

Non-Compete Clauses and Restrictions on Labor Mobility in Japan

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While labor mobility is promoted through support for proactive career development among workers, employers often use non-compete clauses on workers to protect their competitive interests and prevent the outflow of talented human resources. Post-employment non-compete clauses prohibit departing workers from working for a competitor, which restricts the employees' freedom of occupation (Article 22, paragraph (1) of the Constitution). In court precedents, the validity of non-compete clauses is often contested, and the courts tend to scrutinize these clauses strictly by examining the specific details of the non-compete obligations on a case-by-case basis. However, in principle, every worker has the freedom to choose their occupation after leaving a job. In particular, under job-based employment system (*job-gata koyō*) some individuals may seek to build their career by taking up similar positions after changing jobs and making use of the skills and abilities they acquired in the course of performing their work. The non-compete clauses arise from the employer's initiatives and have a significant impact on the career development of workers. From the perspective of preventing disputes arising from non-compete covenants, employers should ensure that workers are adequately informed of the scope and content of such obligations before seeking subsequent employment. Non-compete clauses are subject to the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Antimonopoly Act) for the purpose of promoting fair and free competition in the acquisition of human resources, but this Act has different legal objectives from labor law, and the requirements and effects of a breach of non-compete clauses also differ. Non-compete clauses on freelancers are excluded from the regulation under labor law and regulated under the Antimonopoly Act as these clauses may impede fair competition. In light of the freedom to choose one's occupation, future consideration should be given to non-compete clauses from the perspective of improving the working environment for freelancers.

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I. Introduction

1. Promotion of labor mobility

In recent years, discussions on the shift to job-based employment system (*job-gata koyō*, an employment system in which the employment relationship is structured around clearly defined job descriptions, with remuneration determined by the duties and responsibilities of the position.) and the promotion of multiple job holding, including portfolio-style careers, have been accompanied by policy efforts to promote labor mobility toward growth sectors. According to the *Analysis of the Labour Economy 2022*,¹ although there is no notable overall increase in labor mobility, mobility involving career changes across industries or occupations appears to be rising among highly educated individuals. Additionally, as workers gain more work experience, they tend to move into jobs similar to those they perceive to be suitable to them based on their experience. In the case of specialist jobs, there is a pronounced tendency for workers to move within the same or closely related jobs. The basic principle prescribed in Article 3, paragraph (1) of the Act on Comprehensively Advancing Labor Measures, and Stabilizing the Employment of Workers, and Enriching Workers' Vocational Lives, which sets out the basic policy for labor market policies, states that: "Due consideration must be given to ensuring the employment security throughout workers' entire vocational lives by helping them make appropriate plans for their vocational lives and by effectively taking measures such as helping them develop and improve the abilities required to realize such plans and facilitating them in smoothly finding new employment in the case of job changes." Taking this principle into account, in terms of labor market policies as well, a challenge lies in whether fluid labor mobility can be achieved through workers' autonomous choices when they seek to change jobs or engage in secondary jobs by leveraging their work experience.

2. Restriction on labor mobility by non-compete clauses

In the first place, workers during their employment are obligated to act in accordance with the principle of good faith and avoid unjustly infringing upon the legitimate interests of their employers (Article 3, paragraph (4) of the Labor Contracts Act). This includes the obligation not to compete. The model work rules established by the Ministry of Health, Labour and Welfare (MHLW) indicate that workers are free to engage in multiple job holding in principle, while allowing a company to prohibit workers from engaging in competing activities if the competition is against the interests of the company (Chapter 14, Article 70, paragraph (2), model work rules by MHLW).

In addition, employers may impose a post-employment non-compete clause on their employees in order to protect their competitive interests or prevent the outflow of talented human resources. In other words, this clause restricts an employee from working for a competing company or operating a competing business after their employment is terminated if such competing activity harms or is likely to harm the employer's legitimate interests.² However, such a clause restricts workers' occupational activities and thus raises issues in relation to the freedom to choose occupation guaranteed under Article 22, paragraph (1) of the Constitution.

In addition, as companies increasingly seek highly skilled personnel through experienced hiring (*chuto saiyo*) and as more workers pursue similar positions after job changes, restrictions on moving to competing companies may hinder fluid labor mobility and innovation. Workers may also decide on a prospective employer before leaving their current company. Consequently, when imposing post-employment non-compete clauses, it may be necessary to adopt an approach that enhances legal and practical predictability. Accordingly, this paper provides a legal analysis of non-compete clauses, taking into account the current debates and recent developments on the subject.

II. Non-compete clauses and the freedom to choose one's occupation

1. Classification of disputes over non-compete clauses

Courts have tended to uphold relatively broad non-compete clauses on the ground that such restrictions are necessary to protect the employer's legitimate competitive interests, even where an employer permits its employees to hold multiple jobs during employment.³ Specifically, the following acts have been treated as constituting a breach of the non-compete clause: working for a competing company, establishing or preparing to establish a competing business, conferring benefits on a competitor, or poaching the employer's personnel. Such a breach has given rise to disputes concerning the legality of disciplinary measures, employee dismissal, the non-payment or reduction of retirement benefit, or the employer's right to claim damages.⁴

Even recently, courts have continued to address disputes arising from employee conduct that blurs the boundary between permissible outside work and competitive activity. In one case, a former employee's act of accepting work from another company while still employed—work performed for a competitor to which the employee intended to move to—was held to constitute a breach of the non-compete clause, and the employer's claim for damages was partially upheld.⁵ In another case, the court sustained the employer's claims for damages not only against a former employee who established a competing company during employment and engaged in acts such as poaching customers or employees, but also against the competing company itself under Article 350 of the Companies Act.⁶

On the other hand, for a post-employment non-compete obligation, an explicit legal basis is required because, as will be discussed in Section III, this obligation imposes a strong restriction on employees' freedom to choose their occupation despite the termination of the labor contract. In many court cases, the explicit legal basis for the non-compete obligation is found in a non-compete obligation binding the employee under work rules or written pledges, and the courts tend to interpret such obligations strictly when their validity is challenged.⁷ Furthermore, the breach of the non-compete clause that is found to be valid may result in the reduction or non-payment of retirement benefit, or the employer's claims for damages, payment of penalty, or injunction against competing activities, among others. Thus, the non-compete clause has a significant impact on the employee who breached it.

In addition, even in cases where there is no contractual legal basis, an employer may seek an injunction against its former employee if the employee engages in the improper disclosure of trade secrets defined in Article 2, paragraph (6) of the Unfair Competition Prevention Act, which constitutes unfair competition under paragraph (1), item (vii) of the same Article.⁸ Furthermore, in cases where a former employee engages in illegal competing activities that exceed the boundaries of fair competition as judged in light of social norms, such conduct may constitute a tort and may be subject to the employer's claim for damages under Article 709 of the Civil Code.⁹ Specifically, these cases include instances where an employee took customer information cards and used them for a new employer,¹⁰ or where the employee breached the employer's trust and acted against the employer's interests, poached employees and left the company to operate a competing business without conducting an adequate handover.¹¹ Thus, a series of acts committed by an employee during and after termination of employment may be evaluated as constituting illegal competing activities.

2. Freedom to choose one's occupation and clarification of non-compete clauses

The damage that the employer could suffer due to its employees working for its competitor may not be fully prevented by the confidentiality obligation under the Unfair Competition Prevention Act or as a contractual obligation alone. There is a court ruling holding that it is reasonable for an employer to impose the non-compete obligation, in addition to the confidentiality obligation, to prevent employees from using information or know-how acquired during employment, after they move to the competitor.¹² However, the post-employment non-

compete clauses restrict the employment of workers and thereby restricts their freedom to choose their occupation (Article 22, paragraph (1) of the Constitution).¹³ As discussed below (Section IV), courts tend to strictly review the validity of non-compete clauses, taking into account the potential restriction on an employee's freedom to choose their occupation. If the specific types of competing activities of workers that constitute acts harmful to the employer's interests and the consequences of the breach of non-compete clauses are clearly defined between labor and management beforehand, and this will enhance predictability for workers.

To prevent disputes over competing activities of workers and ensuring their freedom to choose one's occupation, discussions are underway toward clarifying the permissible scope of post-employment non-compete clauses. *The 1993 Report by the Study Group on the Labor Standards Act* concluded that legislation should specify the procedures for imposing such restrictions on workers, including explicit written terms regarding duration, scope, and related obligations. *The 2005 Report by the Study Group on the Labor Contracts Law System* noted that balance should be achieved between the necessity to impose non-compete clauses and the interests of workers that could be affected by such clauses. The report also stated that it is appropriate to require employers to clearly specify business category, job category, period, and other matters subject to the non-compete clauses, and to encourage them, to make these matters clear in writing to workers upon termination of employment by guidelines or anything similar. Discussions on clarification are also underway in the 2024 Working Group on Work Styles and Investment in People under the Council for Promotion of Regulatory Reform.

In this regard, workers should fundamentally be free to choose their post-employment occupation. Therefore, it is essential to avoid overly restricting their competing activities by explicitly stipulating the requirements for the validity of non-competition clauses. For example, individuals who have worked in the same job for many years or who have built their career by specializing in specific duties may, after termination of employment, choose to engage in work that is similar to their previous work by leveraging the knowledge and experience they gained in the previous work. Restricting such choice by workers on the grounds of non-compete clauses would be more likely to affect their potential of proactive career development and unduly restrict their freedom to choose their occupation.

III. Legal basis of post-employment non-compete obligations

1. Issues concerning the legal basis of the obligations

(1) Work rules

It is considered that an explicit legal basis is required for the post-employment non-compete obligation, and academic opinions are divided depending on whether an individual agreement between employer and worker is necessary in light of the risk of restricting the employee's freedom to choose their occupation,¹⁴ or work rules can sufficiently serve as such legal basis. In addition, among those who support the latter view, there is debate over whether a post-employment non-compete clause in the work rules can be regarded as "working conditions" that constitute the content of a labor contract under Article 7 of the Labor Contracts Act. The prevailing view emphasizes the relevance with a labor contract and recognizes a non-compete clause in the work rules as "working conditions," considering it to be appropriate to strictly examine the reasonableness of work rules containing such clauses.¹⁵ However, some raise a doubt about whether workers should be bound by a clause that they were unaware of, because this strongly restricts their freedom to choose their occupation.¹⁶ Furthermore, even if individual agreements are not required, there is room for discussion on whether it is sufficient just to make the work rules known to employees.

(2) Court rulings on individual agreements

Next, when an individual agreement serves as the legal basis for the non-compete obligation, the issue arises

as to how the requirements for such agreement should be interpreted. In this regard, there are precedent in which the court approved the validity of an individual agreement if the worker was able to recognize the non-compete clause in the agreement or easily understand the clause by reading the agreement.¹⁷ On the other hand, in a case in which whether the worker was imposed to reach an agreement was an issue, the court held that the worker cannot be found to have prepared the written pledge at their own free will because the worker would not be able to receive a necessary form for claiming retirement benefit without signing the pledge.¹⁸ In another case in which workers, while being suspected of attempting to move to a competing company, were individually summoned by their employer, and they submitted a written pledge on the non-compete obligation during the inquiries about the reasons for leaving the company, the court held that it is highly doubtful that the workers' written pledges can be regarded as their voluntary agreement to the non-compete obligation because they were compelled to prepare and submit a written pledge against their will under the circumstances where it was difficult to refuse to submit.¹⁹

Accordingly, with respect to post-employment non-compete obligations, there are situations in which workers have no choice but to accept an individual agreement of non-compete clauses due to the employer's superior bargaining power, and in some cases, it is inappropriate to find that the worker's agreement has been validly formed.

(3) Worker's freely given consent

Considering the unique characteristics of labor contracts, such as heteronomous work (*fremdbestimmte Arbeit*) and information disparity, it is important to determine whether the non-compete clause was agreed upon as an individual agreement through voluntary negotiations between employer and worker, even if it pertains to the obligation not to compete after termination of employment. Regarding this point, some scholars argue that the requirement of the "worker's freely given consent" (voluntariness review approach) applies to all changes in working conditions, and point out the possibility of the invalidity of non-compete clauses established as individual agreements between employer and employee based on this approach.²⁰ Since the Labor Contracts Act establishes the principle of agreement between employer and worker as a basic principle of labor contracts (Article 3, paragraph (1)), the "worker's freely given consent" is subject to procedural review centered on the employer's duty to explain and provide information. Thus, the key issue is whether the employer provided the worker with sufficient information to enable the worker to consider and judge the details of the non-compete clause. In addition, even if the worker's consent is deemed to be freely given, there may be room for regulating the details of the non-compete clause if it imposes an excessive restriction on the worker's choice of occupation.²¹

On the other hand, given that a post-employment non-compete obligation has been subject to strict validity review, there is a view that is opposed to adopting the freely given consent at the stage of forming an agreement on the obligation.²² As discussed later, many cases have focused on the reasonableness of a non-compete obligation imposed on an employee, whether under work rules or by individual agreement, and those that excessively restrict the worker's freedom to choose their occupation have been held to be contrary to public policy and therefore void (Article 90 of the Civil Code). Yet, the post-employment non-compete obligation are initiated by employers. Accordingly, grounded in the principle of mutual agreement between employer and worker, it is essential that employers provide workers—especially those wishing to engage in work similar to their previous work—with sufficient information regarding the non-compete obligation.

(4) Timing of individual agreements

The details of the non-compete obligation are considered to be subject to the employer's duty to promote workers' understanding and ensure documentation whenever possible as prescribed in Article 4 of the Labor Contracts Act.²³ An agreement between employer and worker may be reached on occasions such as upon hiring, or upon or after termination of employment. The *2005 Report by the Study Group on the Labor Contracts Law*

System stated that it is appropriate to encourage employers, by guidelines or similar measure, to make explicit in writing the details of the non-compete obligation upon termination of employment.

In this point, a court ruling noted that careful consideration is necessary regarding the worker's agreement not to seek employment with a competitor, which was made by means of a written pledge at the time of concluding an employment contract, and denied the validity of the agreement on the non-compete obligation due to the unclear definition of the scope of restriction on the worker's freedom to choose their occupation.²⁴ Conversely, some cases are based on non-compete clauses in pledges signed when the employment contract was concluded. For example, in the *Japan Industrial Partners* case,²⁵ even though the employee refused to agree to the non-compete obligation at the time of termination of employment, the court relied on their agreement in the written pledge executed at the time of hiring. In this case, in the process of judging the validity of the worker's agreement, the court held that the scope of restriction was not unreasonably broad because the scope of competing activities had been explained to the worker before termination of employment. Considering these points, what matters would be whether the scope of competing activities subject to the non-compete obligation is clearly defined, rather than when an individual agreement has been reached. In particular, in cases where a worker notifies the employer of their intention to resign before finding a new job, there is a possibility that the non-compete obligation may unduly restrict the worker's freedom to choose their occupation unless the scope of the obligation is clearly defined before the employee finds a new job.

Meanwhile, if an employee reaches an agreement on the non-compete obligation after leaving the company, the question arises as to how such agreement should be interpreted, because the person is no longer an employee after the termination of the labor contract. Concerning this point, in the *REI Former Employee* case,²⁶ the court held that when the individually agreed non-compete clause was concluded after termination of employment, the parties were no longer in the relationship between employer and worker, and thus, there were no longer situated in the employer-employee relationship. Accordingly, there were no circumstances where the former employee's ability to decide freely was impaired by an imbalance in bargaining position decision on their free will due to the difference in the footing. Some argue that if an employee reaches an agreement on the non-compete obligation after deciding to leave the company, their free will in making a decision may be guaranteed to some extent.²⁷ However, even if an agreement concluded after termination of employment is found to be valid, it should nevertheless be subject to a reasonableness review to the extent that it imposes an excessive restriction on the employee's freedom to choose their occupation.

IV. Reasonableness of non-compete clauses

1. Reasonableness review

(1) Current status of discussions

The reasonableness of non-competition clauses is likely to be subject to strict review, in consideration of the worker's freedom to choose occupation. In the precedent-setting *Foseco Japan Limited* case (in which a company sought an order of provisional disposition against its former employees' competing activities),²⁸ the court stated that "in determining the reasonable scope of restriction on competing activities, it is necessary to carefully consider matters such as the period and geographical scope of the restriction, the scope of the job category subject to the restriction, and the availability of compensation, based on the following three viewpoints: the advantage for the obligee (protection of the company's trade secrets), the disadvantage for the obligors (the former employees' difficulty in changing jobs or finding new employment), and harm to social interest (risk of monopoly and concentration and the resulting harm to general consumers)."

Recent court rulings²⁹ reviewed the validity of the agreement in dispute between employer and worker by comprehensively considering factors such as (i) the purpose of protecting the employer's legitimate interests, (ii)

the employee's status, (iii) the scope of the job, period, and geographical area subject to the non-compete clause, and (iv) the availability of compensatory measures. The agreement, which is not reasonable, was judged to be against public policy and therefore void (Article 90 of the Civil Code) (reasonable interpretation theory). In addition, there is a position that argues that the prohibition of competing activities should be limited to the minimum necessary level, considering that such prohibition could restrict the worker's freedom to choose their occupation after termination of employment.³⁰ According to this position, the employer is required to take measures to sufficiently compensate for the disadvantage that the worker would suffer from the prohibition of competing activities.

There is another view that distinguishes between cases where the non-compete clause is intended to protect the employer's business interests under the Unfair Competition Prevention Act and cases where there is no such intention; in the latter cases, the prohibition of competing activities must be limited to the minimum necessary level with sufficient compensatory measures available (theory of distinction between the legal basis and the requirements).³¹ In academic literature, there is also a view that even when the restriction on an employee's competing activities is not intended to protect the employer's trade secrets, the validity of the individually agreed non-compete clause may be recognized if appropriate compensation for the restriction is provided through substantial negotiations between employer and worker.³²

In addition, there are court decisions that apply a reasonably narrow interpretation to the scope of the non-compete obligation, treating it as valid to the extent that, as so limited, it does not contravene public policy.³³ There is also an academic opinion that agrees to the limited interpretation of clauses defined in general or abstract terms.³⁴ However, there is a view that points out that such interpretation could allow employers to impose excessive non-compete obligations, thereby discouraging employees from competing activities after termination of employment and unduly restricting their freedom to choose occupation.³⁵

(2) Specific determinations on reasonableness

In a court ruling, it is determined that even if the employee was involved in the core operations of the employer, the non-compete clause is unreasonable and against public policy and therefore void if the clause imposes too broad a restriction that prohibits such employee from "working for another company engaged in the business that falls under the category of the employer's business or from running such business," without any geographical limitations, for a period of as long as five years, and without adequate compensatory measures.³⁶

Conversely, in one case, the court upheld an individually agreed non-compete clause set forth in a written pledge, which prohibited a former COO from establishing a competing business or joining a competitor for three years after termination. The employee had held a position equivalent to that of a corporate representative at a company conducting business nationwide.³⁷ In this case, the court took into consideration the fact that as a compensatory measure, the person received payment exceeding the amount calculated under the retirement benefit regulations at the time of resignation. There is also an academic opinion that regards compensatory measures as an essential requirement.³⁸

On the other hand, in cases where the scope of the non-compete obligation is limited to acts of customer poaching, some argue that the restriction on the employee's freedom to choose their occupation is minimal, and therefore the obligation remains reasonable even without compensatory measures.³⁹ Thus, the extent of the restriction on the employee's freedom of choice of occupation may influence the determination of whether compensatory measures are required.

2. Recent trends

(1) Job-based employment system and non-compete clauses

For example, if a worker employed under the job-based employment system engages in the same job category

after changing employers, does the former employer have a legitimate interest in preventing the disclosure of know-how acquired in the course of that employment? In principle, an employer's interest in preventing the use or disclosure of know-how that a worker has developed through their own ability and effort is not deemed legitimate, nor is the objective of preventing the outflow of human resources.⁴⁰ In a court case regarding a post-employment non-compete clause imposed by a company that dispatches and introduces system engineers to other companies, on its employee who worked as a system engineer (whose job included system design, development, and testing), the court held that the purpose and interest of imposing such a non-compete clause were unclear because the company cannot be found to possess any unique know-how in system development, system operations, or related fields.⁴¹

On the other hand, the employer is found to have the legitimate interest in imposing a non-compete clause if the employer possesses secrets that do not fall within the scope of trade secrets under the Unfair Competition Prevention Act but that deserve to be protected,⁴² or the employer intends to prevent the risk of disclosure of important information on technology or business by imposing the non-compete obligation on its employees in addition to the confidentiality obligation.⁴³ Examples of such cases include where the knowledge that the employee acquired in the company is highly confidential and the employee has been provided with special training using know-how developed by the company for the purpose of enabling its employees to acquire skills,⁴⁴ or where the purpose of the non-compete clause is to maintain technical secrets or know-how in product development.⁴⁵ Even in the case of job-based employment system, whether the employer has legitimate interests would be interpreted in the same manner. However, even if the necessity to protect the employer's interests is recognized, if the non-compete obligation is imposed for a long period, without any geographical limitations, to prohibit a broad scope of activities, and no compensatory measures are taken, the obligation may be deemed to be against public policy.⁴⁶

Furthermore, if the scope of the non-compete clause is broad, it may prevent employees from utilizing the knowledge and experience they acquired in their previous work to engage in similar work, thereby imposing significant restrictions on their freedom to choose their occupation. For example, a non-compete clause that is not limited to the job category associated with the technology related to the employer's proprietary know-how is evaluated as being broad in scope and this can be the factors for denying the reasonableness of the clause.⁴⁷ Similarly, even if the period of the non-compete clause is relatively short (six months), if the scope of activities prohibited by the clause is not specifically limited but only defined as activities performed within Japan, such clause imposes significant restrictions on the employees.⁴⁸

On the other hand, in a case involving a non-compete clause prohibiting an employee, an investment professional, from joining a company that is deemed to be in a "competing or similar business" for one year after termination of employment, the restriction under the clause was not found to be unreasonably broad and so unclear as to render the clause invalid because the employer explained the scope of competitors (companies engaged in private equity buyout funds) before termination of employment.⁴⁹ Considering these points, employers are required to clearly define the scope and period of non-compete clauses and make these matters clear to employees. However, even if non-compete clauses are limited in scope, sufficient compensatory measures should be provided, given that such clauses can significantly impact employees seeking to build their careers, such as those in job-based employment system.

(2) Wages and compensatory measures

When a non-compete clause is imposed on workers with high levels of expertise or skills, could high pay, for example, be evaluated as a compensatory measure and serve as an element supporting the reasonableness of the clause? In a case where an employee, who was an investment professional, was paid an annual base salary and performance-based salary totaling over 12 million yen,⁵⁰ the court held that such payment may be taken into

consideration, but there is no evidence to find that the amount paid to the employee was particularly high compared to the amounts paid to others in the same job, and therefore the payment of such salaries could not be immediately determined to be sufficient compensation. In other words, if the amount paid to the employee is found to be higher than the amounts paid to others in the same job, there may be room for such payment to be approved as a compensatory measure associated with the non-compete obligation. However, considering the worker's freedom to choose their occupation, if it is not made clear to the employee that the payment of high salary has the nature of a compensatory measure associated with the non-compete obligation, such payment should not be evaluated as a compensatory measure.

Next, regarding whether retirement benefit can be considered as a compensatory measure, it is generally understood that retirement benefit has the meaning of compensation for labor during employment and does not possess the nature of a compensatory measure for a non-compete obligation.⁵¹ Similarly, in academic opinion, the idea of considering the payment of retirement benefit as compensation is generally rejected,⁵² and it is also argued that other monetary payment with the nature of compensation must be offered.⁵³ On the other hand, there is a view that the non-payment of all or part of retirement benefit can be interpreted as a negative form of institutional compensation,⁵⁴ and according to this view, the non-payment of retirement benefit due to a breach of the non-compete clause is permissible as long as it is explicitly stated in advance.⁵⁵ In a court case in which an employee who was subject to the early retirement program was granted preferential treatment totaling over 30 million yen, including a premium retirement benefit in addition to a regular retirement benefit, the court held that the premium retirement benefit had the nature of a compensatory measure for the non-compete clause.⁵⁶ In this respect, there is a view that points out that the premium payment was offered as part of a personnel reduction scheme and that it is questionable whether the extra payment that is available to all applicants can be considered as a compensatory measure for the non-compete obligation.⁵⁷ A retirement benefit should generally not be regarded as a compensatory measure due to its nature but a premium retirement benefit might be recognized as having the nature of a compensatory measure as an exception if the employer has clearly stated in advance that it has such nature.

Additionally, in connection with early retirement programs, there are court rulings stating that if a company grants departing employees an additional retirement benefit separately from a regular retirement benefit on condition that they would not join a competing company, such treatment is more favorable to employees than regular retirement and it is not detrimental to their freedom to choose occupation.⁵⁸ It is true that employees have the option to apply for the early retirement program, and if they choose to join a competing company, they simply need not utilize the program. However, an additional retirement benefit can be regarded as having the nature of a compensatory measure in that employees are restricted from engaging in competing activities in exchange for such retirement benefit, and therefore, employers should make this point clear in advance and inform employees beforehand that they would be required to return the additional retirement benefit if they find employment at competing companies. Furthermore, there is a case in which an employee's competing activity performed while being clearly aware of such additional retirement benefit program was found to constitute fraudulent conduct in breach of the duty to notify the employer under the principle of good faith, which led to upholding the employer's claim for damages due to a tort.⁵⁹ From the perspective of preventing disputes, it is therefore necessary to make clear the nature of additional retirement benefit as a compensatory measure associated with the non-competition clause.

3. Effects of a breach of the non-compete clause

(1) Freedom to choose occupation and effects of a breach

Among the effects of a breach of a non-compete clause, an injunction against competing activities directly restricts the employee's freedom to choose their occupation. In a court case,⁶⁰ in light of the purpose of Article

3, paragraph (1) of the Unfair Competition Prevention Act (Right to Claim for an Injunction), the court held that granting an injunction is not justifiable where there is no risk of harm to the employer's business interests through unfair competition; thus the availability of injunctive relief requires either existing harm or a demonstrable likelihood of such harm. In another case, the court granted an injunction against a former employee's business activities including advertisement and solicitation, to be performed by creating a website and blog and publishing them on the internet for a period of three years, as claimed by the employer, a company operating a voice training school, in order to protect its know-how, which is found to be unique and useful.⁶¹

In this respect, there is an academic opinion that, compared to claims for an injunction, claims for damages or for reduction of retirement benefit cause a smaller conflict with the freedom of choice of occupation, and that whether to uphold these claims should be determined by considering the effects of the breach of the non-competition clause.⁶² For example, in the *Yamada Denki* case,⁶³ the company claimed a 50% reduction in retirement benefit and payment of penalty equivalent to six months' salary for the period immediately prior to resignation on the grounds that the former employee's breach of the non-compete clause was executed at the time of resignation. The court held that the 50% reduction in retirement benefit was not unreasonable and that the penalty should be paid up to an amount equivalent to one month's salary.

(2) Reduction or non-payment of retirement benefit

A system that reduces retirement benefit by half for former employees who join a competing company in breach of the non-compete clause cannot be deemed to be an unreasonable measure.⁶⁴ However, in the *Chubu Nippon Advertising* case,⁶⁵ the court denied the non-payment of retirement benefit in full amount on the grounds of the employee's competing activity, in accordance with the non-payment clause providing that "retirement benefit shall not be paid if the employee joins a competing company within six months of resignation." In this case, the court held that such a non-payment clause is permissible only where the employee's conduct constitutes a material breach of trust sufficient to deprive the employee of the retirement benefit, which represents compensation for past services. Subsequent court cases tend to determine whether non-payment of retirement benefit should be permitted depending on whether the employee's breach of the non-compete clause constitutes conduct in egregious bad faith that it negates the employee's prior contributions in service, considering the circumstances of the breach.⁶⁶ In practice, conduct such as using the employer's proprietary information or materials at a competing company after termination of employment or taking them outside the employer company are assessed as a serious breach of the non-compete clause and are deemed acts of egregious bad faith that significantly reduce the employee's contributions in service.⁶⁷ In addition, an academic opinion suggests that if a serious breach of trust is found in the employee's competing conduct in light of how the employee engaged in such conduct and how it harmed the employer, the employee's claim for retirement benefit could exceptionally be deemed to be an abuse of rights.⁶⁸

As shown above, since retirement benefit also serves as compensation for labor performed during employment, it is interpreted that principally, an employee's post-employment competing activity cannot automatically be recognized as grounds for reducing or refusing payment of retirement benefit. However, considering that retirement benefit also has a compensatory nature for the employee's past contributions, if a series of acts by an employee, such as taking documents outside the company while still being employed in preparation for post-employment competing activity, are evaluated as serious bad faith, a reduction or refusal of payment of retirement benefit may be exceptionally approved even when retirement benefit does not have a compensatory nature.

V. Regulation under the Antimonopoly Act

1. Relationship with the post-employment non-compete clause

In recent years, post-employment competition has been discussed in relation to regulation under the Antimonopoly Act from the perspective of ensuring fair and free competition in securing human resources.⁶⁹ The *2018 Report of the Study Group on Human Resource and Competition Policy* of the Fair Trade Commission (hereinafter referred to as the *Report*)⁷⁰ addresses situations where a contracting party (client) imposes a non-compete obligation on a service provider. As will be discussed in section 2 below, the *Report* targets competition among freelancers for acquiring clients, but it also contemplates cases where the service provider is deemed to be an employee. According to this, in areas regulated by labor law, the Antimonopoly Act does not apply in principle even when its applicability may become an issue; but there are exceptional cases where it may apply. The *Report* stated that a post-employment non-compete obligation may be subject to the Antimonopoly Act as an issue arising after the termination of a labor contract.⁷¹ Regarding the effects of a breach of a non-compete clause, the Antimonopoly Act provides measures such as eliminating the act in violation of the provision against the breaching party (Article 7 of the Act), surcharges (Article 7-2, etc. of the Act), and claims for damages (Article 25 of the Act) to restore a fair and free competitive order. As mentioned earlier, post-employment non-compete obligations are often grounded in clauses existing prior to the termination of the labor contract and are subject to labor law. Even if the applicability of the Antimonopoly Act is affirmed on the grounds that the labor contract has terminated, it is conceivable that the regulations under both labor law and the Antimonopoly Act may apply. Regarding the relationship between the two, an academic opinion points out that since the regulations under the Antimonopoly Act apply to post-employment non-compete obligations from the perspective of promoting fair and free competition in the market, the differences in the purposes and objectives of the two laws are reflected in their application.⁷² Another view holds that imposing and enforcing non-compete obligations that are lawful under labor law do not raise issues under the Antimonopoly Act, and that only those restrictions that are not lawful under labor law may be subject to the Antimonopoly Act.⁷³ Thus, scholarly opinions on this issue remain divided.

Regarding the assessment of illegality, the *Report* states that a non-compete clause may be an issue under the Antimonopoly Act from the following three perspectives. (i) Substantial restraint of competition in a particular field of trade (Article 2, paragraph (5) of the Antimonopoly Act): a client's conduct restricts service providers (including workers who left employment) from the provision of services to other clients, preventing other clients from securing necessary service providers, thereby making it difficult for them to enter the market for goods or services. (ii) Unfairness of competitive means (Items 14, Designation of Unfair Trade Practices): a client describes the content of a non-compete obligation in a manner that differs from the actual content or does not sufficiently clarify the obligation in advance, and service providers accept the obligation under such circumstances. (iii) Abuse of a superior bargaining position (Article 2, paragraph (9), item (v) of the Antimonopoly Act): the non-compete obligations imposed by a client (employer) who has a superior bargaining position are deemed to impose an unreasonable disadvantage on service providers.

In assessing illegality under the Antimonopoly Act, the factors for consideration in relation to post-employment non-compete clauses under labor law (the legitimate purpose of restricting competing activities, the status of the worker, the reasonableness of the scope of the non-compete clause, and the availability of compensatory measures) may be relevant. However, even when these factors are applied, analysis is conducted based on a viewpoint that differs from the reasonableness review theory under labor law as it is aimed at ensuring fair and free competition in the talent acquisition market. Although there are no court cases where post-employment non-compete clauses are related to Antimonopoly Act, an academic opinion suggests that such clauses may raise issues under Antimonopoly Act if they affect competition between clients (the former employer

and the new employer) in the talent acquisition market.⁷⁴ In addition, regarding whether post-employment non-compete clauses have an effect of reducing free competition, it is interpreted that this issue should be determined by defining the market and taking into consideration the market share of the party engaging in anticompetitive conduct and the importance of the excluded parties in competition.⁷⁵ From the perspective of labor law, however, reasonableness is assessed on the legal foundation of the three viewpoints: the advantage for the employer, the disadvantage for the employee, and social interests.⁷⁶ In particular, the approach differs in that strict review is conducted with a focus on balancing the interests of employers and employees and considering the employee's freedom to choose their occupation.

According to the *Report*, coordinated arrangements among multiple clients (employers) to restrict job transfers or job switching by service providers may fall under Article 2, paragraph (6) of the Antimonopoly Act. Such arrangements limit service providers' ability to change the parties to which they provide their services, and thereby impede or prevent competition for talent among clients (employers) in the talent acquisition market. Even if such arrangements are in place, employees subject to these restrictions often have little opportunities to become aware of them. Nevertheless, the arrangements could still be understood as constraining workers' freedom to choose their occupation under Article 22, paragraph (1) of the Constitution. If employees are unable to transfer to competing companies due to the restrictions imposed by such arrangements, a further question arises as to what claims they may assert. This issue should be addressed in future studies.

2. Freelance and competition

In recent years, growing attention has been paid to whether non-compete clauses unduly impede fluid labor mobility, limit opportunities for the effective use of skills, and hinder productivity gains, particularly in the context of freelancers. A government study has been conducted to clarify the actual conditions surrounding these practices.⁷⁷ According to this study some non-compete clauses restrict or prohibit freelancers from entering into new transactions with competitors once their engagement with a client has ended. The study also finds that, in such cases, freelancers receive wage premiums that remain even after controlling for individual attributes (age, gender, education, employment status, etc.) as well as industry or occupation. On this basis, the study suggests the importance of negotiating wages in combination with non-compete obligations during the contract negotiation process.

In this respect, the *Guidelines for Secure Working Conditions for Freelancers* published in 2021 stated that non-compete obligations may constitute an abuse of a superior bargaining position (Article 2, paragraph (9), item (v) of the Antimonopoly Act). Specifically, this refers to situations where a contracting entity with a superior bargaining position imposes non-compete obligations on a freelancer one-sidedly beyond what is reasonably necessary, and the freelancer is compelled to accept such obligations due to concerns about the impact of their refusal on future transactions. According to the *Report* mentioned above, whether non-compete obligations constitute such abuse is determined by considering matters such as whether the content and period of the obligation are excessive in light of its purpose, the extent of the disadvantage imposed on the service provider, the availability and level of compensatory measures, the decision-making method, including sufficient consultation with the transaction counterparty, and comparison with the terms of trade imposed on other counterparties, as well as the general circumstances of non-compete obligations. In other words, non-compete obligations imposed on freelancers generally fall outside the scope of labor law and are determined at the parties' discretion. Nevertheless, such clauses may be subject to scrutiny under competition law if they constitute an abuse of superior bargaining power and result in the restraint of fair market competition. However, even though freelancers are different from employees, they have the freedom to choose their occupation, and there remains room for the application of reasonableness review.⁷⁸ Considering the purpose of the Act on Improvement of Transactions between Freelancers and Undertakings (Act on Ensuring Proper Transactions Involving Specified

Entrusted Business Operators) (Article 1), and from the perspective of improving working environment, it will be necessary to further examine how the freedom of choice of occupation, guaranteed under Article 22, paragraph (1) of the Constitution, which holds a higher legal value, should be evaluated.

VI. Conclusion

Under the circumstances where fluid labor mobility and workers' proactive career development are increasingly expected, employers may impose non-compete obligations on workers to protect trade secrets and to prevent the outflow of valuable human capital. In particular, post-employment non-compete clauses have a significant impact on workers' freedom to choose their occupation (Article 22, paragraph (1) of the Constitution). In judicial decisions, courts examined whether employers really genuinely require restrictions on competitive activities and whether such restrictions are reasonable. Even for freelancers, post-termination non-compete clauses operate as constraints on their freedom to choose business activities. Although such clauses are subject to scrutiny under the Antimonopoly Act insofar as they may impede fair and open competition in the market for human capital, the legislative purposes of labor law and antimonopoly law diverge. Correspondingly, both the substantive requirements for enforcement and the legal consequences of breach differ under these regimes.

Furthermore, since post-employment non-compete obligations arise from the employer's initiative, employers must provide employees with sufficient information about the details of such obligations when employees consider engaging in work similar to their previous employment. Traditionally, in consideration of the impact on the freedom of choice of occupation, the validity of such obligations has been examined on a case-by-case basis and tended to be handled as post-employment disputes. In principle, employees would be free to change jobs if they are not bound by a non-compete obligation binding the employee under work rules or by individual agreement. If an employer finds it necessary to impose non-compete obligations, a clear and well-defined mechanism should be established to specify the scope and content of such obligations, with due regard to their potential impact on employees' career development.

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Notes

1. Ministry of Health, Labour and Welfare (MHLW), "Section II, Chapter 2: Trends in Labour Mobility in Japan," in *Analysis of the Labour Economy 2022: Challenges in Promoting Labour Mobility through Support for Workers' Proactive Career Development* 139–177 (Tokyo: MHLW, 2023).
2. Michio Tsuchida, *Rodo keiyaku ho* [Labor Contracts Act], 2nd ed. (Tokyo: Yuhikaku, 2016), 710; Daisuke Yokochi, "Jugyo-in to no kyogyo hishi gimu to ni kansuru shoron-ten ni tsuite (jyo) (ge)" [Issues concerning non-compete obligations of employees (parts 1 and 2)], *Hanrei Times*, no.1387, (2013): 5, and Fumiko Obata, "Taishoku shita rodo-sha no kyogyo kisei" [Regulation on competing activities of workers after termination of employment], *Monthly Jurist*, 1066, (1995): 119.
3. The *e-Life* case, Tokyo District Court (Feb. 28, 2013) 1074 *Rohan* 47 ; The *Kyoritsu Bussan* case, Tokyo District Court (May 28, 1999) 1727 *Hanrei Jiho* 108.
4. The *Japan Convention Services Inc.* case, Osaka High Court (May 29, 1998) 745 *Rohan* 42 (disciplinary action); The *e-Life* case, *supra* note 3 (non-payment of retirement benefit); The *Rakuson, etc.* case, Tokyo District Court (Feb. 25, 1991) 588 *Rohan* 74 (claim for damages); The *Staff-mate Minami Kyushu and Andwork* case, Miyazaki district court, Miyakonojo Branch (April 16, 2021) 1260 *Rohan* 34 (claim for damages).
5. The *Y Design* case, Tokyo District Court (Nov. 25, 2022) *Journal of Labor Cases*, no.136: 44.
6. The *Z Company* case, Nagoya District Court (Sept. 28, 2023) 2535 *Rokeisoku* 13.
7. Tsuchida, *supra* note 2, 711.
8. The *Tokyo Legal Mind K. K.* case, Tokyo District Court (Oct. 16, 1995) 690 *Rohan* 75; The *Iwaki Glass Co. Ltd., etc.* case, Osaka District Court (Dec. 22, 1998) 30-4 *Chiteki Saishū* 1000.
9. The *Success, etc. (Sankei Tech)* case, Supreme Court (Mar. 25, 2010) 1005 *Rohan* 5.
10. The *Kotobuki* case, Yokohama District Court (Mar. 27, 2008) 1000 *Rohan* 17.

11. The *Net Dream* case, Osaka District Court (Dec. 10, 2015) *Journal of Labor Cases*, no.49: 40.
12. The *Japan Industrial Partners, Inc.* case, Tokyo District Court (Nov. 30, 2023) 2543 *Rokeisoku* 3.
13. The *Total Service Co. Ltd.* case, Tokyo District Court (Nov. 18, 2008) 980 *Rohan* 56; The *Harima Shokusan* case, Osaka District Court (Mar. 14, 2017) 65 *Journal of Labor Cases*, no.65: 46.
14. Satoshi Nishitani, *Rodoho* [Labor law], 3rd ed. (Tokyo: Nihon Hyoronsha, 2020), 216.
15. Takashi Araki, Kazuo Sugeno, and Ryuichi Yamakawa, *Shosetsu Rodo Keiyaku Ho* [Exposition of the Labour Contracts Act], 2nd ed. (Tokyo: Yuhikaku, 2014), 111; Tsuchida, *supra* note 2, 710; Takashi Araki, *Rodo ho* [Labor and employment law], 5th ed. (Tokyo: Yuhikaku, 2022), 421.
16. Ryuichi Yamakawa, “Rodo keiyaku ho no seitei: Igi to kadai” [The enactment of the Labour Contracts Act: Its significance and Issues], *Japanese Journal of Labour Studies* 50, no.7 (July 2008) : 9.
17. The *Legend K.K.* case, Fukuoka District Court, Kokura Branch (Jun. 17, 2020) 1241 *Rohan* 79; The *REI former employee* case, Tokyo District Court (May 13, 2022) 1278 *Rohan* 20. The court examined the validity of the non-compete clause and found it to be contrary to public policy and therefore void under Article 90 of the Civil Code.
18. The *Shobo Shiken Kyokai* case, Tokyo District Court (Oct. 17, 2003) 1861 *Rokeisoku* 14.
19. The *Jacpa Corporation* case, Osaka District Court (Sept. 22, 2000) 794 *Rohan* 37.
20. The author discusses the factors for consideration with reference to the *Yamanashi Kenmin Shinyo Kumiai* case. Michio Tsuchida, “Koen furiransu no hoteki hogo/Taishoku go no kyogyo hishi gimu to shuhi gimu o meguru mondai (ge) : Furiransu no rodosha-sei/Dokusen kinshi ho no tekiyo o fukumete” [Legal protection for freelancers: Issues associated with the post-employment non-compete obligation and confidentiality obligation (part 2): Freelancers’ status as workers: Including the application of the Antimonopoly Act], *Chuo rodo jiho*, no.1299 (Mar. 2023): 4–26 ; The *Yamanashi Kenmin Shinyo Kumiai* case, Supreme Court (Feb. 19, 2016) 70-2 *Minshu* 123.
21. See Tsuchida, *supra* note 2, 598, for the view that even when a worker’s consent based on their free will is recognized, a reasonableness review should be conducted exceptionally to examine the validity of the agreement.
22. Hiroki Yoshida, “Koyo ryudo ka to taishoku go no kyogyo hishi gimu” [Employment mobility and post-employment non-compete clauses], *Journal of Management Lawyers Council*, no.215, (2023): 3.
23. Araki, Sugeno, and Yamakawa, *supra* note 15, 286.
24. The *Patent Firm A* case, Osaka District Court (Oct. 5, 2006) 927 *Rohan* 23.
25. *Supra* note 12.
26. *Supra* note 17.
27. Takahiro Fujiwara, “Kyogyo hishi gimu ihan ni motozuku kaisha kara no songai baisho seikyu no kahi: REI moto jugyo-in jiken” [Legitimacy of an employer’s claim for damages based on breach of a non-compete obligation: The *REI former employee* case], *Journal of Management Lawyers Council*, no. 219, (2024): 50.
28. The *Foseco Japan Limited* case, Nara District Court (Oct. 23, 1975) 624 *Hanrei Jiho* 78.
29. The *Metlife ALICO* case, Tokyo High Court (Jun. 13, 2012), *Journal of Labor Cases*, no.8: 9; The *Daiichi Shigyo* case, Tokyo District Court (Jan. 15, 2016) 2276 *Rokeisoku* 12.
30. The *Tokyo Kamotsu sha* case, Tokyo District Court (Dec. 18, 2000) 807 *Rohan* 32; The *Kanto Kogyo* case, Tokyo District Court (Mar. 13, 2012) 2144 *Rokeisoku* 23.
31. The *Tokyo Legal Mind K.K.* case, *supra* note 8.
32. Shimpei, Ishida. “Eigyō himitsu hogo to taishoku go no kyogyo hishi gimu” [Protection of trade secrets and post-employment non-compete clauses], *Japan Labor Law Association Journal*, no.132 (2019): 34.
33. The *Mita Engineering* case, Tokyo High Court (Apr. 27, 2010) 1005 *Rohan* 21; The *Legend K.K.* case, Fukuoka High Court (Nov. 11, 2020) 1241 *Rohan* 70 (The court held that the change of the employer and business activities by the employee are not included in the scope of the non-compete clause.)
34. Toru Ueda, “America New York shuho ni okeru kyogyo hishi tokuyaku ni motozuku kenri kyusai ron” [Remedies based on restrictive covenants under New York State law in the United States], *Journal of Law, Politics, and Sociology* 95, no.7 (2022): 1–81. https://koara.lib.keio.ac.jp/xoonips/modules/xoonips/detail.php?koar_id=AN00224504-20220728-0001.
35. Tsuchida, *supra* note 2, 713; Araki, *supra* note 15, 327.
36. The *Iwaki Glass Co. Ltd., etc.* case, *supra* note 8, for other cases in which the non-compete clauses were found to be unreasonable, see The *Kiyō System* case, Osaka District Court (Jun. 19, 2000) 791 *Rohan* 8; The *American Life Insurance Company (ALICO)* case, Tokyo District Court (Jan. 13, 2012) 1041 *Rohan* 82; The *Soiku* case, Tokyo District Court (Jun. 16, 2023) *Journal of Labor Cases*, no.143: 48.
37. The *Leifras* case, Tokyo District court (Jan. 17, 2012), [LEX/DB No.25491225]. For other cases in which the reasonableness of the non-compete clause was affirmed, see the *Yamada Denki Co. Ltd.* case, Tokyo District Court (Apr. 24, 2007) 942 *Rohan* 39, the *Daiohs Services* case, Tokyo District Court (Aug. 30, 2002) 838 *Rohan* 32; the *Powerful Voice* case, Tokyo District Court (Oct. 27, 2010) 2105 *Hanrei Jiho* 136.
38. Tsuchida, *supra* note 2, 712; Nishitani, *supra* note 14, 218.
39. The *Daiohs Services* case, *supra* note 37; The *Soiku* case, *supra* note 36.
40. The *American Life Insurance Company (ALICO)* case, *supra* note 36. For other cases, the *Artnature Trade Secret (Customer List)* case,

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- Tokyo District Court (Feb. 23, 2005), 902 *Rohan* 106.
41. The *REI former employee* case, *supra* note 17.
 42. The *Total Service Co. Ltd.* case, *supra* note 13.
 43. The *Yamada Denki Co. Ltd.* case, *supra* note 37; The *Dance Music Record* case, Tokyo District Court (Nov. 26, 2008) 2040 *Hanrei Jiho* 126.
 44. The *Asahipretec* case, Fukuoka District Court (Oct. 5, 2007) 1269 *Hanrei Times* 197.
 45. The *Daiichi Shigyo* case, *supra* note 29.
 46. The *Digital Power Station* case, Tokyo District Court (Dec. 19, 2016), *Journal of Labor Cases*, no.61: 21.
 47. The *Iwaki Glass Co. Ltd., etc.* case, *supra* note 8.
 48. The *Soiku* case, *supra* note 36.
 49. The *Japan Industrial Partners* case, *supra* note 12.
 50. The *Japan Industrial Partners* case, *supra* note 12.
 51. The *Iwaki Glass Co. Ltd., etc.* case, *supra* note 8.
 52. Tsuchida, *supra* note 2, 716.
 53. Tetsu Yamada, “Dogyo tasha ni tenshoku shita moto-jugyoin ni taisuru taishoku kasan-kin no henkan seikyu ga mitome rareta rei: Nomura Shoken moto-jugyoin jiken” [A case where a claim for restitution of additional amount of retirement benefit was upheld against a former employee who had transferred to a competitor: The *Former Employee of Nomura Securities Co. Ltd.* case], *Quarterly Labor Law*, no.259 (Winter 2017): 190.
 54. Susumu Noda, “Rodo-ryoku ido to kyogyo hishi gimu” [Labor mobility and non-compete obligation], *Quarterly Labor Law*, no.160 (Summer 1991): 57.
 55. The *Leifras* case, *supra* note 37. In this case, since the retirement benefit provisions in work rules stipulate that the return of retirement benefit shall be required only if the fact that an employee’s conduct during employment that constitutes grounds for disciplinary action is revealed after termination of employment, the court held that even if such conduct occurs after termination of employment, the retirement benefit already granted cannot be deemed unjust enrichment; and it cannot be interpreted that the employee who received it would be obligated to return it to the employer.
 56. The *Daiichi Shigyo* case, *supra* note 29. In this case, there were no provisions on the return of retirement benefit, and based on the grounds for excluding employees from application of the early retirement program—specifically, that a breach of the non-compete clause constituted a disciplinary violation under work rules, the court held that the additional payment granted as preferential treatment under the early retirement program, lacked a legal foundation. It therefore upheld the employer’s claim for restitution.
 57. Hideyuki Morito, “Kyogyo hishi gimu ihan ni yoru taishoku-kin henkan seikyu to soki taishoku yugu seido: The *Daiichi Shigyo jiken*” [Claims for restitution of retirement benefit arising from breach of the non-compete clause, and early retirement incentive programs: The *Daiichi Shigyo* case], 1493 *Monthly Jurist* 5.
 58. The *Fujitsu Limited (additional amount of retirement benefit)* case, Tokyo District Court (Oct. 3, 2005) 907 *Rohan* 16; The *Former Employee of Nomura Securities Co. Ltd.* case, Tokyo District Court (Mar. 31, 2016) 1144 *Rohan* 37.
 59. Kyoto District Court (May 29, 2017) 1464 *Hanrei Times* 162, titled “A case where a claim for damages in an amount equivalent to the early-retirement retirement benefit was permissible on the ground that accepting the retirement benefit—granted under a early retirement program conditioned on compliance with a post-employment non-compete clause—constituted fraud by omission (a tort), notwithstanding that the validity of the non-compete clause itself was recognized.” In this case, the court considered that the premium retirement benefit granted as a compensatory measure for early retirement exceeded “two years” amount of the employee’s annual salary and that the employer claimed damages equivalent to that premium amount.
 60. The *Tokyo Legal Mind K. K.* case, *supra* note 8. In this case, the claim for an injunction was dismissed.
 61. The *Powerful Voice* case, *supra* note 37.
 62. Araki, *supra* note 15, 327.
 63. *Supra* note 37.
 64. The *Sankosha* case, Supreme Court (Aug. 9, 1978) 958 *Rokeisoku* 25.
 65. The *Chubu Nippon Advertising* case, Nagoya High Court (Aug. 31, 1990) 569 *Rohan* 37.
 66. The *Can System Co. Ltd.* case, Tokyo District Court (Oct. 28, 2009) 997 *Rohan* 55; The *Metlife ALICO* case, *supra* note 29; The *Japan Industrial Partners* case, *supra* note 12. The court upheld the employer’s claim for partial reduction of performance-based retirement benefit.
 67. The *Japan Industrial Partners* case, *supra* note 12.
 68. Michio Tsuchida, “Rodo shijo no ryudo-ka o meguru horitsu mondai (jo)” [Legal issues concerning mobility in the labor market (part 1)], *Monthly Jurist*, no.1040 (March 1994): 58.
 69. Michio Tsuchida, “Jinzai kakutoku shijo ni okeru rodo-ho to kyoso-ho no kino” [Functions of labor law and competition law in the talent acquisition market], *Montly Jurist* no.1523: 48, Masako Wakui, “Kyogyo/tenshoku/dokuritsu kaigyō o samatageru koi to kyoso seisaku: Kyogyo hishi gimū o meguru rodo-ho to dokkin-ho no kosaku” [Restrictions on competitive activities, job mobility, and new business formation, and competition policy: The intersection of labor law and competition policy in the regulation of non-compete clauses], *NBL*, no.1157 (November 2019); Eri Matsumoto, Michio Tsuchida, and Shingo Seryo, “Taishoku go no kyogyo hishi gimū to rodohō/dokusen kinshi hō: Rodohō to kyoso hō no Kosaku” [Post-employment non-compete obligations, labor law and the Antimonopoly

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- Act: Intersection of labor law and competition law], *Quarterly Labor Law*, no. 274, (Autumn 2021): 78.
70. Japan Fair Trade Commission, *Human Resource Mobility and Competition Policy*, 9 ff., https://www.jftc.go.jp/cprc/conference/index_files/180215jinzai01.pdf (last accessed Sept. 30, 2024). https://www.jftc.go.jp/en/pressreleases/yearly-2018/February/180215_files/180215_3.pdf. [English]
71. Naoko Kono, “Dokusen kinshi ho to rodo ho” [The Antimonopoly Act and, labor and employment law], in *Kigyo homu to rodo-ho* [Corporate legal affairs and labor and employment law], edited by Michio Tsuchida and compiled by the Study Group on Corporate Legal Affairs and Labor and Employment Law (Tokyo: Shojihomu, 2019), 270.
72. Matsumoto, Tsuchida, and Seryo, *supra* note 69, 92.
73. Wakui, *supra* note 69, 8.
74. Michio Tsuchida, “Koen furiransu no hoteki hogo/Taishoku go no kyogyo hishi gimu to shuhi gimu o meguru mondai (jyo): Furiransu no rodosha-sei/Dokusen kinshi ho no tekiyo o fukumete” [Legal protection for freelancers: Issues associated with the post-employment non-compete obligation and confidentiality obligation (part 1): Freelancers’ status as workers: Including the application of the Antimonopoly Act], *Chuo Rodo Jiho*, no.1296 (December 2022): 4–19.
75. Wakui, *supra* note 69, 12.
76. The *Foseko Japan Limited* case, *supra* note 28.
77. “Nihon no furiransu ni tsuite: Sono kibo ya tokucho, kyogyo hishi gimu no jokyo ya eikyo no bunseki. Seisaku kadai bunseki shirizu 17” [Freelancers in Japan: Analysis of the number and characteristics of freelancers, and the status and impact of non-compete clauses. Policy issue analysis series 17], Director General for Economic Research, Cabinet Office, last accessed September 30, 2024, <https://www5.cao.go.jp/keizai3/2019/07seisakukadai17-0.pdf>.
78. The *MetLife ALICO* case, *supra* note 29. In this case, in determining the validity of the non-compete obligation imposed on the former executive officer, the court conducted a reasonableness review while considering the officer’s freedom to choose their occupation. In another court case, the court held that the non-compete obligation imposed on the former representative director to be reasonable, emphasizing that caution must be exercised in determining whether the content of such an obligation violates public policy and is therefore void. The *Bell System 24* case (Tokyo District Court (May 19, 2009) 1314 *Hanrei Times* 218, a case where an agreement etc., imposing post-employment non-compete obligations and similar duties on a former representative director, was deemed not contrary to public policy and thus valid.)

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