

Basic Issues of Labor Law under New Types of Work Organization: Japanese Case

Introduction

In individual labor relations that are conventional and typical in nature, there is always a “worker” who provides labor after being hired by an employer and who is paid a wage, and an “employer” who pays wages to the worker he or she hires. The regulation of the contractual relationship between the two parties and protection of the worker, who is placed in a weaker position in negotiations, has traditionally been the objective of labor contract laws, labor standards laws, and labor union laws.

In recent years, it has become possible to access the Internet from portable devices. Now employers can use online chat software and other resources to check on the working circumstances of workers anytime and anywhere and contact them instantly. Additionally, contractual rights and obligations and specific work procedures are now spelled out with more clarity and detail as a result of advancements in the techniques used to prepare the contract documents and work manuals that are distributed to individual contractors. Moreover, business is being increasingly offshored as major companies enter overseas markets. Accompanying such changes are attempts by employers to change their contract relationship with workers, which they have traditionally hired based on an employment relationship, to another contract relationship—namely by changing the contract format from “employment” to “subcontracting”—and also to switch from direct employment to indirect employment. Under such circumstances, there is now room to reexamine various basic concepts pertaining to labor law. For example, how should the term “employment relationship” be defined? In the relationship with subcontracting, can the pursuit of “labor” in itself rather than the “results of labor” still be used to effectively draw a distinction between an employment relationship and contracting relationship? How should the supervisory relationship between an employer and a hired worker be recognized when contact can be

achieved instantly from a remote location? How much responsibility should be placed on a person who is other than the employer specified in a worker’s labor contract but who ultimately receives the results of labor provided by the worker and has a certain degree of say in the worker’s labor conditions?

In the United States, the social phenomena described above have been given the collective name “the fissured workplace” by David Weil. Dr. Weil comprehensively analyzed their origin from the angles of sociology, legal studies, and economics in his book, *The Fissured Workplace*.

According to *The Fissured Workplace*, in recent years, vast quantities of capital have been concentrated in fund management companies, and the businesses in which they invest are expected to “produce more profit in less time.” In response to this, “cutting off divisions not directly related to core competency” has emerged as a corporate strategy. Innovations in methods of communication technology as well as the management and monitoring of workers have made it possible to direct and supervise workers remotely, and a byzantine variety of contractual and relational arrangements has been used between business entities and their workforces within the same workplace.

In *The Fissured Workplace*, the above-mentioned changes in corporate strategy and innovation in worker management technologies lead to the involvement of multiple business entities as participants in labor relations, which in turn leads to uncertainty vis-à-vis the applicability of labor laws and the identity of actors that must bear responsibility as employers. The “typical” labor relationships entered into between workers and employers have become more complex due to the additional involvement of a third party (such as a contractor or a recipient firm that engages temporary staff dispatched from a dispatching firm) and the formation of contracting or delegation agreements instead of labor contracts. Accordingly there is an increasing number of cases in which no labor contract has been concluded, and of cases in which the entity

that demands the results of the labor provided is not the immediate employer. In many respects—such as job security, social insurance, and health and safety guarantees—workers who provide their labor in such a way are not being provided with the rights enjoyed by “typical workers.” Particularly, as they are not provided with job security, such workers are constantly exposed to the risk of losing their jobs, their bargaining power becomes weaker than that of typical workers, and they become unable to assert their legitimate rights or demand an amount of wages that is commensurate with the labor that they provide.

Meanwhile, social phenomena similar to those seen in the United States have also emerged in the EU countries. Viewed as new developments concerning labor law that deserve attention, they are now the subject of a great deal of research.¹ However, in the EU’s case, little basic research is taking place for the purpose of defining them as an overall field for study, as *The Fissured Workplace* attempts to do. Instead, research themes are compartmentalized into the emergence of new employment formats; substitution of labor contracts with subcontracting; promotion of cross-border supply chains and CSR; the legal character of Uber, Airbnb, crowdsourcing; and so on.

In Japan’s case, several specific employment formats that embody what is called the “fissured workplace phenomenon” in the United States have been in wide use for many years. However, with the globalization of enterprises and arrival of new technologies in recent years, the scope and means of those formats’ application have changed significantly, even if the categories to which they belong have not changed. Indeed, some formats have emerged that do not belong to any of the existing categories or can, depending on how they are viewed, be categorized in different categories. Thus, this paper will not employ the concept of the “fissured workplace phenomenon.” Instead, it will refer to the various employment formats that are outside of the traditional employment relationship (i.e., in which a “labor contract” is concluded

with the person who will receive labor) as what the author calls the “Atypical Work Organization.” It will further categorize the specific employment formats that make up this organization in the following way: “old types,” “types having undergone reformation,” and “types newly formed.” It will then study basic problems that they generate from the standpoint of labor laws.

Using “contracting” as an example for the purpose of explanation, under the post-Second World War labor law system, “contracting” has been clearly distinguished from an employment relationship, as it focuses only on the “results” of labor. However, a look at the actual circumstances of plant labor prior to the war shows that an employment format in which employment and contracting were intertwined—called the “foreman contracting system”—already existed. Even under the Labor Standards Act, which is the main worker protection law of the post-war era, the “worker” status of a craftsman as a single foreman in the construction industry, or of a subcontracting vehicle driver engaged in transport operations using his or her own truck, who provides manpower almost exclusively for a specific enterprise for the sole purpose of providing “results of work” under what is nominally an individual contract has often been questionable.

Meanwhile, a new change has emerged. With technological advancements and improvements in contract-preparation technics, the use of individual contractors has become increasingly conspicuous, even in operations that concern companies’ core competencies. Moreover, in IT development and other such industries, employment formats that combine the characteristics of “employment” and “contracting” have emerged. An example is “telecommuting,” in which wages are paid on a performance basis (i.e., number of completed projects multiplied by a rate) and workers are not under the workplace directions and supervision of the employer. Also emerging, are formats with still unclear legal character;

1 Degryse C.(2016), Digitalisation of the economy and its impact on labour markets. Working paper 2016.02, russels,ETUI.
Eurofound (2015), New forms of employment, Publications Office of the European Union, Luxembourg.Jan Drahokoupil (2015), The outsourcing challenge: organizing workers across fragmented production networks.Working paper 2015.07, Brussels,ETUI, etc.

representative among them are Uber, Airbnb, and crowdsourcing.

Yet another important representation of the Atypical Work Organization is the insertion of an additional “layer” between workers and employers to create a three-party or multiple-party structure. Multilayered subcontracting relationships have been commonly used at construction sites and other workplaces in Japan since before the Second World War; thus, they are not new. Detailed regulations that clarify the industrial health and safety officers in those instances are already stipulated in the Industrial Safety and Health Act. The attribution of employers’ responsibilities is also spelled out in specific legislation for other related employment formats, such as in-house subcontracting and worker dispatch.

Furthermore, as Japan’s manufacturing industries move overseas, the reach of worker protection regulations in Japanese law does not extend to overseas manufacturing bases, and thus hard law-based regulation cannot be expected there. Given this, a new problem arises: What can be done to improve the labor conditions of overseas peripheral workers?

As the above discussion shows, the Atypical Work Organization has existed in Japan for years, and, to a certain degree at least, there is a legal system in place that corresponds to it. Precisely because of this, efforts to deal with employment formats that have newly emerged in recent years as well as those whose application has undergone significant change tend to take place on a case-by-case basis under the existing legal system. As a consequence, there has been no fundamental reexamination of the legal system in its entirety.

In this paper, the author will first arrange the current circumstances of the “Atypical Work Organization” for the purpose of encouraging a fundamental reexamination of the various labor law-related problems that have emerged as a result of it.

Although specific formats come in an infinite variety, an “employment relationship” always has two parties; a worker and an employer. Indeed, the existence of “worker status” and “employer status” among the parties becomes an important criterion when determining whether or not a relationship is an employment relationship. Given this, the author will

arrange pertinent regulations in current Japanese law and then focus on the discussion surrounding the concept of “employer” and “worker.”

When determining the existence of “employer status,” the most important point is whether the party has “rights” in terms of providing direction and supervision for the labor process and receiving the results of labor and, simultaneously, whether the party has “obligations” in terms of paying wages; complying with legal standards concerning working hours, holidays, and vacation; and bearing responsibility for workers’ compensation. With regard to this point, a phenomenon has emerged whereby a “third party” in the form of a contractor (in the case of business process contracting) or dispatching firm (in the case of worker dispatch) comes in between the worker and the employer and is given responsibilities and obligations in the labor contract. On top of this, the emergence of multilayered contracting, the offshoring of supply chains, and other developments are further complicating the task of pinning down employer responsibility.

Accordingly, the author will give particular focus to the following problems when presenting the “employer” concept. Specifically, the author will examine the judicial and legislative extension of employer’s responsibility due to the involvement of a third party, and the criteria for evaluating eligibility as a worker due to the increasing number of contract formats other than the labor contract, in which only the outcome of the labor is demanded.

On the other hand, when presenting the “worker” concept within an environment in which the labor process is not directly directed and supervised and only the supply of its results is stressed, the author will put primary focus on drawing a sharp distinction between workers and executives, individual business owners, and specialists.

Finally, as a summary, the author will present new labor law challenges that are arising as the Atypical Work Organization changes how specific employment formats are utilized and expands their scope of application.

I . Overview of the Atypical Work Organization in Legislation and Case Law

I-1. Old types

I-1-1. The foreman contracting system

Under current labor laws, even if both involve the use of manpower, an “employment relationship” and a “contracting relationship” are clearly distinguished as a relationship involving the provision of labor under instructions and orders and a relationship that is focused solely on the “results” of labor. However, a look at the actual circumstances of plant labor prior to the Second World War shows that employment and contracting were intertwined under an employment format called the “foreman contracting system.” Accordingly, the dichotomy did not have practical viability, as the foremen who undertook work from a factory owner distributed it to factory workers under their control. Those workers were all factory workers deployed by the factory owner, and their work was based on contracting relationships rather than employment relationships. In light of such practices, under the Factory Act,² Japan’s first full-scale labor legislation prior to the Second World War, if a person was engaged in labor at a factory and his operations were, by nature, the work of a factory worker, the worker would be handled as a factory worker employed by the factory owner, regardless of whether a direct employment relationship existed between the factory owner and the factory worker or a foreman (contractor).³ Thus, restrictions on the employment of minors, restrictions on the working hours of minors and women, and obligation on the part of the business operator to provide compensation to workers or survivors with regard to work-related accidents were administered to be applicable regardless of whether workers worked under a contract for labor or under a contracting relationship so long as those workers

were involved in operations at the factory.⁴

After the Second World War, the Factory Act was fundamentally reformed into the Labor Standards Act, which was applied to all industries and all business categories, including manufacturing plants. Under this new legislation, whether or not a person could be described as a “worker” under an employment contract became established as a determining criteria when making judgments concerning the applicability of labor standards.

I-1-2. Multilayered subcontracting relationships in the construction industry, etc.

In the construction industry, even since before the Second World War, a practice has existed whereby several subcontracting businesses cooperate with each other by dividing up the work of a single construction site in a multilayered fashion. Thus, the Workers’ Compensation Act of 1931 imposed responsibility for workers’ accident compensation on the prime contractor, which stood at the top of this kind of multilayered subcontracting framework. This responsibility applied even to industrial accidents suffered by subcontractors’ workers when accidents occurred at the prime contractor’s construction site. This stipulation was succeeded by Article 87 of the Labor Standards Act after World War II, and continues to be applied to construction sites.

Also under industrial safety and health regulation, it has long been the responsibility of the prime contractor of a construction project to take safety measures to prevent industrial accidents when engaging in operations in which the prime contractor and subcontractors work together at the same worksite.

I-1-3. Business process contracting in the workplaces of ordering companies (in-house subcontracting)

The practice by which a company, in order to

2 Promulgated in 1911 and executed in 1916.

3 This case is a kind of “Atypical Work Organization” because the worker is in an employment relationship with a contractor who has entered into a subcontracting contract with the business operator.

4 For more on this topic, see Minoru Oka, “*Kōjō Hō Ron*” (Theory of the Factory Act) [3rd Edition] (Yuhikaku, 1917) p.287 and thereafter.

execute its business, contracts another business operator to handle a portion of its processes (i.e., outsourcing) has been commonly used for many years. In such business process contracting, the contractor itself frequently supplies the labor; however, it is also often the case that the contractor hires employees to engage in the performance of the work. Thus “business process contracting”—whereby ordering companies and contracting companies enter into a business process contracting agreement and then workers employed by the contracting company execute the contracted process under the instructions and orders of the contracting company at the work site of the ordering company—takes place under a typical contract for “subcontracting” in the Civil Code. So long as business process contracting is practiced in line with the manner stated in the agreement, responsibility as the employer rests solely with the contracting company in terms of the labor contract as well as the Labor Standards Act. In principle, no employer obligations are attributed to the ordering company.

However, in Japan, labor supply undertakings that have workers engage in labor under the instructions and orders of another person based on a supply contract had been strictly regulated under the Employment Placement Act from before the Second World War. It later became completely prohibited by the newly enacted Employment Security Act of 1947 amid reforms for democratization following the war.⁵ Accordingly, business process contracting became subject to Article 4 of the Ordinance for the Enforcement of the Employment Security Act, which stipulates that a person who supplies a worker to work for another person based on a contracting-out agreement is regarded as being engaged in a labor supply undertaking prohibited by the Act, unless all of the following four requirements are satisfied.

- 1) The person assumes all responsibilities and liabilities, both financially and legally as a business operator;
- 2) The person gives directions to and provides supervision of the worker;

- 3) The person bears all employer’s responsibilities provided by law; and
- 4) The work contracted out does not merely involve the execution of physical labor.

If the business process contracting meets all four of these requirements, no employer obligations are attributed to the ordering company. However, even in such cases, if the contracting company exclusively undertakes work for a particular ordering company, and if all wages of workers employed by the contracting company are covered by contract fees provided by the ordering company, the contracting company and its employees are, in actuality, placed in an extremely weak position in their negotiations with the ordering company. This is particularly so in the case of in-house subcontracting, where contracted work is executed in the workplace of the ordering company. In this case, the ordering company may lower the subcontract price or even cancel its order with the subcontracting company when another business that will accept work at a lower price exists. If such a case occurs, the workers of the subcontracting company (or their union) may request negotiations with the ordering company asking for consideration vis-à-vis the subcontract price or continuation of the order. In such cases, the question arises whether or not the ordering company cannot be deemed to be an employer that is obligated to engage in collective bargaining with the union of subcontracted workers under Article 7 of the Labor Union Act. Such a question has frequently been discussed in Labour Relations Commission (LRC) orders and judicial precedents.

I-2. Types having undergone reformation

I-2-1. Individual contracting

Since the Labor Standards Act’s enactment in 1947, it has always been contested whether workers such as foremen individually participating in construction projects or truck drivers engaged in transport operations for a specific company using their own truck fall under “workers” to be protected by the Act, as they tended to be under the arrangements of

⁵ Article 44 of the Employment Security Act. It should be noted that worker dispatch was established as being outside the scope of labor supply when worker dispatch was made legal by the 1985 act to be mentioned later.

independent contractors. Labor inspection offices and the court have been dealing with such cases by examining the substance of work relationships, and there are two Supreme Court precedents, both of which denied worker status for a truck driver⁶ and a foreman carpenter⁷ in the context of the cases.

In recent years, use of individual contractors has increased for services associated with companies' core competencies, giving rise to cases in Labour Relations Commissions regarding the refusal of collective bargaining by an ordering firm vis-à-vis a union organizing such contractors. Disputed were the status of "worker" under the Trade Union Act in regard to technicians that engage in repair work on household water-use equipment in kitchens, bathrooms and toilets;⁸ workers that provide express courier service by bicycle or motorbike;⁹ and technicians that visit sites to repair audio equipment.¹⁰

Three rulings by the Supreme Court in 2011 and 2012¹¹ may be cited to provide a framework for the actual scope of workers under the Labor Union Act. According to these rulings, basic elements for judgment are (1) whether the persons are incorporated, as a labor force, in a business organization of the enterprise for which they are supplying labor; (2) whether they are subject to unilateral and routine decisions on the contents of contractual relations; and (3) whether remuneration for their services has the aspect of compensation for their labor. Supplementary elements for judgment are (4) whether they are in practice obligated to respond to work requests, and (5) whether they provide labor under direction and supervision in

the broad sense, and whether and to what extent they are under constraints in the location and time of work. A final element that works negatively on worker status is (6) the existence of entrepreneurship aspects such as the ownership of machines and other equipment, and the discretion to make profits or losses of their own.¹² In the cases of individual contractors mentioned above, the "worker" status was recognized by the Labour Relations Commissions, the decisions of which were supported by the Supreme Court in the above stated rulings.

Contracting has been used for many years mainly as a means to avoid employer's responsibilities under protective labor law and social security systems. However, the active use of individual contractors for services that concern companies' core competencies appears to be a very recent phenomenon that may be understood in the following context.

When a task in which a contractor is to be engaged is closer to a company's core operations, that contractor must possess a higher work standard and maintain tighter collaboration with the company. However, because providing direction and supervision in the contractor's execution of the work from a remote location in real time was difficult, which thus also made it difficult to ensure a high work standard, entrusting core tasks to contractors was virtually impossible. However, recent advancements in information and communication technologies and the preparation of detailed work processing manuals have made it possible to control workers in remote locations in real time and, by extension, to utilize

6 Chief of Yokohama Minami Labor Standards Office Case, First Petty Bench 11/28/1996, *Rohan* No. 714, p. 14.

7 Chief of Fujisawa Labor Standards Office Case, First Petty Bench 6/28/2007, *Rohan* No. 940, p. 11.

8 The State and CLRC (INAX Maintenance) Case, Third Petty Bench 4/12/2011, *Rohan* No. 1026, p. 27.

9 Sokuhei Case, Tokyo District Court 4/28/2010, *Rohan* No. 1010, p. 25.

10 The State and CLRC (Victor) Case, Third Petty Bench 2/21/2012, *Minshu* Vol. 66 No. 3, p. 955.

11 The State and CLRC (New National Theatre Foundation) Case, Third Petty Bench 4/12/2011, *Minshū* Vol.65 No.3 p.943; the State and CLRC (INAX Maintenance) Case, Third Petty Bench 4/12/2011, *Rōdō Hanrei* No.1026 p.27; and the State and CLRC (Victor) Case, Third Petty Bench 2/21/2012, *Minshū* Vol. 66 No.3 p.955.

12 See Ministry of Health, Labour and Welfare, "Labor Relations Research Group Report (On the Criteria for Judging Worker Status under the Labor Union Act)" (<http://www.mhlw.go.jp/stf/houdou/2r9852000001juuf-att/2r9852000001jx21.pdf>), p.10 ff.

contractors for core tasks.

1-2-2. Subcontracting alliance (“*Keiretsu*”) and offshoring

As was mentioned previously, subcontracting has been used in Japan since before the Second World War, and it has served as a buffer during a great number of international economic fluctuations. Particularly in the case of manufacturing, it has been pointed out that an important characteristic of Japan’s manufacturing industry is the lowness of its ratio of in-house production compared to that of the United States.¹³

In a number of manufacturing sectors, of which the automobile manufacturing industry is representative, a division of labor-based approach through subcontracting relationships extending over multiple stages and levels was used for the production and processing of components and fittings that are not made in-house. Specifically, production and processing tasks are divided up among subcontractors at the primary, secondary, tertiary, and even quaternary levels. The large enterprise standing at the top of this subcontracting system mainly devotes itself to final assembly.

Within this kind of subcontracting system, some large enterprises standing at the top of the division of labor have become oligopolistic. They engage in long-term business with a number of small and medium-sized subcontractors (exclusive subcontractors) that mainly make their parts, thus creating a relationship resembling a “one-to-many” pyramid. While doing business with several subcontractors that make the same parts, lead companies have constantly reorganized their subcontracting in order to reinforce their own competitiveness. Among other steps, this has involved strengthening their relationship (building an alliance) with prominent subcontractors and cutting ties with subcontractors that have difficulty with responding.

This “*Keiretsu*” or subcontracting alliance system has advantages for parent companies in that it conserves fixed capital and labor, makes it possible to procure parts below the external labor market price, and allows flexible adjustment of the internal-external

manufacturing ratio. For subcontractors, however, it exposes them to fierce competition with other subcontractors and pressure from the parent company to engage in in-house production. It also requires them to be as flexible as possible in responding to various demands from the parent company so that they may continue doing business with the parent company. Consequently, companies nearer to the bottom of this layered subcontracted production structure pay lower wages. This produces a structure of hierarchical wage disparities.

Previously, the mechanism that moderated wage disparities between large enterprises and subcontractors was the spring wage negotiations (“*Shunto*”) that take place between March and April of each year. Although actual wage negotiations themselves take place at the employer-company union level, these *Shunto* negotiations have been coordinated and linked across industries through the setting of wage increase targets within an industry or throughout all industries by industrial union federations or trade union national centers as well as the setting of negotiation schedules within or among industries on the union side, and through the coordinated setting of negotiation schedules between or among industries on the management side. Additionally, the wages paid by major enterprises within each industry made their influence felt in company wage negotiations through the industry hierarchy. The *Shunto* wage-increase patterns thus spread to small and medium-sized enterprises to a significant extent, boosted by a shortage of labor in the overall national economy.

The *Shunto* system was extremely successful as a mechanism for extending wage increases across industries and firms during Japan’s period of high economic growth. However, following the collapse of the “bubble economy” and the advent of intensified globalized competition, the mechanism’s effectiveness to spread wage increases across firms and industries weakened significantly due to differences between winning and losing firms as well as deterioration of the labor market for job-seekers.

In recent years, much of the production and

13 Solow, M. and John C. Scott, *Made in America*, Cambridge, Mass., MIT Press. 1989.

processing of components and fittings that traditionally took place in Japan has moved to overseas manufacturing bases as Japanese manufacturing expands internationally. As a result, the supply chain for Japan's industry now crosses international borders. Many subcontractors that became exposed to fierce competition with overseas rivals as a result now do business with multiple parent companies to secure the volume of orders they need. Consequently, rather than manufacturing narrowly defined parts mainly for a single company, they now provide specialized technical assistance to end-product manufacturers to meet a variety of purposes. Subcontracting companies that successfully made this switch in roles have become "specialized processing companies" possessing a number of clients and gained the ability to do business with large enterprises on an equal footing. At the same time, the corporate relationship between specialized processing companies and client companies has also shifted from a pyramid-type relationship with large enterprises at the top to a network-type industrial organization with horizontal and equal links. As a result, the subordinate relationships that subcontracting companies had with large enterprises are weakening and new interdependent relationships as equal business partners are emerging.¹⁴

As companies move low-added-value parts manufacturing and assembly offshore to low-wage developing countries, the labor conditions of workers working at overseas production sites that are now part of the supply chain have also become a matter of concern. However, unless there are exceptional circumstances, Japanese labor laws are not applicable to labor issues in foreign countries. As an example, there was a case in which the union of an overseas local subsidiary of a Japanese company joined an industrial union in Japan in connection with a labor dispute in the office of that subsidiary. The industrial union then approached the Japanese headquarters company with

a request to engage in collective bargaining to settle the dispute but was refused. The industrial union responded by filing a complaint against the Japanese company claiming that its refusal to engage in collective bargaining constituted an unfair labor practice. However, the Central Labour Relations Commission ruled that the case essentially concerned labor relations in a foreign country in which Japan's Labor Union Act did not apply and, therefore, that the case was outside of the CLRC's jurisdiction.¹⁵ The ruling was subsequently endorsed by the court in its judicial review.¹⁶

I-3. Types newly formed

I-3-1. Worker dispatch

Until the Worker Dispatching Act was enacted in 1985, worker dispatching by temporary employment agencies was uniformly prohibited as a form of labor supply business under Article 44 of the Employment Security Act. In practice, however, there was a sharp increase in worker dispatch businesses from the mid-1970s into the 1980s after the first Oil Crisis of 1973. This increase occurred in the operation of information equipment, cleaning and maintenance of buildings, and other services requiring special skills amid expanding efforts by companies to enhance outsourcing in order to reduce payroll costs. It was also the result of female workers' seeking of employment opportunities compatible with their family responsibilities.

Although worker dispatching before the 1985 Act was mostly conducted in the form of business process subcontracting, ordering companies that received dispatched workers in their undertakings tended to provide a certain direction or supervision to those workers in the execution of subcontracted work. Thus, questions arose frequently regarding whether or not such worker dispatching practices violated the ban on labor supply businesses. Moreover, there was the problem of uncertainty regarding where legal

14 For more on this topic, see Gendai Kigyo Kenkyukai (ed.), "Nihon no Kigyo-kan Kankei: Sono Riron to Jittai" (inter-corporate relations in Japan: theory and reality) (Chuokeizai-sha, 1994) p. 175 and thereafter; and Kenichi Imai and Ryutaro Komiya, "Nihon no Kigyo" (Japanese enterprises) (University of Tokyo Press, 1989) p. 163 and thereafter.

15 Toyota Philippines Case, CLRC 12/6/2006, *Meireishu* 136, p. 1258.

16 Tokyo High Court 12/26/2007, *Rokeisoku* No. 2063, p. 3.

responsibility under labor protection laws should rest, since the receiving companies that actually used the labor were not employers in terms of labor contracts.

The Worker Dispatching Act of 1985 was enacted, accordingly, under the principle of revising the policy of uniformly banning labor supply business and of permitting worker dispatch businesses for limited types of work (jobs) while at the same time placing those newly permitted businesses under appropriate regulation. On the one hand, the Act placed strict regulations on “temporary employment-type” dispatch businesses whereby each time a business operator dispatches workers who are registered as desiring dispatch employment, the operator hires those workers for the required dispatch period only and then dispatches them to other companies. In light of the instability of dispatch employment under this type, the Act required such dispatch businesses to obtain a “license” from the Minister of Labour (currently the Minister of Health, Labour and Welfare) enumerating reasons for the disqualification of business operators (Article 6 of the Worker Dispatching Act). On the other hand, in the case of “stable employment-type” dispatching whereby only workers employed under non-fixed-term contracts or for periods in excess of one year are dispatched, dispatch business operators were merely obligated to notify the Minister of Health, Labour and Welfare that they will engage in such dispatch business.

Thus, although worker dispatch is, in terms of its characteristics, the supply of workers to another, it was expressly excluded from “labor supply,” which is banned by the Employment Security Act, in terms of its definition. On the other hand, purposefully, repeatedly, and continuously having a person under one’s own control provide manpower to a third party under the instructions and orders of that party in a form that does not fall under the definition of “worker dispatch” continued to be prohibited as “labor supply business.”

The Worker Dispatching Act initially adopted a “positive list” method, whereby the types of work for which dispatch is permitted were specifically listed.

However, the types of work were in principle liberalized with progressing deregulation in the 1990s, and a 1999 revision of the act shifted to a “negative list method” whereby only prohibited types were listed. Moreover, manufacturing industries, which had been suffering from competition with their Asian counterparts using less expensive manpower, demanded that manufacturing dispatching, a practice that had been banned, be allowed. Their demand became reality in 2003. Such deregulation led to a dramatic increase in the use of dispatching; however, it was those dispatched workers who were hit first by employment adjustment in the wake of the global recession that was sparked by Lehman Brothers’ collapse in the autumn of 2008. At that time, enterprises using dispatched workers first cancelled their worker dispatch contracts with dispatching firms and removed dispatched workers from their production sites. Many dispatched workers were then dismissed by the dispatching firms and became unemployed, even though their labor contracts with those firms had not yet concluded. Such actions—known as *haken-giri* (“cutting off dispatched workers”)—were widely reported in the media. Claims that deregulation had gone too far mounted in the media, coupled with criticism of increasing use of the practice of day worker dispatching. As a result, the Worker Dispatching Act was revised in 2012 to tighten regulation in the following respects:

- Dispatches on a daily basis or for periods of less than two months (so-called “day worker dispatching”) are prohibited.
- Dispatching of workers inside group enterprise shall not exceed 80% of dispatches performed by a particular dispatch operator.
- In cases of illegal dispatch, it shall be deemed that the firm receiving the dispatched worker offered direct employment to the dispatched worker under the labor conditions provided by the dispatching firm.¹⁷

A further revision of the Worker Dispatching Act was made on September 30, 2015, to strengthen protection

17 The regulation concerning the deeming of illegal dispatch as an offer of direct employment was executed on October 1, 2015; the other revisions were executed on October 1, 2012.

of dispatched workers in the following respects:

- All worker dispatching undertakings are placed under the license system, regardless of whether they engage in temporary employment-type or stable employment-type dispatching.
- The period during which a worker can be dispatched to the same establishment is redefined to three years, in principle.
- Dispatching firms must see to it that dispatched workers are directly employed by the recipient firm or continue employment with the dispatching firm as a dispatched worker after the dispatch to the firm concludes due to the expiration of the three-year limitation stated above (“employment security measures”).
- Dispatching firms are obligated to execute career development measures, such as provision of education and training and career consulting, to the dispatched workers they employ.
- Dispatching firms and firms receiving dispatched workers must see to it that dispatched workers receive working conditions in balance with those of workers who engage in similar work at the receiving firm.

As will be discussed in II-5-2, it should be noted that several judicial precedents and Central Labour Relations Commission (CLRC) orders of recent years have recognized employer status under the Labor Union Act for firms that receive dispatched workers.

I-3-2. Franchising

In Japan, the franchise industry has largely shown continuous strong growth as a new form of business since the 1990s. The growth of convenience stores is receiving particular attention within this trend.

In the case of the United States, inferior labor conditions of workers employed by franchisees compared to workers in directly managed stores is seen as a problem. On the other hand, in Japan, workers who are hired based on the authority of the store manager are ordinarily part-time workers, regardless of whether the store is directly-managed or operated by a franchisee.

Given this, the problem of lower labor conditions for peripheral workers under the organizational format of “franchising” is largely seen as a problem of part-time workers. Additionally, because regulations that guarantee labor conditions, including minimum wages, extend to workers who are employed by franchisees, the problem of lower labor conditions based on the specific circumstance of “franchising” has not been viewed as one of great importance.

However, recently, the labor conditions of convenience store managers who are given the contractual status of “franchisee” have come into the spotlight. The reason for this is that convenience store managers are told by their companies that they are not “workers” because they signed a service agreement, despite the fact that in reality they work in the same way as ordinary workers. As a result, there are many cases in which managers are made to work under harsh conditions. Against this backdrop, there has been a trend whereby such convenience store managers join small local unions in their regions to demand better conditions. On March 20, 2014, a Labour Relations Commission order was issued stating that convenience store managers are workers in terms of the Labor Union Act.¹⁸ Relying on criteria established by the Central Labour Relations Commission and Supreme Court, specifically, the Commission studied the following elements individually and in detail, and ruled that despite being business operators in a location separate from the company, member store managers have weak bargaining power that should be protected under collective bargaining laws and thus correspond to “workers” under the Labor Union Act.

Incorporation into a business organization

- (1) Standardized content of contractual relations unilaterally decided by the franchiser (inequality in bargaining power)
- (2) Nature of remuneration as compensation for labor
- (3) Obligation to respond to work requests
- (4) Provision of labor under direction and supervision in the broad sense, and the existence of

18 Okayama Prefecture Labour Relations Commission 2010 (Fu) No. 2 Unfair Labor Practice Relief Petition Case Order <http://www.pref.okayama.jp/uploaded/attachment/182426.pdf>.

certain constraints in the location and time of work

(5) The lack of clear entrepreneurship aspects

Compared to individual and multilayered subcontracting, franchising appears to be a relatively new form of business. The reason for this is that maintaining a brand's overall image makes it necessary to maintain a working standard among workers who work under franchisees. The creation of detailed work training manuals to achieve this as well as the preparation of agreements that spell out responsibilities if a problem occurs require a high level of technical capability. Meeting such requirements has only become possible recently.

In relation to franchising, in Japan, there is another type of commercial arrangement by which multiple retail stores do business within the same store building. Such a facility is called a "cooperative department store." Maintaining brand image is an important consideration in the franchise industry; however, in the case of a cooperative department store, the companies that open stores have their brands and the department store providing the place and facilities also has its own brand. In such cases, the workers who work at the stores are obligated to abide by the regulations of both the company that operates the store and the department store, and there are times when the assignment of worker status and employer's responsibility becomes problematic. To illustrate as an example, say Brand C store opens stores in Brand A department store and Brand B department store. However, Brand A department store declares that it will open for business on January 1, while Brand B department store says it will begin sales on January 3. In this case, despite working for the same Brand C store, workers assigned to Brand A department store will be obligated to work beginning on January 1, while those assigned to Brand B department store will begin work on January 3. In this sense, cooperative department stores can decide, even if only partially, the labor conditions of workers who are employed by the stores that do business in them.

1-3-3. Other new types in the Atypical Work Organization

In the cases of worker dispatch and franchising,

the legal character and regulatory methods of those practices have already been the subjects of considerable study, and both are regulated by legislation and judicially created doctrine. On the other hand, for new employment formats like those mentioned at the beginning of this paper—of which telecommuting, Uber, Airbnb, and crowdsourcing are representative—there has been little concrete discussion in line with each format in terms of the worker status of people employed under those formats and the assignment of employer's responsibilities to persons who use them and acquire the results of labor provided through them, to say nothing of their statute-based regulation. Judgments concerning the validity of "employment relationships" within those formats and of the applicability of worker protection laws to the people who work under them are left to conceptual demarcations of "worker" and "employer" within the conventional legal framework.

Against this backdrop, the author will next present criteria for judging how the concepts of "employer" and "worker," which are the parties of a labor relationship, are demarcated in the Atypical Work Organization in Japan.

II . Extension of Employer's Responsibility in the Atypical Work Organization

As described above, the main problems within the Atypical Work Organization in Japan are the concept of "worker" (which will be discussed later), the concept of "employer," and the extension of employer's responsibilities in the area of industrial health and safety. The following will present the concept of "employer" in terms of labor contracts and in terms of the Labor Union Act, with emphasis on the concept and its extension. It will then present legal principles for expanding employer's responsibilities beyond the scope of judicial personality.

II -1. The issue of extending employer's responsibility under individual labor relations

The most basic concept of "employer" under individual labor relations law is that of the employer in a labor contract. The definition given in Article 2

paragraph 2 of the Labor Contract Act is as follows: “The term ‘employer’ as used in this Act means a person who pays wages to the workers he/she employs.”

In this regard, the employer status of someone who is not formally one of the parties to a contract sometimes causes problems. Specifically, such instances include cases of tripartite labor relationship, such as the acceptance of dispatched workers, or subcontracting relationship, in which a third party to the labor contract appears to be exhibiting employer-like functions but escaping from employer’s responsibilities. Similarly, there are cases where, as in a parent-subsidiary relationship, a subsidiary company is a direct contractual employer but controlled by another corporation, creating a situation in which the other corporation influences the subsidiary’s labor relations.

II -2. Statutory extension of employer’s responsibility under individual labor relations

It should first be mentioned that there have been a few statutory responses to the need to extend employer’s responsibility under a labor contract to an employer-like third party.

The first is the imposition of quasi-employer responsibilities under the Industrial Safety and Health Act. The Labor Standards Act originally included provisions in Chapter 5 “Safety and Health,” imposing several obligations and systems of safety and health management on employers. In the process of high-level economic growth from 1955 onwards, however, major changes occurred in the labor environment in terms of the innovation of machinery and equipment, intensification of work, and handling of new hazardous substances. This led to an increase in both the risk of industrial accidents and accident victims. To address this situation, the Industrial Safety and Health Act was enacted in 1972 as a comprehensive law aimed at preventing work-related accidents. Characteristic among the provisions of the new Act is that the obligation to take certain measures to prevent

accidents or health impairment in the workplace is imposed not only on employers under labor contracts, but also on the manufacturers, orderers and leasers of hazardous machines or equipment, or harmful materials. Especially remarkable in the Atypical Work Organization is a special regulation to prevent hazards in the workplace involving multilayered subcontracting. Namely, the prime contractor must give necessary guidance so that related subcontractors do not violate the Industrial Health and Safety Act. The prime contractor in construction and shipbuilding projects, in particular, must take various measures to prevent industrial accidents that could occur as a result of workers of the prime contractor and subcontractors working together in the same workplace (Articles 29 to 34 of said Act).¹⁹

The second is a special arrangement concerning the employer’s responsibility for industrial accident compensation in construction projects. Article 87 of the Labor Standards Act prescribes that, in construction projects executed with multilayered subcontracting, the prime contractor shall be deemed to be the employer responsible for compensating for work-related accidents occurring during a project. The Act further states that the prime contractor may conclude a written agreement with one of the subcontractors to assume responsibility for compensation. In such a case, the Act stipulates that both the prime contractor and the subcontractor assume joint responsibility for compensation.

The third is a partial extension of the employer’s responsibilities under protective labor legislation to recipient firms in a worker dispatch setting. As previously explained, under the Worker Dispatch Act, the dispatching firm in principle assumes the employer’s responsibilities under the Labor Standards Act, the Industrial Safety and Health Act, and other laws in relation to the dispatched workers. The reason is, of course, that it is not the recipient firm but the dispatching firm that is the employer under the labor contract with dispatched workers. Nevertheless, the

¹⁹ Such measures include the establishment and administration of a consultative organization for carrying out liaison and adjustment between related operations, conducting inspection tours of places of operation, and providing guidance and assistance regarding education conducted by related subcontractors for the safety and health of workers.

Act imposes certain regulations in the Labor Standards Act and other laws solely or cumulatively on the accepting firm as responsibilities when the firm actually uses the manpower of dispatched workers under its direction and supervision. For example, the employer's responsibilities to abide by limits on daily and weekly working hours and to provide daily rest periods and weekly rest days are imposed solely on the recipient enterprise. The responsibility to give equal treatment to workers in terms of working conditions, irrespective of their nationality, religion, creed, and social origin, and to men and women in terms of wages are imposed on both the dispatching and recipient enterprises.

II -3. Extension of employer's responsibility under the doctrine of denying the legal entity of the direct employer

In the triangular settings of business process contracting or parent-subsidary relationships, there are cases in which the business management and labor relations of the contractor or subsidiary company are so greatly dominated by the client or parent company that the contractor or subsidiary company appears to be part of the corporate organization of the client or parent company. In such a situation, one can argue for the doctrine of denying the legal entity of the contractor or subsidiary company vis-à-vis the client or parent company, thereby deeming workers employed by the former company to be those employed by the latter company.

More concretely, in parent-subsidary relationships, there are cases in which the parent company completely dominates the decisions of the subsidiary company and comprehensively controls its operations. In this context, the employment relationships and working conditions of workers in the subsidiary would be completely dominated by the parent company. In such a situation, if the workers of the subsidiary find that the subsidiary, as their direct employer, has been dissolved by the parent company and that wages for work already done are not yet paid or workers are subjected to economic dismissal, they may wish to pursue liability for unpaid wages or unfair dismissal against the parent company.

According to established case law of the Supreme

Court, the status of a corporation as an independent legal entity can be denied when the substance of the corporate organization is a mere shell as a legal entity, or when the corporate organization is abusing the legal entity for unlawful purposes. Applying this general doctrine, when a subsidiary corporation is placed under the parent corporation's comprehensive and complete control through the latter's holding of all of the subsidiary's shares, dispatching of officers to run the subsidiary, and maintenance of an exclusive business relationship with the subsidiary, and the parent exercises tight control over the subsidiary's decisions on wages, working conditions, and other personnel matters, the employees may argue that the legal entity of the subsidiary company is a mere shell vis-à-vis the parent company, and, therefore, that the subsidiary company should be deemed to be a business branch of the parent company. By so arguing, they can contend that they should legally be deemed to be in a labor contract relationship with the parent company. They may thus be able to claim unpaid wages against or employment relations with the parent corporation.

In the setting of business process contracting, on the other hand, there are also cases in which a contractor company is wholly dependent on the client company as its exclusive contractor. The contractor company is doing nothing but the businesses contracted out by the client company, solely within the facilities of the latter company. Contractual conditions are unilaterally decided by the client company, which frequently puts pressure on the contractor company to reduce its workers' wages and thus lower contracting costs. The client company can also make contracting workers perform their work together with its own employees, and can issue directions to the contracting workers. In such a situation, if the client company decides to replace the contractor company with another firm proposing less expensive and more efficient contracting, the workers may lose their jobs due to the termination of business process contracting. The workers of the contractor company may claim labor contract relations with the client company by relying on the doctrine of denying legal entity. Generally speaking, however, it is difficult to apply the doctrine to contractual relations unless the client

company is at the same time the parent company of the contractor company.

II -4. Extension of employer's responsibility under the theory of the implied labor contract

The next theory that is useful for extending the employer's responsibility under a labor contract is the theory of implied labor contracts. According to case law, implied labor contract relations can be recognized between an enterprise and a worker who, although not in an explicit labor contract relationship, are in fact in a relationship in which the worker is providing labor for the enterprise and the enterprise is paying wages to the worker as remuneration for that labor. According to case law, to ascertain an implied labor contract relationship, it is not sufficient that a worker is providing labor under the direction and supervision of an enterprise. The worker has to identify the enterprise directing and supervising his or her labor as the employer who is paying wages in return for that labor.

In parent-subsidiary relations, for example, this theory can be workable in cases when there is almost no independence of the subsidiary in business operations as well as in personnel management, and, accordingly, the subsidiary could be recognized merely as a part of the parent's business organization. In such cases, the workers of the subsidiary may consider that they are actually working for the parent company and that the wages they are receiving are paid by the parent company as remuneration for their work for the parent company. These are also cases in which one can rely on the doctrine of denying the legal entity of the subsidiary company. In the parent-subsidiary setting, workers of the subsidiary more often resort to the doctrine of denying legal entity than the theory of implied labor contract relations.

The theory of implied labor contract relations is also referred to in cases of worker dispatch and business process contracting. Namely, when dispatched workers lose their jobs due to the termination of a worker dispatch agreement between dispatching and recipient enterprises, they may criticize the callous attitude of the recipient enterprise and may even claim the existence of labor contract relations with

the recipient company. Such an attempt will not be successful unless the dispatching company can be regarded as not in fact an independent business entity but rather as a mere manpower office of the recipient company performing recruitment of workers on its behalf.

The above-mentioned workers of a contractor company who lose their jobs due to the termination of an exclusive contractual relationship between the client (recipient) company and the contractor company may also contend that real labor contract relations exist between them and the client company in accordance with the theory of implied labor contract. Here again, such a contention will not be persuasive unless the contractor company can be recognized not as an independent business entity but rather as a mere branch office of the client company that performs personnel management on the client company's behalf.

II -5. Extension of employer's responsibilities under the Labor Union Act

II -5-1. Extension in the cases of parent-subsidiary and subcontracting relations

Article 7 of the Labor Union Act prohibits certain acts by employers that are not permissible in collective labor relations institutionalized by the Act; these acts are known as unfair labor practices. When a violation occurs, an administrative committee called a Labour Relations Commission issues an administrative relief order, the aim being to restore and secure proper order in collective labor relations.

Article 7 mentioned above prescribes that the "employer shall not commit" the listed unfair labor practices. Here, the problem lies in what "the employer" refers to as the actor of unfair labor practices. It goes without saying that the employer should be identified as one party to a labor contract who receives the labor of and pays wages to the other party. Here, however, we shall question whether some legal entity other than this employer based on a labor contract could be regarded as an employer.

The combined efforts of labor law academics and the courts have established a doctrine of extending employer status to the third party in a labor contract who dominates and controls the working conditions

of workers in the labor contract. This doctrine has been formed with regard to cases of parent-subsidiary relations and subcontracting relations in the following way.

If a parent company controls a subsidiary company's operations and the treatment of the latter's workers, this could work toward affirming the employer status of the parent company pursuant to Article 7 of the Labor Union Act. Thus, if the parent company, through its stock ownership, dispatch of officials, subcontracting relations and the like, places the subsidiary company under its control, and it has actual and concrete managerial authority with respect to the working conditions of the latter's employees, the parent will have employer status in collective bargaining, along with the subsidiary, with regard to those employees' working conditions.²⁰

Also, when an enterprise subcontracts some of its work to another enterprise and provides its own employees to that other enterprise, the recipient enterprise may acquire the status of an "employer" for purposes of Article 7 toward those employees of the subcontractor enterprise. Thus, where the recipient company has actual and concrete control over the working conditions and treatment of such workers working in its place of business, it is deemed to possess the status of the employer towards those workers. According to a Supreme Court precedent,²¹ even where the recipient company does not control working conditions in the contractor company comprehensively, it should still be deemed "a partial employer" if it has "substantial and concrete domination" over partial but significant working conditions in the latter company.²²

II-5-2. Extension of employer status in the Atypical Work Organization

Applying the theories explained above, a typical legal issue arising in multilayered subcontracting relationships is whether a client company that contracts

out part of its work to a subcontractor should be viewed as an employer under the Labor Union Law vis-à-vis the workers who are employed by the bottom-level subcontractor and received in the place of business of the contracting-out company. According to the theory of extending employer status mentioned above, the basic criterion is the extent to which the client (recipient) company has "substantial and concrete domination" over the working conditions of the subcontractor's workers.

As shown in Fig. 1, let us assume that Company D is one of Company A's subcontractor companies, and that Company A is a subcontractor company of Company Y. If Company Y has substantial and concrete domination over Company D not only in terms of Company D's business operation but also in a partial yet substantial portion of the working conditions of Company D's Worker X, who is engaged in the subcontracted work, Company Y would be viewed as the employer of Worker X, even though the worker is directly employed by Subcontractor D.

The same approach is used when the Labour Relations Commissions ascertain the existence or non-existence of employer status on the part of firms that receive workers dispatched by temporary agencies within their establishments and, in practice, direct and supervise them.

A similar extension of employer status could be applied to the multilayered parent-subsidiary relationship. For example, as shown in Fig. 2, let us assume that Company D is a subsidiary company of Company A, and Company A is a subsidiary company of Company Y. If Company Y has substantial and concrete domination over Company D not only in its business operation but also in the management of a partial yet significant portion of working conditions, Company Y would be viewed as the employer of Worker X, even though the worker is directly employed by Subsidiary D. The point is that the doctrine of extending employer status under the Labor Union

20 Kazuo Sugeno, *Japanese Employment and Labor Law*, North Carolina Academic Press 2002, p.699.

21 *Asahi Hōsō Case*, Supreme Court 3rd Petty Bench Decision, February 28, 1995.

22 Sugeno 2002, p.700.

Figure II-1 Extention of Employer Status in Multilayered Subcontracting Relationship

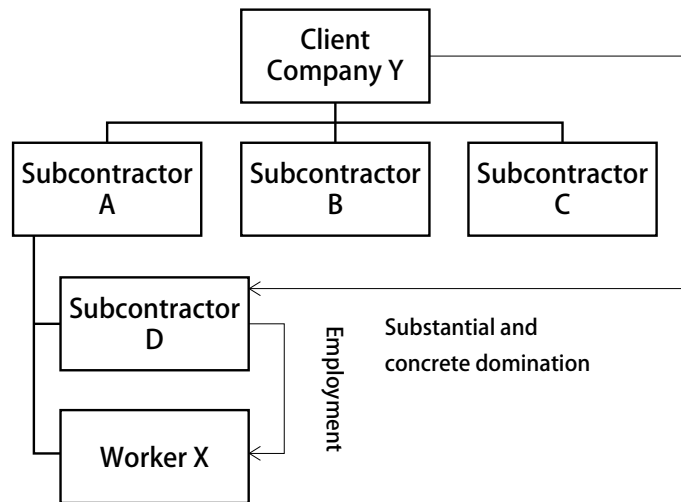
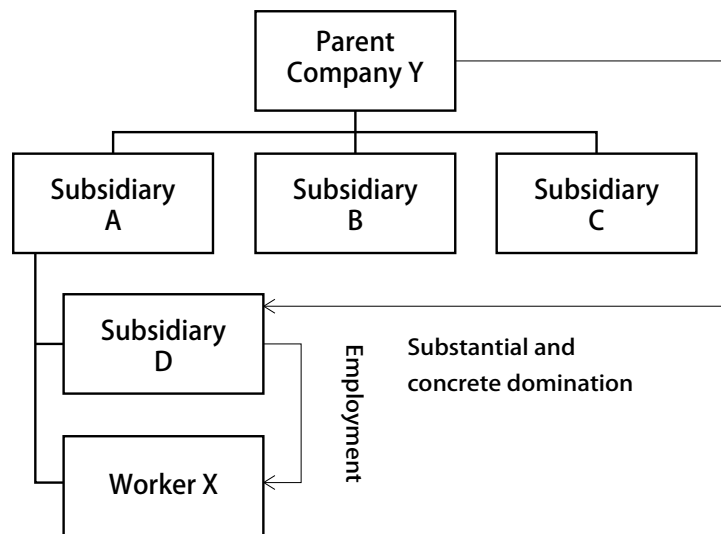


Figure II-2 Extention of Employer Status in Parent-Subsidiary Relationship



Act can be applied to tripartite business relations, such as a parent, subsidiary, and subsidiary's employees, or a subcontractor, subcontractor's employees, and recipient, regardless of whether these be simple tripartite relations or more complex multilayered tripartite relations. It should be added that the doctrine would be usable even for other tripartite relations, such as that of a franchiser, franchisee, and franchisee's employees, or a dispatcher, dispatcher's employees, and recipient, regardless of whether these be simple or a multilayered relations.

III. Evaluation of Eligibility as a Worker in Japanese Labor Law

This section begins by introducing the definitions of the concept of "worker" in Japanese labor law and the general criteria for evaluating eligibility as a worker, and then builds on this by describing several specific issues related to evaluating whether or not a person is eligible as a worker.

III-1. The definition of “worker” in the Labor Contract Act and the Labor Standards Act

The Labor Contract Act defines “worker”—namely, a person to whom the act is applied—as “a person who works by being employed by an employer and to whom wages are paid” (Article 2, Paragraph 1). The elements of employment and wage payment are common elements to define the definitions of “employer” (Article 2, Paragraph 2) and “the establishment of a labor contract” (Article 6). In comparison, the Labor Standards Act defines the “worker” it seeks to protect as a person “who is employed at an enterprise or office and receives wages therefrom” (Article 9). This can be interpreted as being essentially identical to the definition set out in the Labor Contract Act, but with the additional restriction that the person shall be employed by a business (enterprise).

Given these definitions of “worker,” when determining whether or not the Labor Contract Act, the Labor Standards Act, or other additional or related legal provisions should be applied, the fundamental question is whether or not the subject can be described as someone who “works by being employed and receives wages.” Here we discuss the concept of “worker” defined in the Labor Standards Act.

III-2. Criteria for evaluating eligibility as a worker

The definition of “worker” in Article 9 of the Labor Standards Act states that a workers shall be (1) employed at a business and (2) receive wages therefrom. However, as the meaning of “employed” and the definition of “wages” (Labor Standards Act, Article 11) are broad and abstract, it is not possible to clarify the scope of workers directly from the provisions of this act. It is therefore necessary to clarify the interpretations of the criteria used for evaluating eligibility as a worker.

A report published by the Japanese Ministry of Health, Labour and Welfare’s Labor Standards Act Study Group (*Rōdōkijunhō kenkyūkai*)—entitled “Criteria for Defining ‘Workers’ in the Labor Standards Act” (December 19, 1985)—which is understood to be widely accepted at present, asserts that

evaluation of eligibility as a worker should be conducted on the basis of practical terms, regardless of the format of the contract, such as employment contract or contractor agreement. It then seeks to clarify a means of evaluating whether or not a person falls under the category of “worker” under the Labor Standards Act by demonstrating that the existence (or not) of “subordination to an employer” can be used as a basic framework for evaluation, and by identifying specific criteria for determining “subordination to an employer” and other factors that can be used to support evaluations of eligibility as a worker. Being “subordinate to an employer” is defined as cases in which the person in question is (1) working under the direction and supervision of an employer and (2) receiving remuneration that is compensation for their labor.

Firstly, the question of whether or not work is conducted under direction or supervision is evaluated according to criteria such as the following: whether or not the person in question receives (specific) requests to engage in work; whether or not they have the freedom to accept or refuse instructions, etc., on engaging in work (if no such freedom exists, they are assumed to be under direction and supervision); whether or not they are directed or supervised in the process of carrying out tasks (if they receive specific instructions or orders regarding work content or means of carrying it out, it is easy to acknowledge that they are under direction and supervision); whether or not there are restrictions on the workplace or working hours (it may be difficult to ascertain whether such restrictions inevitably arise due to the nature of the work, or whether they are due to instructions or orders from the employer); and whether or not the person is “substitutable” (if another person can provide labor on behalf of the original one, or, if a supporting person can be used to carry out the work; this is a factor that suggests that the person is *not* under direction and supervision).

Secondly, when evaluating the nature of the remunerations, factors such as the calculation of remunerations on the basis of an hourly salary, etc., as opposed to remunerations that vary significantly according to the results of the labor; deductions from remunerations in the event of absence; and allowances paid for

overtime work indicate that the person in question is receiving remuneration that is compensation for providing labor for fixed amounts of time. In this case, it reinforces the suggestion that the person is “subordinate to an employer.”

For cases in which it is not possible to make an evaluation on the basis of the two points described above, the report also lists a third set of factors that may be used to support evaluations of eligibility as a worker. Among them are factors related to whether or not the person in question can be classified as a business owner (bearing expenses for machinery and equipment, amount of remuneration, responsibility for damages, use of a trade name, etc.) and the extent to which work is conducted exclusively for a certain company or organization.

III-3. Specific evaluation of eligibility as a worker

With the growing prominence of the service industry, increasing globalization, and advances in information technology, ways of working are becoming ever more diverse, and companies are adopting measures to reduce costs. Such developments have in turn made the question of whether or not people are “workers” a greater and more complex problem. Here we look at some more specific issues that are involved.

III-3-1. Distinguishing between “executives” and “workers”

When considering whether or not a person is a “worker,” the first question is where to draw the line between “workers” and those who are involved in the executive management of a company (company officers) as opposed to being employed by the company.

Representative of people involved in executive corporate management are “directors” in stock companies. The Companies Act states that in the case of directors (people involved in the executive management of a stock company), appointments, dismissals, and decisions on their remunerations shall be voted on at shareholders’ meetings; terms of appointment shall not exceed a certain period; and such persons shall be delegated authority by the company and take on various obligations and responsibilities. In other

words, directors are not classed as “workers” because they are prescribed under the Companies Act as having different statuses and responsibilities to people who are employed by a company and receive wages therefrom (i.e., workers). “Auditors,” who have the task of auditing directors’ performance of duty, are also not included under the category of “worker” because they are likewise legally prescribed special statuses and responsibilities under the Companies Act. The same applies to “executive officers” in companies with committees.

The officers of organizations such as general incorporated associations, general incorporated foundations, public interest incorporated associations, and public interest incorporated foundations (chairpersons and inspectors) are also elected by the general meetings of those organizations; delegated their roles by those organizations; subject to legally prescribed rules regarding their appointment, dismissal, and responsibilities; and engage in executive management. They are therefore also distinguished from workers who are under a labor contract with the organization.

There is in fact also a considerable number of cases of “worker directors”—that is, directors who have been assigned the status of director but also have the status of a worker—and this generates various problems. It is also difficult to determine whether family workers and co-workers in individually-owned businesses are joint managers of the business or workers who are “employed and receive wages.”

III-3-2. Distinguishing between “individual business owners” and “workers”

People such as sales representatives (for brokerage firms or insurance companies), customer engineers, entertainers, and people who work at home engage in work under “delegation” or “contracting” agreements rather than “employment” contracts. In addition to the fact that their guaranteed remunerations are low, the working conditions of people under such contracts may include such factors as being paid proportionate to the results they produce (under systems such as commission or performance-based pay), little restrictions on working hours or place of work, not being subject to formal rules of employment, and not being entered into the labor insurance scheme by another

party. People such as construction industry craftsmen who work for themselves, subcontracted drivers who use their own truck to engage in transportation for a specific company, and managers of franchises may also be engaged under “delegation” or “contracting” agreements as individual business owners; however, if they essentially provide labor exclusively for a specific company, it may be necessary to address the question of whether or not they are “workers.”

Whether or not such people who supply labor through contracting or delegation agreements are “workers” is not determined by the format (wording) of their contract. Instead, they can be described as “workers” if it is recognized that the actual conditions of the labor relationship that they work under forms a labor contract relationship in which they are “employed” by a business and paid wages. This is because, regardless of how their contract is set out as a “delegation” or a “contracting” agreement, if it is recognized that under the practical conditions of their labor relationship the person in question is employed by a business and paid wages therefrom, it is not possible to avoid the strict regulations applying to such a labor relationship.²³

When considering the meanings of the criteria “employed” and “wages” as they are used in the definitions of “worker” in the Labor Contract Act and the Labor Standards Act (Article 2, Paragraph 1 of the Labor Contract Act and Article 9 of the Labor Standards Act), “employed” is interpreted as providing labor under instructions or orders, and “wages” is defined as “all kinds of payment made from employer to worker as remuneration for labor” (Labor Standards Act, Article 11). These two criteria are abstract and at the same time closely linked. The established evaluation method that has been adopted in government supervision and court precedents regarding labor standards is to combine and summarize both criteria as “subordination to an employer,” and then closely examine and combine various factors of the labor relationship to determine whether or not the person in

question is a worker as defined in the relevant articles. As noted above, the 1985 report of the Labor Standards Act Study Group sets the main factors used for this evaluation as (1) whether or not the person in question has the freedom to refuse requests to engage in work, (2) whether or not they receive direction or supervision when performing work, (3) the level of restrictions on time or place, (4) whether or not the person is “substitutable,” and (5) the methods of calculating and paying remunerations. The report also suggests supplementary factors for evaluation, such as (1) whether or not the person can be defined as a business owner due to factors such as bearing expenses for machinery or equipment or amount of remunerations, etc., and (2) the extent to which the work is provided exclusively to a certain company or organization. These factors have been used since the report was published.

Cases in which a person is classified as being “employed” are typically those in which actual working conditions include not having the freedom to accept or refuse requests to engage in work, receiving instructions or orders about the content of work and the way in which one should conduct it, having a regulated working location and working hours, and engaging in work that cannot be carried out by a substitute. Whether or not remuneration can be referred to as wages is then determined based on whether or not such conditions exist, as well as whether or not the remuneration has the same qualities as wages of an employee in terms of its amount, method of calculation, and form of payment, or whether or not it is payment for contracted work carried out by a small business owner. Factors such as whether or not the remuneration has taxes deducted at the source (as in the case of salary income), and whether or not insurance premiums such as employment insurance, employees’ pension insurance, or health insurance premiums are collected are also used to determine if remunerations can be classified as “wages.” Even if the person in question engages exclusively in work

23 In a 2009 questionnaire survey by the Ministry of Health, Labour and Welfare’s Fixed-term Labor Contract Study Group (*Yūki rōdō keiyaku kenkyūkai*) of around 5,000 people under fixed-term labor contracts, just over 10% of respondents responded that they were working under outsourcing or contracting contracts.

for the relevant company, and even in cases where the person's business is small, they are not recognized as a worker if there are factors that suggest that they are running a business in terms of providing capital and organizing accounts (possession of facilities and machinery, bearing of costs of equipment and expenses, earning of surplus funds, undertaking of risk or responsibility, or employment of other people, etc.). In contrast, if it is recognized that such factors barely exist, and the person is simply employed by another person and receives compensation for their labor, they can be classified as workers.

In Supreme Court precedents regarding a subcontracted driver engaging exclusively in work for a specific company²⁴ and a foreman carpenter working for himself²⁵ the court determined in both cases that the persons in question did not fall under the definition of “worker” as set out in the Labor Standards Act. In recent years, the questions of eligibility as a worker and what constitutes a labor contract have been addressed by the lower courts with regard to various kinds of outsourcing contracts, and there are both precedents for eligibility as a worker being recognized²⁶ and precedents for eligibility as a worker not being recognized.²⁷

III-3-3. People who engage in specialist work under semi-flexible working systems

Doctors, lawyers, first-class architects (*ikkyū kenchikushi*), or other people who have advanced specialist skills, qualifications, or knowledge and who are engaged in the work of a business exclusively for a specific business operator, but who supply their labor independently without receiving specific instructions or orders in the actual pursuit of their work, may also be classified as workers if they work in accordance with fundamental instructions or orders set out by their employer regarding the content or quality and quantity of their work and receive remuneration for said work.²⁸ It is also possible that those who provide labor in the process of receiving training to develop such advanced specialist vocational skills may also be classified as workers. In a Supreme Court precedent regarding a medical intern who had passed the National Examination for Medical Practitioners and was engaging in clinical training at a university hospital, it was determined that the intern should be regarded as a “worker” who should be paid a minimum wage due to the fact that his activities not only involved training to improve his qualities as a doctor but also included providing labor to the hospital, and that he was engaged in medical practice in accordance

24 Chief of the Yokohama Minami Labour Standards Office Case, First Petty Bench of the Supreme Court 11/28/1996, *Rohan* No. 714, p. 14.

The court determined that the driver was not a “worker” due to the fact that he owned the truck used for the work and bore the expenses of gasoline costs, repair costs, and expressway tolls himself; he did not receive instructions or orders on how to conduct the transportation work beyond necessary instructions; he had only loose restrictions on time and place of work, and his remuneration was performance-based payment and declared as business income, among other factors.

25 Chief of the Fujisawa Labour Standards Office Case, First Petty Bench of the Supreme Court 6/28/2007, *Rohan* No. 940, p.11.

The court determined that the carpenter in question was not a “worker” due to the fact that there was nothing to suggest that he received instructions or orders from a construction firm, his remuneration was paid for completed work, and he provided his own tools for the work, among other factors.

26 Examples of cases in which the person's eligibility as a worker was recognized include a member of a brass band, a camera operator in film production, a promotion staff member distributing pamphlets for a prefectural mutual aid scheme, a club hostess, a lifestyle support staff member living in a housing complex for older people and providing assistance to residents, a person seeking to become a media personality with an entertainment agency, the manager of a computer skills school, a person delivering/checking the safety of gas cylinders, a regional staff member of the Japan Broadcasting Corporation (NHK), and an insurance salesperson of an insurance broker.

27 Examples of cases in which the person's eligibility as a worker was not recognized include a door-to-door salesperson for a brokerage firm, a television reception fee collector, the manager of a shop selling bread under a franchise contract, a freelance reporter for a newspaper firm, a motorcycle racer, a driver providing his own truck, a professional sumo wrestler in the Japan Sumo Association, and a live-in helper in a dormitory for people with mental disabilities.

28 Case of Company B (legal experts), Tokyo District Court 12/24/2009, *Rohan* No. 1007, p.67, is an example of a court precedent in which the relationship between an in-house lawyer and a company was recognized as a labor contract.

with the instructions of the advising doctor at the dates and times and in the locations determined by the hospital, and was receiving a payment in return for such labor in the form of a scholarship, etc.²⁹

Conclusion

Globalization, the application of new information technologies, and other factors have produced a situation whereby the receipt of the results of labor receives more attention than direct command and supervision of the labor process. Not only has this led to the emergence of various new employment formats that replace the traditional “employment relationship,” it has also brought major changes to the scope and methods for applying previously existing employment formats. In the United States, this social phenomenon was given the name “the fissured workplace” by David Weil, who refers to it as “a new form of fundamental restructuring of business organizations.” A similar social phenomenon is also appearing in the EU nations, although basic research to grasp it in its entirety is still limited. Instead, considerable attention is being given to research associated with new employment formats and related themes, such as cross-border supply chains. However, employment formats that resemble these new formats have existed in Japan for years, as have legal norms that regulate them. Focusing attention on similarities with previously existing formats, the author studied those formats that underwent change in terms of their scope and method of application as well as new formats by referring to them as the “Atypical Work Organization.” This study revealed that, when it comes to such formats, it is not just the “old types” but also “types having undergone reformation” that are handled largely on a case-by-case basis within the conventional legal framework.

However, as is seen in some cases of individual contracting, there are cases in which a contracted worker’s contract remains the same in terms of type but has its scope of application extended to fields connected with a firm’s core competencies. As a

result, the actual labor situations of the worker come to resemble those of the firm’s regular employees to such a degree that drawing a distinction between them becomes difficult. Additionally, as is seen in subcontracting alliances, there are cases in which it becomes difficult to assign hard law-based employer’s responsibilities following the overseas relocation of manufacturing plants. In such cases, the drawing out of valid conclusions becomes impossible when pertinent regulations are applied as they existed prior to the manifestation of the significant changes mentioned above.

On the other hand, for new employment formats—of which telecommuting, Uber, Airbnb, and crowd-sourcing are representative—there has yet to be much discussion on the worker status of people employed under those formats and the assignment of employer’s responsibilities to persons who use them and acquire the results of labor provided through them, to say nothing of special statute-based regulation. Judgments concerning the validity of “employment relationships” within those formats and of the applicability of worker protection laws to the people who work under them are left to conceptual demarcations of “worker” and “employer” within the conventional legal framework.

In labor law study to take place going forward, it will first be important to examine realities in the application of newly emerging employment formats, and then to consider the necessity of applying worker protection regulations to them as well as the forms those regulations should take. Then, for conventional employment formats, it will be important to consider whether major changes have occurred in their application and whether relevant laws and regulations should be reexamined to address those changes.

Moreover, as individual responses to existing specific employment formats are reevaluated, criteria pertaining to the applicability of “worker” and “employer” statuses within the Atypical Work Organization must also be reconsidered. Suitable criteria for “worker” status and “employer” status will serve as the foundation for considering whether or not to

29 Case of Kansai Medical University, Second Petty Bench of the Supreme Court 6/3/2005, *Minshu* Vol. 59, No. 5, p. 938.

apply labor protection laws and the type and extent of protection required whenever additional new employment formats appear.