Workers' Protection in Japan

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1.
The criteria defining employment relationships and the instruments establishing those criteria

The standards for employment relationships are not clearly specified in the law. If an employment contract relationship is considered to mean the same thing as an employment relationship, however, there are provisions in the Civil Code for contract relationships. Also, there have been significant disputes in labour law regarding the similarities and differences between employment contracts and labour contracts. There are also disputes regarding whether the relationships to which labour law is applied are labour relationships or labour contract relationships.

I will provide a brief explanation of employment contracts and labour contracts as a reference. In Japan's market economy system, many people perform work as company employees. They make a living with the wages they are paid as compensation for this work. This is the typical employment relationship and labour relationship as viewed in this paper.

According to the Civil Code established 1886, the relationship in which a certain person receives remuneration for the labour performed for another person (labour relationship) has as its contractual forms employment, contract of services, and consignment. Of these, employment is the usual contractual form of the labour relationship 1.

The regulations regarding employment in the Civil Code provide equal rights and obligations to the parties in the labour relationship, but the authority of the employer is in fact greater. Therefore, the labour relationship is one of supervisor and subordinate. Thus, in the Labour Standards Law instituted in 1947, several contractual principles and standards are established to protect the worker from the employer. The contractual concept of the labour contract was established to express this labour relationship to which these legal restrictions apply.

Therefore, the labour contract is said to be a labour supply contract to which the Labour Standards Law applies. In the large majority of cases, the labour contract corresponds to the employment contract under the Civil Code. There are additional types of contracts, however. The labour contract is also a labour supply contract in the form of contract or consignment under the Civil Code, and there are also atypical labour supply contracts in addition to these.

The factor determining whether a certain labour supply contract relationship can be termed a labour contract relationship depends on whether the persons providing the labour are engaged in subordinate labour. Specifically, this decision is made by determining whether the worker is employed for paid labour applicable to the Labour Standards Law. Refer to (4) for the standards for determining a worker.

2.

The ratio compared the number of salaried workers over the past 10 years

There has been an increase in the number of salaried workers. The total population of Japan was 122.11 million in 1987, which climbed to 126.04 million 10 years later 2. Of these, the working population in 1987 was 60.84 million people. This total rose by 7.03 million people in the next 10 years to 67.87 million people, a 10.4% rate of increase 3. The ratio of females in the working population rose slightly during this 10-year period from 39.9% to 40.7%.

Within the working population, there was a 17.9% increase in employees during this 10-year period from 44.28 million people in 1987 to 53.91 million people in 1997. The ratio of females in the employee category rose during this 10-year period from 36.5% to 39.5%. Currently, employees account for 79.4% of the working population.

3.

In which sectors did salaried workers decline, remain the same, and increase?

The sectors in which the actual number of salaried workers declined were the fishing industry and the mining industry. In addition to the fishing and mining industries, however, the industries in which the ratio of the number of employees compared to those in all industries (composition ratio) fell were the manufacturing industry, the financial and insurance industry, and the real estate industry 4.

The industries that had no change in the number of salaried workers were the mining industry and the public sector.

In contrast, the real number of employees increased in most industries. Those industries with a significant increase in the ratio of employees to all industries (composition ratio) were the service industry and the construction industry 5.

4.

The definition of the terms employer and worker. Are the concepts of these terms primarily based on law, collective of agreements, and judicial precedents ?

4-1.

Workers

In labour law, workers are generally divided into two categories. The first is workers as the term is applied in the Labour Standards Law. The second is workers as the term is applied in the Trade Union Law. Both of these laws have different objectives, so the concepts regarding workers in these laws also may be thought to be different. When the labour provider is recognized as a worker under the Labour Standards Law, however, that person is also regarded as a worker under the Trade Union Law. Thus, the term worker in the Trade Union Law covers a broader concept than that in the Labour Standards Law.

The term worker in the Labour Standards Law refers to a person employed in an enterprise or office without regard to occupation, and is a person to whom wages are paid (Article 9, Labour Standards Law). Under the Labour Standards Law, two conditions must apply for a person to be considered a worker. First, that person must be "employed", and second, that person must be paid. Persons can be said to be "employed" if (1) they provide labour under the directions and supervision of another. If a person is recognized as one who is "employed", the remuneration paid for work to that person is recognized as wages (2). Therefore, the determination of whether one is "employed" is of critical importance.

In the system of Japan's labour protection laws, the Labour Standards Law is at the apex.

Historically, many of the regulations that had first constituted the part of the Labour Standards Law were later separated from the act and established independently. Therefore, these related laws and regulations also apply to the workers in the Labour Standards Law 6.

Further, the Trade Union Law established regulations for the formation of labour unions and the protection of their activities. The labour unions protected in this law are understood to be the bodies primarily composed of workers. Workers in the Trade Union Law are those persons who maintain their livelihood by the income derived from the wages, salaries, or other remuneration corresponding to these regardless of occupation (Article 3 of the Trade Union Law).

One theory holds that the concept of worker in the Trade Union Law is recognized to cover a broader scope than that in the Labour Standards Law. The worker has a subsidiary position to that of the employer (1), so is a person for which the right to organize is required 7. Another theory holds that the definition of this person should be determined from the perspective of which person should be protected by the Trade Union Law for the promotion of collective bargaining (2) 8.

4-2.

Employers

In the same way that there are two concepts for workers, there are two concepts for employers. One is the employer under the terms of the Labour Standards Law, and the other is the employer under the terms of the Trade Union Law.

The employer in the Labour Standards Law is all persons who act for the head of the enterprise in regard to those items related to the workers of that enterprise, including the head of the enterprise, the people responsible for managing the enterprise, or others (Article 10, Labour Standards Law). The head of the enterprise as stated in Article 10 of the Labour Standards Law is usually one party in the labour contract.

Usually, this employer has the comprehensive obligation as the employer, as provided for in the Labour Standards Law. This is not the employer in the complete sense of the term, however. In some instances, the employer must be interpreted as that person with a certain type of limited obligation. For example, when a subsidiary that is the original employer is liquidated and the workers do not receive their wages, it must be recognized that the parent company is a limited employer with the obligation only to pay the wages owed 9. The standards for judgement used in this instance are the legal principle of the non-recognition of the corporate body 10. In this instance, the parent company is not the primary operating entity as the party that concluded the labour contract. Rather, as the employer, it is the head of the enterprise corresponding to Article 10 of the Labour Standards Law.

The Trade Union Law prohibits acts of the employer that infringe on the organization of workers as unfair labour practices. For example, this includes discrimination against union members who have joined labour unions, or the denial of collective bargaining without suitable reason. One theory contains the interpretation that employers in the Trade Union Law are one party in the collective joint worker-employer relationship, based on similar and neighbouring relationships, not limited to the employer who is one party to the labour contract 11. A broader interpretation holds that the employer is all those with the power and influence over employee benefits in the labour relationship 12 .

The Supreme Court has ruled that when a certain company subcontracts certain obligations to another company (the user company) and provides the user company with its own employees,

the user company is in the position of the employer under the Trade Union Law. For example, in a certain case, the Supreme Court held that when the user company has specific authority over the labour conditions of the workers and other treatment, they must not refuse collective bargaining for the workers outside the company 13. Also, even in cases in which the company providing the workers has control over and determines wage-related conditions, when the user company controls and determines some working conditions related to the assignment of working hours, the status of employer is allotted to those who have the authority [Annex 1] 14.

5.
The principal instruments controlling the status of salaried employees

The major characteristic of Japanese labour law is that the basic principles of labour law and the rights of the worker are systemically provided for in the Constitution, the highest national standard. Article 27 of the Constitution states, "All people shall have the right and the obligation to work". It also states, "Standards for wages, hours, rest, and other working conditions shall be fixed by law".

In addition, Article 28 states, "The right of workers to organize and to bargain and act collectively is guaranteed." Here, the worker has roughly the same meaning as worker in labour law. The various provisions in labour law have been made concrete in compliance with the provisions in the Constitution.

Also, the principal instruments that determine the status of salaried workers are work rules and collective agreements. Work rules are those rules established by the employer regarding working conditions, service regulations, and other matters. When a employer draws up the work rule, he/she has to ask the opinion of the trade union organized by a majority of workers at the workplace concerned, where such a trade union exists, or of a person representing a majority of workers, where no such trade union exists. The consent of trade union or the person does not have to be obtained, however.

When the work rules are established, the labour contract to be inferior to them will become invalid. The provisions of the work rules shall be applied to replace the invalidated portion of the contract. In Japan, since the employer establishes the work rules, the employer has the principal initiative to determine working conditions.

The collective agreement is also important. The collective agreement is a written agreement between the labour union and the employer, or the group of employers.

6.
Are salaried workers really protected by law? Is that protection adequate or inadequate?
6-1. What are the standards for determining whether protection is adequate? If ILO conventions are used as the standard, the answer would be that in many areas the protection of employed workers is inadequate because Japan has not ratified many of these conventions. Even if the protection of employed workers is insufficient in light of ILO standards, however, the protection is rather generous when compared to self-employed persons and subordinated independent workers with same protection as in those persons at most.

Therefore, if the protection provided to subordinated independent workers is inadequate, the degree of inadequacy is greater than that for employed workers. Therefore, I would like to use as much as possible the expressions "Inadequate compared to ILO standards", or "More inadequate compared to the protection of employed workers".

6-2.
Employment conditions and remuneration

Employment conditions and remuneration are generally provided by law, except for the regulation against dismissal. In light of ILO treaties, however, this protection is inadequate. Also, in many cases, these inadequate legal provisions are in fact not followed.

The following is a summary of the primary laws established regarding working conditions and remuneration.

6-2-1 Labour Standards Law

The Labour Standards Law contains the minimum standards for wages and other primary working conditions. Working conditions that are inferior to such standards are invalid 15. All salaried workers are subject to the Labour Standards Law, so they are generally protected under Japanese law.

Recently, however, worker protection for salaried workers has been rendered insufficient due to the diversification in the forms of employment 16. There has been a decline in the ratio of regular salaried workers to the total number of employees overall. In contrast, there has been an increase in the number of dispatched workers, part-time workers, and workers employed for limited terms. This trend has been greatly influenced by Nikkeiren (Japan Federation of Employer's Associations) policies 17.

The Labour Standards Law is also applied to non-regular salaried workers. In some cases, however, employers do not provide workers with their rights. Also, the workers sometimes mistakenly believe that the Labour Standards Law does not apply to them. Therefore, the protection is in fact insufficient.

For example, there have been cases in which part-time workers cannot receive annual paid leave or maternity leave. The supervisors from the Labour Standards Inspection Office are provided with the authority for oversight through the penal regulations for illegal acts. The insufficient number of authorities, however, means that they cannot keep up with all the illegal acts.

6-2-2.
Laws and regulations regarding the Labour Standards Law

Special measures are not foreseen under the Labour Standards Law to ensure the claims on wages when companies lose the ability to pay wages and retirement benefits due to operational difficulties or bankruptcy. The provisions of the Civil Code and the Commercial Code are also inadequate 18.

However, the Law for concerning Security of Wage Payment, established in 1976, provides that the government will pay the unpaid wages in place of the company when the head of the enterprise has declared bankruptcy and it has been determined that the enterprise lacks the ability to pay wages.

There are other laws regarding employment conditions and remuneration. These include the Minimum Wage Law, which establishes a minimum wage, and the Equal Employment Opportunity Law for Men and Women, which prohibits the discrimination of female workers.

6-2-3.
Regulations against dismissal

Workers and employers generally conclude a labour contract with no fixed term. In these

cases, both the dismissal by the employer and the resignation of the employee means a termination of labour contract through an expression of intent by one of the parties. Under the Civil Code, the employer has the freedom to dismiss employees and the worker has the freedom to resign 19.

There are regulations in the Labour Standards Law that establish a system for a prior notice to dismissal to protect the worker 20. The provisions of this law, however, are not applied when the term of the contract expires. Therefore, among salaried workers, they do not apply to workers on a fixed-term contract.

The Labour Standards Act contains no provisions regarding the reasons for dismissal. While there are regulations that make it illegal to dismiss an employee for special reasons 21, in general no regulations require "suitable reasons" for dismissal.

Judicial precedents have been established by the courts regarding the reasons an employee is dismissed. This has resulted in the legal doctrine of the Abusive Dismissal when there is no rational reason for dismissal. The dismissal in this case will be declared invalid because of the abusive use of this right 22. The cases in which the dismissal is considered rational according to this doctrine are rather limited.

The legal doctrine of the Abusive Dismissal is applied when contracts with no fixed terms are cancelled, but are not applied when the term of fixed-term employment has expired. In the case of contracts in which the fixed-term contract is repeatedly renewed--making it essentially no different from a contract with no fixed term--an objective, rational reason is required for the refusal to renew the contracts, as when an employee is dismissed.

6-3
Industrial Safety and Health Law

While there are laws regulating labour health and safety, the standard of protection is inadequate from the perspective of ILO convention standards. The Industrial Safety and Health Law and the industrial safety and health regulations based on the law establish standards to prevent dangerous situations and thus prevent labour accidents. These regulations enumerate what the heads of enterprises should do to prevent labour accidents, as well as what they must not do.

In addition to the heads of enterprises, who are the employers, this law takes into consideration the increase of joint ventures and the development of the leasing industry and requires that certain measures be taken for people not covered by labour contracts. These include the parties ordering subcontracted work, wholesalers, the manufacturers of machinery or raw materials, importers, lessors, and others.

Those subject to protection, however, are limited to the workers in the Labour Standards Law. Self-employed workers are not protected at all.

6-4
Social Security

There is appropriate protection in the law that corresponds with ILO convention standards, but many of the provisions are inadequate. Protection is therefore inadequate in fact. The rights of workers to social security are obtained by their participation in social insurance.

6-4-1
Workers' Accident Compensation Insurance Law

The Labour Standards Law provides that employers must assume absolute liability if workers suffer injury, illness, or death through on-the-job accidents 23. Substitution of the employer's liability for compensation is actually made by the provision of Workers' Accident Compensation Insurance Law to insure for worker injury, illness, disability, or death through job-related accidents. When an accident involving a worker occurs, the workers or their surviving family will receive a fixed amount of insurance benefits. When these benefits are paid, the employer is absolved of the liability for compensation under the Labour Standards Law.

It is compulsory that all enterprises be subject to this law. Insurance benefits will be paid when the worker working at that establishment is injured in a work-related accident. In that event, the worker corresponds to the worker of Article 9 of the Labour Standards Law.

Though insurance benefits paid to the worker in a work-related accident are in some respects insufficient, protection is generally provided 24. Insurance premiums under the Workers' Accident Compensation Insurance Law are paid only by the employers. These premiums are calculated by multiplying the total wages by the worker's compensation insurance rate. The insurance rate is different for each type of business 25, but for businesses of a certain size or larger, the insurance premium rate will rise or fall up to 40% in accordance with the amount of insurance benefits paid for work-related accidents during the previous three years. Therefore, the insurance premium rate will be reduced if the rate of accidents is reduced.

This is an incentive for the employer to work to prevent accidents. On the other hand, this is also a factor encouraging companies to conceal accidents when they occur without demanding workers' compensation. In fact, more than a few workers have received medical treatment through health insurance as if their injuries were incurred outside the work environment, without receiving workers' compensation benefits, because their companies would not perform the procedures. Thus, protection is in fact inadequate.

6-4-2
Medical Insurance

The persons employed at all corporate places of business or in the places of business of individuals with at least five employees are insured persons under the Health Insurance Law, which provides for health insurance for employees. The employer is liable to pay for half of the premiums. Medical insurance benefits to the employee are in some aspects still insufficient, but protection is generally provided 26.

In contrast, persons who are not employees (including the self-employed) and employees at the places of business of companies with fewer than five employees are insured under the National Health Insurance Law. These persons are wholly responsible for the premiums (because there is no liability by the employer). The liability of the insured person for medical care expenses is a high 30% 27, and they do not receive illness allowances or maternity allowances if they take time off from work. Some employees are even not subject to employee insurance 28. Protection for them is thoroughly inadequate when compared to other employees.

6-4-3

Pension Insurance

The persons employed at all corporate places of business or in the places of business of individuals with at least five employees are insured persons under the Employees' Pension Insurance Law, which provides for annuity insurance for employees. The head of the enterprise is liable for half of the premiums. The annuity provided is paid in addition to the national annuity (the basic annuity) which the self-employed receive 29.

In contrast, persons who are not employees and employees at the places of business of companies with fewer than five employees are insured under the National Pension Law. These persons are wholly responsible for the premiums, and the only annuity benefits they receive are those from the basic annuity. As with health insurance, some employees are not eligible to receive annuities. They will receive only the basic annuity in the future.

6-4-4
Unemployment Insurance

The persons employed at all places of business are insured under the Unemployment Insurance Law. Payment of the premiums is divided equally between the employee and the employer. The employee receives the basic allowance when unemployed 30.

The Unemployment Insurance Law, however, has conditions that the employee must fulfill. They are: (1) at least 20 hours worked per week, (2) the prospects for continued employment for at least one year, and (3) the prospects for annual revenue of at least 900,000 yen. Those who do not fulfill these conditions are not qualified to receive the insurance benefit.

6-5
The Freedom of Association (The right to organize); collective bargaining

Other than public employees, the right of association and the right of collective bargaining of the workers at private sector companies is generally protected by law.

The workers at private sector companies may freely establish labour unions without authorization or notification. The act of employers that infringe on the organization of the workers is prohibited as an "unfair labour practice". Remedies may be sought by a Labour Commission, an administrative organization. Labour unions must have fulfilled the conditions for qualification to receive an order for remedy of unfair labour practice by a Labour Commission, however. These conditions are that the union is democratic and independent.

Labour unions have the right of collective bargaining between themselves and the employer. The denial of the right of collective bargaining without just reason is prohibited as an unfair labour practice.

Public employees who are clerical workers, however, may form employee organizations, but the negotiating scope of these employee organizations is limited. Management and operations are outside the scope of negotiations. Also, they have no right to conclude collective agreements. Dispute acts are prohibited. For these public employees, there are insufficient guarantees for their right to organize and their right to collective bargaining.

6-6

Administrative, judicial, and agreement measures to resolve disputes

Other than individual disputes, the measures for resolving disputes are generally legal. In actual practice, however, the prolonged system of relief is subject to criticism, and protection must therefore be deemed inadequate.

6-6-1
Administrative measures

For collective disputes between labour unions and employers, the Labour Commission has two administrative measures for resolving disputes. First, they may reconcile labour disputes through conciliation, mediation, or arbitration. Second, they may judge and provide remedy for unfair labour practices.

The judgement of the Labour Commission requires two steps--from the regional Labour Commission to the Central Labour Commission. In actual practice, this procedure is rather prolonged. Thus, there is little expediency in providing administrative relief.

For individual disputes between workers and employers, there is a management system through the Labour Standards Inspection Office. Also, for gender discrimination, advice and guidance is provided by the head of the office responsible for the employment of women and young people in each prefecture. There are also mediation procedures by the Equal Opportunity Mediation Committee. Further, the revision of the Labour Standards Law in 1998 gave the heads of the prefectural Labour Standards Inspection Bureaus the authority to provide the required advice and guidance for disputes regarding labour conditions when sought by the parties to the dispute.

6-6-2
Judicial Measures

The resolution of both collective disputes and individual disputes by judicial means is the ultimate recourse for dispute resolution.

7.
Is there a certain presumptions that is an indicator of an employment relationship? What are those presumptions?

The approach taken in a 1985 report by the Labour Standards Law Research Association shows the defined standards regarding the existence of employment relationships [Annex 2]31. It considers the relationship between workers, who are the subject of various labour laws, and employers. In this instance, the concept of workers in the Trade Union Law is more broadly interpreted than that of workers in the Labour Standards Law. Therefore, the concept of workers that applies, particularly during controversy, is that of the Labour Standards Law.

Formerly, the interpretation by the government tended to emphasize the form of the contract. The association's 1985 report presented standards for determining employment dependency. The first standard is whether a person is working under another's direction and supervision (the standard of direction and supervision). For limited cases in which it is not

possible to make a judgement on this standard alone, judgement is made by the standard of determined what characteristics the worker has as an independent worker (an independent worker standard).

There are several standards for evaluating whether a person is working under direction and supervision. They include:
(1) Whether a worker has the freedom to refuse ordered work or instructions regarding tasks (The right of refusal)
(2) Whether there are instructions or orders for the content of the task or the method of performing the task when tasks are performed (Instruction and supervision of task performance).
(3) Whether the worksite and working hours are designated and supervised (The presence of restrictions)
(4) Whether it is authorized to offer the work to someone else in place of the person in question (The presence of substitutability)

There are also standards for judging the independent characteristics of the worker. These include:
(5) Who owns the expensive machinery and equipment? (Liability relationship for machinery and equipment)
(6) Whether the remuneration is significantly higher than that of the regular employees of the user company (Amount of remuneration)

The approach in the association's report is fundamentally supported by both theory and the courts. In actual practice, however, companies do not handle workers in accordance with the association's approach 32. When disputes arise, they are handled by the courts or a Labour Commission, and the results recognize the characteristics of "worker". Also, the courts do not always render the appropriate judgement in specific cases. The association's report on standards for judgement provides nothing more than several abstract standards. Therefore, the conclusions will be entirely different depending on which standards the court emphasizes when applying these specific standards in limited cases.

8.
The real advantages and disadvantages of this presumption

The advantage is that a real judgement can be made of employment dependency regardless of the type of contract. The disadvantage is that conclusions can differ due to differences in emphasis because these are just several abstract standards. Therefore, in some limited cases, it is sometimes impossible for people to determine in advance whether they are workers protected under the legislation.

9.
Quantitative trends in disguised employment relationships over the past 10 years. Sectors in which this has increased. Specific examples

There is no statistical basis for the existence of disguised employment relationships. Recently, however, I have heard many reports of this practice in various sectors, so I think it is

growing. The manufacturing industry is the sector in which these employment relationships are thought to have increased. It is assumed that there has been an increase in the type of contract in which works are subcontracted.

I will provide brief examples in which a company evades the responsibilities of an employer by entering deliberately vague employment relationships or by using contract forms other than employment contracts. More detailed cases are provided in the [Annex 3].

9-1.
Door-to-door workers of securities companies

Securities companies have door-to-door workers that sell securities and perform transactions on commission. The form of the door-to-door worker contract is a consignment contract. In actual practice, however, door-to-door workers are affiliated with a single securities company and do not have the freedom to refuse work. They are not permitted to engage in work for other companies, and other employees may not substitute for them. Their remuneration is based on a low commission. Many of these employees have received official commendation for working at the same office for at least 10 continuous years. Thus, in real terms, their employment dependency has been recognized. The courts have denied claims that door-to-door workers have the characteristics of employees what they call, however 33.

9-2
Commissioned sales employees of cleaning companies

The commissioned sales employees of cleaning companies are assigned an area of responsibility near their residence and provided a customer list. These employees receive remuneration by conducting a rental service business for cleaning equipment. Their only instructions are to handle the number of cases on the customer list, so there are no designated starting and finishing times for their working hours. Their working days of a week also are not specified, and actually work just several hours a week. They do not participate in labour or social insurance system, and there is nothing withheld from the salary they receive.

In these cases, however, the people providing the work have absolutely no independence or discretion as special elements in their quasi-consignment contract. In actual practice, the commissioned sales workers are 'employees' with recognized employment dependency.

When application was made for workers' accident compensation benefits, however, the head of the prefectural Labour Standards Inspection Office ruled that the commissioned sales workers were not workers to be protected under the law and decided that they should not be awarded benefits.

9-3
Freelance computer technicians

A small software development company (Y) sent a technician (X) to a major software company that ordered software to be developed for mainframe computers. Y cancelled X's contract without remitting the payment in the contract because it claimed X had a poor work attitude. The dispute was taken to court to determine whether this constituted the non-payment of

wages or dismissal. Y exchanged order forms and other documents with X to be used when contract for services was concluded.

The court ruled in 1997 that the contract in this case was a labour contract because the work provided by X differed in no respects from that other employees, and the work was provided as one laborer under the direction and supervision of the major software development company. The company had created order forms and other documents that did not reflect the labour status of employment to escape the application of the Labour Services Dispatching Law (actual disguise). Also, the contract in an amount higher than that for other employees was held to be money paid to X so that the company would not have to provide him with the status, bonuses, social insurance, and annuities of a regular employee 34. It is assumed there are many technicians such as X in the computer industry.

9-4
Hired vehicle drivers (Drivers that own vehicles) 35

In 1993, Company Y, engaged in the manufacture and sale of concrete, coerced all the company drivers to leave their employ as a way to cut personnel costs due to what they claimed was poor business performance. The company told the drivers they would provide them work in the future. X and five other drivers formally left the employ of Company Y and concluded a transportation vehicle leasing agreement with the company. Under this agreement, the vehicles were leased to Company Y with X and the others as owners. Company Y paid X and the others a fee for using the vehicles.

The vehicle ownership rights were not transferred, however, and the form of employment for X and the others changed not in the least from the time before they left the company's employ. Company Y sent without warning notification in 1996 that they would cancel the transport agreement. X and the others claimed that this was abusive use of the right of dismissal and brought action that the notification of the contract cancellation was invalid. The working conditions of X and the others at Y company had changed in no way from the time they were regular employees.

In this case, Company Y had clearly disguised their employees as drivers of hired vehicles to eliminate the insurance premiums they should have paid and to escape the application of the principle of the abusive use of the right of dismissal when they reduced their workforce in the future.

9-5.
On-site workers in the construction industry 36

Construction Company Y is engaged in the exterior remodeling of wood frame housing. The company employs many workers as on-site workers, but deals with them as self-employed persons. It does not fulfill its responsibilities under labour law or under the social insurance law. One worker is assigned to one work site. When there is no work, they are paid an allowance to wait for work. The workers are forbidden to conclude contracts with other companies. The company provides the materials, and the work is done in accordance with a manual. The workers supply their own trucks and tools. The starting and quitting time of work are designated, and a site supervisor manages the work. The workers' wages are determined by using a per tsubo unit

price (a tsubo is an area of floor measurement). The workers cannot bargain over their wages. They are formally self-employed persons, but they comply with the procedures for the special qualifications to receive workmen's compensation insurance. The company deducts the worker's compensation insurance premiums from the remuneration they are paid.

The labour union (National Federation of Construction Workers' Unions) claimed that the company's objective for the special qualifications for workmen's compensation insurance was to disguise the on-site workers by claiming they were not employees. The union claimed that the workers were forced to participate in this fashion and did not do so of their own will.

9-6.
Custom ordered construction design consultants 37

The design consultants registered with real estate company Y were introduced to customers taken to Y's housing exhibition site, conducted plot surveys, discussed customer requests, and repeatedly modified the plans to conform to customer wishes. When it came time to form a contract, Company Y paid remuneration to the consultants based on the remuneration forms created by the company.

The consultants also performed estimation work, but the contract they agreed to at this time was for a low rate of profit, and the consultant's remuneration in correspondence with this contract was a mechanism for reducing the amount. The consultant's design work had few restrictions as to the time in which it was performed, and the company did not provide detailed instructions regarding the performance of the task. The consultants provided work exclusively to Company Y for a long period of time, however. Also, only the company decided the amount of remuneration, and they established the time for engaging in work related to customer appointments. Thus, there was a strong degree of subordination to the company.

Then the company decided to close its custom order construction division and transfer it to a subsidiary. They cancelled contracts with about 30 consultants and provided just a few minutes notice. The consultants formed a labour union and demanded collective bargaining, but the company refused to bargain with the consultants because they said the consultants were not employees.

9-7.
Arts-related staff 38

The lack of workmen's compensation payments to persons in the arts, including actors and other performers, and the production staff for films and dramas, has become a major issue. Mr. A., an artistic director in films, fell from the second floor of a studio warehouse and suffered total paralysis as a result. He was classified with a Class I physical disability.

In September 1995, however, the Labour Standards Inspection Office head ruled that worker's compensation payments did not have to be made. He gave the following three reasons: (1) The nature of the director's contract was as a independent contractor. (2) While he was partially restricted by a schedule, he had the right of refusal for working on a particular project and had the right of discretion in performing his duties. Also, it could not be understood that he ordinarily was under direction and supervision. (3) Taxes were paid through the director's final tax return, and the director received social insurance as an independent worker.

In addition, freelance cameraman B died from a cerebral infarction in 1986 due to continuous filming on location in extremely cold weather. His surviving family applied for survivor's benefits from worker's compensation insurance, but this was not paid for the following reasons: (1) A had superior technical skills and ability, and had the freedom to accept or reject work. (2) Working hours, break time, and off days were not established in advance. There were no restrictions on his working days except on days of filming. (3) He had a great deal of discretion in the performance of his work. (4) He was not paid wages, but rather paid a flat rate per film. (5) Taxes were paid as the income from an independent worker.

10.
What contract forms are frequently used for disguised employment relationships? What procedures should be used when a dispute arises and the worker is made to declare the existence of an employment relationship to the authorities concerned?

Contracts for services, consignment contracts, and other atypical contracts are frequently used to disguise employment relationships.

When workers are unable to exercise their rights under the Labour Standards Law because it has been determined that an employment relationship does not exist, they may appeal to the head of the Labour Standards Inspection Office. The case's applicability to the doctrine of the Abusive Dismissal is not an issue that comprises a violation of the Labour Standards Law, so the case must be pursued in court. Another possibility is that advice and guidance for resolving the dispute be sought from the Labour Standards Inspection Office.

The application to the head of the Labour Standards Inspection Office to perform the procedures for the payment of worker's accident compensation insurance benefits is made after the accident occurs. When a decision of non-payment is made, a request for examination is made to the examining officer for worker's compensation insurance, and the another request for examination is made to the worker's compensation insurance examination committee. Ultimately, an administrative appeal is made to overturn the decision of the worker's compensation insurance examination committee.

An appeal for examination regarding the right to organize and the right to collective bargaining, is made to the Labour Commission claiming that employer's conducts are unfair labour practices.

11. Traditionally, the most common triangular relationships are called contract relationships. Other triangular relationships are called dispatched labour relationships.

11-1.

In the Employment Security Law established in 1947, sending a worker under one's control to work for another party as part of the labour supply business, and this act does not have the characteristics of work under contract for services, violates Article 44 of the law. The standards for differentiating work under contract and the labour supply business are as established in Article 4 of the law's Enforcement Regulation. This article legally recognized a subcontractor as performing work under contract only if all the following four conditions apply: (1) The party assumes responsibility for completing the work as the head of an enterprise (2) The party directs and supervises workers (3) The party assumes all the obligations to the worker as an

employer (4) The party performs work requiring specialized technical skills and experience using machinery, equipment, and materials supplied by the party himself. If these four conditions are not complied, the work is not interpreted as work under contract, and it is illegal work in violation of Article 44 of the law.

When labour is actually provided in violation of the Employment Security Law, the supplier company providing the labour and the company using the workers (the user companies) will receive criminal sanctions. The protection provided to the worker in the labour supply business, however, is inadequate. That's because the work relationship is deemed illegal, and the employees are the ones who suffer losses as a result.39

11-2
Worker dispatch business

There were pronounced changes in workforce supply and demand in the 1970s. The technological revolution and the ongoing development of the service economy required workers with specialized knowledge, technical skills, and experience. There was an increase in the type of work that could be more efficiently performed when relying on outside workers rather than directing in-house workers The workers themselves were more educated, and more of them wanted to work as specialists who utilized their specialized knowledge, technical skills, and experience. Thus, the benefits for those with demand for labour and those supplying the labour were equal. As a result, there was an increase in the type of business in which one dispatched workers that one employed to a user company and allowed them to work at that company under the user company's instructions and orders.

Legally speaking, businesses of this type were a kind of labour supply business, and were illegal under the Employment Security Law. Actual practice had forged ahead of the law, however, so the Worker Dispatching Law was enacted in 1985. It recognized this type of labour supply business in certain industries as long as it conformed to the required regulations. In short, this was worker dispatch.

The worker dispatch permitted by the worker dispatching law supplied dispatched workers to the user company. These workers performed work under the instructions and orders of the user company. In 1985, under this law, the scope of the businesses in which labour dispatch businesses could operate were limited primarily to work that required specialized knowledge and experience 40.

The law was revised in June 1996, however, to expand the scope of the applicable businesses 41. The law was revised yet again in June 1999. This time, except certain businesses 42, the worker dispatch business was, as a rule, permitted over a wide area.

The persons conducting the worker dispatch business must either notify the relevant authority or comply with the procedures to receive authorization. The period of dispatch for the original 26 businesses is a maximum of three years, and is one year for the other businesses (temporary worker type). If this period is extended, the user company that has accepted the dispatched workers must strive to employ those workers if the workers so desire.

The original dispatching company forms the contract with the dispatched workers. The employer responsibility for worker dispatch is therefore with the original dispatching company. The law for dispatching merely defines the company to which the worker is dispatched as the user. It does not have any responsibility as the employer.

This law, however, does have a mechanism that places a small part of the responsibility of the employer as defined in the Labour Standards Law on the company to whom the workers are dispatched. For example, the company to whom the workers are dispatched have the responsibility to provide equal treatment, working hours, break time, holidays, and enforce restrictions on performing work that can be dangerous or harmful. There are no penalties placed on the company to whom the workers have been dispatched in the event of violations of the law, however.

12.
The protection of workers in a triangular relationship. Are these workers protected both de jure and de facto? Is that protection adequate?

12-1
The classification of problems

As already has been noted, the two forms under which workers are employed in a triangular relationship are: (1) when the subcontracting company or the dispatching company provides the workers they employ for labour to the user company, and (2) an agent supplies registered workers to the user company, and the workers provide labour in a circumstance similar to an employee of the user company.

In the case of (1), the worker forms a labour contract either with the subcontracting company or the dispatching company. The problems that arise with these workers centers on the extent to which the responsibility of the user company can be pursued when the subcontracting company or the dispatching company with the original employee responsibility is faced with a situation in which the responsibility to the employee cannot be fulfilled.

In contrast, in the case of (2), the worker has not formed an employment contract with the agent, so the main problem is to what extent responsibility can be extended to the user company. The relationship between the worker and the user company in this second scenario is almost completely unchanged when there is no agent present (in other words, a two-party relationship). Therefore, this can be generally considered as a problem involving a two-sided relationship.

The form of employment in (1) in particular must be examined to look at worker protection in a triangular relationship.

12-2
Subcontracting within the work site

Japan has a very long history of subcontracting, and it has been used in a wide range of industries. Here, I will examine the trend toward subcontracting in the manufacturing industry. Refer to the [Annex 3] for details.

According to one survey 43, many of the companies contracting work that responded were established in the 1990s. Though they are small in size, turnovers have been steadily growing over the past few years. In most cases, the customer (user enterprises) provided the production equipment and machinery, but most companies do not pay a usage fee. At many work sites, the contract workers work side-by-side with the employees of the customer company. To employ the workers, the work contracting company creates the employment contract and the

worker registry, and handles the basic procedures when the hiring is done, such as health examinations. There is a low rate of social insurance use.

Surveys of this type of subcontracting within the work site reveal a form in which the contracted worker merely subcontracts the provision of labour, instructions for the work are given by an employee of the user company, and materials and equipment are provided by the user company. This work situation, under Japan's current legal situation, is closer to dispatch rather than contracting.

Dispatching work is prohibited in the manufacturing process now, in 1999, so this is believed to constitute a violation of the Worker Dispatching Law. In actuality, however, disclosure is not so easy because the provision of the services under contract is cleverly disguised.

12-3.
Worker dispatch

Workers who work under the Worker Dispatching Law face serious difficulties. They have grievances in many cases, including unreasonable cancellation of contracts by the company to which they have been dispatched, receiving instructions and orders that ignore contracts and laws, and suffering from sexual harassment. In all these cases, this constitutes the abused use of authority by the company to whom the workers have been dispatched (user company). Resolving these problems is the responsibility of the company to which the workers have been dispatched, but the Worker Dispatching Law has no strong function for restricting violations of the law or the infringement of rights.

Further, the response of the dispatching company is also insufficient. Many dispatched workers are not eligible for social insurance. This could well become a more serious problem if there is an increase in the temporary work type of dispatch planned for the 1999 revision of the law. One problem is that the social security system does not adequately meet the conditions of short-term employment. This requires a basic policy for resolving this problem.

For the temporary work type of dispatch, the 1999 revision of the law establishes the obligation of the company to which the worker is dispatched to strive to employ the dispatched worker if the period of dispatch to the company exceeds one year. Some believe that one subject of further investigation should be the responsibility to guarantee insurance premiums unpaid by the company to whom workers are dispatched when the dispatching company does not pay social insurance premiums.

13
There is no particular definition of self-employment and there are no texts that regulate it. The primary form of self-employment takes the form of a juridical person in quite a few cases

14.
Trends in the number and ratio of self-employed workers over the past 10 years

The number of self-employed business owners is declining. There were 9.15 million in 1987, but this fell to 7.72 in 1997. Females accounted for 2.23 million of these workers, or 28.9%. Currently, self-employed business owners account for 11.4% of the working population

44. I have the impression, however, that there has been a rapid increase in recent years in the number of employed workers becoming self-employed business owners.

15
Protection of self-employed business owners

15-1
Employment conditions and remuneration

There is no protection under the law. In practice, there is satisfactory protection if business operations are stable. No protection, however, is provided if business operations become unstable.

15-1280526940 There is no protection under the law for labour safety and health.
15-1280526941 Legal protections for self-employed business owners are inadequate compared to employed workers. In fact, practical protections are quite inadequate. Self-employed business owners are not considered workers, so in principle they cannot be eligible for workers' accident compensation insurance. If those self-employed business owners qualified for special participation in the workers' compensation insurance program conform to the procedures, however, they may become eligible. The Worker's Accident Compensation Insurance Law recognizes four groups 45 other than workers as having special qualifications for eligibility.

Some self-employed business owners have not complied with the procedures to become eligible for workers' compensation insurance, however. Those that have not complied receive no worker's compensation benefits and are only covered by general health insurance 46.

They also have the problem of not receiving worker's compensation benefits even if they have special qualifications for eligibility. When small business owners comply with the procedures for special participation, they must note the content of the work in which the insured parties are engaged. If the workers are injured while engaged in work other than that work noted, they will not receive compensation 47. It is possible that small business owners will be engaged in multiple types of work, but it is not usual that they would pay for premiums to comply with several types of procedures for special eligibility for worker's compensation if that were the case. This legal system provides inadequate protection.

15-4.
The freedom to organize and collective bargaining

This is insufficient. Generally speaking, there is legal protection, though it is extremely limited. According to the Law for Cooperative Associations of Small and Medium Enterprises, when people operating small businesses establish cooperative associations, those with transaction relationships must faithfully respond to negotiations when an application for collective bargaining is received from a representative of the cooperative association (Article 9.2.8). Actually, the Japan Actor's Union and the Japan scriptwriter's union have formed agreements with NHK and private sector broadcasters.

15-5.
Procedures for dispute resolution

There are no legal protections

16
Are there independent-subordinated workers? What are their recent characteristics?

There are independent-subordinated workers. The other party in their affiliation is the companies and customers who are their transaction partners.

16-1.
Who are independent-subordinated workers?

It is extremely difficult to clearly describe the difference between independent-subordinated workers and a disguised employment relationship. A certain explanation is required first.

In this report, a disguised employment relationship is considered to be one involving people not treated as workers, and who are employed under the same actual conditions as ordinary employees (or in an employment-subordinated relationship) without an employment contract. There have been disputes over this worker concept regarding whether these are workers to whom Article 9 of the Labour Standards Law primarily applies.

In contrast, the term independent-subordinated worker is used in a broader sense. Without fear of misunderstanding, those workers are not covered by Article 9 of the Labour Standards Law. Because they have an economic dependency, however, I believe that they at least are quasi-workers that require protection of some sort.

Actually, some of those who claim that they are workers under Article 9 of the Labour Standards Law do not want the law applied to them. They are not looking for protection of labour conditions in a narrow sense (for example, regulations regarding working hours, leave, etc.), but are looking for protection from dismissal and seek worker's compensation benefits.

To be blunt, I think it would be sufficient to determine the extent to which they require economic protection. Yet, unless they are forced to claim that they are workers under the Labour Standards Law, and therefore, the extent to which they receive instructions and orders from employers, they will not be able to limit dismissals or receive worker's compensation benefits. However, discussing the extent of the authority an employer has to issue instructions and orders regarding working hours and duties is beside the point from judging the necessity for protecting the workers from the difficulties of unemployment.

Taking that into consideration, in a legislative debate, the Labour Standards Law does not apply. One appropriate means of resolving the question would be to provide appropriate protection to the quasi-workers that should receive individual protection at the same level as workers, and are here referred to as independent-subordinated workers.

Unfortunately, however, the premises of the current Japanese legal system mean that I must hesitate to describe a certain type of worker as a quasi-worker, or an independent-subordinated worker. A depiction of that sort would deny them the essence of being a worker, and they would lose any possibility for protection being applied as a result. Therefore,

while I cannot present specific cases, I think there are an enormous number of what I consider to be quasi-workers.

The case of franchise store or convenience store managers could be raised as one example of quasi-workers, although they are generally admitted to be typical self-employed business owner. For details, refer to the [Annex 3].

16-2
Convenience store managers 48

While convenience stores have a relatively short history, their revenues and earnings have mushroomed. Convenience stores have a system in which the headquarters sells products at wholesale prices and provides operating instructions to the franchise member based on a franchise agreement. As compensation, the franchise member pays royalties referred to as operating instruction fees. The portion received by the franchise member, or store manager, are funds taken from sales. In addition, royalties, personnel expenses for one's store, and utilities expenses also are deducted from the portion received by the franchise member.

In the franchise agreement, headquarters does not take a loss owing to the payment of royalties or the proceeds from the wholesale sale of products, but it is not easy for the franchise member to receive store operating expenses and a living wage. Indeed, if the contract is cancelled before it expires, a large amount must be paid to headquarters for breach of contract. The store manager is an independent business owner and is not protected as a worker. The manager does not have the complete right to operate the store on his own, however, and must work under the instructions and guidance of the franchiser. While store managers are independent business people, they also have the special features of subordinated labour.

17.
The categories of independent-subordinated workers

Independent-subordinated workers differ from self-employment. They are economically dependent on others, so they cannot freely perform transactions on their own. They also are different from wage workers, however, because they have the freedom to refuse work, can transact with multiple persons, and can have other people substitute for their work. Their legal protection, however, is entirely the same as that for independent business owners, which is almost no protection at all.

18
Do people exist working in conditions similar to those of employed workers apart from those already mentioned?

18-1
First, we will take up teleworkers. For details, refer to the [Annex 3].

Recently, information and communications equipment has spread among companies and households with the development of information and telecommunication technology. There has been a result in teleworkers, or people who work at home or in satellite offices using these kinds

of equipment. There is both employed work and non-employed work combined in telework, and the legal problems involved with telework are many and diverse.

Many of those teleworkers of the type not classified as employees are women with young children. The problems of telework from the teleworkers' perspective are obtaining work and the low unit prices. About 15% of teleworkers have experienced job-related problems--a not inconsequential number.

There is no particular legislation that protects teleworkers now, however. The law that provides certain protections to people who work at home--the Home Workers Law--applies to people engaged in the manufacturing or processing of products provided on consignment from a consignor. It is therefore difficult to devise an interpretation of this law that includes teleworkers.

18-2
People Working at Silver Centers

Legislation was created for Silver Centers (hereafter, Centers) in 1986 with the Law Concerning the Stability of Employment of Senior Citizens. Members pay a set annual fee to the Centers. The Centers provide members with work such as assistants for short terms when they are accepted the work through contracts for services or consignment contracts. The objective is to obtain work opportunities for members that do not depend on employment. The Centers in turn provide the work as either contract or consignment to their members.

The members have the freedom to accept or reject the work. If they accept the work, it is believed that the Center becomes the original contractor, and the members are individual self-employed business people who become subcontractors. The people who order the work accept the provision of labour from the members and pay the Center a fee. The Center pays a share of the money to the members on the designated day in correspondence with their job contracts. There is no employment contract relationship between the Center and the members, so the Labour Standards Law, the Trade Union Law, and the Worker's Accident Compensation Insurance Law do not apply to the members' labour.

There has been a sharp rise in accidents occurring on the job 49. The administrative authorities take the superficial stance that the work the Silver Centers provide is not primarily employment labour. Though in most cases it actually is employment labour, the members are therefore not subject to the provision of worker's compensation benefits. There have been three cases in which accident compensation has been awarded for incidents that occurred involving Silver Center operations.

19
Special types of workers

19-1
Truck drivers for transport companies (particularly, cases of drivers of leased vehicles)

Since 1960, there has been a marked trend by construction companies to turn their drivers into self-employed business people by paying workers to drive trucks disposed of and owned by

the drivers. This is the problem involving drivers of leased vehicles, and public interest has grown in this problem since 1970.

Currently, there is a sharp increase in the number of drivers of leased vehicles. More than half the drivers of large vehicles for hauling sand are thought to be drivers of leased vehicles 50. These drivers usually conclude an other contract with the company than employment contract. They bring their own truck to the company and are liable for fuel and other expenses. They are also liable for taxes and social insurance.

Many of these drivers work as exclusive subcontractors for specific companies. Considering the liability for repaying the loans to purchase the vehicles and the various operating expenses, remuneration is almost the same as that for workers who are engaged as employees. Their treatment is extremely unstable.

There have been many disputes regarding the drivers of leased vehicles. The types of disputes include: (1) Whether the company's arbitrary cancellation of transport contracts constitutes dismissal 51. (2) Whether the company's cancellation of contracts because of its dislike of union activities constitutes unfair labour practices 52. (3) Whether the drivers can claim that in the event of the company's bankruptcy, the payment of remuneration to the drivers should take precedence over other claims 53. (4) Whether the drivers can claim to be workers under the terms of the Worker's Accident Compensation Insurance Law 54. Judicial decisions have been mixed because the situations of the drivers of the leased vehicles have varied.

One of these, the 1996 Supreme Court decision regarding the case in which the head of the Yokohama Minami Labour Standards Inspection Office case 55 rejected the claim that the drivers had characteristics of workers for the provision of worker's compensation, will be described here [Annex 4]. The evaluation of the Supreme Court was that since the drivers owned their own trucks and were liable for their own operating expenses, they performed their duties in a situation in which they took risks and made their own expenditures on their own responsibility (elements of self-employed business people). Also, based on the overall consideration of whether the level of employment dependency was strong enough to outweigh these elements, and the factors that they were not subject to instructions and supervision regarding their routes of transport and their time of departure, their restrictions on time and place were minimal, and that income tax and social insurance premiums were not withheld from their pay, the court ruled that the drivers of leased trucks could not be considered as workers under the Labour Standards Law.

While these drivers work under various conditions, the usual working form of the drivers of leased vehicles has most of the characteristics recognized by the Supreme Court. Therefore, there are concerns that the Supreme Court decision has largely denied the worker characteristics of the drivers of leased vehicles.

Recently, a case has been reported of company treatment in which former employees were disguised as drivers of leased vehicles, which eliminated their eligibility for protection. This case already has been described in 9-4.

19-2
The case of sales clerks in the perfume sales section of a department store

The sales clerks in the perfume sales sections of department stores are usually the employees of the perfume manufacturers and are assigned to work in the department stores. The document governing the sales clerks is in fact the employment manual of the department stores.

The sales clerks have entered into employment contracts with the manufacturers, so the guidelines of working conditions are the employment rules of the manufacturer who dispatches the workers.

The protection for employment conditions and remuneration are the same as for ordinary employed workers. The right of organization and the right for collective bargaining are protected at about the same level as for ordinary employed workers. In fact, many of them do not have unions, and many do not conduct bargaining.

Because their place of work is a department store, there are sometimes changes in working hours to correspond to the circumstances of the department store. In many cases, it is difficult for the manufacturer, who has the responsibility as the employer, to resolve disputes at the work site.

19-3
Construction workers 56

19-3-1
The usual work practices of construction workers

Construction workers are generally divided into experienced skilled craftsmen and unskilled labour. The work practices of these two types are entirely different.

The work practices of experienced skilled craftsmen differ depending on the conditions at the construction site where they provide their labour. Superficially, many are small business owners 57. It is natural that many (1) work as self-employed business people, but more than a few (2) work as dependent workers 58. Also, some (3) work in triangular relationships 59. Recently, however, few is working as 60 (4) independent-subordinated workers.

19-3-2
Basic terms of these workers' relationships with the enterprise

The general factors construction workers have in common is that the practice of creating documents related to labour provision is seldom carried out. Generally, all agreements are in the form of oral promises. In many cases, therefore, the contractual form is not clear, and the standards are vague for the payment of remuneration, vacations, and the liability for social insurance premiums.

For experienced, skilled workers, the system of paying remuneration in accordance with the volume of work performed offsets the weaknesses of contracts based on oral promises. Specifically, this includes: (1) Determining remuneration per unit of area depending on the type and content of the work, (2) Determining the total remuneration by multiplying the total area of the work by the figure in (1), (3) Employer calculation once a month of the rate of progress of the work, and, (4) Remuneration paid once a month for providing the work by multiplying the amount in (2) by the ratio in (3). In this method of determining remuneration, there is a tacit agreement regarding the level of quality of the work that should be attained by experienced, skilled craftsmen.

19-3-3

What are the principal instruments that govern their labour?

Of those people employed in the construction industry, a significant proportion of the workers employed by the major national corporations have formed labour unions. Therefore, the first instrument that governs their labour is the collective agreement.

Most of the construction workers engaged in unskilled labour are workers under the Labour Standards Law. Therefore, the employers are obligated to formulate work rules that specify work conditions. Thus, the second instrument governing labour is the work rules.

The experienced, skilled craftsman, who is not an employee, has only memos as the contract for the labour provided. These memos specify only the amount of remuneration per unit of area and the total work area. They are titled "Estimate" and "Bill".

19-3-4
The main jurisprudental guidelines for the labour of construction industry workers

The Industrial Safety and Health Regulations based on the Industrial Safety and Health Law include a detailed listing of all the things the head of an enterprise should do and must do to prevent work accidents. The major companies in the construction industry provide strict instructions to the laborers engaged in physical labour on the work site to obey these regulations to prevent company liability for civil injury compensation.

The courts have broadly recognized the responsibility of the employer in the construction industry to consider safety for labour accidents when there is a labour contract. Accidents that result from not fulfilling this obligation are an admission of the employer's liability for compensation 61.

The courts also have recognized the employer's obligation to consider safety when labour is provided in a manner similar to a contract for services that is not an employment contract and recognized the employer's liability for compensation. In this instance, however, the courts often have given much greater consideration to the responsibility of the person providing services in the form of labour for the occurrence of accidents. Therefore, in some cases, the courts have recognized the responsibility of the user company at a limit of slightly more than 20% of the amount of the total of the injury suffered by the injured party 62.

19-3-5
The de jure and de facto protection of the construction industry worker

This protection is insufficient both legally and in fact.

20
Comments regarding worker protection

20-1
Why do disguised employment relationships occur in Japan?

Disguised employment relationships are believed to be increasing recently in both the types of work in which they appear and in the quantity of the relationships 63. Please refer to the

appended materials for details.

The company's objective for using disguised employment is first, to avoid the employer's liability for social insurance premiums. Changing the employment contract into a contract for services or consignment contract eliminates the liability for health insurance, pension insurance, and unemployment insurance premiums that are equivalent to half the total amount for each employee. The company also avoids the liability for worker's compensation insurance premiums, for which it is liable for the full amount. Society is rather tolerant of companies that avoid their liability for social insurance premiums. Not one criminal indictment has been tried in the past 15 years based on one party purposely avoiding the liability for social insurance premiums.

Second, disguising employment relationships reduces the company's consumption tax liability. The wages companies pay to workers are subject to consumption tax. If the wages are converted to outsourcing costs based on contracts for services, they are no longer subject to the consumption tax. For companies, outsourcing expenses for the external form of services means they will pay a lower consumption tax amount in comparison to paying their labour costs as wages.

20-2
Some suggestions

As I have repeatedly stated, workers are protected by a rather large number of specific labour laws in Japan through the recognition of their characteristics as workers in Article 9 of the Labour Standards Law. Therefore, judgements will be rendered in which they receive 100% protection or no protection at all depending on whether they correspond to workers in Article 9 of the law. For workers, this judgement is a life or death matter.

The workers on the borderline of being considered workers will first realize their status as workers qualified to receive worker's compensation when they apply for worker's compensation after suffering an injury on the job, and the head of the Labour Standards Inspection Office renders a judgment that will determine if they receive compensation or not. Further, though the judgment will be based on standards delineated in the 1985 Labour Standards Law Research Association report, the standards themselves are abstract. The problem of a lack of uniformity for judgements in limited cases remains.

Therefore, I want to make two specific suggestions to resolve these problems.

First, the standards for judging and determining a person's characteristics as a worker should be clarified, and a public mechanism established for making a judgement about those characteristics. This is particularly important for worker's compensation insurance. In today's worker compensation insurance system, the non-payment of insurance premiums by employers does not necessarily mean that worker's compensation will not be paid. (Worker's compensation benefits will be paid even when the employer does not pay the insurance premiums.)

This itself is indispensable for worker protection, but on the other hand, the non-payment of insurance premiums tends to be overlooked in a system of this type. It also means that workers do not have to confirm their characteristics as workers on their own. Therefore, this system should be reexamined, insurance premiums strictly collected from the start, and a mechanism established for judging and determining the characteristics as workers of workers not subject to the system.

Second, I want to point out the problem that the standards of judgement for characteristics

as workers in this instance are based solely on whether the characteristics conform to Article 9 of the Labour Standards Law. Is it acceptable that the range of workers in a narrow sense who should receive protection for work conditions, workers who should receive protection from dismissal, and workers who should receive worker's compensation insurance benefits differs in each case?

Therefore, a mechanism should by all means be provided that allows even workers not subject to labour condition protection to receive protection from dismissal and worker's compensation benefits as "quasi-workers". To attain that objective, I believe a legal system must be devised for protecting what this report terms independent-subordinated workers to the same extent as employed workers.

Notes

1.
Employment contracts are those contracts for the purpose of providing labour itself in accordance with the instructions and orders of the employer (Article 623, Civil Code). Contract of services have the purpose of completing work from the party ordering the work (Article 632 Civil Code). Consignment contracts are those in which the party providing the labour performs certain work on his own judgement without instructions from others, and the acceptance of remuneration does not require the completion of the job (Article 643 Civil Code).

2.
The Statistics Bureau of the Management and Coordination Agency, "Labour Force Survey".

3.
The population of those aged 15 and older with the will and ability to work.

4.
Incidentally, the composition ratio of the number of employees in the manufacturing industry to all industries declined from 28.0% to 26.2% for males from 1987 to 1997, and 26.5% to 21.2% for females in the same period. During the same 10-year period, the composition ratio of the number of employees in the financial, insurance industry and the real estate industry declined from 4.0% to 3.6% for males and 6.3% to 5.5% for females. Statistics are based on the Labour Force Survey from the Statistics Bureau of the Management and Coordination Agency.

5.
The composition ratio of the number of employees in the service industry to all industries rose from 18.3% to 20.5% for males from 1987 to 1997, and 30.5% to 34.6% for females in the same period. During the same 10-year period, the composition ratio of the number of employees in the construction industry rose from 12.6% to 14.4% for males and 3.5% to 4.3% for females.

6.
Relevant laws include the Industrial Safety and Health Law, the Workers' Accident

Compensation Insurance Law, the Law concerning Security of Wages Payment, the Minimum Wage Law, and the Equal Employment Opportunity Law for Men and Women

7.
According to Nishitani's theory, the understanding of the real meaning of the Trade Union Law and Article 28 of the Constitution, which is the basis for the law, basic labour rights are guaranteed to workers. The parties in a subordinate position to the employers establish a position on an equality with them by exercising the right to organize, and are able to determine working conditions. Therefore, the concept of workers is a relationship in opposition to that of the employers, and the law must be understood broadly to cover those parties in a structurally subordinate relationship who require the right to organize for that purpose. (Satoshi Nishitani, "The Trade Union Law", Yuhikaku, 1998, p. 72)

8.
Kazuo Sugeno, Labour Law, 5th Edition, Kobundo, p. 468

9.
Kawagishi Kogyo Case, Sendai District Court Decision, March 26, 1970 Labour Civil Cases Reporter, Vol.2 No. 2, p. 330. This decision recognized that Kawagishi Kogyo, the parent company, had an overlapping obligation to pay the wages to the workers due them from a subsidiary, thus approving limits to the rights of employers.

10.
The legal principle of the non-recognition of the incorporation is that when several parties are incorporated, the non-recognition of the incorporation of a certain party recognizes that the legal relationships that exist with that party also exist with another party. Required for the recognition of this principle between a parent company and a subsidiary is that the parent company own a substantial amount of stock of the subsidiary and that the parent company actually manages and directs the corporate activities of the subsidiary.

11.
Kazuo Sugeno, Labour Law, 5th Edition, Kobundo, p. 652

12.
Sadao Kishii, "The Legal Theory of Unfair Labour Practices", Sogorodo Kenkyusho, p. 145

13.
Hanshin Kanko Case, Supreme Court Decision, February 26, 1987 Labour Case Judgements, No. 492, p. 6.

14.
Asahi Broadcasting Corp. Case, Supreme Court Decision, February 28, 1995, Labour Case Judgements, No. 668, p. 11.

15.

The Labour Standards Law provides for the principle of equal treatment and pay for males and females, regulates working hours, break time, holidays, the principle of the payment of wages, maternity leave, time for child care, and prohibits child labour.

16.
Japan fell into a prolonged economic slump after the collapse of the bubble economy. Also, corporate business has been affected by the intensification of international competition (mega-competition) accompanying the globalization of the economy. Many companies merged or carried out restructuring or rationalization programs. The unemployment rate nearly exceeded 5%, a rate higher than any previously recorded.

17.
Nikkeiren, in the Research Project Report on New Japanese-Style Management Systems published in 1995, revealed its intention to divide employees into three classifications. These are: (1) long-term employment based on the accumulation of job ability, (2) employment based on the use of sophisticated professional ability, and (3) employment based on flexible patterns. Nikkeiren believes that the first classification of long-term employment based on the accumulation of job ability is accounted for only by part of the core workers at a company. It is their intention to increase the number of employees in the other two groups. The phenomenon of the diversification of employment forms is typified by this Nikkeiren policy.

18.
The Civil Code establishes the right of priority to be paid of the salary for the final six months a person is employed from among the assets of the head of the enterprise (Articles 306, 308, Civil Code). The Commercial Code also gives priority to the right of employees' wages (Article 295, Commercial Code). Actually, however, payment is often not received due to the paucity of the total assets of the enterprise.

19.
In the Civil Code, either party may apply to cancel the contract at any time. The contract will be terminated after two weeks from the date of application to cancel (Article 627.1, Civil Code).

20.
In regard to the dismissal of employees, the Labour Standards Law provides that either 30 days advance notice, or a minimum of 30 days' salary be paid to the employee (Article 20.1). Also, workers may not be dismissed during the period in which workers are on leave due to injury or illness incurred in the course of work, or for a 30-day period thereafter. Further, female workers may not be dismissed during the maternity leave --usually six weeks before birth and eight weeks after birth--and an additional 30 days thereafter (Article 19.1).

21.
Discriminatory dismissal due to nationality, creed, or social status is prohibited (Article 3, Labour Standards Law). Dismissal for participation in labour union activities also is prohibited (Article 7.1). Further, dismissal due to applying for or receiving leave to provide child care or nursing care also is prohibited (Articles 10, 16 of the Child Care and Nursing Leave Act).

22.
In its decision in the case of Japan Shokuen Company, the Supreme Court let stand a lower court decision recognizing the doctrine of the Abusive Dismissal. (See Japan Shokuen Case, April 25, 1975, Supreme Court Reporter Vol. 29 No. 4, p.456).) According to this doctrine, the reasons for dismissal recognized as reasonable are limited to cases in which there is a necessity due to unavoidable business reasons. These include: (1) cases when the work provided is unacceptable due to a worker's lack of ability or qualifications, (2) cases in which the worker has disobeyed work instructions or committed an improper act, and (3) adjustment dismissal due to business slumps.

23.
In addition to assuming the liability for medical expenses (treatment compensation), the employer also must assume the liability for compensation in an amount corresponding to wages during the employee's time off from work (leave compensation), the financial liability when disabilities remain (disability compensation), and the financial liability to the surviving family members when the worker dies (survivors' compensation).

24.
The following insurance benefits are provided.
(1) Providing medical care for which the insured party has no liability for medical costs (The provision of compensation for treatment and care.)
(2) The payment of an amount corresponding to 60% of wages during the period the employee cannot work (The provision of leave compensation)
(3) The payment of an annuity or a temporary payment when disabilities remain (The provision of disability compensation)
(4) The partial compensation of nursing expenses (The provision of nursing compensation)
(5) The provision of an annuity or a temporary payment to the surviving family when a worker dies (The provision of compensation to the surviving family)

25.
The Minister of Labour will establish the insurance rate for each type of business considering the rate of occurrence of labour accidents over the preceding three years.

26.
The employees receive medical benefits when they are ill, and the employees' liability for medical costs is 20%. ü@Employees also are paid 60% of their daily wages when they miss work as an injury and illness allowance. When employees are absent due to childbirth, they are paid 60% of their wages as a maternity allowance.

27.
However, there are national insurance associations for such special sectors as civil engineering architects, doctors, and lawyers. The personal liability for health care costs for the members of these associations ranges from zero to 20%. Currently, there are more than 150 of these national insurance associations for various sectors with about 4.5 million members.

28.
Persons employed day to day, persons who are employed for a term less than two months, and persons engaged in seasonal work are not eligible for insurance under the Health Insurance Law. Part-time workers whose working hours are less than three-quarters of those of regular employees are not treated as insured parties under the Health Insurance Law. As with the self-employed business people, these workers do not receive injury or illness allowances or maternity allowances.

29.
Annuities include old-age annuities, disability annuities, and annuities for surviving family members.

30.
As a rule, when the insured party has paid at least six months' worth of insurance premiums in a one-year period, the basic allowance of 60%-80% of wages will be paid for a period from 90 to 300 days, depending on the insured party's age.

31.
The Labour Standards Law Research Association's Subcommittee #1, "Standards for determining 'workers' in the Labour Standards Law", December 19, 1985

32.
It is believed that companies ultimately determine whether a person is a worker in conformance with the form of the contract. Companies do not perform the procedures for participating in social insurance for the workers with whom they have formed contracts for services or consignment agreements. They also arbitrarily cancel contracts, and in some cases do not pay remuneration. This has happened on more occasions than can be counted.

33.
The case of Taiheiyo Securities, Osaka District Court, June 19, 1995, Labour Case Judgements, No. 682, p. 72

34.
The Hashiba K.K. Case, Osaka District Court, July 25, 1997, Labour Case Judgements, No. 720, p. 18.

35.
Attorney Yoshimasa Obayashi provided information regarding this case.

36.
Attorney Keiichi Furukawa provided information regarding this case.

37.
Attorney Hidero Ogawa provided information regarding this case.

38.
Information regarding this case was provided by Ogata of the Film and Drama Industry Labour Union Solidarity Council.

39.
When the persons supplying labour supply workers that have no work relationship with themselves to a user company, can the workers claim that they have an employment relationship with the user company? In many recent cases, the establishment of an employment relationship was denied, as circumstances did not allow for the conclusion of an employment relationship between the user company and the worker. See the Daiei Eizo Case, Tokyo High Court decision (December 22, 1993, Labour Case Judgements, No. 664, P. 81), the Yasuda Hospital Case, Osaka District Court decision (February 17, 1997, Labour Case Judgements, No. 715, P. 70). However, there is a trend of cases in which the party that provides labour is made to assume responsibility as the employer. In fact, in the Daiei Eizo case, the court recognized that the enterprise providing labour had responsibility as the employer.

40.
Specifically, this was limited to 16 jobs, including the system design of the electronic computer, the operation of broadcasting equipment, interpretation and translation, and other specialized tasks.

41.
New jobs were added to the original 16 for a total of 26.

42.
Work at ports, transportation work, construction work, and security work are excluded.

43.
Kunihiko Shirai, "Contemporary Problems in Contract Labour" (Kamata, et al., "Legal and Economic Research into Contract Labour" (In Japanese), p. 81 -). In this survey, researchers at the Kushiro Municipal University distributed questionnaires to 280 companies they thought were engaged in the work of contracting labour for the production process at October 1998. They received replies from 51 for a response rate of 18.2%.

44.
The Statistics Bureau of the Management and Coordination Agency, "Labour Force Survey"

45.
The special qualifications for eligibility for Worker's Compensation Insurance are: (1) Small business owners employing 300 people or fewer, and those who work for small business owners (such as family employees) (2) The so-called "hitori oyakata" (a single master without servants) and family members engaged in the business (3) Special agricultural workers, home workers, and others. (4) Persons dispatched overseas

46.

Details cannot be provided, but those workers uninsured for worker's compensation insurance who are injured in work-related accidents will receive treatment benefits from insurance if they are part of the ordinary National Health Insurance, but will not receive benefits if they are parties of Health Insurance Law. The explanation is that health insurance covers injuries incurred outside of work, so injuries incurred during work are not applicable. Tadashi Shimada, "The Work-Related Accidents of Small Business Owners Not Eligible for Worker's Compensation Insurance and Their Methods of Receiving Benefits", Wages and Social Security, No. 1224, 1998, p. 61.

47.
When the head of an enterprise who had applied for special worker's compensation for work related to the operation of civil engineering died during the course of work related to the rental of heavy equipment, a business he operated at the same time, he was not awarded worker's compensation. This was the result of a decision by the Supreme Court. The head of The Himeji Labour Standards Inspection Office case, Supreme Court decision, January 23, 1998, Labour Case Judgements, No. 716, p. 6

48.
I received assistance from freelance writer Kenji Hirota regarding this matter.

49.
There are currently 700 centers nationwide with 370,000 members. They hope to have one million members in the 21st century. There were 822 accidents at the "Silver Centers" in 1983, resulting in four deaths. In 1995, there were 4,146 accidents resulting in 30 deaths.

50.
"The Special Measures Law for the Prevention of Traffic Accidents for Large Vehicles for Transporting Earth and Sand, etc." designates the display numbers for all vehicles. Judging from these display numbers, there are 164,045 vehicles involved in the transport of sand nationwide. The persons who operate businesses with at least five vehicles must obtain authorization under the Trucking Business Law. There are 85,327 vehicles involved with the transport of sand that do not have this authorization because they are privately owned cars. (This is the number of drivers of leased vehicles.) Therefore, the percentage of drivers of leased vehicles engaged in the sand and earth transport business is about half the national total.

51.
Regarding the disputes over dismissal, the decision in which the cancellation of the leased vehicle driver contracts was recognized as a dismissal was for the Kitahama Doseki Saiseki Case in Kanazawa District Court (November 27, 1987, Journal of Judicial Decisions No. 1268, p. 143. Those in which it was not recognized was the Osaka Toyota Fork Lift Case, Osaka District Court (June 29, 1984, Labour Case Judgements, No. 434, p. 30)

52.
The case in which the cancellation of the leased vehicle driver contracts was recognized as an unfair labour practices was the Sekino Kosan Case, Toyama District Court, February 22, 1974

Journal of Judicial decisions, No. 737, p. 99

53.
Examples of cases in which this was denied were the Uenoya Case, Toyama District Court, January 30, 1986, Labour Civil Cases Reporter, Vol. 37, No. 4.5, p. 335, and the Nagoya High Court decision, July 28, 1986, Labour Civil Cases Reporter, Vol. 37, No. 4.5, p. 328

54.
A decision that recognized the worker characteristics regarding worker's compensation insurance was the head of Shibata Labour Standards Inspection Office case, Niigata District Court decision, December 22, 1992, Hanrei Times, No. 820, p. 205. A decision that denied worker characteristics was the head of the Yokohama Minami Labour Standards Inspection Office Case, Supreme Court, November 28, 1996, Labour Case Judgements, No. 714, p. 14.

55.
Refer to note 54.

56.
I received assistance from attorney Keiichi Furukawa regarding this matter.

57.
There are 6.85 million people engaged in the construction business, and of these, 560,000 are licensed companies. (National Federation of Construction Workers' Unions "ILO Report", p. 79). The reason there are so many licensed companies is that quite a few skilled workers make themselves the heads of small enterprises.

58.
A particularly large number of workers are required at specific times in the construction process. At only those times, they work as subordinated workers hired by other heads of small enterprises for work at the construction site.

59.
For the construction work subcontracted by major national companies, many skilled workers provide services to subcontracting companies as subordinated workers.

60.
Previously, there were many skilled workers, called itinerant artisans, engaged in subordinated work but with a strong sense of independence because they frequently selected different employers. There are fewer of this type of worker in recent days, however.

61.
There have been cases in which a young worker is awarded 50 million yen as compensation for death in addition to worker's compensation insurance. There also have been cases in which workers with a serious disability have been awarded compensation of 100 million yen in addition to worker's compensation insurance.

62.
Fujishima Construction Case, Urawa District Court decision, March 22, 1996, Labour Case Judgements, No. 696, p. 56

63.
In addition to the cases already described, there was a recent case in which office worker X, who had been an employee, entered a commissioned services contract with Company Y. The contract conditions included: (1) X would, as in the past, work 230 days a year at the place designated by Y, (2) Y would pay X an amount corresponding to the number of days worked when X worked more or less than 230 days in a year, (3) Y would be liable for the required expenses, and (4) X would be paid monthly. It is thought that this intended to disguise the independent self-employment of X, who had been once an employee, avoided the obligations for paying social insurance premiums, and avoided all the employer's responsibilities.