Japanese Employment and Labor Laws in Transition

By Kojima Noriaki

Background to law reexamination

Deregulation is one of the most important tasks now facing Japan. Employment and labor practices cannot be exempted from this process. Two labor laws enacted half a century ago, around the time the Constitution took effect (May 3, 1947) are now the focus of debate over deregulation relating to employment and labor. They are the Labor Standards Law promulgated on April 7, 1947, and the Employment Security Law, promulgated on November 30 of the same year. The former regulates labor-management relations, while the latter governs the labor market.

The Labor Standards Law, most of whose provisions took effect when the Ministry of Labor was set up on September 1, 1947, had its basis in the pre-World War II Factory Law. This law was promulgated on March 28, 1911, and took effect on September 1, 1916. Its principal theme was the protection of factory hands and was underscored by the policy of protecting women as well as minors uniformly as

"the weak." The Employment Security Law, which took effect on December 1, 1947—shortly after the Labor Standards Law—had its roots in the prewar Employment Exchange Service Law, promulgated on April 9, 1921, and which took effect on July 1 of the same year. Under the defunct Employment Exchange Service Law, the mayors of cities, towns and villages were entrusted with employment agency service by the central government, but as a result of a law revision in 1938, this service was transferred to the central government, and employment security offices were nationalized. The Employment Security Law defined, in Article 1, "meeting the labor needs of industry" as the task of public employment security offices. Thus, from the beginning, it was a law with strong overtones of state control.

The Labor Standards Law later underwent a series of revisions: e.g. regulations for the "protection" of women were eased with the enactment of the Equal Employment Opportunity Law in 1985 (the restrictions on working overtime and on holidays were abolished for (1) women in supervisory positions of subsection chief level and above and (2) women engaged in jobs that require professional knowledge or skills such as systems engineers, and at night for (1), (2), effective from April 1, 1986). Regulations concerning working hours were relaxed in 1987 with legislation mandating the introduction of a 40-hour workweek. The relaxed regulations allowed, among other things, the adoption of a discretionary working system and flextime, effective from April 1, 1988. However, the regulatory framework itself was left almost intact.

As for the Employment Security Law, worker dispatching was permitted with the enactment of the Worker Dispatching Law (effective July 1986) as an exception to the ban on worker supply business defined in the Employment Security Law (the business of supplying workers to work under the direction of another person). Worker dispatching was permitted only when a person dispatched a worker in his or her employ and only in the case of jobs that require professional skill. With these deregulatory steps, it became legally possible for the private sector to utilize to some extent the worker supply-demand adjustment mechanism. However, the Employment Security Law itself remained unchanged.

Such a state of affairs, however, is now coming to an end, since there is now a national consensus in favor of further deregulation. Laws relating to employment and labor, which have been in force for a half century since the end of World War II, are now facing a complete overhaul. With the 21st century approaching, how are Japanese employment and labor laws going to change, and how should they be changed? In the following, I propose to discuss the laws in their present form and the future outlook for change.

Reform of employment-related laws

Among the bills approved by the Cabinet and submitted to the Diet on February 7, 1997 is "the bill concerning the arrangement of the law respecting the guarantee of equal opportunity and treatment of men and women in employment." This bill has two main objectives. One is to strengthen the Equal Employment Opportunity Law, and the other is to abolish the regulations in the Labor Standards Law concerning the "protection" of women, except for maternity protection. To attain the first objective, (1) discrimination between men and women in recruitment, admission, assignments and promotions will be totally banned (at present, employers are required only to "make endeavors for nondiscrimination"), and (2) the mediation system for labor disputes will be strengthened by abolishing the provision that initiating mediation requires the consent of both parties. With regard to the second objective, the ban on women working overtime, on holidays and at night will be abolished, effective from April 1, 1999, according to the timetable in the bill. (The bill also contains provisions for revising the Child and Family Care Leave Law, aimed at restricting night work by workers, both male and female, who have to bring up a child [until enrollment in an elementary school] or have to provide care to a family member.) If the bill passes the Diet, the debate over "protection" versus "equality", which has lasted for many years, will be settled in favor of equality. The traditional thinking that women are weaker than men and thus need protection, which has persisted in Japan since the Factory Law of 1911 will disappear from the legal scene.

On March 29, the Cabinet decided to take additional steps in line with the policy for relaxation of regulations under the Labor Standards Law. (It decided to again revise the deregulation promotion plan, and is expected to decide on the outline of the additional deregulatory program by July this year and implement concrete measures, including legislation, as quickly as possible.) The additional steps the Cabinet decided to take on March 29 are as follows:

Regarding the upper limit on the periods of labor contracts

On the basis of an overall study of labor contract-related legislation, the maximum period of labor contracts will be extended to about three to five years for people with abilities as specialists, older people who have left companies on reaching the mandatory retirement age, and people who are to engage in a project to be completed at the end of a certain period of time. (The present maximum period is one year.)

Regarding the discretionary working system

(1) The government will drastically expand the categories of white-collar workers' jobs to which the discretionary working system is applicable, and will do so while taking steps to ensure proper application of the discretionary working system, including steps to ensure the health and welfare of workers, confirm each worker's discretionary power in doing work and set the rules through labor-management consultation on the application of the discretionary power, and steps concerning the options of

Protection or equality: Labor law amendments shake the job market

workers themselves. (At present, the discretionary working system is applicable to 11 job categories.)

(2) As regards the application of rules concerning overtime work, holiday work and breaks under the discretionary working system, the government will introduce a system that requires labor–management agreement and the consent of the workers concerned, while taking steps to ensure proper application of the discretionary working system for the purpose of encouraging workers' flexibility and creativity in carrying out work.

(3) The provision that all workers at a workplace should be allowed a break at the same time will be made flexible by taking into account the categories, modes, etc., of jobs. (At present, a licensing system is in effect.)

Yearly-based variable working hours system

The daily and weekly maximum scheduled working hours (now nine hours a day and 48 hours a week) will be increased, the categories of workers to which this variable working hours system applies will be expanded and the rules that determine the working hours for each workday will be made flexible.

On all these issues, however, there is still a considerable difference of views between labor and management, and no early resolution is in sight. In the process of reexamining the existing rules and implementing deregulation, I believe, the government should recognize the existence of a large diversity of workers and promote deregulatory efforts in the direction of widening the choices of each worker as much as possible.

Reform of laws relating to labor market

On April 1, 1997, Japanese law relating to the labor market drastically changed its stance toward employment agency business. To be specific, the following three revisions took effect: (1) major expansion of occupations that employment agencies can handle; (2) liberalization of employment agency service fees; and (3) lowering the barriers to new entries in the employment agency market.

Major expansion of occupations that employment agencies can handle

The positive list of 29 occupations, including housekeeping, that employment agencies are allowed to handle has been replaced by a negative list, i.e. a list of occupations that employment agencies are not allowed to handle. White-collar workers, as a rule, are among those that employment agencies can now deal with. (In the past, managers, scientists and engineers were the only white-collar workers that employment agencies could handle.) Specifically, employment agencies can now serve (1) professional and technical workers, (2) managerial workers, (3) clerks, and (4) salespeople; as regards (3) and (4), however, jobs expected to be undertaken by new graduates (people for whom one year has not yet passed since graduation) are not included.

Liberalization of employment agency service fees

Under the revised law, the maximum limit on the fee that employment agencies can charge is applicable only to such basic services as matching (10.5% of the wage and up to a maximum period of six months). The consulting and counseling fees based on individual requests can be set freely, subject to approval by the Minister of Labor. (In the past, the government had set up an upper limit which combined these two fees.) Advance payments and lump-sum payments are now allowed in addition to payment after each service provided.

Lowering barriers to new entries

Conditions imposed upon an individual wishing to launch an employment agency business, such as that "there should be a sure prospect of a clientele large enough to make the employment agency business feasible as a fee-charging business" and that "there are no fears of a bankruptcy" have been abolished, while the requirement concerning the length of experience of the person responsible for procuring an individual for an employer or for finding an employer for a job seeker has been changed from "10 years or over" to

"three years or over." (However, the basic requirement that has constituted a major barrier to new entries, namely "the opening of an employment agency is necessary for improving the efficiency of and streamlining labor supply and demand," has not been abolished, but has merely been toned down to "an applicant has a feasible employment agency business plan that explains that he or she can meet the above requirements.") Moreover, while the license renewal period was not extended from one year to three years, all documents that had to be submitted in undergoing the renewal procedure every year in the past are no longer needed. Thus, the validity period of the license has essentially been extended to three years, and the procedure for obtaining a license has been simplified.

The stance of the Employment Security Law toward the employment agency business has completely changed from "banning in principle" to "free in principle." However, except for revision of its enforcement regulations (a ministerial ordinance), the law itself has not been revised. This was because, as will be explained later, an overhaul of the ILO (International Labor Organization) Convention No. 96 (the fee-charging employment agency convention of 1949), which will greatly affect the future of the Employment Security Law.

Why were jobs scheduled to be done by people for whom a full year had not yet passed since graduation excluded from the clerical and sales jobs that employment agencies can handle? Why could the government not extend the validity period of a license to three years? The answers to these questions are that the recent revisions were based on the premise that the existing Employment Security Law should not be changed. You will readily understand the reasons if you think of the existence of the rule as one which limits the occupations that employment agencies can handle to ones requiring "special techniques" and the provision that restricts the validity period of a license to one year. (These rules are contained in Article 32 of the Employment Security Law, while ILO Convention No. 96 also requires the renewal of a license at intervals of one year.)

Therefore, the recent revisions may be considered the first step to overhauling labor market-related laws. In fact, as the above deregulation promotion plan, which was revised again at the end of March, states, the government itself has confirmed that "As regards a further expansion of the job categories that can be handled by employment agencies, a concrete policy shall be established on the basis of such conditions as progress in the completion and application of the negative list and the outcome of the revision of the ILO Convention No. 96 in June 1997, the revised convention should be ratified simultaneously with the law amendment, and efforts to achieve concrete results should be made." The text of the draft revision of the ILO convention released to the public states, "the legal status of a private employment agency should be determined in accordance with the laws and practices of the countries concerned." Unlike ILO Convention No. 96, it does not require the signatory countries to adopt a license system. Is it necessary to preserve the license system for employment agencies hereafter?

The government is going to reexamine the Employment Security Law, beginning in the current fiscal year. In this reexamination, it will have to totally overhaul the basis of the employment agency business, and not simply expand the list of occupations that employment agencies can handle. It should also reexamine the regulations concerning free employment agency businesses based on a license system (limited to employment agency business undertaken by bodies other than schools) and recruitment on consignment (recruiting workers through a third person other than a worker in one's employ).

Again, the deregulation plan announced after the second amendment states, "Regarding the worker dispatching business, . . . an overall reexamination of the (employment agency) system will be conducted with its focus on the adoption of a negative list in lieu of a positive list of work concerned, the period of dispatch, and the measures for the protection of workers . . . setting the basic course of reexamination, . . . and efforts for its implementation, including legislative measures, will be undertaken." (The government will decide on the basic course of reexamination by December 1997, and take legislative and other steps for its implementation as quickly as possible.) That the government has decided to switch from the positive list system to the negative list system for the worker dispatching business in the wake of implementing a similar step for the employment agency business deserves attention.

The advisability of switching from the positive list system to the negative list system was the most controversial issue in the debate over the relaxation of labor market-related laws and regulations. However, several other issues remain to be discussed. For example, Article 33 of the Worker Dispatching Law states that a contract to prohibit, without good reason, the hiring of a dispatched worker by the client company after the dispatch period is over may not be concluded. Further, the worker dispatching agency taking a commission in such cases is illegal, since the firm is not an employment agency. (The newly revised criteria for licensing an employment agency include a provision which states that, as a condition for permitting an employment agency to double as a worker dispatching agency, a person may not engage in a worker dispatching service as a means for procuring employment for a job seeker.) In order to enable dispatched workers to be employed by the client companies as regular workers and expand the job opportunities for dispatched workers, however, the government should study the advisability of permitting a worker dispatching agency to serve also as an employment introduction agency. JJTI

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