

## Column

# The Employment Adjustment Subsidy and New Assistance for Temporary Leave

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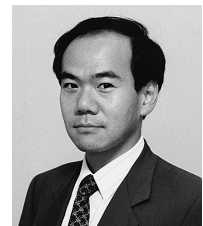
The year 2020 was supposed to be the start of new labor policies targeting such matters as “equal work for equal pay” and “power harassment” (workplace bullying) here in Japan. Since the beginning of the year, however, a series of emergency measures has come out to deal with the novel coronavirus infectious disease COVID-19, which rapidly spread globally and became a pandemic. Several developments arose here that deserve attention from the viewpoint of labor policy. Attracting renewed attention along with the new era topics of “teleworking” and “freelancing” are the Employment Adjustment Subsidy (EAS), which in recent years has tended to be viewed negatively under the catchphrase of “shifting from excessive employment stability to support for labor mobility,” as well as direct payments to employed persons not at work. In this column, I will review the “prehistory” of the EAS program’s existence and summarize its turbulent history up to the present day. I will also take a look at policy responses to the COVID-19 pandemic in perspective of comparative law and consider legal problems pertaining to a new temporary leave assistance.

## I. Prehistory: Temporary layoffs and responses to disasters

When viewed in terms of labor policy history, the direct payments being made now have aspects of a throwback to disaster responses made during the days of unemployment insurance, prior to the EAS’s establishment. Let us take a look at this history by examining an episode that is not widely known.

When the Allied occupation (1945–52) of Japan

came to an end, there was a time when layoffs were being made in association with reduced operations in the cotton spinning industry, based on a Ministry of International Trade and Industry-issued recommendation to curtail operations by 40%. In a notification titled “Concerning the Administration of Unemployment Insurance Benefits to Workers Experiencing Temporarily Unemployment Associated with Curtailed Operations in the Cotton Spinning Industry” (4/23/1952 *Shokuhatsu* No. 281), the Ministry of Labour applied the term “temporary job separation” to layoffs that were issued on the condition of reemployment after a certain period and approved unemployment insurance payments in such cases.



Later, from the end of 1953, there was a series of industrial readjustments that came from monetary tightening in many industries. This led the Ministry of Labour to issue “Concerning the Handling of Unemployment Insurance Relating to the Temporary Layoff System” (7/15/1954 *Shokuhatsu* No. 409), which normalized the handling described and established procedures in detail. The main targets were the coal and shipbuilding industries. Accompanying this notification was a “Plan Concerning the Temporary Layoffs System Associated with Curtailed Operations” (dated July 5).<sup>1</sup> This was a prototype that subsequently developed into the employment adjustment subsidy and can be seen as an attempt to somehow realize such benefits within the framework of unemployment

benefits. Theoretically speaking, this is a remarkably acrobatic approach, as it attempts to include people who have been promised employment—in other words, who have obtained a tentative hiring decision—in unemployment insurance eligibility as unemployed people in order to deal with them within the framework of the unemployment system.

On the other hand, the “Special Act on Application of the Unemployment Insurance Act on Workers Employed at Business Establishments in Areas Damaged by Major Floods of June and July 1953,” which was enacted as House members-initiated legislation in 1953, pertains to business establishments covered by unemployment insurance that were damaged by major flooding in western Japan and therefore forced to suspend business. When, as a result, insured persons who were employed by those establishments were put on leave, did not receive temporary leave allowances or other benefits, and could not obtain other employment, the act worked to pay unemployment insurance by considering them as having separated from employment or otherwise unemployed. Moreover, a very similar measure was taken in 1959, six years later, when the “Special Unemployment Insurance Act concerning Flood Damage of July and August 1959 and Storm and Flood Damage of August and September of the Same Year” was enacted as a government-submitted bill for storm and flood damage caused by the Isewan Typhoon and other events of 1959.

These were special laws that were limited to a specific region and time. However, their aims became stipulated as a permanent special measure in Article 25 of the Act on Special Financial Support to Deal with Extremely Severe Disasters (“Extremely Severe Disasters Act,” enacted in 1962). Article 25 was added to this act according to a supplementary provision of the Unemployment Insurance Act revised in 1963, the following year. The provisions were developed so that special provisions of the Unemployment Insurance Act and, later, the Employment Insurance Act became applicable whenever extremely severe damage becomes specified in a government ordinance that is based

on the Extremely Severe Disasters Act, without having to prepare new legislation in each occasion. This is the so-called “assumed unemployment scheme.” Specifically, the provisions stipulate that “when workers are in a state whereby they have no choice but to take leave due to the suspension or ending of business operations and cannot work and receive wages despite having the intent and ability to work” because businesses covered by insurance in regions affected by extremely severe disasters that have been designated by government ordinance received damage, “[regarding application of the stipulations of this Act] payment of unemployment insurance can be made by considering said state to be unemployment.”

“Assumed unemployment scheme” was applied at the time of the Great East Japan Earthquake of 2011. A notification called “Concerning Special Provisions for Employment Insurance Associated with the Designation of an Extremely Severe Disaster” (3/13/2011 *Shokuhatsu* 0313-1) directs that, when the above-mentioned condition is met, “special measures permitting the recognition of unemployment status without actual job separation and the payment of unemployment allowances of employment insurance shall be implemented.” The scheme has been repeatedly applied in cases of natural disasters, including the Kumamoto Earthquakes of 2016, the Hokkaido Eastern Iburi Earthquake of 2018, and Typhoon 19 (Hagibis) of 2019.

## II. The development of Employment Adjustment Subsidy

Japan’s employment policy during the nation’s years of rapid economic growth aimed to “create a modern labor market based on occupational types and vocational skills.” The subsidy provided in the Employment Measures Act of 1966 was a labor mobility support-aimed “job-change benefit.” Then the Employment Insurance Act, which was enacted in the midst of the 1974 oil crisis, established an employment stability-aimed “employment adjustment subsidy” and steered toward an internal labor market-oriented employment policy. The

provision's wording at that time was "[provide] necessary subsidy and assistance for business operators to prevent unemployment in the case where the business operator has been compelled to curtail business activities due to changes in the economy, sudden changes in the international economic situation, or other economic reasons." There was no mention of "changes in industrial structure" or "employment stability." The subsidy's basis was a short-time work allowance in West Germany, which was a temporary employment stability measure for dealing with sudden contractions in labor demand caused by external situations such as economic environment. So in this sense, it cannot necessarily be described as a peculiar policy to Japan.

However, in a revision made three years later, in 1977, a subsidy for business operators who provide education and training and leave when "the business operator has been compelled to switch businesses or curtail business activities due to changes in the industrial structure or other economic reasons" was added. With this revision, the provision became more than a measure for employment adjustments associated with short-term economic cycles, as it also applied to medium- and long-term changes in the industrial structure. While the former is an approach that is also seen in European countries, the latter represented a major step in a uniquely Japanese policy direction, one in which an attempt was made to take what was traditionally thought to be a role of the government's economic policy—to provide education and training in response to changes in the industrial structure—and make it part of employment stability measures within companies. Behind this policy idea is Japan's unique concept of the "employment contract," which, it goes without saying, defines job duties and content poorly and which views it to be natural for workers to engage in various duties as ordered by their employers. It is thus a policy that the United States and Europe, which have "job description based" employment systems, would have difficulty implementing even if they wanted to. However, in terms of causal relationship, the policy of maintaining employment through in-company education and training based

on this employment policy idea may have played a role in reinforcing the thinking of employment contract without job description throughout society as a whole.

In the 1990s, "promoting labor mobility without unemployment" became a policy goal, and demands were made for a shift "from employment stability to support for labor mobility" when the Employment Measures Act was amended in 2001. A labor mobility support subsidy came into the spotlight as a result. Meanwhile, the EAS survived as a subsidy for temporary employment adjustments when individual business establishments were suddenly forced to curtail their business activities, and the subsidy's importance had clearly diminished.

However, when Japan's economy fell into recession as a result of the 2008 global financial crisis and the nation's employment situation suddenly deteriorated, the people eligible for EAS payments and the amounts paid increased sharply. Indeed, the government promoted this by relaxing EAS requirements considerably. A JILPT Research Material series no.99 paper released in 2012 titled *Koyo Chosei Joseikin ni yoru Koyo Iji Kino no Ryoteki Koka ni kan-suru Ichikosatsu* (Study on the quantitative effect of the employment maintenance function of employment adjustment subsidies) empirically estimated the degree to which the EAS was effective in preventing unemployment. The paper estimated that the EAS's quantitative employment stability/retention effect was between 900,000 and 1.2 million people in manufacturing industry and around 1.5 million in all industries (excluding agriculture, forestry, and fisheries). This clearly pointed to a revival of the age of "employment stability." One could say that the 2008 global financial crisis brought a shift toward an employment stability-based policy somewhat reminiscent—a small "déjà vu" so to speak—of the time when Japan's employment policy made a large course change toward an employment stability stance during the 1970s oil crises.

When the second Abe Cabinet came to power at the end of 2012, the phrase policy change from "excessive employment stability to labor mobility"

(realizing labor movement without unemployment) reappeared in the “Japan Revitalization Strategy” of the following year, and the aim became to expand the labor mobility support subsidy and thereby make its budget larger than that of the EAS. The maxim “history repeats itself” comes to mind. And it is here that the third external shock arrives: the current COVID-19 pandemic.

### **III. The Employment Adjustment Subsidy during the COVID-19 pandemic**

Germany and most of the other continental European countries have systems resembling the Japanese EAS. With the arrival of the COVID-19 pandemic, even the United Kingdom (which previously did not have such a system) has joined its neighbors by establishing one. Today, this kind of “non-excessive” employment stability-based policy—i.e., one of maintaining employment with public financial assistance in response to a temporary economic crisis while waiting for labor demand to return—has been established as a generally common policy in developed countries, at least with the exception of the United States. As of early May, the number of those covered by such policies reached 11.3 million in France, 10.1 million in Germany, 8.3 million in Italy, and 6.3 million in the UK, whose policy is newly established.

In Japan, on the other hand, the scope of covered employers was expanded and requirements about production indices, employment indices, and period of insured worker status were relaxed in a first round of measures implemented at the end of February 2020. Further relaxation measures and as well as raising of the grant rate ( $1/2 \rightarrow 2/3$  [and  $3/4$  when no dismissals are made] for large corporations; and  $2/3 \rightarrow 4/5$  [and  $9/10$  when no dismissals are made] for SMEs) were implemented in a second round in April. A point that attracts particular attention here is the “inclusion of absence from work by workers who are not covered by employment insurance in EAS coverage” with the abolishment of the requirement of being covered by employment insurance. This requirement was previously thought to be a natural limitation given that the EAS is funded by the

employment insurance scheme. The abolishment in the first round of the condition requiring workers to be insured for at least six months was on the same track.

However, with some 5,000 applications and roughly 500 approved payments made in early May, Japan’s EAS took a considerable amount of time to get moving. In the mass media and elsewhere appeared criticisms of the enormous number and difficulty of application form items and attached documents, and of the excessive time and cost needed for the application process. One factor here is that the small, medium, and micro enterprises (such as eating and drinking establishments and interpersonal services) that were easily affected by the COVID-19 pandemic have difficulty relying on labor and social security attorneys. Consequently, their managers had to complete subsidy procedures that were completely new to them on their own. This is in contrast to what happened in the oil crises and global financial crisis of 2008–09, when those affected tended to be large foreign demand-oriented manufacturers and associated industries having personnel departments with the ability to deal with subsidy operations. It can also be pointed out that claims of improper receipt were not infrequent following the EAS’s application during the global financial crisis of 2008–09, and, as a result, procedures were made more complex to ensure the system’s strict operation.

The Ministry of Health, Labour and Welfare (MHLW) urgently endeavored to simplify procedures. It reduced by half the number of items appearing on application forms. Also, it cut the amount of attached documentation required, and made it possible to apply with existing documents. This led to a gradual increase in both the number of applications and approved payments, with figures rising from approximately 120,000 and 60,000, respectively, in early June to approximately 1,310,000 and 1,191,000, respectively, in late September.

### **IV. The new temporary leave assistance and related legal problems**

As of early May, there have arisen demands

(coinciding with criticisms of application process and delays in payment) for a system that issues public absence-from-work-related benefits directly to workers who are not working, rather through their companies, and thereby makes payments more quickly than the EAS. For instance, on May 7, the Japan Federation of Bar Associations called for the implementation of benefits similar to the special provision in Article 25 of the aforementioned Extremely Severe Disasters Act for suspensions of business associated with the recent state of emergency declaration. The federation also demanded the implementation of measures permitting workers to receive unemployment benefits even if they have not actually separated from employment until infections subside, and the maintenance of employment by business operators who aim to resume business. Additionally, Unite for the Right to Life against Covid-19 issued “31 Emergency Recommendations to Guaranty the Right to Life” on April 24. One of the proposals is “workers who have not separated from/left their jobs but who cannot receive wages nor compensation for absence from work due to their employers’ suspension or scaling back of business operations should be aided with unemployment benefits from employment insurance by applying the ‘unemployment in essence’ concept for times of disaster that was utilized following the Great East Japan Earthquake.” Prime Minister Shinzo Abe indicated a positive attitude toward realizing these steps on May 11, as did Katsunobu Kato, Minister of Health, Labour and Welfare on May 12.

However, if we ask whether Article 25 of the Extremely Severe Disasters Act can be applied to absence from work caused by the current COVID-19 pandemic, we must conclude that it cannot. This is because the Act is solely a law for coping with “extremely severe disasters,” such as earthquakes and typhoons. It does not cover infectious diseases such as new types of influenza and SARS. Accordingly, any desire to apply a similar legal framework to leave attributable to the current COVID-19 situation will require the enforcement legislative measures in one form or another. It seems likely that measures similar to Article 25 were being studied within the

government around May 11 and 12. However, given the characteristic that, unlike earthquakes, typhoons, and other natural disasters, the difficulty of doing business comes from requests for voluntary restraint from the national and prefectural governments, it is probable that a view advocating that a different kind of approach is required. According to a news report on May 14, the government intends to establish a new scheme that will pay about 80% of monthly wages directly to employed persons not at work, with focus on employees of SMEs that have not applied for the EAS, as an employment insurance special provision scheme based on the spread of novel coronavirus infections. It reports that a related bill will be submitted to the current Diet and the payment of benefits will begin as soon as it is enacted.

MHLW held a consultation with the Labour Policy Council concerning the outline of the bill on May 26, received the council’s response that the outline is valid, and submitted the bill to the Diet on June 8. The bill was adopted and enacted on June 12 and put into effect immediately. However, the preparation of specific application documents was completed on July 7 and the receipt of documents began on July 10.

This “Act on Temporary Special Provisions, etc., for the Employment Insurance Act in Response to the Effects of the Novel Coronavirus Infectious Disease, etc.” is comprised of “temporary leave assistance in response to COVID-19” paid to “persons who have been put on leave by a business operator due to the effects of the novel coronavirus infectious disease, etc., and who cannot receive their wages, either in whole or in part, during the time they are put on leave” and a “special benefit” paid within budgetary limitations to workers who are not insured persons. A significant labor law problem exists here.

The problem with the stipulation that “[persons] who have been put on leave by a business operator due to the effects of the novel coronavirus infectious disease, etc., and who could not receive payment of their wages, either in whole or in part, during the time they are put on leave.” Article 26 of the Labor Standards Act states that “In the event of an absence from work for reasons attributable to the employer,

the employer must pay the worker an allowance equal to at least 60 percent of their average wage during that period of absence from work.” Opinions are divided on what is included within “reasons attributable to the employer.” However, there is no doubt that “absence from work” in the special provisions act includes both cases when an employer must pay allowance for absence from work equivalent to 60% of average wage and cases when the employer need not make such a payment. Specifically, the act’s assistance design assumes that the employer is in a state of legal violation, so to speak, in that the worker “could not receive payment of wages” because the employer does not pay an allowance for absence from work despite the fact that the employer has the obligation to do so based on the Labor Standards Act.

Just because a worker receives temporary leave assistance because the employer (who has the obligation to pay an allowance for absence from work) does not pay the allowance for absence from work, this does not mean that the employer’s obligation to pay an allowance for absence from work based on the Labor Standards Act extinguishes as the employer continues to bear the obligation to pay the allowance to the worker. However, if, for example, a labor standards inspector conducts an on-the-spot inspection of such a company and discovers that the obligation to pay allowances for absence from work was not performed, and if a worker at the company promptly applies for temporary leave assistance because he or she will not receive an allowance for absence from work, and then, receives the payment, a puzzling situation would arise in terms of whether or not a recommendation to rectify the violation in Article 26 of the Act should be issued.

Obviously, if viewed strictly in terms of the legal relationship of rights and obligations, the employer has not yet performed its obligation to pay the allowance for absence from work based on the Labor Standards Act and therefore must still pay the allowance to the worker who received the temporary leave assistance. But if that were to happen, the worker would receive double compensation for absence from work from two sources: the employer

and the state. This is an extremely uncomfortable conclusion.

Additionally, it appears that employment security administration, if not others, officially recognizes that the allowance for absence from work will not be paid. Specifically, for a question in the recipient qualification checklist, “Have you not paid an allowance for absence from work, either in whole or in part, or are you planning not to pay said allowance?” the employer responds by checking a box indicating “No, I have not paid it (I do not plan to pay it).” In fact, if the employer has a worker who receive temporary leave assistance and also pays an allowance for absence from work to the worker, the temporary leave assistance is considered to be illegally received. This could result in a court order to pay three times the amount received as punishment. This becomes the ultimate “double bind” whereby the employer *must not pay* something that it *must pay*.

MHLW’s website indicates that the obligation to pay allowances for absence from work is not lifted by the payment of the temporary leave assistance. However, it also *asks* audience to first consider using the EAS. It hardly claim that this does much to resolve the fundamental problem.

1. Plan Concerning the Temporary Layoff System Associated with Curtailed Operations (July 5, 1954, Ministry of Labour)

1) Policy

To stabilize employment and contribute to unemployment measures by employing a temporary layoff system and including it within the coverage of unemployment insurance, with the aim of avoiding the temporary generation of industrial readjustment-caused mass unemployment and labor-management conflicts that are predicted in the near future as a result of spreading monetary tightening since October of last year.

2) Requirements for including the temporary layoff system in unemployment insurance

- (1) The business cannot avoid industrial readjustment due to financial trouble, curtailment of operations, etc.
- (2) The generation of temporary mass unemployment and social unrest are anticipated as a result of the aforementioned industrial readjustment.
- (3) The business can be expected with certainty to have smooth operations secured by implementing the temporary layoff system and be capable of reabsorbing temporarily laid-off workers.
- (4) The business, which intends to implement the temporary layoff system, enters into a labor agreement concerning

temporary layoffs.

(5) Business operators are unable to pay allowances and other wages during the period that temporarily laid-off workers are eligible to receive unemployment insurance benefits.

(6) Unemployment insurance premiums are paid in full.

3) Program outline

(1) Workers who will be temporarily laid off are treated as being subjected to temporary unemployment with a promise of being reemployed and made eligible for unemployment insurance.

(2) The layoff period shall, in general, be three months, and reemployment shall be for at least six months after the end of the layoff.

(3) The handling of unemployment insurance for temporarily

laid-off workers shall be in accordance with the following:

a) The reason for job separation shall be dismissal, with a promise for reemployment, due to circumstances attributable to the business operator.

b) Recognition of unemployment for insurance benefits shall be conducted once every two weeks; other matters concerning insurance benefits shall be handled in the same manner as for general unemployment insurance.

(4) A business operator who intends to implement the temporary layoff system shall submit a temporary layoff implementation plan (attached with a labor agreement that establishes the scope of temporary layoffs) to the Minister of Labour or prefectural governor and receive approval for said plan.

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