipulates a conclusive presumption system of the number of working hours for off-site work, mainly for sales staff working away from company premises, but administrative interpretation issued in 1987 state that the conclusive presumption system does not apply to those who work off-site while receiving instructions as needed via radio communication or pager. This interpretation, based on the ICT environment of an era when people did not have mobile phones, let alone smartphones, remains in place today.

The above-mentioned February 2018 guidelines for off-site work state that teleworking does not mean that a de facto working-hours system can be applied, and that to do so, it is necessary to satisfy requirements including that ICT equipment *not* be in a state in which the employer can always contact the employee. Therefore, even with teleworking, in principle a normal working-hours system is to be applied, and suggests that idle periods be treated as breaks, or as annual paid leave measured in hourly units. Considering that the guidelines were drawn up at a time when addressing excessive working hours were a primary concern, there is unavoidably some degree of over-regulation.

Now, COVID-19 has brought the issue sharply into focus, but even prior to it, with the development of ICT over the past 10 to 20 years the paradigm of “working anytime, anywhere” has become prevalent worldwide. In this context, many different parties are calling for re-examination of the legal system governing working hours, which is premised on an Industrial Revolution-era work style in which workers arrive at a factory at a certain time and work in unison. In the future it will be necessary to revise working-hours regulations for teleworking, focusing on the principle of employers not micromanaging how work is performed and time allocated, which also relates to a re-examination of the discretionary work scheme. It is not yet clear how much telework will advance during the current crisis, but it is to be hoped that as businesses implement teleworking for the first time, various issues will be identified and it will provide the impetus for revision of regulations.

#### **IV. Subsidies for elementary school closures, etc. and the (unintended) launch of measures for freelance workers**

Among the current countermeasures against COVID-19, support for working parents taking leave due to the closure of school for children is extremely important in terms of the extension of labor policy, and that support has been extended to freelance workers. This countermeasure emerged because, on February 27, Prime Minister Shinzo Abe requested at the Novel Coronavirus Response Headquarters meeting at the Prime Minister’s official residence that all elementary schools, junior high schools, high schools, and so forth nationwide be temporarily closed from March 2 through spring break (late March, eventually continued until May).

For working parents of young children, schools undoubtedly also play the role of daycare providers, and when schools are closed the parents find themselves torn between work and childcare. Thus, MHLW swiftly established the “Subsidy for Guardians Affected by School Closures Related to COVID-19.”

While this is a new subsidy, it is still within the broader framework of employment subsidies. That is, it is a subsidy program for employers who offer paid leave (wages paid in full) separate from the annual paid leave under the Labor Standards Act for workers who are parents or guardians of (1) a child attending an elementary school, etc. that is temporarily closed in response to COVID-19, or (2) a child attending an elementary school, etc. who is infected with COVID-19 or shows cold symptoms, etc. indicating possible infection with COVID-19. The maximum subsidy amount is 8,330 yen per person per day, and this amount is the same for large corporations and small and medium-sized companies.

Since this is an “employment” subsidy, it is of course limited to workers who are employed, but it was pointed out that while freelance workers with children find themselves in the same position, they are unreasonably excluded from the subsidies, and a debate emerged. It can indeed be regarded as unreasonable, but at the same time, it is difficult to extend an employment policy intended for employed

workers to those who are self-employed. Over the past few years, however, there have been repeated discussions in governmental committees and so forth regarding measures for those with “employment-like (quasi-employment) working styles,” but there is a dark and deep gulf, so to speak, between employee and non-employee workers, which cannot easily be bridged.

Under the current circumstances, a countermeasure for this cohort suddenly appeared like a rabbit from a hat as part of the package of COVID-19 countermeasures, and compensation for freelance workers needing to take leave was established. However, when the outline of the system was announced on March 10, there was widespread criticism that the amount of “4,100 yen (fixed amount) per day” was too low compared to “8,330 yen (maximum amount) per day” for employed workers.

Thereafter, applications for this program began to be accepted on March 18, but at this time it was known as “financial support for elementary school closures, etc. due to COVID-19.” (financial support, hereafter) The different wording appears to indicate that the program differs in character from the “*subsidy* for elementary school closures, etc. due to COVID-19” aimed at employed workers. The payment procedure specifically indicates that those eligible to receive payments are “self-employed persons contracted to perform work.” Here, let us directly quote the wording of this section of the payment procedure.

## 2. Persons eligible for payment

Those eligible for financial support are parents or guardians to which all of (1) to (5) below apply.

(1) The person belongs to either category (a) or (b) below:

(a) Have taken care of child attending or receiving supervision at elementary schools, etc., that have instituted temporary closures (School Health and Safety Act [Act No. 56 of 1958] Article 20) or equivalent measures (referred to below as “temporary closures”) in response to the spread of COVID-19

(b) Have taken care of child attending or receiving supervision at elementary schools, etc., where that child has been infected by COVID-19 or is considered at risk and has been asked to refrain from attending the elementary school, etc.

(2) Prior to the temporary closure described in (1)(a) above, or prior to caring for the child as described in (1)(b) above, the person concluded a contract with a client (ordering party) to which all of the following (a) to (c) apply:

(a) Remuneration must be paid for the performance of tasks based on a business consignment contract, etc.

(b) There is a client (ordering party), and the person has been given certain indications from the client regarding the manner in which the work is to be performed, the place and time work is to be done, etc.

(c) The form of remuneration, such as calculation by hours worked, is based on the assumption that there is little variation among individuals in terms of time required to perform work and the results of the work.

(3) The person has ceased doing work based on business consignment contract, etc. with client as described in (2) above, in order to take care of a child as described in (1) above during the period of temporary closure or other measures described in (1) (b) above (referred to below as “temporary closure measures”).

(4) The person is not covered by employment insurance.

(5) The person is not a business owner who employs workers.

(6) The person is not a national or regional civil servant.

(3. to 5. is omitted here)

## 6. Days eligible for payment

Days eligible for financial support payments are days during the overall payment period on which work based on business consignment contract, etc. with the client as described in 2 (3) above was canceled. However, days on which work based on the business consignment contract with the client is done even for part of (some hours of) the day are excluded from eligibility for payment.

## 7. Amount paid

The amount of financial support shall be the amount obtained by multiplying the number of days eligible for payment by 4,100 yen per day, and is to be paid by MHLW's Employment Environment and Equal Employment Bureau Director (referred to below as Director) within the scope of the allocated budget.

As mentioned above, there was widespread criticism to the outline announced on March 10 that half of the 8,330 yen per day allocated for employed workers was too low. The essence of the problem with this system, although it was lost amid such criticism, is how to apply a framework intended for employed workers, who are under the supervision and follow the orders of employers while carrying out duties during working hours, to freelance self-employed people in the first place. Naturally, MHLW bureau is very aware of the problems surrounding this. For example, with regard to the part of the overall framework referring to "days when the individual was scheduled to work," the payment procedure refers to days when the individual "has ceased doing work based on a business consignment contract, etc. with the client as described in (2) above, in order to take care of a child as described in (1) above during the period of the temporary closure of school or other measures described in (1)(b) above." In other words, to be eligible for payment the worker is required to have already received an order and have been working on it or been about to start with it, but have stopped due to the child's school closure.

Reading through the payment procedure, it seems that the scope of freelance workers eligible for payment is limited to those in so-called "employment-

like working styles," i.e. whose situation is similar to that workers officially employed at businesses. In other words, requirements 2(2), particularly (b) ("certain indications from the client regarding the manner in which the work is to be performed, the place and time work is to be done, etc.") and (c) ("form of remuneration, such as calculation by hours worked, is based on the assumption that there is little variation among individuals in terms of time required to perform work and the results of the work") are oriented toward the criteria used to determine "worker status" according to labor laws.

From this perspective, the "financial support" package that suddenly emerged as a COVID-19 countermeasure may be unexpectedly preceding in part of the policy governing "employment-like working styles" that has been discussed in successive committees of the MHLW's Employment Environment and Equal Employment Bureau in recent years. We should now look at an overview of these discussions' progress in recent years.

Here as well the starting point of recent developments is the March 2017 Action Plan for the Realization of Work Style Reform. The plan notes that "[c]onsidering 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." Starting in October 2017, the MHLW convened the Meeting on Employment-like Working Styles, conducted interviews with related parties and organizations, heard reports on the status of these working styles in Japan and other countries, and compiled a report in March 2018. This report was presented in April 2018 to the Committee on Basic Labour Policy of the Labour Policy Council (an advisory panel to the MHLW), and this committee also conducted interviews and discussions and in September of the same year compiled a committee report entitled *Addressing Evolving Working Styles in an Evolving Era*. In October the Meeting on Points of Controversy with regard to Employment-like Working Styles was established and discussions are

underway. The committee was scheduled to compile a report in March 2020, but it has been postponed due to the spread of the COVID-19. Then, let us turn to the Interim Report compiled in June 2019, which includes a discussion of protections for those with employment-like working styles.<sup>1</sup>

According to the Interim Report, the basic idea is that with regard to self-employed persons who are not objectively recognized as having “worker status” but have work styles similar to those of workers, there are three potential approaches:

- (1) Expanding the definition of “worker” to extend protections to these individuals
- (2) Defining those self-employed individuals that require protections as occupying an intermediate category between employees and self-employed, and partially apply the labor-related laws to them,
- (3) Rather than expanding the definition of “worker,” separately taking necessary measures for self-employed persons who require a certain degree of protection, while considering the content of protections. Among these, the Interim Report notes that (1) is difficult because it involves a drastic review of the criteria for worker status, and for the time being, policy direction will be taken toward (3) and focus primarily on those self-employed people who are “persons who are entrusted with work by a client, provide services, and receive remuneration for these services while operating primarily as individuals.”

To enumerate specific approaches outlined, those under discussion are: (1) Measures to promote clarification of terms and conditions when recruiting individuals who will perform work in a employment-like working context, (2) Measures to encourage clients to explicitly indicate working

conditions to employment-like working individuals when ordering work or altering working conditions, (3) Regarding termination of contracts, requiring advance notice from clients and setting certain limitations on reasons for termination or revocation of contracts, (4) With regard to ensuring payment of remuneration, measures to encourage payment of remuneration by a certain fixed day, (5) Regarding amount of remuneration, potentially setting a minimum remuneration amount, with reference to minimum wage regulations, (6) Regarding health and safety, measures to encourage certain safeguards such as establishment of procedures to prevent hazards when transferring equipment, goods, etc. that may cause harm to employment-like workers, and (7) Establishing a consulting service for when disputes arise.

As noted above, these considerations are still in the final stages, but in the meantime, it seems that the financial support program for freelance workers with elementary school children, suddenly established and implemented at this point, represents one of the measures for “employment-like working styles” being unexpectedly implemented ahead of schedule. Moving forward, it is necessary to pay continued attention to how policies for employment-like working styles develop after emergency countermeasures have ended.

The views and recommendations of this paper are the author’s and do not represent those of the Japan Institute for Labour Policy and Training.

1. For detail, see Koichi KAMATA, “Legal Issues Surrounding Employment-like Working Styles: Disguised Employment and Dependent Self-employment,” *Japan Labor Issues* vol.4, no.22 (March-April 2020), <https://www.jil.go.jp/english/jli/documents/2020/022-01.pdf>.

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