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**Legal Status of Home-based Workers as Employees
and Self-employed
(Summary)**

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Home-based Workers' Status as Employees and Self-employed:
Policy Measures and Support
(Summary)

With the penetration of personal computers in the home, the number of people who are willing to work at home is potentially increasing. However, the home-based workers' labor market is being formed without the full implementation of a supply-demand adjustment system or agreement on a reasonable level of remuneration. As a result, it has been pointed out that problems are occurring because contracts are concluded orally, unit prices of remuneration are low, and home-based workers' health suffers because of unreasonable delivery schedules. In addition, the lack of distinction between industrial homeworkers as defined by the Industrial Homework Law and home-based workers is also an issue.

Since 1994 the Japan Institute of Labour (JIL) has undertaken research on home-based working and has already compiled and published a number of reports. These include "The Use of IT for the Development of Home-based and Teleworking" (JIL Research Report No.75, 1995), "Situations and Issues Related to Home-based Working Using Information and Communication Devices" (JIL Research Report No.113, 1998), "SOHO and Home-based Working 2000" (JIL Databook, 2000), and "Trends Related to Order Placement to Home-based Workers and Home-based Working" (JIL Reference Series No.119, 2002).

Continuing from the past research, this research aims to clarify the situations and issues related to home-based working as well as examining its direction for the future.

The composition of this report is as shown below.

Introduction: Composition and issues of the research report

Chapter I: Working Styles of Home-based Working: home-based workers' impressions

1. Where did we come from?
2. Home-office workers (HOWs): situations and impressions
3. Recent social responses
4. Where are we going? Our scenario on future working styles

Chapter II: The significance of increasing the number of clients and complication of orders to home-based workers, and the factors affecting hourly incomes – Analysis of data from JIL Survey 1997 and the Ministry of Health, Labour and Welfare Survey 2002

Introduction

1. Increase in the percentage of home-based workers receiving orders from more than one client
2. Changes in occupational composition and prolongation of the period to work as home-based workers
3. Relation between number of clients, length of working hours, and income
4. The level of hourly income
5. Summary and analysis

Supplementary discussion: Statistics on the population of home-based workers
in surveyed occupations

Chapter III: Peculiarity of home-based working: an analysis from the viewpoint of risk
distribution

1. Changes in the working environment
2. Major categorization of the working environment
3. Analysis of risk distribution
4. Desired policy changes
5. Conclusion

Chapter IV: The current state and issues related to policy support for home-based
workers

Introduction: Identification of issues

1. On the nature of home-based workers as employees and self-employed
2. Home-based workers' needs for assistance and the current state of policy support
3. Issues related to policy support for home-based workers

Conclusion: Issues that need to be addressed by home-based workers

Chapter V: A study on the future labor protection laws: An analysis of legal issues
related to self-employed home-based workers

1. Introduction
2. Background
3. Home-based workers and labor protection laws
4. Problems faced by home-based workers
5. On protection of self-employed home-based workers
6. Future labor protection laws
7. Conclusion

Chapter VI: Situations, legal status, and measures related to home-based working in
Germany

1. Concept and current state of home workers in Germany

2. Legal status of home workers
3. Policy measures for home working in Germany
4. Implications from Germany

In this summary, we excerpted the "Introduction," which describes the report's approach to the issues, as shown below.

Introduction: Composition and issues of the survey report

As employment and working styles become more diversified and diffused, an increase in the number of workers engaged in "home-based work" is becoming conspicuous. On one hand, a shift towards non-regular employment is occurring as companies try to reduce labor costs and improve their prolonged poor performance. On the other hand, there is a growing tendency among employees to free themselves from the time, place, and mental constraints of companies. These trends in both the labor supply and demand are resulting in the expansion of non-regular working styles. The results of the Ministry of Public Management, Home Affairs, Posts and Telecommunications' "Basic Survey on Employment Structure 2002" showed that during five years from the previous survey, 35.5 percent of regular employees who changed jobs found work in non-regular employment, while only 24.8 percent of workers involved in non-regular employment who changed jobs were able to become regular employees. A shift from regular employment to non-regular employment is rapidly proceeding, accompanied by creation of new types of employment and work.

Daniel H. Pink (2002) estimates that a quarter of all workers in the U.S. are "free agents" who do not belong to any organization and who relate to their work as individuals. Pink describes a free agent as one who works on one's own at home using the Internet without the protection of an organization, relying on one's intelligence, and is independent yet connected with the society. While it is doubtful that "contingent workers," whom Pink categorizes as one type of free agents, can indeed be called free agents as "those who work without being hired," it is clear that new styles of working, centered on freelancers, are increasing. Although statistical data on free agents in Japan is currently not available, the IT Strategy Headquarters established within the Japanese Government proclaimed in "e-Japan Strategy II" (July 2, 2003) to "set a target for increasing the number of teleworkers to comprise 20 percent of all

working population by 2010 under a reasonable working environment.” It is almost certain that those who “provide services from their own homes using IT equipment and receive remuneration as self-employed (commissioned or freelance)” will increase in Japan as well.

It should be noted that the expansion of such non-regular employment and work is occurring not simply because companies are trying to cut labor costs at times of prolonged stagnation and downturn in business performance, but also because workers are engaging in such employment and work by choice. This point should not be overlooked in the discussion on the issues related to home-based working. It has been pointed out that “the ability to work from home has brought about an independent working style for the worker as well as the realization of both working life and family life” and “from the standpoint of respecting a person’s independence, it represents one of the ideal work styles.” Based on such a positive understanding of home-based working—in other words, without detracting from their autonomy—we need to consider what policy support and protection are required and can be provided. This is the awareness of the issue we have come to share. Based on such awareness, we explain below “the composition and issues” of our study group’s report, which is comprised of six articles.

1) Before clarifying the composition and issues of the current survey report, it is appropriate to describe the past research done by JIL on “home-based working.” JIL began research on the subject in 1994 when information and communication technology was beginning to be introduced in full scale ahead of the Internet. The former Ministry of Labour had agreed to sponsor a joint Japan-British research conference on telework in 1995 and requested JIL to conduct a survey and research. A survey was designed in response to this request. To be consistent with the survey that was already being carried out in Britain, the purpose of the Japanese survey was to investigate the overall situations of “teleworking” (working at a location other than the designated workplace) covering from commissioned work done at home and industrial homeworking to “working from home” and commuting to locations other than one’s own workplace. The results of this survey were compiled in “The Use of IT for the Development of Home-based and Teleworking” (JIL Survey Report No.75). The summary of the report was presented at the conference in Britain.

The survey was limited in its selection of surveyed offices for such reasons as the existence of teleworking was not taken into consideration and that telecommuting was still in the very early stage. However, it did bring about an unexpected development. The report caught the attention of Ms. Yuko Kanai, who was the organizer of

home-based workers' forum on Nifty (ISP)'s website (FWORK), and partnership was formed. This made possible for JIL to conduct surveys on the member home-based workers of the forum from 1997 to 2000. This period corresponded with a period of expansion of home-based working in Japan, and JIL was able to efficiently obtain valuable information. The results of the surveys from 1997 to 1999 are contained in "SOHO and Home-based Working 2000" (JIL Databook, 2000). From 1999 to 2000, a panel survey was conducted on the forum members, and an analysis was made on the development of home-based workers on an individual basis ("Trends Related to Order Placement to Home-based Workers and Home-based Working" (JIL Reference Series No. 119, 2002)).

In parallel with the joint survey with FWORK, JIL carried out another comprehensive survey in 1997 commissioned by the Women's Bureau of former Ministry of Labour. In the latter survey, a preliminary survey was conducted to extract businesses that placed orders with home-based workers during the reference period, and then the businesses and the home-based workers who received the orders from them were investigated. The results were published in "Situations and Issues Related to Home-based Working Using Information and Communication Devices" (JIL Survey Report No. 113, 1998). The data obtained from the two surveys were later used for discussions of the former Ministry of Labour's "Study Group on Issues Related to Home-based Working" (2000) and for drawing up the Guideline for Proper Practice of Home-based Work.

Based on such developments, our study group aims to elucidate the current state and issues related to home-based working after the implementation of the above guideline in June 2000, and to consider the future direction of measures the government should take.

The Ministry of Health, Labour and Welfare's survey of 2002 ensured continuity with the JIL surveys, making year-to-year observation possible. While the current report makes an analysis of the two surveys in some respects, a full analysis must be carried out in the future.

2) The main theme of this report is social protection and assistance for home-based workers. Prior to the discussion of these themes, the situation of home-based workers is examined by focusing on their own "impressions." The author of Chapter I, Horikoshi, left her job as a company employee after giving birth to her daughter in 1988 and became a home-based worker. She started a study group on home-based working, participated by office workers and translators, to carry out research on how to strike a balance between work and life and to promote exchange of information. She

also became a member of the former Ministry of Labour's Study Group on Issues Related to Home-based Working. While her "impressions" are personal in many respects, they were extremely specific and vivid and provided a rich source of materials for discussion. The topics presented were wide-ranging, but in relation to our primary motifs, three are particularly noteworthy. The first is the home-based workers' relation with their client companies. While an intimate relation with specific client companies is essential for securing work and stabilizing the workload, that relation does not necessarily need to be permanent or even continuous.

She comments that "As "information" is much more prone to continuous transformation than "objects," there is a less tendency for any piece of work involving information to be outsourced to the same person and in the same form all the time. More often than not, a company would determine the delivery schedule, workload, quality, and economies of each project before outsourcing." This means that in order to stabilize home-based working, a seemingly contradictory approach of continuity that includes discontinuity is needed. This leads to adopting measures and building a support system for achieving long-term stability through diversification of client companies. Moreover, the idea of looking at the home-based workers' relation with client companies in terms of individual projects offers a new standpoint of approaching the issue of protection and assistance of home-based workers based not on each company but on each project, contract, and work.

The second point, which appears to contradict the first, is an understanding that the required competence is company-specific. It was pointed out that "the method of carrying out specific work often reverts to individual organizations. One shares expertise with one's former colleagues and is able to smoothly execute work without the need of inputting know-how on how to perform one's task... An understanding on how one's work will be used within a company improves the quality of the output and facilitates the execution of work. Particularly when the parties are working in different locations, performance of work through mutual understanding leads to guaranteeing the quality of the output and contributes significantly to risk management and avoiding troubles." The reason that a large majority of work is received from a company one has previously worked for or from a small number of companies even when one has an expanded client base is not only to stabilize the workload, but also owing to the peculiarities of the company or industry to which the work is related. It is a novel observation.

The third point pertains to the "discretion" in the performance of one's work. It was expressed: "The output needs to be appropriately valued. The rest, how one reflects

one's time, energy, and skill, is a trade secret (the area of the seller's discretion)." This point is also related to the issue of home-based workers' duality of being "an employee" and "self-employed," an issue that is almost always taken up in the discussion on home-based workers. We need to have the perspective of protecting and assisting "workers" while giving an emphasis on their discretion, or nonrestriction. This issue is discussed throughout the current report.

Horikoshi repeatedly speaks about keeping business operation to a manageable level, which suggests that home-based workers' do not necessarily request the support provided to contain the viewpoint for the expansion or growth of their business.

3) Based on this awareness of the facts, Chapter II sheds light on the issue of increasing the number of client companies. Kantani, who was involved in the planning and execution of all research done by the Japan Institute of Labour (JIL) mentioned under 1) above, approached the issue of home-based workers being an employee (dependency on and restriction from client companies) and a self-employed (independence from companies), based on the accumulation of past surveys and research and from the standpoint of increasing the number of client companies. The JIL survey of 1997 and the Ministry of Health, Labour and Welfare's survey of 2002 are used: "Whereas close to 60 percent of all home-based workers received orders from only one company in 1997, the percentage declined to less than 50 percent by 2002, with the number of home-based workers receiving orders from two or more companies exceeding those working only with one company by a small margin. In particular, those receiving orders from three or more companies increased substantially from around 25 percent to 40 percent." Other surveys have suggested that one of the causes of the diversification of client companies was the use of websites by home-based workers to receive a greater amount of orders. More companies are using these websites or other intermediaries for placing orders, which inevitably results in the diversification of client companies for the workers. In addition, the author looks at the changing occupational structure and long-term continued operation as factors of the diversification.

The type of work is broadly categorized into "input-related," covering inputting of words and data and transcription, and "non-input-related," including writing, translating, and system designing and programming. A high percentage of workers in input-related jobs work with one company, while workers in non-input-related work tend to diversify their clients. As contents of the work become more sophisticated and shifts towards non-input-related work, the percentage of dependency on one company declines and workers become comparatively freer from companies.

In what may appear to contradict the above point, duration of the period to work as home-based workers also promotes diversification. The trend that this period is becoming longer can be confirmed, as from 1997 to 2002, "the percentage of workers who have been working as a home-based worker for a less than a year declined by half from around 20 percent to 10 percent, while the percentage of workers who have been working as a home-based worker for more than 10 years increased by around 10 percent in five years to 23 percent in 2002." The dependency on a single company clearly declines corresponding to the length of period to have worked as home-based workers.

It should also be noted that even with the increase in the number of client companies, the percentage of orders received from "principal client companies" remains high. With respect to securing a stable supply of workload, this means that while an increase in client companies has a certain effect, it does not automatically lead to diversification and hence independence.

In chapter II of the main report, the hourly remuneration of services provided by home-based workers is estimated, using the Ministry of Health, Labour and Welfare's survey of 2002. Despite the low level of remuneration per unit of home-based workers has been pointed out as one of the problems faced by home-based workers, the actual level of their prices was never gauged in the past, so this attempt should be valuable. However, as this subject departs from our main theme, we will not go into further details here.

4) Based on the above awareness of the facts, Kitaura considered government measures for supporting home-based workers. As Secretary General of the Conference for SOHO-Portal.Org and Director of Japan SOHO Association, he focused on the building of a social matching system, corporate growth of home-based working, and introduction of measures for supporting such endeavor. In this respect, Kitaura differs somewhat from Horikoshi's statement about "keeping one's operation to a manageable size."

In considering "a systematic policy support for home-based workers," Kitaura enumerates the following eight areas as home-based workers' policy needs:

1. Stabilization of business and receipt of orders
2. Clarifying details of contracts when concluding contracts, ensuring contracts are socially reasonable, and securing the safety of transactions
3. Solving problems and bearing risks
4. Securing funds for business management and reinforcement in facilities and equipment

5. Improvement of workers' competence and skills for enhancement of the quality of business results and ability to win orders
6. Securing reasonable working hours and holidays
7. Health management and occupational safety
8. Life planning including old age, problems of unemployment and illnesses, etc.

As shown above, a wide range of issues related to home-based working as business is covered. These issues will need to be examined from the standpoint of home-based workers as both employee and self-employed and without neglecting their independence. Home-based working should be categorized according to annual business and types of services and occupation, and policy support should be designed for each category of home-based working. As Kitaura's attention is focused on SOHO, the business aspects of home-based working are highlighted, and his policy proposals are also focused more on assistance than protection. This is evident in the following expression: "In other words, home-based working should revolve around the basic axis of the "self-employed" and reinforced by the peculiarity of "employee." This is the basic direction in which to establish SOHO as a stabilized working style."

The proposal of categorizing home-based workers according to their aspects of self-employed and employee and conceptualizing general policies for assistance and protection based on such categorization remains a proposal. Considering what assistance and protection is required and can be provided, while taking the view of home-based workers' individuality and particularly without detracting from their autonomy, is an urgent task.

5) Wendy A. Spinks, who has shown an interest in teleworking from the early stages and who has played a pioneering role in conducting surveys and research in this field, has made an important contribution in policymaking through her participation in the former Ministry of Labour's "Study Group on Issues Related to Home-based Working," the Ministry of Health, Labour and Welfare's "Steering Committee of SOHO-Portal.Org," the Ministry of Land, Infrastructure and Transport's "Committee for Regional Revitalization Through Promotion of Teleworking and SOHO," and the Ministry of Public Management, Home Affairs, Posts and Telecommunications' "Committee for Regional Revitalization Through Global Activities of SOHO." In Chapter IV of the main report, one of the points Spinks has reached is disclosed. The complexity and ambiguity of employment are especially noted. In the past, dependency and non-dependency was seen as a factor determining the relation between the user and the supplier of labor. Dependency was divided into "employment dependency" (human dependency) and "economic dependency." However, as

employment and working styles become increasingly diverse, working styles that cannot be analyzed based on dependency have been created and are increasing. Home-based working is a typical example of such new working styles. For example, home-based workers seem to have autonomy and are not dependent with respect to their working hours, but they may actually be forced to work certain hours through the device of a "delivery date." Furthermore, the existence and degree of dependency are variable depending on each order and contract, and an unchanging relation of dependency cannot be established. Therefore, a new basis for analysis needs to be developed.

The working environment is thus categorized based on a combination of the people in the working environment (Players), working styles (Position), people who request performance of certain work to individual workers (Partners), and the place where individual workers perform their job (Place). The analysis is called the 4P analysis from the four categories. For "players," the government, businesses (those placing orders, employers, etc.), individuals (those receiving orders, employees, etc.) may apply, but because policy support for home-based workers is being considered in this chapter, the "player" is limited to the government. Work patterns are composed of a combination with other three categories.

The purpose of the categorization is risk management. It has been pointed out that "the decisive difference of home-based working is the lack of a third person overseeing and supervising the working environment" and that "the lack of a third person's control means that individual workers must have the ability for self-management." When such skills are underdeveloped, "there is a potential risk that may undermine the sound execution of work done by workers." Therefore, a risk analysis for each category is carried out. The potential risk of each of 3Ps and work patterns is numerically quantified. The results show that risk is concentrated on the "position" of consigned workers, the category in which home-based workers are included.

Lastly, "five basic areas for supporting, and not protecting, the independence (self-responsibility) of consigned workers and especially home-based workers who present completely new issues from the standpoint of government" are indicated. The five basic areas are 1) safe working environment, 2) health management, 3) assistance in the maintenance and improvement of ability and skills, 4) securing work, and 5) dealing with troubles when they occur.

The numerical quantification of risks in each category of 3Ps is somewhat transcendental, and its validity with respect to the actual situation is doubted. The indicated areas for support must also be examined to see if they are matched with the

actual needs of home-based working. Having said that, however, the effort to conceptualize the overall structure of policy support for home-based working, together with the discussions made in Chapter III of the main report, is noteworthy.

6) In Chapter V of the main report, Ouchi, who was also a member of the former Ministry of Labour's "Study Group on Issues Related to Home Working," approaches the subject from the standpoint of jurisprudence. While pursuing the possibility and the logic of flexibly interpreting the Labour Standards Law's definitions of the employee (referred to as "worker" in the Law) in order to include home-based workers within the context of the law, Ouchi is in the opinion that "it is difficult to recognize home-based workers who are purely self-employed as employees" but asks, "Should all legal protection be negated for such self-employed home-based workers?" In other words, what needs to be considered is 1) the status of the home-based workers under the existing legal system and 2) the gap in legal protection from the standpoint of equality under the law.

Although the Labour Standards Law's definitions of the employee tend to be interpreted flexibly, the majority of home-based workers are not recognized as employees. In such cases, legal protection provided by the labor laws is not applicable, and problems may arise in the following two aspects: Why should a worker be protected with respect to 1) the content of contracts concluded between a home-based worker and those placing orders to the home-based worker and 2) the home-based workers' labor market, and particularly matching and intermediation of supply and demand? Basically, it is because of "economic dependency." A question remains whether it is reasonable to exclude self-employed home-based workers, who are free from human dependency but are still subject to economic dependency. The points at issue can be summarized into 1) a standard definition of employee, 2) a subjective limit on extension of protection of workers with respect to whom should be protected, and 3) an objective limit on extension of protection with respect to in what circumstances should protection be provided. Ouchi sets out "a direction of at least extending the protective provisions of the labor laws on certain people among those who are not recognized as employees under the current law and under certain circumstances."

Based on this understanding, proposals for "the new legal system for labor protection" are made. Firstly, the scope of workers protected and the circumstances in which they are protected under the labor laws should be expanded. Prior to that, the concepts of human dependency and economic dependency must be clarified. Secondly, a novel proposal of "determining the legal qualification of the employed worker based on the expressed intent of a worker" is made by adopting the approach of "the

subjective scope of worker protection." Obviously, "taking into consideration contracting parties' subjective views and intent in the determination of who can be protected under the forcible provisions of the Labour Standards Law is theoretically negative." However, with respect to home-based workers, the viewpoint of what choices the parties make is extremely important as well as realistic. Thirdly, it is also proposed that associating protection of workers with "dependency" should be reviewed. This conception requires that "there is no extreme gap in protection depending on the type of work that an individual chooses to engage in" and that responds to the question set out earlier in the chapter, "For whom do the labor laws exist?"

7) Lastly, a paper "The State of Home-based Working in Germany, its Legal Status, and Measures" by Kamata (also the coauthor of "Study of Contract Labor: Labor Issues of Outsourcing.") is introduced as a reference in considering the legal measures for home-based workers in Japan. In the paper, he explains that "the German labor laws categorize "those similar to the employee" and industrial homeworkers in between "employee" and "employer," which are so defined based on personal dependency." The concept of "contract labor" is Kamata's own categorization of workers based on the International Labor Organization's deliberations on the draft Contract Labor Convention from 1997 to 1998 and on the German category of "those similar to the employee."

In Germany, "independent home-based working" virtually corresponds to home-based working in Japan. No statistical surveys, however, have been conducted on independent home-based teleworkers in Germany, and information is limited to a few case studies. "Home-based workers," which also include independent home teleworkers, "work not in the user's office but mainly in their own homes." "Home-based teleworkers communicate with users through document transfer on computers, e-mail, video conference, and telephone. The completed work is also delivered to users through such means. Home-based teleworkers often directly contact their fellow workers without going through their superiors, and it is rare for them to contact their superiors personally."

In Germany, workers are categorized into either of the following legal status: employee, industrial homemaker, those similar to employee, and enterpriser. Home-based workers may belong to any of these categories depending on their state and are provided legal protection in accordance with their social status. In this respect, there is no need to separate them from existing legal framework and prepare special provisions for their protection.

Many home-based workers in Germany are considered to be categorized as "those

similar to employee," which is a concept unique in Germany. "When a teleworker is neither an employee nor industrial homemaker, he or she may be engaged in a work as a "free cooperator" within a framework of a contract for commission or employment." "A free cooperator makes one's own decisions on labor, freely shapes one's job, sets one's working hours and place of work, and is not incorporated into others' business organizations. In principle, a free cooperator consumes labor in accordance with one's own purpose and sells one's labor on the market on one's own responsibility. Therefore, a free cooperator is distinguishable from the employee in terms of personal dependency. A free cooperator is an independent person." There is an affinity between this definition and that of the home-based worker in Japan. "A free cooperator is considered as "those similar to the employee" when they meet certain conditions prescribed by the law."

The above knowledge about Germany provides some hints on addressing the issues of home-based workers in Japan: "Firstly, the issues of home-based workers should not only be considered with respect to the style of working at home, but also be examined more broadly as issues of workers who work in a style similar to that of the employee ("contract workers")."

"Secondly, partial application of the current labor laws on home-based workers should be considered instead of introducing unified laws specifically for home-based workers."

8) The above articles and arguments are largely transitional. This is mainly because home-based workers are still in a transitional stage. As the number of home-based workers increases and they engage in more diverse fields, the issues will become more specific. The issues related to home-based workers are also still transitional because they differ both significantly and subtly from the existing frameworks. The future development of these issues will be observed with interest.