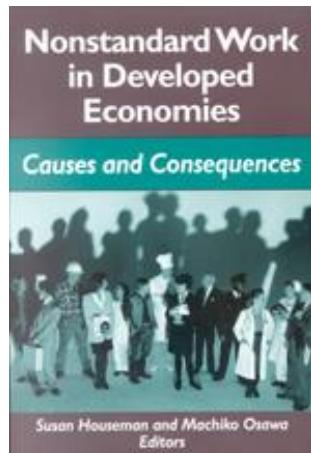


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Nonstandard Work Arrangements in Japan and the United States

A Legal Perspective

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When the framework of the Japanese employment and labor laws was established after World War II, Japan was still under the control of the Allied powers, including the United States. Major Japanese labor statutes—the Trade Union Act (enforced in 1945, amended completely in 1949); the Labor Relations Adjustment Act (enforced in 1946); and the Labor Standards Act (enforced in 1947), which together are called the “Three Major Labor Acts,” were imported, in part, from the United States. For example, unfair labor practices under the Trade Union Act were a replica of the U.S. system.

Some provisions of the Employment Security Act governing the Japanese labor market (enforced in 1947) were also influenced by American labor law, which has, for example, introduced a license system for the fee-charged job placement business. However, the act had the character of a controlled-economy legislation formed prior to World War II under national general mobilization; it did not allow private organizations an intermediary role in the labor market, given that public employment services fulfilled this role. Fee-charged job-placement services were allowed only for the jobs that were not easily handled by the public employment service (11 jobs in the beginning, later extended to 29 jobs). Even job-placement services free of charge and commissioning of recruitment had substantially been restricted under the license system. Thus, those who supply workers for a third-party employer are engaged in the labor supply business prohibited under Article 44 of the Employment Security Act (except when trade unions provide the service free of charge [Article 45]). The labor supply business has been prohibited for the reason it could establish subordinate

relationships between a supplier and a worker, which could lead to forced labor and wage skimming, a situation that existed before World War II.

The Temporary Help Business Act (which was enacted in 1985, and took effect in 1986) greatly relaxed restrictions on the temporary-help business by excluding the prohibited labor supply clause.¹ It should be noted, however, that the prohibition (Article 44) has never been deleted. In other words, the temporary help business has been an exception to the provision.

On the contrary, in the United States only recently have a few states regulated the temporary-help business via a notification or registration system; no federal law yet controls the business. Later in this chapter, the differences between the United States and Japan in the temporary-help business will be described in greater detail. Regarding some other nonstandard arrangements, broad common points are evident in that neither country has ever strictly regulated part-time work and fixed-term contract work.

In the following sections, we introduce the current Japanese law on nonstandard work arrangements, describe the U.S. system, and focus on the regulations of so-called “temp-to-hire” arrangements to highlight the peculiarity of the Japanese law.

NONSTANDARD WORK ARRANGEMENTS IN JAPAN

Coverage of Labor Law

The Japanese labor law can be characterized by its wide coverage; labor law is applied to any establishment with one or more employee(s), with few exceptions.² The feature is grounded on “equality in the eye of the law,” which is quite different from the labor law systems of the United States and European countries.

Employers are obliged to bargain with any trade unions regardless of the number of members. When employers refuse to bargain with a trade union without good reason, it is deemed an unfair labor practice and subject to remedies by the Labor Relations Commission.³ It may appear a peculiarity of the Japanese law that it attaches greater impor-

tance to equality between trade unions than to the efficiency of collective bargaining.

As for employment law, the coverage varies depending on each act,⁴ and the law shall be applied to anyone who meets the requirements of each act, regardless of working hours or fixed-term employment contract. Exceptions include 1) employees whose working hours are less than the prescribed hours, for whom the days of annual paid leave are reduced proportionally according to their actual working hours, and 2) employees with a fixed-term employment contract, who are excluded from the system of child and family care leave under the Child and Family Care Leave Act.⁵

On the other hand, the Employees Pension Plan Act and the Employees Medical Insurance Act limit coverage by tenure or working hours, which causes lower coverage rates for part-time workers and temporary agency workers.⁶ However, we should note that under the universal pension and insurance system, even those who are ineligible for social insurance are supposed to join the National Pension Plan and National Medical Insurance plan, and the majority of part-time workers and temporary agency workers are covered as dependents.⁷

Companies have legal responsibilities as employers under employment and labor laws only when employees have an “employment relationship” with the companies. Under this “employment relationship,” the following applies:

- 1) The form of employment contract shall not be considered. The employment relationship shall be determined realistically. Thus, even though the contract says “contract with an independent contractor” or “contract of commission,” employment and labor laws may be applied when these workers are in reality employees. The Labor Standards Act⁸ offers a guideline to determine whether a person is an employee (Table 11.1). The guideline is similar to the American “right to control” test (see note 25).
- 2) Even though employers do not have an employment relationship with a person, they may be legally responsible as the employer. A recent Supreme Court decision expansively interpreted the definition of “employers,” who are liable for unfair labor practices under Article 7 of the Trade Union Act. The Supreme

Court ruled that when the client company was in a position to specifically command and control the basic working conditions of leased workers in the same way as a leasing company, the client company was assumed to be an employer under Article 7 of the Trade Union Act, and the employer cannot refuse to bargain collectively with any union without good reason (the case of *Asahi Broadcasting Co.*, February 28, 1995). Thus, the client companies in some cases must accept a request of collective bargaining from the trade unions of temporary agency workers even though those workers are not their employees.

As for temporary agency workers, client companies are liable for some stipulations of the Labor Standards Act, the Occupational Safety

Table 11.1 Test to Determine Employee Status under the Labor Standards Act, Japan

-
1. The employer's degree of control
 - A. Type of employer control
 - i. whether the individual is required to follow the employers instructions
 - ii. whether the employer gives control and direction on the work and method, or whether the individual is required to follow the employer's instructions or orders beyond the usual work
 - iii. the degree of restriction (where to work, when to work)
 - iv. whether the individual's work can be substituted
 - B. Compensation for work performed: whether the compensation is for the work performed for the working hours under the control by the employer
 2. Factors that reinforce the decision of an employee's status
 - A. Whether the employee is an independent contractor (i.e., whether the individual provides equipment or tools; the amount of compensation; other factors such as responsibility for any damage or use of his own trade name)
 - B. Degree of exclusiveness
 - i. whether the individual is restricted from working for other companies
 - ii. how much the individual depends on the compensation by the employer
 - iii. other factors such as hiring process, withholding tax, or application of labor insurance

SOURCE: The Ministry of Labor, "The Report on the Labor Standards Act Meeting" (1985).

and Health Act, and the Employment Opportunities Equality Act to the extent provided under the Temporary Help Business Act (Table 11.2). In 1997, the Equal Employment Opportunities Act added a major amendment. The provisions include 1) recruitment and hiring, 2) assignment and promotion, 3) fringe benefits, 4) compulsory retirement age, retirement, and dismissal. Different from Title VII in the United States, this act applies to any establishment regardless of size. It also applies to part-time workers and workers with fixed-term contracts, but temporary help agencies shall be liable as an employer for temporary agency workers.

Table 11.2 Employers' Responsibilities for Temporary Agency Workers, Japan

Hiring company (temporary agency)	Client company
The Labor Standards Act	
Equal treatment	Equal Treatment
Equal pay for men and women	
Prohibition of forced labor	Prohibition of forced labor
	Voting rights
Contract of employment	
Wages	Working hours, break, holidays
Agreement of overtime work	
Paid annual leave	
Maternity leave	Maternity leave
	Nursing hours
Compensation for accidents	
Rules of employment	
The Occupational Safety and Health Act	
Responsibilities to maintain:	Responsibilities to maintain:
Occupational safety and health at workplace	Occupational safety and health at workplace
Periodic basic health check	Appointment of safety manager Health check for specific occupations (e.g., VDT)
Act of Equal Employment Opportunities	
Prevention of sexual harassment	Prevention of sexual harassment

SOURCE: Authors' compilation from the Labor Standards Sct.

Employment and Labor Policy for Part-Time Workers—The Administration and the Judiciary Take the Lead

According to the Survey of Diversification of Work Styles conducted by the Ministry of Labor in September 1999, 27.5 percent of the total employed were nonstandard workers (including transferred workers).⁹ Of this percentage, the largest group was part-time workers (20.3 percent), followed by contract workers (2.3 percent), casual workers (1.8 percent), and temporary agency workers (1.1 percent).¹⁰ Thus, most nonstandard workers in Japan are part-time employees, and the number of temporary agency workers is only one-twentieth in comparison. The Survey of Part-Time Workers in 1995, conducted by the Ministry of Labor, also showed that approximately 40 percent of part-time workers were based on a fixed-term employment contract, and some consider part-time employment to be the typical nonstandard working style.

Table 11.3 shows the monthly average wage rate of nonstandard workers. The wage rate of part-time workers is relatively low, and the gap between part-time and regular workers is large. These are the biggest issues concerning part-time workers. Despite arguments over legislative solutions, no bill has passed to limit fixed-term contracts or determine comparable worth that would redress the differential wages

Table 11.3 Average Monthly Wages of Nonstandard Workers, United States and Japan

Type of employment	Yen ^a	US\$
Total	140,800	1,341
Contract workers	237,900	2,266
Casual workers	109,800	1,046
Part-time workers (short hours)	89,700	854
Part-time workers (others)	152,800	1,455
Temporary agency workers	209,300	1,993

NOTE: Part-time workers (short hours) are those who work fewer hours than regular full-time workers.

^a Calculation is based on the exchange rate US\$1 = 105 yen.

SOURCE: Ministry of Labor, “The Survey of Diversification of Work Styles” (1999).

between full-time and part-time workers; however, this does not mean that Japan has done nothing to solve the problem, and in fact it has come up with positive results by administrative and judicial efforts.

Employment security

The Civil Code of Japan stipulates that any employment contract without a fixed term can be terminated at any time, and it shall expire two weeks after a party requests termination of the employment contract (Article 627[1]). The code clearly states that employment contracts with no fixed term can be terminated with two weeks' notice,¹¹ and the Labor Standards Act provides, based on this article, that employers shall provide at least 30 days' prior notice.¹² On the other hand, the Japanese courts introduced the "principle of abuse of right to dismissal" after World War II, which is based on Article 1(3) of the Civil Code. According to judicial precedent, an employer's right to dismissal is null and void when a dismissal cannot be socially and generally approved without good reason.

On the other hand, part-time workers often enter into a fixed-term contract with their employer. Fixed-term contracts end with the expiration of the contract. It is possible to renew the contract for an extended term based on Article 14 of the Labor Standards Act, and refusal to renew the contract shall not be treated as a dismissal. Yet, it is notable that the administration issued a notice that employers should provide 30 days' prior notice to part-time workers when they choose not to renew the fixed-term contract, just as in cases of dismissal. For instance, a guideline issued by the Ministry of Labor concerning employment contracts with a fixed term (grounded in Article 8 of the Part-Time Work Act [which was enacted in June 1993, and took effect in December 1993]) states:

- a) If an employer has been hiring a part-time worker on a series of fixed-term contracts for a year or more, when the contract comes up for renewal the worker must be offered a contract for the maximum allowable duration, which is one year. The exception is for workers who are 60 years of age and older. For them, fixed-term contracts may last up to three years. If the employer is not renewing the contract, advance notice must be given to the worker.
- b) In the case where an employer has continuously employed a part-time worker for more than one year by renewing a fixed-term

employment contract, and has not renewed said contract, the employer shall endeavor to provide advance notice of at least thirty days to the part-time worker.¹³

Moreover, the courts have taken the position to apply the principle of the abuse of right to dismissal to the cases of refusal to renew fixed-term employment contracts when one of the following three conditions is met:

- 1) An employment contract has become identical to a contract with no set term because the fixed-term contract has been renewed repeatedly and routinely (the case of *Toshiba Yanagimachi Plant*, the Supreme Court, July 22, 1974);
- 2) An employment contract has been renewed with an expectation that the employment relationship would continue indefinitely, and the job was not a casual one (the case of *Hitachi Medico*, the Supreme Court, December 4, 1986);
- 3) An employment contract was concluded on the premise that it shall be renewed as a matter of course, with special conditions to continue the employment.

Indeed, hiring part-time workers or casual workers is comparatively simple, which differs from hiring regular employees; thus, the Japanese legal system has deemed it acceptable to treat regular workers differently since they enter into an employment contract with no set term and with an expectation of lifetime or long-term employment, as the Supreme Court affirmed (the case of *Hitachi Medico*, aforementioned).¹⁴ However, it cannot be construed that an employment contract shall automatically expire when the term expires, even for casual workers. Courts have argued that the status of nonstandard workers should not be unreasonably precarious, even though it might be less stable than that of regular employees.¹⁵

Differential wages

It is not the purpose of this section to analyze why part-time workers earn lower wages (Houseman and Osawa, this volume; Nagase, this volume). However, it should be noted that wages are not designed for each individual, but for a household, as well as taxation and social insurance in Japan. This system greatly influences the work style of

part-time employees, especially married women. Part-time workers within a certain range of annual income are exempted from income taxes and social insurance premiums, and they are also paid family allowances.¹⁶ As a result, some part-time workers try to limit their working hours from the beginning or take leaves at year's end to control their annual income. According to the Survey of Part-Time Workers in 1995, 37.6 percent of female part-time workers have adjusted their annual working hours not to exceed the tax-exempt line. This has resulted in a low valuation of part-time workers.¹⁷

Thus, in order to lessen the wage differences between part-time and full-time workers, the taxation and social insurance systems need to be redesigned. However, that redesign would be difficult because many part-time workers have taken their vested rights for granted. Further, the principle of "comparable worth" may not be broadly accepted in Japan, because traditionally wages have been calculated based on the age, tenure, and number of dependents of an employee rather than job evaluation. Nevertheless, Article 3 of the Part-Time Workers Act provided that employers shall endeavor to promote effective utilization of part-time workers, and the Ministry of Labor has also clarified its view on part-time employment (Table 11.4) from a perspective of equivalence with full-time employees (Meeting on Employment Management of Part-Time Workers, April 2000). Administrative measures have been taken to redress the differential wages between part-time and full-time workers, although these have met with some resistance.¹⁸

The Temporary Help Business Act—Emphasizing the Regulation of Business

The Temporary Help Business Act took effect in July 1986 (promulgated in July 1985). As mentioned earlier, the labor-supply business had been prohibited by the Employment Security Act until the temporary-help business was permitted as an exception when a temporary agency worker has an employment relationship with a temporary help agency, not with a client company.¹⁹ There are two types of temporary help businesses in Japan: one is fixed-term employment called general temporary help business (enrolled temp), and the other is a non-fixed-term employment type, in which all temporaries are regular

Table 11.4 Japan Ministry of Labor Guidelines on Part-Time Employment (for part-time workers who perform the same duties as full-time regular workers)

Treatment and working conditions:

- a. The determining method of treatment and working conditions for part-time workers should be same as that of full-time workers; different treatment must be justified with good reason.
- b. Employers should try to balance the working conditions between part-time and full-time workers.
- c. Part-time employees who perform the same duties as full-time employees should be treated equally in bonus and retirement pay.
- d. When there is a difference in treatment or working conditions between part-time employees and full-time employees, it is necessary to clarify the situations, explain the reasons, and prepare a grievance system to satisfy them.

Preparation for various working styles

It is important to establish a system for part-time workers to become full-time employees; to raise their morale, enhance their satisfaction, and improve their ability.

SOURCE: The Ministry of Labor. "A Report on Part-Time Workers" (2002).

workers of the agency, and is called specified temporary help business (regular temp). The former requires a license from the Ministry of Labor, while the latter only needs a registration. The act maintains its characteristics in emphasizing the regulation of the business.

At the time it took effect in 1986, only 13 jobs were permitted, which expanded to 26 jobs in 1996. For those substituting for child and family care leaves and workers older than 60, all jobs were allowed except port labor, construction, security guard, and manufacturing (older workers only), with a limitation of the working period to one year.

Article 2[4](a) of the Private Employment Agencies Convention (adopted by the General Meeting of the International Labor Organization in 1997 as Convention no. 181) prohibits private employment agencies, including temporary help agencies, only from "certain categories of workers or branches of economic activity." Japan was thus

compelled to adopt a “negative listing” for jobs that were not permitted, since it planned to ratify the convention (see Table 11.5).²⁰ Accordingly, the Amendment Act was enacted with two major features: a negative listing and limitations on the duration of temporary help service up to one year for newly permitted jobs (promulgated in July 1999, enforced in December 1999). One of the main features of the Amendment Act is this shift from a positive listing (of permitted jobs) to a negative listing. The jobs relating to manufacturing are not yet permitted, which is often in contention and is quite unusual compared with other advanced countries’ regulations.

Limitation on the duration of temporary work

The second major feature of the Amendment Act is the limitation on the duration of temporary work. Client companies may not receive the service of temporary help businesses for more than one year for the same job at the same establishment, with some exceptions.

Table 11.5 Jobs Not Permitted under Temporary Work in the Japanese Amendment Act

Jobs not permitted
1. Port labor
2. Construction
3. Security guard
4. Medical-related jobs (by a government ordinance, including doctors, dentists, nurses, pharmacists, dieticians, and X-ray technicians)
5. Production line work in manufacturing (for the time being), ^a provided that substitutes for maternity leave (up to 2 years) and family care leave (up to 1 year) shall not be applied in this case
6. Other jobs
a. relating to personnel management, and collective bargaining at the client’s worksite
b. attorneys, solicitors handling foreign laws, judicial scriveners, real estate appraisers, tax accountants, certified public accountants, patent attorneys, social insurance specialists, and public notaries

^a The Diet is currently reviewing an amendment to the Temporary Help Business Act that would lift such bans.

SOURCE: Authors’ compilation from the Temporary Help Business Act..

Previously, temporary work through an agency was never viewed as a temporary or casual work style in Japan. For instance, there was no limitation on the duration of temporary help contract jobs in sanitation, infrastructure maintenance, parking-lot management, or telemarketing. In addition, although the contract term for other jobs on the positive list was limited to one year or less, companies could renew the contract through the Ministry of Labor for up to three years.²¹ By more strictly limiting the duration of temporary help contracts, the amendment recognizes temporary work through an agency as a temporary or casual work style.

The purpose of the limitation is to prevent temporary agency workers from substituting for regular employees.²² Nonetheless, the limitation may not benefit temporary agency employees. Many agency temporaries prefer to work longer with the same client, as Table 11.6 shows. According to a survey by the Osaka Prefecture (1998), 64.2 percent of temporary agency workers prefer to continue to work as a temp. Thus, some argue that the Amendment Act does not meet this desire of temporaries.²³

NONSTANDARD WORK ARRANGEMENTS IN THE UNITED STATES

The U.S. labor market is widely viewed as “flexible” and “dynamic” and it appears that the recent economic boom has been supported with nonstandard work arrangements. It may be true that employers can use the workforce effectively and efficiently with less cost under nonstandard work arrangements. On the other hand, some concerns have been expressed over the rights of nonstandard workers. We will discuss the legal issues in nonstandard work arrangements in the United States, focusing particularly on independent contractors, temporary agencies, and leased employees.²⁴

Independent Contractors

Workers can be classified in one of two basic legal categories: employees or independent contractors. Such distinction is crucial

because an employee is protected under employment and labor laws and an independent contractor is not. Employees are covered under the Fair Labor Standards Act (FLSA), Title VII, and other antidiscrimination laws, the National Labor Relations Act (NLRA), the Family Medical Leave Act (FMLA), unemployment insurance laws, and workers compensation laws. Corporations, therefore, must undertake responsibilities and liabilities as an employer, and they are obliged to obey these laws whenever they hire regular employees. Some employers prefer hiring independent contractors to employees when they need people with expertise or technique for specialized projects or when they need flexibility in hiring. However, some employers use independent contractors to avoid paying taxes, avoid paying workers benefits, or to circumvent other labor regulations.

It is not easy to determine whether a worker is an employee or independent contractor, and employers often misclassify some of their employees as independent contractors. Courts and agencies are trying to distinguish the two by using various tests such as the common law test,²⁵ the Internal Revenue Service (IRS) test,²⁶ or the economic realities test.²⁷ See Table 11.7 for the tests applied under various statutes. In a recent case in U.S. District Court for the Southern District of New York (*S.D.N.Y. 98 Civ. 7589*), the U.S. Department of Labor sued Time Warner in October 1998 for allegedly misclassifying hundreds of

Table 11.6 Japanese Worker Preference on Length of Temporary Employment (%)

	Regular temp (Specified temporary help business)	Enrolled temp (General temporary help business)	Total temp (%)
1 year or less	10.3	27.8	21.1
3 months or less	1.3	1.2	1.2
3–6 months	1.9	7.8	5.7
6+ months	7.1	18.8	14.1
Longer than 1 year	76.9	62.9	68.2
1–2 years	14.1	26.1	21.3
2–3 years	9.0	13.9	11.9
3+ years	53.8	22.9	35.0
Other or n/a	12.8	9.4	10.7

SOURCE: Osaka Prefecture, “Report of Temporary Work Business and Working Conditions of Temporary Workers” (1998).

full-time employees as temporaries or independent contractors and thereby denying them health insurance and pension benefits. The government sought a court order appointing an independent fiduciary to audit Time Inc., and identify all employees who were potentially misclassified and denied the opportunity to participate in nine benefit plans, including health, savings, and stock ownership programs. The Secretary of Labor stated in a press release that “employers must deliver promised benefits to all eligible employees, and we believe some misclassified Time Inc. employees did not receive benefits they were entitled to” (U.S. Department of Labor 1998). The implications

Table 11.7 Tests Used to Distinguish an Employee from an Independent Contractor, United States

Statute	Test used to determine employee status	Potential liability for mischaracterization
Federal taxes	IRS control test	Liability for unpaid taxes Penalty Interest
Fair Labor Standards Act (covers overtime, minimum wages)	Economic realities test	Liability for unpaid overtime or minimum wage Liquidated damages Fines Criminal sanctions
Federal Employment Discrimination Statutes (Title VII, ADEA, ADA)	Economic realities test (sometimes economic realities combined with common law/IRS control test)	Back pay Front pay Equitable relief Attorney's fees
National Labor Relations Act	Common law; IRS control test	Reinstatement Back pay New bargaining unit election and expenses Cease and desist orders; other equitable relief
Employee Retirement Income Security Act (covers employee pension, welfare benefits)	Common law; IRS control test	Liability for benefits not received Equitable relief Attorney's fees and costs

NOTE: See notes 25 and 27 for description of IRS control test and economic realities test.

SOURCE: Authors' compilation based on the Internal Revenue Code; the Fair Labor Standards Act; the Civil Rights Act of 1964; the Age Discrimination in Employment Act of 1967; the Americans with Disabilities Act of 1990; the National Labor Relations Act; and the Employment Retirement Income Security Act of 1974.

of the Labor Department's action are far-reaching for the growing practice of nonstandard work arrangements in the United States (Lurie 1999). Because of the high visibility of the contestants, it is likely to focus public attention and the attention of Congress on the nagging issue of worker misclassification.

In another case, *Vizcaino vs. Microsoft Corp.*,²⁸ the Ninth U.S. Circuit Court of Appeals ruled that Microsoft Corp. could not exclude freelance workers, hired before 1990, from its employee benefit plans (including the stock purchase plan and savings purchase plan), even though the company had called them "independent contractors," and even though the workers had signed contracts that specifically stated that the workers were independent contractors (freelancers) and that they would not be provided with employee benefits. In 1989 and 1990, the IRS examined Microsoft's employment records and concluded that Microsoft's freelancers were not independent contractors, but employees for federal withholding and employment tax purposes. Microsoft was required to pay millions of dollars in back taxes, penalties, and overtime pay to the misclassified workers. After learning of the IRS rulings, the plaintiffs sought various benefits, including those under the company's savings purchase plan and the employee stock purchase plan. Although the federal district court in Washington State granted summary judgment for Microsoft, on the appeal, the U.S. Circuit Court twice overturned the judgment of the district court and held that the workers were entitled to the benefits. This favors some temporary agency workers employed by temporary help agencies. Microsoft currently has agreements requiring that temporary agency workers agree that Microsoft will not provide benefits regardless of how their legal status may be characterized, and they expressly waive any right to benefits attributable to services performed after signing the agreement.²⁹ Moreover, under a new policy, Microsoft will do business only with staffing firms providing a certain level of employee benefits to temporaries.³⁰ In December 2000, Microsoft agreed to pay \$96.9 million to settle the case (American Staffing Association 2000).

These cases suggest to employers that using independent contractors or temporary workers could cost them a large sum of money if the workers file a suit against them for misclassification. Thus, just like Microsoft, employers using temporary agency workers ensure that

temporary help agencies take responsibility for the benefits of the workers.³¹

Temporary Agency Workers

More than 2 million temporary agency workers are currently employed in the United States. Many employers of all sizes increasingly rely on temporary agency workers to fill staffing needs, reduce employment costs, escape legal liabilities, fill in for absent employees, or to accommodate a seasonal or temporary necessity in workload (see Houseman and Osawa, this volume; and Carré, this volume). From a worker's perspective, temporary work is beneficial in gaining work experience, accessing training, or maximizing their employability. Irrespective of company or worker interests, many legal issues surround their relationships. We now examine some of the main concerns.

Joint employer relationship

Joint employment liability is emerging as an important area of concern for employers who use temporary agency workers. The key issue for temporary workers is to determine which parties are responsible for ensuring that they are granted the benefits and protection to which they are entitled, and which parties are responsible for remedying violations of those rights. There are two potentially responsible parties, the host employer and the temporary help agency. In many cases, more than one party will supervise or control various aspects of the individual's work or pay. Treatment of the "joint employer" relationship differs substantially among the various employment and labor statutes.

FLSA

Under the Fair Labor Standards Act (FLSA), the term *employer* is expansive. The Department of Labor (DOL) has issued regulations that a determination of joint employment "depends upon all the facts in the particular case," but where there is an "arrangement between the employers to share the employee's services," a joint employment will generally be found.³² For temporary agency workers, temporary help agencies usually have primary responsibility for keeping records on hours worked and for paying overtime. The DOL, however, held that temporary workers assigned to work for various clients were typically

employed jointly by the temporary help agency and its clients, and clients may be held jointly responsible for overtime and minimum wage obligations (U.S. Department of Labor 1968). According to case law, the nature and structure of the employment relationship are the keys in determining whether the economic realities are such that a joint employment relationship should be found.³³

Antidiscrimination laws

A client company of temporary help agencies can be held liable for violations of Title VII of the Civil Rights Act of 1964. At least one court has ruled that the temporary agency worker shall be an employee of both the temporary help firm and the client should the employer–employee relationship be substantial enough to support a Title VII claim against the client, particularly when the employee is subject to the direction of the client in his or her work assignments, hours of service, and other typical aspects of an employer–employee relationship.³⁴

The Americans with Disabilities Act (ADA) has specific provisions dealing with the obligations of staffing contractors and their clients.³⁵ Although these duties are not specifically expressed in terms of joint employment, clients should assume that their legal obligations are similar to those arising under Title VII.

FMLA

The Family and Medical Leave Act (FMLA) states that where two or more businesses exercise some control over the work or working conditions of an employee, the businesses may be joint employers under FMLA. The FMLA applies to employers with 50 or more employees per day for 20 or more weeks in the current or preceding calendar year. For individual employees to be eligible for FMLA leave, they must have worked at least 1,250 hours in the preceding 12 months. To comply with the FMLA, workers jointly employed by two employers must be counted by both employers, whether or not maintained on one of the employer's payrolls. Thus, an employer who employs 15 workers from a staffing service and 40 of its own permanent workers is covered by the FMLA. The employer, however, is only responsible for providing FMLA leave to its 40 permanent employees. This means that only the primary employer is responsible for giving

required notices to its employees, providing leave, and maintaining health benefits during leave. Temporary help agencies generally are the primary employers for their temporary workers (29 C.F.R. §825.106 (1993).

OSH Act and OSHA

The federal Occupational Safety and Health Act (OSH Act) and state workplace safety laws require employers to maintain a safe and healthy workplace. Offices of the Occupational Safety and Health Administration (OSHA) have been advised that when temporary agency workers are used, the party in direct control of the workplace and the actions of the employees should be cited.³⁶ Under these determinations, a temporary help agency generally will be cited only if necessary to correct the violation or if it knew or should have known of an unsafe condition (Lenz 1997).

Employee benefit plans

The federal and state laws (except those of Hawaii) do not require employers to provide any health or pension benefits. The Employee Retirement Income and Security Act (ERISA) states, however, that an employer who offers a pension plan for any of its employees must cover 70 percent of all non-highly-compensated individuals who work 1,000 or more hours in a year (1,000 hour rules) to qualify for preferential tax treatment. The rule applies to the direct employers. Thus, where temporary help agencies offer any pension plans for employees, those who meet the qualifications mentioned above should be able to participate in such plans.³⁷

Under the Internal Revenue Code, leased employees³⁸ can be treated as the recipient's employees. Article 414(n) of the code defines a leased employee as any person furnishing services to a recipient if the following conditions are met: the person's services are performed under an agreement between the recipient employer and the leasing organization; the person's services are performed under the primary direction and control of the recipient; and the person has performed services on a substantially full-time basis for one year.

Under IRS guidance, this test is met if during a 12-month period one of the following conditions is met: The employee performs at least

1,500 hours of service for the client (or related entities), or the employee performs a number of hours of service for the client (or related entities) that is equal to at least 75 percent of the average number of hours customarily worked by the client's own employees performing similar services.

There is an exception to the rule that leased employees are considered employees of the recipient.³⁹ Unless the exception applies, the recipient must count its leased employees as employees when determining whether its own tax-qualified plans satisfy the tax law requirements.

Labor law

A temporary help agency and its client may be considered joint employers for purposes of unfair labor practice cases. The key to determining whether the two parties are joint employers is whether the client is substantially involved in determining the terms and conditions of employment of the temporary help company's employees.⁴⁰ In such cases, clients may have joint employer obligations with respect to a temporary help agency's employees.

The National Labor Relations Board (NLRB) and a federal court have held that where there is a sufficient connection between temporary agency workers and the client, the temporary agency workers may be included in the client's collective bargaining unit.⁴¹ Reviewing the case law, for temporary agency workers to be included in the client's bargaining unit, they must clear three hurdles:⁴² 1) the temporary help agency and its client are found to be joint employers; 2) the temporary agency workers and the client's full-time employees have sufficient "community of interest"; and 3) all joint employers have expressly conferred on a joint bargaining agent the power to bind them in negotiations (the consent principle).

As a practical matter, satisfying joint-employer status in the context of supplier and user companies is not difficult. Under NLRB case law, employers are joint if they "share or co-determine matters governing essential terms and conditions of employment."⁴³ If two employers have the authority to affect matters of the temporary workers, such as hiring, firing, discipline, supervision, and direction, then they are joint employers. If joint-employer status exists, the board will decide

whether the temporary agency workers share a community of interest with the client company's regular employees. Community of interest means there is a "mutuality of interests" in wages, hours, and working conditions. However, if the temporary employees are performing the same work as the employees of the user company and if they interact with one another and share facilities such as break rooms, parking lots, and restrooms, then more likely than not the board will find a community of interest and will grant representational rights.⁴⁴

A community of interest also applies in determining whether temporary agency workers who have been hired directly by an employer without the involvement of a supplier company or an agency are eligible for inclusion in a bargaining unit. In such situations, temporary employees who are employed as of the eligibility date for a union election, but whose tenure remains uncertain, can vote if they otherwise share a community of interest with eligible employees. To make this determination, the NLRB considers two factors: a reasonable expectation of further employment and, more important, a contract expiration date. Generally, if temporary workers do not have a reasonable expectation of further employment or their job is to end on a "certain date," they are ineligible to vote.⁴⁵

The NLRB held in August 2000 that employees obtained from a labor supplier may be included in the same bargaining unit as the permanent employees of the employer to which they are assigned when the supplied employees are jointly employed by both employers.⁴⁶ The board overruled *Lee Hospital*,⁴⁷ which held that bargaining units including jointly employed employees together with the employees of the user employer are multiemployer bargaining units and require the consent of the employers. When combined units are employer units under the statute, the board will apply its traditional community of interest analysis to determine their appropriateness on a case-by-case basis.

Employee Leasing

The employee leasing business emerged during the 1970s and has grown since (KRA Corporation 1996). Employee leasing firms are neither temporary help services nor payroll services. Employee leasing firms provide work arrangements that help small business cut human

resource management costs.⁴⁸ According to the National Association of Professional Employer Organizations (NAPEO), professional employer organizations assume responsibility and liability for the business of employment by establishing an employment relationship with the worker and thereby enabling the client to focus on the business of business.⁴⁹ More specifically, clients fire all employees (or most of them), put them on the payroll of an employee leasing firm, and then lease the employees back to the same workplaces (Willey 1993). Employees who are leased back to the client's worksite experience no change in their jobs because they work for the same employer, under the same boss, at the same workplaces, and with the same pay. The only difference is that they are paid by the employing leasing firm, not the client employer.

Some employers had used employee leasing arrangements to circumvent pension laws, which caused a major amendment to tax law.⁵⁰ Today, some employers use the arrangements to control rising benefit costs and to avoid navigating the increasing complexity of government regulation and reporting requirements. With the employee leasing arrangement, employers need not stay informed about regulatory and reporting changes or maintain the staff to complete paperwork.

There is no federal law or definition concerning employee leasing. Many states, however, regulate the business, either through state statutes that require general licensing or registration of employee leasing organizations, or state regulations that deal specifically with Workers' Compensation and unemployment insurance.⁵¹ Fourteen states have enacted licensing statutes, three states have registration statutes, 24 states have workers' compensation statutes, and 31 states have unemployment insurance statutes (Fujikawa 1999).

The term "employee leasing" is misleading when used as a generic term to describe all forms of service arrangements involving the furnishing of labor.⁵² At the same time, it is not very easy to distinguish the employee leasing business from the temporary help business. In practice, however, it is apparent that the employee leasing business is quite distinct. Leased employees work for only one client, while temporary agency workers work for various clients; leased employees work for a much longer period of time, while temporary agency workers usually work for shorter periods (Hammond 1994).

The primary advantage of using a leasing arrangement is that the employers' burdens can be alleviated because leasing firms assume legal and administrative liabilities as the employer of leased employees who work for their clients (Houseman 1999). Employee leasing firms become joint employers with their clients in most cases (Fujikawa 1998). Thus, leasing firms are subject to the joint employer doctrine.

Part-Time Workers

It is often beneficial for companies to use nonstandard work arrangements to reduce employment costs and provide flexibility in the competitive global marketplace. Many workers also enjoy these arrangements given the flexibility to adjust work to their daily lives and needs.

On the other hand, some workers have faced difficulties with non-standard employment. For example, some receive lower wages than regular employees, and no medical insurance or other benefits (see Houseman and Osawa, in this volume). According to the Bureau of Labor Statistics report, *Contingent and Alternative Employment Arrangements*, published in February 1999, only 41 percent of temporary agency workers were provided health insurance, compared with 82.8 percent of regular employees, 73.3 percent of independent contractors, 79.9 percent of contract company workers, and 67.3 percent of on-call workers. This is one of the biggest issues facing nonstandard workers in the United States.

Another area of concern is the legal treatment of part-time employees.⁵³ Generally speaking, state and federal laws make no differentiation between a full-time and part-time employee. For instance, if a company has more than 15 employees, it is required to follow a range of antidiscrimination laws. However, the current laws do not require companies to provide fringe benefits, such as health insurance, to part-time workers, even if they provide them to full-time employees. According to a Hewitt Associates survey of 350 large companies conducted in 1997,⁵⁴ 78 percent of respondents provided part-time workers with health and dental coverage, compared with 73 percent in 1995. The survey also found that 91 percent of the companies offered part-time workers paid vacation days, 77 percent offered sick days, and 57 percent provided short- and long-term disability coverage. It seems

that when the economy is strong, part-time workers gain more benefits at large companies.

FEATURES OF JAPANESE TEMP-TO-HIRE ARRANGEMENTS

In December 2000, one year from the enactment of the Amendment Act in Japan, it became permissible to arrange so-called “temp to hire positions.” Such arrangements entail sending temporary agency employees to client companies with an expectation that they will be hired by the client companies after they work as a temporary for several months. It is similar to temp-to-permanent or temp-to-hire arrangements in the United States and Europe.

The Japanese version of temp-to-hire arrangements, however, has unique regulations. Temporary help agencies are not allowed to perform job placement services for temporary agency workers during their tenure as a temporary employee. The current situation in Japan and the lifting of the ban on the Japanese version of temp-to-hire arrangements reveals the peculiarity of the Japanese regulations, which differ from those in the United States.

Lifting the Ban on Temp-to-Hire Arrangements in Japan

Temp-to-hire arrangements have been prohibited in Japan even after the Temporary Help Business Act took effect in July 1986 because the labor supply business was prohibited by the Employment Security Act (enforced in 1947). Under Article 4(6) of the Employment Security Act, the labor supply business is defined as having employees under the direction and orders of another person based on a supply contract. However, the Temporary Help Business Act specifically exempts this industry from the prohibition of labor supply. Under Article 2(1) of the Temporary Help Business Act the temporary help industry is defined as providing workers employed by one person to another person under the direction of the latter, while maintaining their employment relationship with the former; by this definition, the tempo-

rary help industry excludes cases where the client firm makes an agreement with an agency to hire workers supplied by the agency.

It is possible for a subordinate relationship between the worker and the supplier to exist in the labor supply business when the supplier provides workers for another person. One aim of the Employment Security Act is to prevent forced labor or wage skimming. The Temporary Help Business Act allowed for temporary employment agencies, with a condition that such agencies would be responsible as an employer for temporary agency workers based on an employment contract. The act separated this new business from the prohibited labor supply business. On the other hand, Article 2(1) of the Temporary Help Business Act stipulates that cases in which a client contracts with an agency to employ temporary agency workers shall be deemed a labor supply business and prohibited under Article 4(6) of the Employment Security Act.

The intention of this prohibition is to prevent duplicate employment relationships in the labor supply business, which would make the relationship ambiguous. Informally it was also intended to exclude *shukko* (workers transferred to another company) from the definition of the temporary employment business because *shukko* had been popularly used as a personnel management tool by many corporations. *Shukko* could be deemed a labor supply business, but it is not construed to violate Article 4(4) of the Employment Security Act when it is not done as a business.

Temp-to-hire arrangements by temporary employment agencies, on the contrary, are different from *shukko* and could be deemed a prohibited labor supply business. Thus, to receive both a temporary help business license and job placement business license, a requirement needed to be met by a notice from the Ministry of Labor that an agency did not use the temporary employment business as a means to find jobs for job seekers. This requirement was considered as a basis to ban temp-to-hire arrangements by agencies.

It should be noted that controls had been placed on temporary help agencies and job-placement agencies until the deregulation of the fee-charged job-placement business in April 1997; thus, prior to this time, there was no room for temporary employment agencies to perform job placement in any case. In December 1999, the scope of the jobs arranged by fee-based job-placement agencies and temporary employ-

ment agencies was liberalized with an amendment to the Employment Security Act and the Amendment Act. The acts dramatically expanded the opportunities for any agency to perform job placement for temporary agency employees. Resistance of trade unions and other organizations, however, deferred the lifting of the ban of temp-to-hire arrangements for one year.

Current Regulations on Temp-to-Hire Arrangements in Japan

The temp-to-hire arrangement in Japan is unique in that it is allowed not based on amendments of the Employment Security Act or Temporary Help Business Act, but on amendment of the aforementioned notice from the Ministry of Labor. In other words, the arrangement is allowed only when several requirements are met. One of the requirements is that agencies must offer job placement for temporary agency workers in agreement with the temps and clients, and with confirmation of proper working conditions when they complete the term of temporary help service. Thus, agencies are not allowed to perform job placement until the contract for temporary help service has been completed.

More specifically, clients may not interview temporary agency workers or request résumés until the contract has expired. Under Article 4(6) of the Employment Security Act, job placement is not allowed while the temporary help service contract is in effect because the article deemed such an arrangement to be the (prohibited) labor supply business, not a temporary employment business.⁵⁵ Thus, temp-to-hire arrangements in Japan are only another type of temporary employment service providing job placement after the contract ends.

Although to prohibit job placement during temporary employment service might hinder the smooth operation of the job-placement businesses (as some criticize), it would be very difficult to lift the ban on the labor supply business because it would deprive trade unions of their privilege to provide the labor supply business (trade unions are allowed in this business as an exception to Article 44 of the Employment Security Act).

In Japan, when enactment of a new law or amendment is considered, a committee composed of the government, trade unions, and employers discusses the issues. If either trade unions or employers are

opposed to such enactment or amendment, enactment does not proceed. It can be inferred this is the reason why change does not come easily.

CONCLUSION

The structures and approaches to regulating nonstandard work arrangements in staffing agencies are markedly different in Japan and the United States. Japan has established a statute with the aim of controlling staffing businesses and protecting the rights of temporary agency workers, whereas the United States has relied on existing labor and employment laws and court decisions rather than enacting specific regulations. Japan also limits the occupations and jobs handled by temporary staffing agencies, whereas the United States allows agencies to handle all occupations and jobs. Further, with the Temporary Help Business Act and related ordinances, Japan explicitly limits the contract term of temporary employment so that temporary agency workers may not replace regular employees of client firms, while the United States does not limit the term.

When comparing the laws of Japan and the United States, the Japanese labor and employment laws appear stricter in terms of the entry control of staffing agencies. This may be due to the distinctive histories in labor market developments. Before World War II, unscrupulous labor brokers were rampant in Japan and exploited a great number of workers. Thus, the image of labor intermediaries was quite negative. This image later led to the prohibition of the labor supply business under the Employment Security Act of 1947. At the same time, the lifetime employment system evolved and became widespread after World War II, Japanese industrial relations and labor policies focused on job security and seniority-based wages for full-time workers, and temporary staffing agencies were not relevant to this focus.

Concerns arose in government and union circles that liberalization of the labor supply business would undermine the job security of full-time workers (who could be replaced by temporary agency workers), reduce the bargaining power of labor, and as a result undermine the Japanese employment system. Thus, in post-World War II Japan, regu-

lation of the labor supply business was tight and, until the mid 1980s, the numbers and job categories of temporary agency workers were limited.

On the other hand, the United States has had a less regulated and more flexible labor market for nonstandard employment. A great variety of staffing businesses exist and they have extended their operations to other countries. In a sense, the emergence of these new businesses has helped the economy to expand while lowering the unemployment rate, but not without controversy over some aspects of this growing category of workers.

Different historical backgrounds and employment practices explain some of the differences in the scale and patterns of growth in nonstandard employment. However, similar economic pressures influenced the Japanese labor market to loosen restrictions on this form of employment. Intensified global competition and stronger pressure to reduce labor costs in Japanese firms forced the government to significantly liberalize the labor supply business and open the field for staffing agencies.

Currently, policymakers are considering further deregulation of the labor supply business, such as the duration that temporary agency workers can be hired, the maximum fees companies may charge, and, most important, revision of the Employment Security law as it affects and constrains the labor supply business. Clearly, the trend in Japan is toward greater deregulation as firms try to trim labor costs and become more competitive. Thus, a surge in the number of temporary agency workers is expected.

Notes

1. The Temporary Help Business Act does not recognize as legitimate “temporary help business” situations in which agency workers are hired by the client companies. Thus, placement services are still prohibited under Article 44.
2. The Labor Standards Act provides a few exceptions. For example, employers who employ fewer than 10 employees shall not be obliged to draw up rules of employment (Article 89), and the 40 working hour rule shall not be applied to these small enterprises in commercial and service businesses (Article 40). On the other hand, neither the Trade Union Act, the Equal Employment Opportunities Act, nor the Child and Family Care Leave Act provide exceptions for the size of businesses.

3. Unlike the U.S. majority representation system, small membership shall not be construed as just cause for refusal to bargain. Only employers are obliged to bargain with unions. The Trade Union Act in Japan does not require trade unions to bargain with employers as the National Labor Relations Act does in the United States.
4. For instance, because of the different definitions of an “employee” baseball players are deemed employees under the Trade Union Act but not under the Labor Standards Act. While the Trade Union Act defines an *employee* as “an individual who makes a living depending upon a salary or wages,” the Labor Standards Act specifies an employee as “an individual who is employed by a company or an office, and paid wages.” Based on this definition, baseball players are usually not deemed employees.
5. More specifically, 1) while regular workers who have worked for six months or longer are entitled to 10 days of paid annual leave, and those who have worked for six years and six months are entitled to 20 days, part-time workers who work for four days a week are entitled to seven days for the former employment period, 15 days for the latter employment period (Article 39 of the Labor Standards Act); and 2) workers with a fixed-term employment contract are eligible for maternity leave under the Labor Standards Act. Employers are not obliged to pay wages to workers on maternity leave, the Employees Medical Insurance Act (Article 50, 60 percent of wages) and Unemployment Insurance Act (Article 61[4], 25 percent of wages at present, 40 percent of wages after 2001) provide a certain level of income security.
6. The Employees Pension Plan and the Employees Medical Insurance shall not be applied to workers who are employed with a fixed-term contract shorter than two months and whose working hours are less than 75 percent of those of regular workers. No unemployment insurance shall be applied to workers who work less than 20 hours and who expect to work less than one year.
7. Dependents include those who are a member in the same household as the insured, and who earn less than US\$10,833 annually (1,300,000 yen, US\$1 = 120). Dependents are exempted from the insurance premiums, which may result in lower wages for part-time workers. Moreover, dependents whose annual income is less than US\$8,583 (1,030,000 yen) are exempted from income tax liabilities, and many companies provide family allowances to workers with dependents if they satisfy this requirement.
8. The Labor Standards Act of Japan has 13 chapters whose provisions cover a wider range than the Fair Labor Standards Act of the United States.
9. In most cases, transfers involve a parent company sending its employees to its subsidiary or affiliated companies for the purpose of technical training, restructuring, and so forth. The working conditions of transferred workers are usually unchanged; thus, it is not appropriate to discuss this issue here. Further, the Temporary Help Business Act excludes transfer of workers from the temporary employment business under Article 2.

10. According to the survey, contract workers are those who are employed with a fixed-term contract to be assigned to a specialized job, and casual workers are those who are employed casually or daily with a fixed term of one month or shorter.
11. To terminate a contract with a fixed-term employee could be deemed a breach of contract, and it shall be allowed only when there is an unavoidable reason.
12. The Labor Standards Act prohibits unequal treatment or dismissal by reason of the nationality, creed, or social status of any worker, dismissal during a period of rest for medical treatment with respect to injuries or illnesses suffered in the course of duty or within 30 days thereafter, and dismissal of women during a period of rest before and after childbirth in accordance with the provisions of Article 65 or within 30 days thereafter. The Trade Union Act and the Equal Employment Opportunities Act also have provisions on the ban of dismissal in certain cases. These provisions are applied equally to part-time workers and temporary agency workers.
13. The Ministry of Labor settled on a guideline regarding conclusion, renewal, and refusal of fixed-term employment contracts in December 2000. The guideline mentioned that this idea should be adopted in any fixed-term employment contract, and clarified the standards on renewal and refusal. It also ruled that employers should endeavor to notify workers of the reason for refusal to renew the contract.
14. More specifically, the decision said "it is not unreasonable not to renew the contract of casual workers when there was an unavoidable necessity to reduce personnel, and no way even to transfer the excess personnel to another establishment, accordingly the employer has no choice other than not renewing the contracts with casual workers without a voluntary resignation procedure of regular employees beforehand."
15. Some argue that because of this ruling, employers limit the number of contracts renewed and nonstandard workers do not expect a continuous employment relationship, which makes their status less stable.
16. See note 7.
17. Moreover, part-time workers who work 20–29 hours to be eligible for unemployment insurance must work more than 10 days per month in 12 consecutive months. Those who do not meet this requirement owing to adjustment of working days are ineligible for unemployment benefit.
18. A lower court has concluded that "female part-timers whose duties were very similar to those of female regular employees of the same establishment should be entitled to wages equivalent to at least 80 percent of the regular employees. The employer who had not paid that rate to the part-timers was liable and deemed to be operating against public interest or the principle of comparable worth. This decision has been disparaged by some labor law scholars as a repugnant idea to the Japanese custom. Consequently, the employer should pay the difference. (See *Maruko Keiho-ki, Nagano Dist. Court, Ueda Chapter, March 15, 1996.*)

19. The original purpose was to distinguish “transfers” from temporary work. Transfers are not construed as the labor supply business and so are not prohibited under Article 44 of the Employment Security Act. In contrast, it is usually deemed to be illegal for client companies to interview temporary agency workers in advance.
20. Japan ratified on July 28, 1999.
21. Although we use the term “temporary work or temporary help” for *Rodosha Haken*, it has traditionally been translated as “dispatched work.”
22. Article 40(2) of the Temporary Help Business Act clarifies that temporary jobs whose duration are not limited are those specified by a government ordinance as jobs that shall not threaten the sound employment stability and the chance to maximize employees’ ability for the entire tenure. Article 4 of the Government Ordinance for the Temporary Help Business Act specifies 26 jobs that were formerly listed on the positive list. It is considered harmless to substitute regular employees in these jobs.
23. For more details of the survey and analysis of the Amendment Act, see, Kojima and Fujikawa 2000.
24. We will not discuss the issues of part-time workers in the United States due to space limitations. In most states, part-time workers are defined as those who are employed in jobs of fewer than 40 hours per week. Compared with temporary agency or leased employees, there are few legal concerns about the employment of part-time workers because they are hired directly by their employers, and are often included in the same bargaining units as regular employees.
25. Also called the “right of control” test. It depends on the following 10 factors, which may indicate independent contractor status (Restatement 2d, Agency, §220 (1958)): 1) the degree of “employer” control over the details of the work; 2) whether the individual’s business is a distinct occupation or business; 3) whether the individual’s occupation usually is done without supervision; 4) whether a high level of skill is required by the occupation; 5) whether the worker provides the supplies, tools, and the place of work; 6) the length of time the services are provided; 7) method of payment, by the job rather than the hour or day; 8) whether the work is part of the regular business of the employer; 9) whether the parties believe they are creating an independent contractor relationship; and 10) whether the hiring entity is not in business. Of these criteria, the right to control the worker in the performance and manner of doing the work is the most decisive test (*Criminal Injuries Compensation Bd. v. Gould*, 331 A.2d 55, 74 (Md. 1975)).
26. The IRS is concerned with determining whether a worker is an independent contractor because employers are required to arrange for three types of employment taxes for employees. These are required under the Federal Insurance Contributions Act governing employer and employee contributions to the Social Security System, the Federal Unemployment Tax Act governing employer contributions to the unemployment fund, and the IRS rules governing employee personal income tax withholding. If the employer classifies independent contractors incorrectly, and the IRS concludes that a worker is in fact an employee, the employer may be liable for penalties as well as any unpaid taxes. An important element often

- present in the case law where the courts have found a worker to be an employee, not an independent contractor, is the ability of the employer to dictate not only the result but also the process (or methods) the worker uses to produce his or her result.
- 27. Also called the FLSA test. The FLSA governs the federal minimum wage and overtime pay obligations of many employers. If the U.S. Department of Labor determines that the workers are employees and not independent contractors, the employer may be subject to substantial penalties, including payment of unpaid overtime premiums to liquidated damages, fines of US\$10,000 and six months' imprisonment for willful violations. The "economic realities" test focuses on whether an individual is economically dependent on the business to which services are provided, thus establishing employee status, or whether the worker effectively is in business for himself or herself.
 - 28. *Vizcaino et al. v. Microsoft Corporation et al.*, 120F.3d 1006 (9th Cir. 1997), 97 F.3d 1187, 1189 (9th Cir. 1996). D.C. No. CV-93-00178-CRD2/13/98, 173 F.3d 713 (9th Cir. 1999), *Vizcaino v. Microsoft Corp.*, U.S., No.99-498, cert. denied 1/10/00.
 - 29. *NATSS Connection* for May 17, 1999.
 - 30. The benefits must include medical and dental insurance, at least half funded by the staffing firm, 13 days of paid leave, training opportunities valued at US\$500 per year, and a 401(k) or other retirement plan in which the staffing firm makes partial matching contributions (see *NATSS Connection* for April 12, 1999).
 - 31. Other problems may be involved such as Workers' Compensation benefits. For example, to obtain greater damages outside of Workers' Compensation benefits, a worker injured on the job may resist the Workers' Compensation Law prohibition of a direct cause of action against the employer for personal injury by claiming that he was not an employee but an independent contractor at the time of the incident.
 - 32. 29 C.F.R. § 791.2 (1961).
 - 33. *Brocks v. Superior Care*, 840 F.2d 1058 (2d Cir. 1988).
 - 34. *Amarnare v. Merrill Lynch*, 611 F. Supp. 344 (S.D.N.Y. 1984), *aff'd*, 770 F.wd 157 (2d Cir.1985).
 - 35. 42 U.S.C. §§ 12101 *et seq.*
 - 36. Memorandum to regional administrators from Richard P. Wilson, Deputy Director, Federal Compliance and State Programs, OSHA, Department of Labor (July 5, 1977).
 - 37. 29 C.F.R. § 2350-200b-1(a):1(b) (1992).
 - 38. "Leased employees" means not only employees hired by employee leasing companies, but also temporary agency workers who meet the requirements.
 - 39. There is an exception to the rule that leased employees are considered employees of the recipient. The exception applies if not more than 20 percent of the recipient's non-highly-compensated workforce consists of leased employees, and if the leased employees are covered by a safe harbor retirement plan with a guaranteed employer contribution rate of at least 10 percent of compensation. It must provide

- for immediate full vesting and for participation by all employees of the leasing organization for the plan year and each of the preceding four plan years.
40. *Boire v. Greyhound Corp.*, 376 U.S. 473 (1964).
 41. *NLRB v. Western Temporary Services*, 821 F.2d 1258 (7th Cir. 1987). In this case, the court found that the temporary help firm and its client both exercised substantial control over the employees and that both were involved in determining the essential terms and conditions of employment. Thus, the court found that Western and its client were joint employers. Western and its client argued that the temporary workers had insufficient “community of interest” with the client’s full-time workers to warrant including them in the bargaining unit. The court held, however, that the temporaries worked on a “fairly regular basis over a sufficient period of time and thus demonstrated a substantial interest in the unit’s wages, hours and conditions of employment.” Working an average of four hours per week over a six-month period was held to be “fairly regular.”
 42. See, for example., *Laerco Trans. & Warehouse*, 269 NLRB 324,325 (1984); *TLI Inc.*, 271 NLRB 798 (1984); and *Lee Hospital*, 300 NLRB 947 (1990).
 43. *NLRB v. Browning Ferris Industries*, 691 F.2d 1117, 1123 (3d Cir. 1982).
 44. *NLRB v. Western Temporary Services*, and *ibid*.
 45. *Ibid*.
 46. M.B. Sturgis, Inc. and Jeffboat Div., American Commercial Marine Service Co., 14-RC-11572, 9-UC-406; 331 NLRB No. 173 (2000).
 47. 300 NLRB 947 (1990).
 48. Minnesota Department of Economic Security (1997).
 49. See National Association of Professional Employer Organizations online: <<http://www.napeo.org/index-j.html>>.
 50. The Tax Equity and Fiscal Responsibility Act of 1982 provides that leased employees must be counted by the client as employees for the purposes of qualifying retirement plans and certain other fringe benefits if the workers have provided these services “on a substantially full-time basis for at least a year” and the client primarily controls or directs the work of the leased or temporary employees. See Houseman (1999).
 51. See note 37.
 52. See note 37.
 53. See, for details, Houseman and Osawa, this volume.
 54. A survey conducted by Hewitt Associates in 1997; accessed online at: <<http://was.hewitt.com/hewitt/resource/newsroom>>.
 55. In Japan, a client company is prohibited by administrative notice to interview a temporary agency worker before the contract begins. This is because such action might contravene the Employment Security Act prohibiting the labor supply business. The Amendment Act stipulates that client companies endeavor not to specify a temporary agency worker when concluding a contract of temporary help service, and a guideline also prohibits client companies from interviewing a temporary agency worker in advance or requesting his or her résumé as such actions would specify a temporary agency worker.

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