RETHINKING MEASURES OF IMPLEMENTATION OF LABOR LAWS AND POLICIES

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I. Introduction

This paper is intended to provide an opportunity to rethink the measures of implementation of labour laws and policies against the background of complex nature of today's employment relationship as well as complicated regulations under today's labour laws.[1] To begin with, Part II of this paper describes the traditional measures under labour law. Then, after briefly pointing out the necessity for considering new measures, Part III probes possibilities of new measures under labour laws, with a short reference to other measures than labor laws for implementing labour policies. In conclusion, Part IV points out future prospects for new measures as well as necessities for further empirical research and comparative evaluation. Although this paper is focused on Japanese labour law, a brief reference is made with respect to the law in the United States as informative examples.

[1] This paper is one of the products of the research project, "A Comprehensive Study on Measures for Implementing Labour Laws," supported by JSPS KAKENHI (Grant-in-Aid for Scientific Research (Scientific Research B)), Project Number 26285015.

II. Traditional Measures of Implementation of Labor Laws and Policies

1. Labor Laws as Measures for Implementation of Labor Policies

In many countries labour laws have been one of the main vehicles for implementing labour policies, i.e., policies for the improvement of situations regarding labour and employment. Of course, labour policies can be achieved by other means than labour laws. For example, it is useful for the government to induce and assist the formation of agreements between national employer's groups and national centers of the trade unions in order to promote practices that are consistent with government policies. In recent years, Mr. Shinzo Abe, the Prime Minister of Japan called for meetings with the Japan Business Federation (JBF) and Japanese Trade Union Confederation (JTCU) and asked them to promote wage increases in order to revitalize the Japanese economy.[2] This has been successful to a considerable extent, because the JBF and the JTUC agreed with the Prime Minister and recommended their members to conclude collective bargaining agreements for wage increases. However, since this paper is intended to examine the legal aspects of the implementation of labour policies, the focus is on labor laws that are mainly relied on as legal measures for achieving labour policies.

[2] *See* Norio Hisamoto, *Seiroushi Kaigi ni yoru Chin-age* (Wage Increase through Tripartite Roundtable), Kikan Rodo Ho(Labour Law Quarterly), no. 245, p. 2 (2014).

2. Traditional Measures for Implementation of Labor Laws

(1) Criminal Punishment

In many countries, violation of labour laws is sanctioned through criminal punishment. However, not all labour laws have provisions for criminal punishment. Although the situations may vary depending on countries, typical statutes that have provisions for criminal punishment are statutes regarding basic working conditions such as minimum wages and maximum working time as well as workers' health and safety. The Labour Standards Act[3] and the Industrial Safety and Health Act[4] of Japan have indeed provisions for criminal punishment. In order to enforce the provisions for the criminal sanction, specialized national civil servants called "Labour Inspectors" have the same authority as police officers with respect to arrest, search, seizure and examination of objects, in addition to administrative authorities for inspection as stated below.

In practice, criminal prosecution does not take place very often, since it is only serious cases that the Labour Inspectors send to the Office of Prosecutors for initiating criminal procedure. In 2009, only 1,110 cases regarding the violation of the Labour Standards Act and other related statutes were sent from the Labour Inspectors to the Prosecutors' Office, while the Labour Inspectors made 91,615 administrative recommendation of the correction of

[3] http://www.jil.go.jp/english/laws/documents/l.standards2012.pdf (Arts. 117-121)
[4] http://www.japaneselawtranslation.go.jp/law/detail/?id=1926&vm=04&re=01 (Arts. 115.2-123)

violation as explained below.[5] From this situation, a question arises whether criminal sanction should be utilized more often. As provisions for criminal sanction are not necessarily contained in all labour laws, it is to be asked in the first place what the subject matters of regulation are that are suitable for criminal sanction. Then, with respect to the matters for which criminal sanction is desirable, the next questions is in what circumstances criminal sanction should be appropriate. Furthermore, the third question is whether the procedure and organization for the criminal sanction is sufficient as well as efficient.

(2) Administrative Enforcement and Assistance

a. Administrative Inspection and Recommendation for Correction

Administrative inspection is an important part of the system of the enforcement of labour laws, especially in the area of individual labour laws. In Japan, Labour Inspectors play a very important role in this respect. They conduct both scheduled inspections and complaint-based inspections.[6] If inspectors find violation of laws which they have the duty to enforce, they usually recommend the employers to correct such situation. Although this recommendation merely requires voluntary compliance and does not have a coercive power, the employers are required to report to the Inspector regarding the situation of correction.

[5] http://www.mhlw.go.jp/jigyo_shiwake/dl/15-2a.pdf

[6] For the Labour Inspection System in Japan, *see* Ryoko Sakuraba, *Effectiveness of Labour Law and Labour Inspection System in Japan*, KOBE UNIVERSITY LAW REVIEW, no.47, p.35 (2013).

Labour Inspectors conducted 134,295 scheduled inspections in 2012.[7] As a result of these inspections, violations of the relevant statutes were found at 68.4 percent of the inspected workplaces. In addition, 25,418 inspections were conducted based on workers' complaints in 2012. Violations were found at 71.9 percent of the workplaces where such inspections were conducted. The violation rate as a result of all types of labour inspection from 2003 to 2012 is shown in Figure 1.

Figure 1: Violations Found as a Result of Labour Inspection[8]

year	scheduled inspections	other inspections	violations found (%)
2003	121,031	43,474	65.6
2004	122,793	42,835	67.1
2005	122,734	41,407	66.3
2006	118,872	42,186	67.4
2007	126,499	42,234	67.9
2008	115,993	43,097	68.5
2009	100,535	46,325	65.0
2010	128,959	45,574	66.7
2011	132,829	42,703	67.4
2012	134,295	39,225	68.4

Although specific data is not available in the last few years, more than 90,000 administrative recommendations are made regarding the violation.[9] As stated above, the

[7] For the current operation of the Labour Inspection System as introduced below, *see* Kosei Rodo Sho Rodo Kijun Kyoku (Labour Standards Bureau, Ministry of Health, Labour and Welfare), Heisei 24 Nen Rodo Kijun Kantoku Nenpo (Annual labour standards inspection report 2012) 40, 45 (2014).

[8] http://www.mhlw.go.jp/wp/hakusyo/kousei/13-2/dl/04.pdf

[9] *See* http://www.mhlw.go.jp/jigyo_shiwake/dl/15-2a.pdf

number of cases where criminal prosecutions are initiated regarding serious violations is much smaller.

In Japan, where the number of civil litigation regarding labour disputes has been small in comparison with other industrialized countries, administrative enforcement measures such as labour inspection have played an important role. In addition, since judgments in civil litigation have binding effect only for litigated cases, the implementation of rights under labour law is limited to the workers who become the parties to the litigation. On the other hand, Labour Inspectors usually recommend employers to correct all the violations that they find in the workplace.

However, it is pointed out that the compliance rate regarding Japanese labor laws is low, since, as stated above, violations were found at 68.0 percent of the workplace where scheduled inspections were conducted.

b. Assistance and Incentives

In addition to the enforcement of mandatory provisions, Japanese labour laws have often utilized the measures of assistance for employers to voluntarily comply with the law. This is especially true with so-called “duty to endeavor” provisions, which do not accompany legal sanction for their violation. Such measures of assistance are also provided as incentives for employers to achieve the goals set by the government in order to promote labour policies without directly requiring employers to achieve such goals.

One of the typical measures for such assistances is to provide for financial subsidies. For example, the Employment Insurance Act[10] and its enforcement regulation provide for so called "employment adjustment subsidy" to employers who avoid economic dismissals through such measures as conducting training, transfer to related companies, or paying "leave allowances" to redundant employees who have no work at hand. This subsidy is intended to give an economic incentive for employers to avoid economic dismissals, while the Act does not require employers to avoid economic dismissals or to carry out above-mentioned measures. Thus, this subsidy is a measure to achieve the labour policy to promote the stability of employment. In fact, this subsidy had a certain effect to avoid economic dismissals at the time of drastic economic downturn in Japan caused by the "Lehman" shock in 2008.[11]

(3) Enforcement through Civil Dispute Resolution

Labor laws can be implemented as a realization of private party's legal rights through civil litigation and similar dispute resolution procedures.[12] Formerly, the number of labour cases litigated in court was very small in Japan. In 1991, only 1,054 civil cases (662 ordinary procedure cases and 392 temporary relief cases) involving labour disputes were filed in

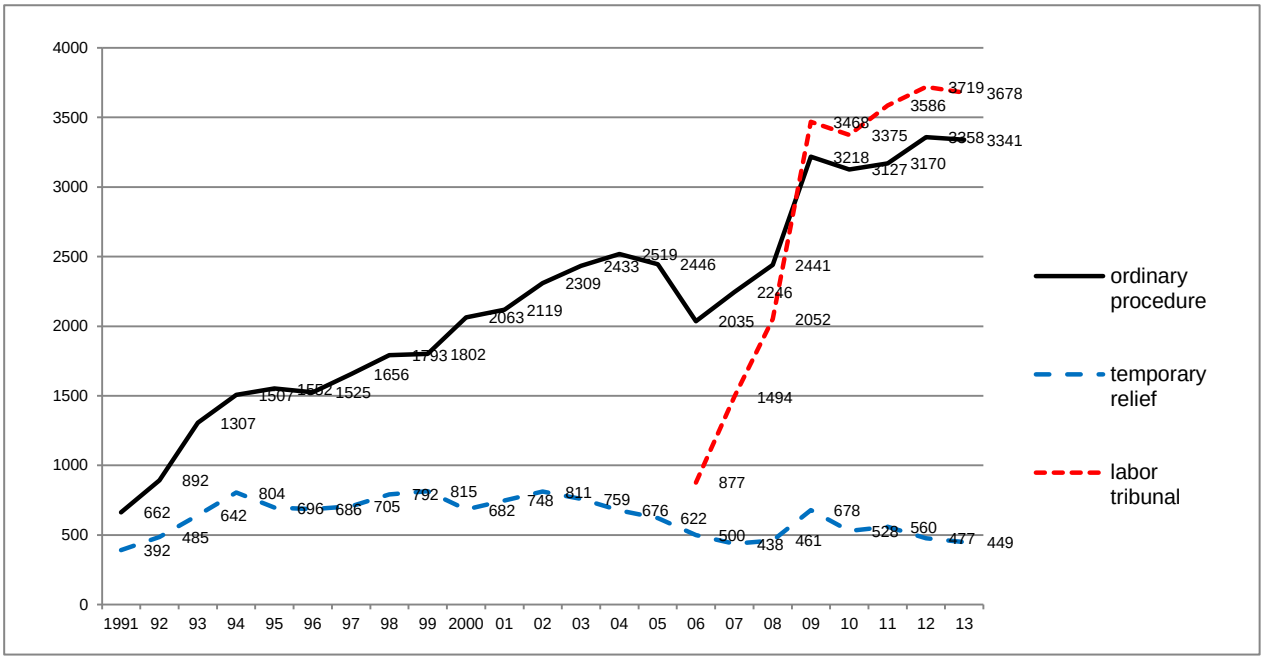
[10] http://www.japaneselawtranslation.go.jp/law/detail/?id=1910&vm=04&re=01 (Art. 62)

[11] Japan Institute of Labour Policy and Training, *Koyo Chosei no Jisshi to Koyo Chosei Joseikin no Katsuyo ni Kansuru Chosa* (A Survey on the Employment Adjustment and Utilization of Employment Adjustment Subsidy), Chosa Series no. 123, p. 77 (2014).

[12] *See generally* Ryuichi Yamakawa, *Systems and Procedures for Resolving Labor Disputes in Japan*, COMPARATIVE LABOR LAW AND POLICY JOURNAL, vol. 34, no.3, p. 899 (2013).

district courts.[13] In recent years, however, such cases have been increasing (Figure 2). This is especially true since the Labour Tribunal System was introduced in 2006 as a simple and fast judicial procedure for resolving individual labour disputes. In 2013, the number of complaints filed with district courts reached 7,468 (3,341 ordinary civil procedure cases, 449 temporary relief cases, and 3,678 Labour Tribunal cases).[14]

Figure 2: Number of Civil Labour Cases Received by District Courts



Nevertheless, there must be many labour disputes that do not go to court at present. Indeed, an administrative system called the "System for Promoting Resolution of Individual Labour

[13] *See* Saiko Saibansho Jimu Sokyoku Gyousei Kyoku (Office of Secretary General, Administrative Division, Supreme Court of Japan), *Heisei 3 Nendo Rodo Kankei Minji-Gyousei Jiken no Gaiyo* (Outline of Civil Labour Cases in 1991), HOSO JIHO (Lawyers' Association Journal), vol. 44, no.7, p. 121 (1992).

[14] Saiko Saibansho Jimu Sokyoku Gyousei Kyoku (Office of Secretary General, Administrative Division, Supreme Court of Japan), *Heisei 25 Nendo Rodo Kankei Minji-Gyousei Jiken no Gaiyo* (Outline of Civil Labour Cases in 2013), HOSO JIHO vol. 66, no.8, p. 149 (2014).

Disputes" handles much more individual labour disputes.[15] Under this system, the Prefectural Labour Bureaus provide free consultation service regarding individual labour disputes. A large number of individual labour dispute are handled by this procedure. 245,783 requests were made for administrative consultation in 2013. In addition, the System for Promoting Resolution of Individual Labour Disputes introduced a free conciliation procedure by the Dispute Adjustment Commission established in the Prefectural Labour Bureaus. The Bureau received 5,712 petitions for conciliation in 2013.

From the viewpoint of the implementation of labor law, however, the civil dispute resolution has its own limitations. For example, the dispute resolution procedures do not begin unless a complaint is filed with a court or a Dispute Adjustment Commission. Also, the realization of labour law rights is usually limited to workers who become the parties to the procedure.

III. New Measures of Implementation of Labor Laws and Policies

1. Background: Necessity for New Measures

Problems have been pointed out regarding the implementation of labour laws. First of all, as shown in the high ratio of violation discovered through administrative inspection, there is much room for improvement regarding the employer's voluntary compliance. Second, it is not

[15]For the operation of the System for Promoting Resolution of Individual Labour Disputes, *see* http://www.mhlw.go.jp/file/04-Houdouhappyou-10401000-Daijinkanbouchihouka-Chihouka/0000047216.pdf

clear whether enforcement measures against employers who violate labor laws are sufficient as remedies and/or deterrent measures. Low compliance rate may reflect the weakness of enforcement measures under the present system.

It may be suggested that more stringent enforcement under the present scheme is necessary in order to achieve sufficient implementation of labour laws through such measures as the increase in the number of Labour Inspectors and the legislation to impose harsher penalties to cope with the problem of the neglect of labor laws. However, such measures may face difficulties in view of the tight government budget and current political environment in the legislature, in which the conservative party has the majority.

Moreover, some of the problems regarding enforcement and securing compliance of labour laws may be caused by the complex nature of today's employment relationship as well as the complicated contents of regulation under today's labour law. Corporations today have very complicated organizations as well as numerous schemes of employment management, and their operation depends on each corporation's customs and practices. As a result, it has become difficult for traditional labour laws to regulate such modern employment relationship adequately. If labour law tries to cope with such situation, its regulation becomes also complicated. Then it may be difficult for employers to understand the legal mandates and direct their managers to observe them. It may also be difficult for the Labour Inspectors or judges to determine whether the violations of law occurred. Thus, it is worthwhile to consider

new measures in order to achieve more effective implementation of labour laws under the current situation.

In considering new measures, the compliance and prevention of violations should be more emphasized than the sanction against or relief for violations after they actually occur. First, the cost for the sanction against violations is generally higher than the cost for prevention. This is not only for the government but also for employers and workers, especially if such sanction is carried out in the form of costly procedures. Second, especially from the viewpoint of workers, the relief after violation occurred is not always sufficient. In addition to the cost and burden of the procedure, it is sometimes difficult for workers to obtain full recovery once the damage is inflicted. The prevention of violation is also desirable in light of maintaining continuous employment relationships. On the other hand, schemes for sanction and relief are still important, since a complete prevention is practically impossible and strong systems for sanction and relief will function to deter violations.

2. Implementation of Labor Policies through Other Measures than Labor Laws

As stated before, labor law is one of the main measures for implementing labour policies, among many political and legal measures. Recently legal measures other than labour laws are beginning to play an important role in Japan in addition to political measures. Under tax law, for example, employers who have increased the employment of workers are entitled to certain

tax reduction ("employment tax reduction").[16] Also, some local governments have introduced schemes in which employers who have achieved certain goals with respect to the assistance to the employment of disabled persons or working mothers with children are given a "plus factor" in competitive bidding for government contracts.[17] A similar scheme is contained in the current legislative proposal for the legislation called "A Bill for the Promotion of Women's Active Participation in Employment."[18] Under this proposal, employers are required to draw up and publish an action plan to promote female workers' active participation in employment. If the plan is certified by the Minister of Health, Labour and Welfare as appropriate, the employer may be given a "plus factor" in competitive bidding for contracts with the national government.

Although the actual effects of these schemes should be examined, it is worth considering to utilize schemes other than those of labour laws, since employers are usually keenly interested such matters as tax reduction or obtaining government contracts, and schemes related to these matters may provide for incentives for employers to achieve goals of labour policies.

[16] http://www.mhlw.go.jp/bunya/roudouseisaku/dl/koyousokushinzei_qa.pdf

[17] Regarding the case of the Osaka Prefecture, *see* http://www.pref.osaka.jp/attach/9495/00000000/H22%201sougouhyouka.pdf

[18] For the outline of the bill, *see* http://www.mhlw.go.jp/file/05-Shingikai-12602000-Seisakutoukatsukan-Sanjikanshitsu_Roudouseisakutantou/shiryou_1.pdf

3. Implementation of Labour Laws through New Measures

Even within the realm of labour laws, several new measures for their implementation have been introduced or need to be considered. Following are examples of such measures.

(1) Promotion of Recognition and Monitoring in the Market Mechanism

a. Public Notification of Name of Employers Who Violate Labour Law

Notification of the name of employers who violated labour laws to society in general will serve the role of sanction against violation, since such notification will damage such employers' reputation in the market. An increasing number of Japanese labour laws are adopting such notification schemes in recent years, i.e., the Act on Employment Promotion of Persons with Disabilities[19], the Act for Equal Employment Opportunity for Men and Women,[20] the Act for Stability of Employment of Elder Persons,[21] the Child and Family Care Leave Act,[22] the Part-time Work Act,[23] the Worker Dispatching Act,[24] and the Industrial Safety and Health Act.[25]

The notification scheme under the Act on Employment Promotion of Persons with Disabilities has a long history, since this scheme was introduced in its 1976 amendment.

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[19] http://wwwhourei.mhlw.go.jp/cgi-bin/t_docframe.cgi?MODE=hourei&DMODE=CONTENTS&SMODE=NORMAL&KEYWORD=&EFSNO=1481 (Art. 47)

[20] http://www.japaneselawtranslation.go.jp/law/detail/?id=60&vm=04&re=01 (Art. 30)

[21] http://www.japaneselawtranslation.go.jp/law/detail/?ft=3&re=01&dn=1&ia=03&bu=2048&_x=53&_y=20&ky=&page=16 (Art. 10)

[22] http://www.japaneselawtranslation.go.jp/law/detail/?id=2288&vm=04&re=01 (Art. 56.2)

[23] http://wwwhourei.mhlw.go.jp/cgi-bin/t_docframe.cgi?MODE=hourei&DMODE=CONTENTS&SMODE=NORMAL&KEYWORD=&EFSNO=1654 (Art. 18)

[24] http://www.japaneselawtranslation.go.jp/law/detail/?id=75&vm=04&re=01 (Art.49.2)

[25] https://www.jaish.gr.jp/anzen/hor/hombun/hor1-1/hor1-1-144-1-0.htm (Art. 78)

Under the Act, employers in the private sector are required to employ workers with disabilities so that their ratio among the entire workers employed by the employer will be at least 2.0 percent. If an employer violates this provision, the Minister of Health, Labour and Welfare shall direct the employer to establish a plan to improve the situation. If the employer does not abide by this direction, the Minister may notify the employer's name in public. The result of notification is currently available at the website of the Ministry of Health, Labour and Welfare.[26] Formerly, several employers' names were notified each year. In 2012 and 2013, it was announced that there was no case for notification, since no employer failed to abide by the Minister's direction. Other than the Act on Employment Promotion of Persons with Disabilities, there was no precedent of notification. It is only recently that the notification scheme was introduced, and the preconditions for notification, which are basically similar to the Act on Employment Promotion of Persons with Disabilities, are not easily satisfied.

In any event, it should be useful to evaluate the effectiveness and usefulness of such notification schemes including the preconditions.

b. Raising Good Employer's Reputation

[26] Regarding the situation in 2013, *see* http://www.mhlw.go.jp/stf/houdou/0000041674.html

The public notification can also raise the reputation of employers if such notification informs to the public of their good performance with respect to requirements under labor laws. In this case, the subject of notification is not limited to the name of employers. A sign that appeals to the eye of public may enhance the employers' reputation. In recent years, Japanese labor law has introduced a new method of implementing labour policies by enhancing public reputation of employers who take desirable measures in view of labour policies.

For example, the Act on Promoting Measures for Assistance of Nurturing Next Generation gives an employer a privilege to use a special sign as shown in the Figure 3 for its goods or services when the Minister of Health, Labour and Welfare certifies that the employer's action plan to make assistance to its employees' childcare is appropriate.[27] This sign is called "Kurumin," which means a covering wear for wrapping babies. The purpose of giving privilege to use this sign is to promote the employer's reputation in the market with regard to its goods or its services.

Figure 3: "Kurumin" sign

[27] http://www.mhlw.go.jp/stf/seisakunitsuite/bunya/kodomo/shokuba_kosodate/kurumin/

c. Promotion of Monitoring in the Labour Market through Providing Employer's Information

Providing good employers' information can also be utilized in the labour market. Last year, the Ministry of Health, Labor and Welfare launched a policy in administering public employment agencies in order to provide incentives for employers to actively recruit young jobseekers. More specifically, the Ministry encouraged employers who use the service of public employment agencies to provide information on good performance in terms of in-house training, paid leave, child care leave, volume of overtime work, and retention of young workers.[28] If the employers provide such information to job-posting at public employment agencies, the agencies provide active support for such employer's recruiting activities including invitations to job fairs.

Furthermore, the Labour Policy Council proposed a new scheme in a new legislation ("A bill for the promotion of youth employment") for the promotion of the employment of young workers.[29] Under the proposed scheme, new graduates who use public employment agencies can request employers who post job offering to provide them information on the recent

[28] http://www.mhlw.go.jp/stf/seisakunitsuite/bunya/koyou_roudou/koyou/jakunen/wakamono/wakamonoouen.html

[29] http://www.mhlw.go.jp/file/05-Shingikai-12602000-Seisakutoukatsukan-Sanjikanshitsu_Roudoueisakutantou/0000071845.pdf

turnover rate, paid leave, child care leave, the volume of overtime work and so on, so that they can choose employers who provide good job opportunities.

Giving privilege of using "Krumin" sign under the Act on Promoting Measures for Assistance of Nurturing Next Generation as shown above can also help employers acquire good reputation in the labour market, since the recognition in the labour market that employers implement effective assistance to their employees' childcare will attract more candidates from whom the employer can choose.

Another means to utilize the labour market mechanism to implement labour policies is to exclude information from the labour market regarding employers who violate labour laws. The Labour Policy Council's proposal for "A bill for the promotion of youth employment[30]" contains a scheme in which the Public Employment Security Offices may reject applications for posting job offering by an employer who violates certain labour laws.

Thus, Japan is beginning to promote monitoring functions of the labour market through increasing recognition of "good" employers and excluding information on "bad" employers. It is to be noted, of course, that the success of such measures depends on the degree of the labour market function.

[30] *See supra* note 29.

(2) Increasing Awareness of Labour Law

One of the most fundamental premises for implementation of labour law is that both employers and workers know rules under labour laws. A number of measures have already been taken for the purpose of promoting understanding of labour law. For example, dissemination of rules under labor laws has been made by the government in various forms including publication of books, distribution of brochures, putting up posters in public places, introduction on websites, conducting free seminars etc.

It is useful from this viewpoint to encourage general citizens including students to learn labour law more intensively. Recently, a non-profit organization in Japan established a program called "Work Rule Kentei (examination)."[31] Under this program, the organization carries out examinations on basic contents of labour laws, and provides certificates for those who "pass" the examination. Although this is a voluntary program, the Japan Trade Union Congress supports this program and encourages its members to take this examination.

In addition to the promotion of awareness in general public, dissemination of rules under labour laws at the workplace is quite important. The Labour Standards Act of Japan has a provision that requires an employer to take measures to make its employees aware of the essence of the Law and its enforcement regulation, work rules that the employer has drawn and so on, through distributing documents to each employee, placing them at conspicuous

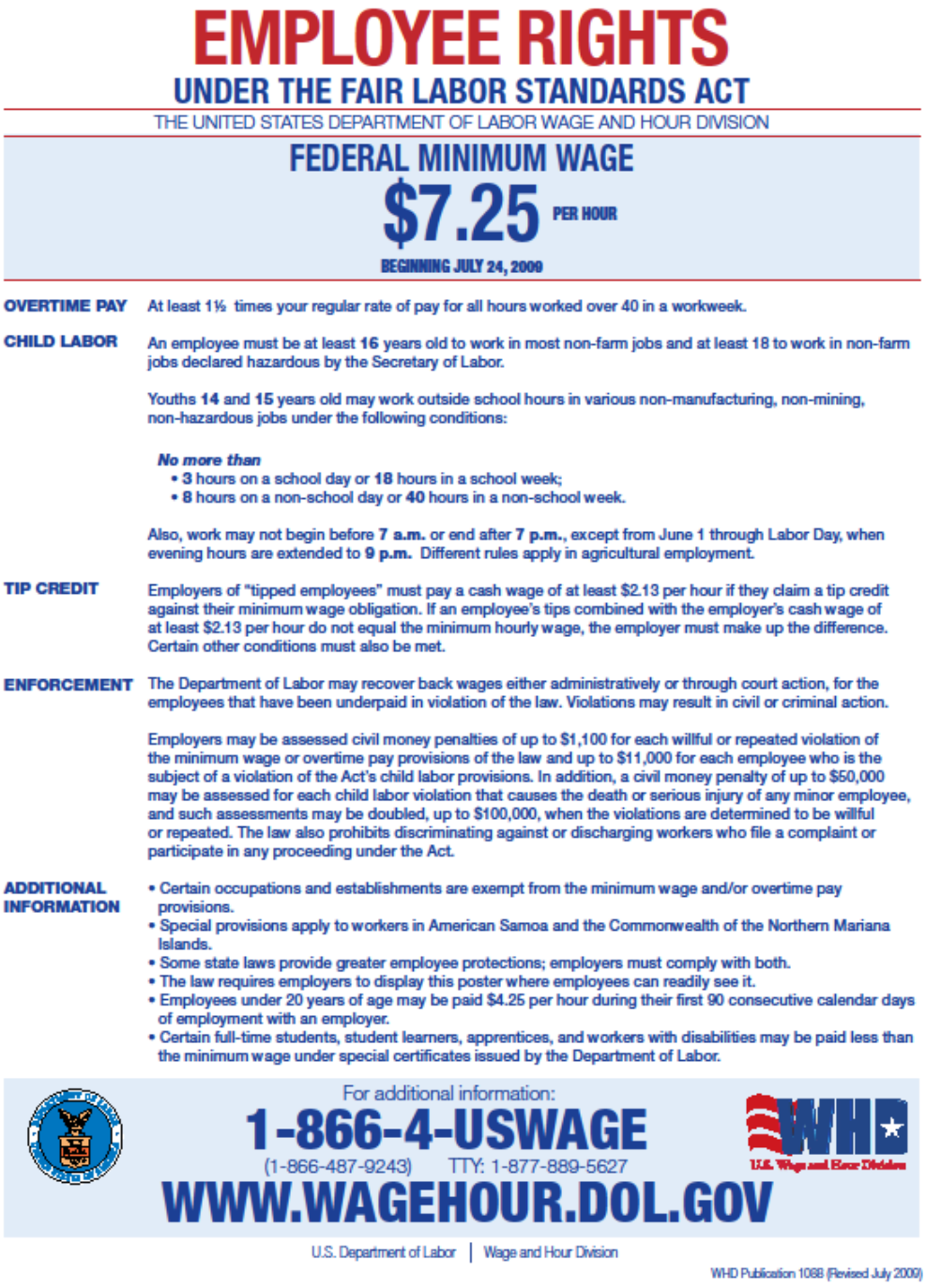
[31] http://workrule-kentei.jp/

places in each facility, and making them readable on computers that are easily accessible.[32] Dissemination of legal rules and work rules at workplaces is quite meaningful, because managers and employees are strongly required to be aware of rules under labour laws at their workplaces, where most of violation and disputes occur, whereas they are less knowledgeable than HR managers or union officers. However, since the mere "placing" may satisfy this requirement under the Labour Standards Act, employees are often unaware of the contents of the Act or work rules applicable to their workplaces. Thus, it is worthwhile considering more effective means of dissemination.

Again, the situation in the United States is interesting in this respect. A number of statutes regulating employment relations require an employer to put up posters at each workplace. Regarding federal labour laws, the Department of Labour (the Equal Employment Commission in the case of anti-discrimination law) provides sample posters, which are readily available on the website of the Department.[33] Such poster outlines basic contents of each statute and includes the phone number of the government office in charge of its administration as well as its URL address, as shown in Figure 4.

[32] http://www.jil.go.jp/english/laws/documents/l.standards2012.pdf (Art. 106)
[33] http://www.dol.gov/oasam/boc/osdbu/sbrefa/poster/matrix.htm

Figure 4: Poster of the Fair Labour Standards Law



EMPLOYEE RIGHTS

UNDER THE FAIR LABOR STANDARDS ACT

THE UNITED STATES DEPARTMENT OF LABOR WAGE AND HOUR DIVISION

FEDERAL MINIMUM WAGE

$7.25 PER HOUR

BEGINNING JULY 24, 2009

OVERTIME PAY At least 1½ times your regular rate of pay for all hours worked over 40 in a workweek.

CHILD LABOR An employee must be at least **16** years old to work in most non-farm jobs and at least 18 to work in non-farm jobs declared hazardous by the Secretary of Labor.

Youths **14** and **15** years old may work outside school hours in various non-manufacturing, non-mining, non-hazardous jobs under the following conditions:

No more than
- **3** hours on a school day or **18** hours in a school week;
- **8** hours on a non-school day or **40** hours in a non-school week.

Also, work may not begin before **7 a.m.** or end after **7 p.m.**, except from June 1 through Labor Day, when evening hours are extended to **9 p.m.** Different rules apply in agricultural employment.

TIP CREDIT Employers of "tipped employees" must pay a cash wage of at least $2.13 per hour if they claim a tip credit against their minimum wage obligation. If an employee's tips combined with the employer's cash wage of at least $2.13 per hour do not equal the minimum hourly wage, the employer must make up the difference. Certain other conditions must also be met.

ENFORCEMENT The Department of Labor may recover back wages either administratively or through court action, for the employees that have been underpaid in violation of the law. Violations may result in civil or criminal action.

Employers may be assessed civil money penalties of up to $1,100 for each willful or repeated violation of the minimum wage or overtime pay provisions of the law and up to $11,000 for each employee who is the subject of a violation of the Act's child labor provisions. In addition, a civil money penalty of up to $50,000 may be assessed for each child labor violation that causes the death or serious injury of any minor employee, and such assessments may be doubled, up to $100,000, when the violations are determined to be willful or repeated. The law also prohibits discriminating against or discharging workers who file a complaint or participate in any proceeding under the Act.

ADDITIONAL INFORMATION
- Certain occupations and establishments are exempt from the minimum wage and/or overtime pay provisions.
- Special provisions apply to workers in American Samoa and the Commonwealth of the Northern Mariana Islands.
- Some state laws provide greater employee protections; employers must comply with both.
- The law requires employers to display this poster where employees can readily see it.
- Employees under 20 years of age may be paid $4.25 per hour during their first 90 consecutive calendar days of employment with an employer.
- Certain full-time students, student learners, apprentices, and workers with disabilities may be paid less than the minimum wage under special certificates issued by the Department of Labor.

For additional information:

1-866-4-USWAGE

(1-866-487-9243) TTY: 1-877-889-5627

WWW.WAGEHOUR.DOL.GOV

WHD U.S. Wage and Hour Division

U.S. Department of Labor | Wage and Hour Division

WHD Publication 1088 (Revised July 2009)

(3) Incentive for Compliance by Giving Immunity for Vicarious Liability

Another measure for promoting the compliance of labour law is to give immunities to employers who took sufficient steps to prevent their employees from violating the law. It is clear that such immunity becomes an incentive for employers to take such preventive steps, which promotes compliance of labour laws. The Labour Standards Act of Japan adopted such measure regarding its criminal sanction when it was enacted in 1947. Article 121[34], paragraph 1 provides, inter alia, "In the event that a person who has violated this Act is an agent or other employee acting on behalf of the [employer], the fine under the relevant Article shall also be assessed against the [employer]; provided, however, that this shall not apply in the event that the [employer] has taken necessary measures to prevent such violation…." The proviso of this Article gives immunity for the employer who has taken necessary preventive measures regarding its employees' violation of the Act, although there have not been many cases where courts have actually given this immunity. The Civil Code of Japan has a similar provision regarding the immunity of employers from their vicarious liability for their employees' tortious conduct. Still, courts have rarely granted immunity under this provision.

Meanwhile, case law in the United States has created such immunity regarding the employer's vicarious liability for sexual harassment in the workplace under Title VII of the Civil Rights Act of 1964 (Title VII). The United Supreme Court has held that, although an

[34] http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=01&dn=1&co=01&ia=03&x=0&y=0&ky=%E5%8A%B4%E5%83%8D%E5%9F%BA%E6%BA%96%E6%B3%95&page=23

employer is subject to vicarious liability for an actionable hostile environment sexual harassment by a supervisor, the employer may raise an affirmative defense to liability or damages, by proving (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.[35]

This case law provides an incentive for employers to introduce and implement procedures to prevent and correct sexual harassment in the workplace. In the same vein, the Supreme Court adopted an incentive-based approach regarding punitive damages for an employer's vicarious liability for its supervisor's conduct, holding that an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good-faith efforts to comply with Title VII.[36] Such framework is incorporated in the proposed Restatement (Third) of Employment Law by the American Law Institute in the form of a broader rule regarding employer's vicarious liability.[37]

Although Japanese courts have not applied existing provisions regarding immunities for employers very often, these provisions may be reconsidered as an incentive for employers to

[35] Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

[36] Kolstad v. American Dental Assn, 527 U.S. 526 (1999).

[37] Section 4.03 of Tentative Draft No.6 of the Restatement (Third) of Employment Law, which was published by the American Law Institute in 2013 (http://www.ali.org/00021333/Emp%20Law%20TD%20No.%206_Online.pdf).

provide for measures to comply with labour laws. Since the necessity to provide relief for victims should also be considered, the immunity may be partial rather than full depending on the circumstances of each case. As stated above, the U.S. Supreme Court refers to the employer's affirmative defense regarding "damages" as well as "liability."

(4) Encouragement of Using Dispute Resolution Procedure to Promote Public Interest

The resolution of labour disputes between private parties can play a role as a means of implementing rules of labour law, especially when rights under labour laws are enforced as a result of dispute resolution. Thus, such dispute resolution can contribute to the realization of public interests at least with respect to labour laws that consist of public orders such as equal employment opportunities and minimum working conditions.

In view of such public nature of the resolution of labour disputes, some labour laws have a scheme to promote an active use of dispute resolution procedure. For example, Article 114 of the Labour Standards Act of Japan enables the court in civil cases to order employers to pay the double amount of money that they are obliged to pay under certain provisions of the Act such as overtime wages.[38] The court has discretion whether and to what extent they order employers to pay such additional amount, considering the level of violation, malice of employers and so on. This scheme provides for an economic incentive to workers who sue

[38] http://www.japaneselawtranslation.go.jp/law/detail/?ft=1&re=01&dn=1&co=01&ia=03&x=0&y=0&ky=%E5%8A%B4%E5%83%8D%E5%9F%BA%E6%BA%96%E6%B3%95&page=23

employers in court for their violation of the Law, while at the same time the payment of additional amount has a meaning as a sanction for violation.

Beyond this, Japanese labour law does not have specific schemes for providing incentives for realizing public interest by way of private litigation. In the United States, there are several other schemes that are intended to promote public interest. For example, prevailing plaintiffs have a right to the payment of attorney fees under public labour and employment laws. As a general rule, parties to private litigations must pay their own attorney fees whether they win or lose. However, a number of statutes regarding labour standards and employment discrimination have provisions regarding the payment of attorney fees in the event that workers win their cases.[39] This is intended to encourage litigation to realize public interest in view of the fact that workers often lack financial resources to ask attorneys for representing them in litigation.

In addition, under a number of labour and employment statutes in the United States, administrative agencies in charge of their enforcement have a standing to file a suit against employers who violate such statutes on behalf of the employees who are victims of the employers' violation. For example, the Equal Employment Commission (EEOC) has a right to file a complaint for civil litigation regarding the violation of anti-discrimination statutes

[39] *E.g.*, 29 U.S.C. § 216(b)(Fair Labour Standards Act).

such as the Title VII.[40] This reflects the fact that the EEOC can promote public policies embodied in the Title VII though civil litigation.

(5) Requirement, Regulation and Assistance of Self-Regulation

A traditional framework of labour law regulation is for the government to establish substantive legal rules and require employers to comply with them. Here, the norms with which employers shall comply are set forth under the law. However, as the reality of workplaces and subject matters of regulation become complex in the modern society, it is often difficult to establish such norms so that they would sufficiently address the problems for all workplaces. For example, problems that impede gender equality in employment may differ depending on the nature of industry, size of organizations, systems of employment management, profiles of employees and corporate culture.

To cope with such problems, it is pointed out that workplace norms may be established by each employer so that they would be customized to each workplace or organization. Some may call this "self-regulation."[41] Of course this does not mean that employers are free to establish workplace norms as they wish. The law may require employers to establish norms in accordance with certain guidelines. Also, the law may require employers to follow certain procedures and receive a review of the contents of their norms by administrative agencies.

[40] 42 U.S.C. § 2000e–5(k).

[41] *See* CYNTHIA ESTLUND, REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION (Yale University Press, 2010).

Since the employer's "self-regulation" is regulated in this sense, it may be called "regulated self-regulation.[42]" Meanwhile, the law may provide benefits for employers who carry out workplace norms that are desirable in light of labour policies.

In Japan, the Act on Promoting Measures for Assistance of Nurturing Next Generation, as introduced above, adopted such framework.[43] Article 12 of the Act requires employers who employ more than 100 employees to draw up an action plan to make assistance to its employees' childcare. This Article also requires employers to submit such plan to the Minister of Health, Labour and Welfare and disseminate to their employees. Although the Act does not intervene in the contents of the plan, the Minister has issued a guideline regarding the contents of the action plan.[44] If the Minister determines based on the employer's application that the action plan is consistent with the guideline, the plan is certified as appropriate. The employer who obtains this certificate may use the "Kurumin" sign as explained before. Furthermore, employers are required to submit this certificate to the government if they apply for certain subsidies for carrying out measures to assist their employees' childcare.

A Bill for the Promotion of Women's Active Participation in Employment, also as explained before, adopts a similar scheme. Under this bill, employers are required to draw up and disseminate an action plan to promote female workers' active participation in

[42] *Id*. at 11-19.

[43] http://wwwhourei.mhlw.go.jp/cgi-bin/t_docframe.cgi?MODE=hourei&DMODE=CONTENTS&SMODE=NORMAL&KEYWORD=&EFSNO=1617

[44] http://www.mhlw.go.jp/general/seido/koyou/jisedai/kaisei/kaisei-houshin.html

employment. Although the contents of the action plan are generally left to the employer's judgment, some elements including numerical goals must be included. The government shall issue a guideline regarding the contents of the plan. Employers are required to submit their plans to the government. In this case, economic incentives given to the employers whose plans are certified as appropriate include certain favorable treatment in competitive bidding for contracts with the government, in addition to the privilege to use certain signs like the "Kurumin." In a sense, this bill would require employers to plan and carry out an affirmative action or positive action program, the contents of which are largely left to employers.

Since these are new measures under Japanese labour law, it must be examined how effective they are and whether incentives are sufficient to promote policy goals.

IV. Conclusion

Traditional measures for the implementation of labour laws are criminal punishment for violation of laws, administrative inspection and guidance, and the resolution of labour disputes between private parties. However, such traditional measures are often insufficient today due to the change in the labour and employment relationship as well as the complicated nature of current regulation.

Therefore, it is necessary to consider new measures for implementing labour policies more sufficiently. This is not limited to the measures that traditionally belong to labour law, but

may include measures such as tax law and the rules of bidding for government contracts. Within the realm of labour law, it is worth considering several new measures such as the promotion of recognition and monitoring in the market mechanism including the labour market, increasing awareness of labour law within and outside of the workplace, providing incentives for employers to promote compliance by giving immunity for their manager's conduct, encouraging dispute resolutions between private parties to promote public interest, requiring and assisting employers' self-regulation such as the introduction and implementation of action plans.

Of course, there may be number of other new measures for the implementation of labour laws and policies. Since it is not necessary or desirable to focus on only one measure, the government should consider mixed utilization of various measures including traditional measures. For this purpose, it is necessary to evaluate the effectiveness of each measure as well as the best combination of various measures.

In order to consider such policy design, it is useful to examine the experience and performance of measures taken by different countries. Although there is little doubt that background situations of each country cannot be neglected, it is also difficult to deny the importance of information exchange and discussion of each country's experience.

[Biography]

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