



A Farewell to Japanese Employment Practices

Why is regular employment system reform necessary?

Proposals made by the regulatory reform council

**TSURU Kotaro, Professor, Graduate School of Business and Commerce, Keio University
(Chairman, Council on Regulatory Reform's working group on employment)**

This June, the government's Council on Regulatory Reforms submitted a report on regulatory reforms to Prime Minister Abe Shinzo. The report discusses areas such as deregulation policies on employment highlighting "regular employment system reform" as one of the three approaches to be taken to reforming Japan's employment system. Having served as a chairman of the working group on employment for compiling the report (refer to table on p. 2), I would like to give my perspectives on the background, objectives and specific policies regarding regular employment system reform.

"Labor mobility" is the key term

The Abe administration launched an economic growth package featuring a growth-generating structural reform strategy as an issue of top priority. This means that structural reform was the first item called for in order to produce economic growth.

There are three possible approaches we can take to have the labor/employment system contribute to economic growth. First is to increase labor force participation rates for women and seniors while the labor population is in a long-term downward trend amid the challenges posed by population decline. Second is to improve individual workers' productivity by boosting human power through education and capacity development. Third is to raise economic productivity as a whole with implementation of labor force reallocation by promoting labor force transfer from low-productivity to high-productivity business areas.

The commonality among these three approaches is labor mobility. An example for labor mobility can be found in the non-labor-force population of women who are not actively looking for work but want to return to employment in the labor market.

Meanwhile, non-labor employment has been on the rise, to nearly 40% of the total labor force, posing a serious concern from a human capital standpoint. Notably, definite contract workers in Japan currently represent 28% of the total labor force; a figure that is one of the highest



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among OECD member nations. Non-regular employees are typically provided fewer job-training opportunities by their employers as compared with regular employees, and an excessive ratio of non-regular employees can potentially diminish the overall quality of the labor force.

For that reason, transforming involuntary non-regular employees who wish for regular employee status into regular employees is quite important. This attempt will promote labor mobility. Moreover, labor being shifted from mature sectors/industries to growing sectors/industries should also typically represent labor mobility.

An obstacle to promoting labor mobility is posed by the systems and institutions surrounding regular employment. A regular employee is generally characterized by distinct status including: (1) indefinite contract, (2) full-time employment and (3) direct employment (under the employer's directions or orders). Compared with the United States and Europe, unlimited regular employment is clearly more commonly practiced in Japan, which does not specify the scope of work, work locations and overtime workload in the hours.

Unlimited regular employees have no choice but to accept job relocation and long work hours, whether they approve or not, and this kind of work practice has placed women and seniors, in particular, at a disadvantage because it impairs the balance between work and family/personal life. Accompanying that, companies tend to be overly careful in hiring regular employees because of the generous employment security and other fringe benefits provided, which has increased the number of definite contract workers, making it difficult to convert non-regular employees to regular employees.

Moreover, indefinite employment, unlimited regular employment and employment dismissal regulations, each of which serve as an inter-compensatory factor, has formed a so-called iron triangle, and this has established Japan's membership-type employment system wherein being a member of a certain company or organization based on the premise of long-term employment carries a great deal of weight. It could be inferred from the above that this membership-type system has constrained Japan's labor mobility or reallocation in line with a change in its economic mechanism.

Regular employment system reform *not* tantamount to easing restrictions on dismissals

Japan's regular employment system has, in a broad sense, tended to hamper labor mobility. So where should we insert the surgical knife of reform in the three factors forming this iron triangle that has long hampered regular employment reform? One option that has actually been commonly practiced is to convert indefinite employees to definite employees, but this has created such problems as employment instability and irrational income gaps.

Meanwhile, there is an argument for revising or deregulating dismissal rules that are often used in the same context as reforming the regular employment system. However, I cannot help but feel strange about using this argument as a threshold for discussions on reforming the regular employment system because Japan's employment protection legislation is less rigorous than the average in OECD nations and, in fact, dismissals are even more commonly practiced among small- and medium-sized companies than they are among large corporations.

Regulations on dismissals allow employers to release employees only when they have a rational and logical reason, as well as appropriateness in general societal terms, to do so (Article 16 of the Labor Contract Act). This in itself poses no particular problem.



While some observers seek clarification of more specific rules on dismissal in Japan, it is common practice even in Europe to let the law stipulate the basics and leave legal judgment on dismissal to the settlement of each individual dispute.

Legal principles for dismissal for the purpose of business reorganization (including four dismissal criteria), which are used as a basis when dismissing employees for economic reasons, have tended to be subject to serious consideration recently regarding each of the criteria. In response to changing times, operation of the law has become flexible to some extent in that procedural aspects are more greatly emphasized, ensuring necessary steps have really been taken before resorting ultimately to dismissing an employee.

This notwithstanding, some executives of large enterprises evidently feel the current dismissal rule is too strict. I assume such a perception, if it really exists, has something to do with the history of employment dismissal regulations having developed as a rule used when dismissing unlimited regular employees. The employer's duty to undertake efforts to avoid dismissal, which is one of the four criteria for dismissal for economic reasons, may substantiate my assumption.

In other words, I mean to what extent the company tried its best to reassign or redeploy the employee to another office or department, or solicit voluntary retirement before resorting to dismissal. The law obligates employers to protect employment at the cost of reassigning the employee's work location or contents. This thinking is merely based on the premise that the employee is hired as an unlimited regular employee.

In Japan, employment dismissal regulations could be applied even to an employee who has just undergone a certain probationary period, thus making it hard for the company to let the employee be subject to certain circumstances. This would be understandable if one was to interpret that the company cannot fire employees for their inability to handle a certain assignment because they were hired as unlimited regular employees.

In general, when dismissing an unlimited regular employee for poor performance or lack of ability, the employer will often even have a burden of proof that there are no other alternative job opportunities available for the employee within the organization, according to judicial precedents.

Conversely, there are a few other judicial precedents indicating that the employment dismissal regulations would provide no compassionate protection to unlimited regular employees if they violate the implied rule.

For example, the court ruled that punitive dismissal for refusing to accept job relocation or overtime work was valid in the "Toa Paint Case" (judgment of the Supreme Court of Japan, 2nd Petty Bench, December 19, 1969) and "Hitachi Musashino Plant Case" (judgment of the Supreme Court of Japan, 1st Petty Bench, November 28, 1991). The validity of those court rulings appears debatable, but they are understandable from the standpoint of the employment dismissal regulations being designed to rigorously protect the unlimited regular employment system.

Everything is based on assumptions underlying the unlimited employment system

Unlimited attributes pertaining to regular employees, which can be paraphrased as an employer having considerable discretion over personnel matters, with employees obligated to accept future changes in work location and contents, as well as overtime, is closely related to many of the problems surrounding Japanese work styles.

For example, in a society assuming the majority of workers are unlimited regular employees, it is taken for granted that wives are mostly categorized as housewives spending most of the time supporting their families, and



they find it difficult to continue working as regular employees due to the heavy burden of parenting or of providing nursing care for elderly parents. One can argue that such a traditional peculiarity of Japanese society has doubly hindered women's participation in the labor market. Slow progress on work-life balance with empty slogans is also attributed to assumption of the unlimited regular employment system.

Successful introduction of a white-collar exemption system (accommodating flexible work schedules for qualified white-collar employees by exempting them from labor-hour restrictions) will solely depend on whether or not working styles focusing on individual workers' autonomy will be widely accepted. Yet there will be little chance for this to happen as long as the Japanese labor market assumes unlimited regular employment to be its underlying system. Moreover, with employers' discretionary power becoming overly strong in issues of human resources, the "unlimited" attribute of the proposed work style runs the risk of eventually being replaced with "unrestrained," which may lead to death from overwork, harassment and exploitation (or so-called black *kigyo*).

Japan's company labor unions also have traditionally played a countervailing role to employers' overly strong discretionary powers that can potentially be wielded. In this sense, I believe this company union system is also based on unlimited regular employment.

Why we need an unlimited regular employee system

As discussed above, regular employment system reform aiming to promote labor mobility is badly needed in order to promote employment system reforms for economic growth. To that end, reforming the unlimited regular employment system has been chosen as a priority to be used as a dawn of the labor "big bang." Therefore, while unlimited attributes in regular employment pose a challenge to be addressed, we must strive further to work on relevant employment rules for introduction of a limited regular employee system, which will hire workers to full-time positions in limited areas, limited job categories or with specified work hours.

Readers are advised to refer to the "Regulatory Reform Council's Working Group Report on Employment" (note) for approaches to new employment rules relevant to limited regular employment systems. Here I would like to respond to some of the criticism leveled at the limited regular employment system.

The first criticism is that the limited regular employment system is a de facto system widely adopted by companies, with no particular regulations against its introduction. There is no need for the government, and the panel, to intervene by promoting the system through undertaking legislative measures.

According to the survey by the Ministry of Health, Labour and Welfare on nearly 2,000 large corporations, around half have already introduced a limited employment system. This notwithstanding, definite contract workers' percentage share in the total labor force in Japan is quite high among industrialized nations, as discussed earlier. Some research analysis has pointed out Japan's slow conversion from definite to indefinite employment (around 25% in five years). In contrast, OECD nations have realized 40%-60% conversion within three years, representing a large gap with Japan (OECD, Employment Outlook 2006).

In view of the current situation where it is difficult to convert definite contract workers into unlimited regular employees, the limited regular employment system should play a pivotal role in absorbing definite contract workers wishing to become regular employees. To begin with, we should aim to convert 10% of the total labor force represented by definite contract workers into limited regular employees. The revised Labor Contract Act, which

went into effect this April, allows limited-term contract workers to request a change of their contract to unlimited when the limited-term contract is renewed several times and the total employment period exceeds five years. This legislative attempt is designed to systematically create limited regular employees. In view of these new movements emerging, there is urgent need to build an environment in which companies can promote expanding the limited regular employment system.

Table: Regulatory Reform Items and Time Schedule		
Item	Regulatory Reforms	Implementation Time Schedule
Employment rules for limited regular employees	Map out points for attention in employment management such as clarifying employment terms in order to promote diversified work styles for regular employees focusing on job contents	Discussions to begin in FY2013, to be launched in FY2014
Legislative revisions for discretionary work schedule, flexible work time, etc.	Working hour legislation will be comprehensively reviewed in the Labor Policy Council from the standpoint of work-life balance and boosting labor productivity	Research to begin in first half of FY2013; discussions to begin in fall of FY2013; to be launched upon reaching conclusion within one year
Deregulation of job-placement agency business	Intends to expand job-search business that earns commissions from job seekers and shares a common awareness of an ideal user-oriented system from the standpoint of raising job-matching capabilities through utilizing private-sector job-placement businesses	Discussions to begin in FY2013, to reach conclusion in early FY2014
Revision of dispatch labor system	Intends to review contract terms for temporary workers, measures to develop temporary workers' careers, and non-discriminatory treatment for temporary workers	To be discussed in Labor Policy Council from fall of FY2013 To be launched upon reaching a conclusion
Source: Excerpts from the "Regulatory Reform Council's Working Group Report on Employment"		

Clarify the distinction in employment rules

What serves as a major challenge to the prevalence of the limited regular employment system is the lack of sufficient explanations about the distinction in the way of treating limited and unlimited regular employees through pre-employment documents such as employment rules and labor contracts, as well as termination documents. The Working Group's report prioritizes efforts to clarify the distinction between the two systems, and raise the predictability of issues arising from the difference.

The third criticism is that a limited regular employee's contract could be automatically terminated if that worker's workplace or position is eliminated. The panel is looking to ease employment dismissal regulations while stretching the category of regular employees who are easily dismissed. However, as in the judicial precedents thus far, principles of dismissal regulations should be applied to limited regular employees just like traditional unlimited



regular employees, and limited regular employees should be provided with an opportunity that carefully tests and confirms the dismissal's objective rationality in societal terms. Judicial precedents indicate that factors such as limited workplaces and designated work contents are fully considered, and limited regular employees are often treated differently than unlimited regular employees.

For example, in trials regarding an employer's attempt to undertake duties to avoid dismissal of a limited regular employee on economic grounds, the court often tends to regard the employer as having performed duties to avoid dismissal (or simply makes a judgment regardless of the employer performing the duties) because chances for reassignment are limited within the designated workplace and limited scope of job contents. With respect to the criteria for selecting employees subject to dismissal, one of the four requirements for dismissal, dismissing all relevant workers following closure of workplaces or positions, is typically deemed rational (or rationality is not an issue).

In contrast, other requirements such as existence of the need to cut labor and the employer's reasonable explanation that is acceptable to the labor union and relevant workers must also be an issue when dismissing limited regular employees. To avoid unnecessary disputes, the employer is required to specify a contract category in advance for limited regular employees in the employment contract, effectively explain the specifics of the job category to the relevant workers, and have them fully understand those specifics.

Limited regular employees are more advantageous?

As already discussed, limited and unlimited regular employees may well be treated differently even if the same dismissal rule is applied. It is important that basic principles and facts based on judicial precedents are shared and fully understood among everyone in Japan. With this taking root as a consensus between labor, management and the judicial community, the rule may change. Conversely, it would undoubtedly be premature to legislate the rule without establishing a national consensus. I believe the Regulatory Reform Council is responsible for taking a leadership role in promoting forming of a national consensus and developing a doctrine of precedent, and should not irresponsibly wait for the matter to take its own course.

The point to keep in mind when promoting a limited regular employment system is the way of treating unlimited regular employees being converted to limited regular employees within the same organization. Employers must not push the conversion as if it were a "stab in the back" without providing the employee with sufficient information about limited regular employment systems.

Suffice it to say, the employment terms must first be agreed to, and any changes to them will need to be clarified in writing. The employee's intention still comes first in converting employment status within the same company. When an agreement is made for an unlimited regular employee to change to a limited position for a certain period of time for the purpose of parenting or academic study, and later returning to an unlimited position, the rationale and sensibility in dismissing a limited regular employee should be applied to the employee. The situation needs to be carefully handled in this manner.

An employee with a limited framework may be seen as inferior to a regular full-time employee. Unlimited employees are in fact usually provided better treatment in return for accepting future job relocation, reassignment and overtime. But full-time regular workers with limited duties, accounting for the majority of limited regular



employees, will be provided with opportunities to enjoy benefits with different facets. We should not forget this point.

Employment with limited duties means working in line with one's own career-development approach, while taking advantage of and recognizing one's own strengths and value. This type of work style explores external frontiers of new job opportunities, and this is expected to provide the employee with leverage in pay and other benefit negotiations.

This goes with the panel's policy philosophy promoting labor mobility, which is formulated in its report where it reads: "Those who work actively with hopes in accordance with their willingness will be provided support." This poses the question: Are you going to stay with the present comfortable stability while working as a "Jack-of-all-trades" employee sticking to a company or an organization?

The other choice is: Are you going to develop your own work style exploring new frontiers of opportunities, while believing in your professional abilities despite challenges and maintaining a good balance with your family and private life? The regular employment system reform poses this major option.

Note: Refer to the following website for the "Regulatory Reform Council's Working Group Report on Employment." URL: <http://www8.cao.go.jp/kisei-kaikaku/kaigi/publication/130605/item4.pdf> (Japanese only)

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TSURU Kotaro

Professor, Graduate School of Business and Commerce, Keio University
Chairman, Council on Regulatory Reform's working group on employment

Born in 1960. He graduated from School of Science, University of Tokyo in 1984. He obtained D. Phil. in Economics from University of Oxford (St. Anthony's College). He worked for the Economic Planning Agency of the Japanese Government as Government Economist from 1984-1995, Economics Department of OECD (in Paris) as Staff Economist 1995-2000, Institute of Monetary and Economic Studies, Bank of Japan as Research Economist 2000-2001, then Senior Fellow at Research Institute of Economy, Trade and Industry (RIETI) from 2001-2012. His publications include *Minimum Wage Reform* (co-authored).
