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INADVERTENT SUPPORT OF TRADITIONAL EMPLOYMENT PRACTICES: IMPEDIMENTS TO THE INTERNATIONALIZATION OF JAPANESE EMPLOYMENT LAW

Yoichiro Hamabe†

INTRODUCTION

The at-will employment system of the United States, which permits employers to hire employees during times of business expansion and lay them off during recessions, arguably promotes fair and free competition for workers and jobs, resulting in an efficient labor market. American companies generally seek to keep lean manufacturing lines and efficient distribution systems, goals that do not permit paying salaries to unnecessary workers. In Japan, on the other hand, business enterprises, in accordance with social norms, assume responsibility for “lifetime” employment—that is, long-term employment by a single firm, from hiring fresh out of college until retirement.

This responsibility to provide long-term job security tempers cost-cutting measures for Japanese enterprises and has a number of side effects, both good and bad. First, preserving the numerous job positions in established industries can preclude effective enforcement of antimonopoly policy in Japan. Second, regardless of changing economic conditions, Japanese companies feel compelled to retain male workers because typically they support their households; accordingly, a recession disproportionately harms the employment prospects of women. Furthermore, in order to benefit existing providers of employment, the Japanese government extends protection—such as exemptions from the

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Antimonopoly Law¹ and restrictions on large-scale retail stores²—even to ineffective or inefficient industries. Such protection has served a dual goal of nurturing and enriching established domestic industries while providing Japanese employees with job security.

Although Japanese tend to prefer resolving major social problems through private arrangements rather than through courts or attorneys,³ labor law has experienced unique growth in Japan in postwar years. Numerous serious disputes have come to trial, and court decisions have shaped the application of the law to a degree unusual in Japan. On the issue of job security, for example, Japanese courts have in essence circumscribed the legal authority of employers to hire and fire by imputing prevailing social expectations to the concepts of “reasonable” or “abusive” employer behavior. As a result, Japanese law has transformed social norms into self-perpetuating legal standards. This process, which I call “inadvertent support” of traditional practice, has shaped the lifetime employment system.

Japanese attorneys contributed to the development of case law protecting employees’ jobs. Some Japanese lawyers have enthusiastically pressed for legal resolution of employment and labor disputes as a method of implementing their own political agendas. Although the attorneys and their labor union clients did not prevail in all challenges to employment practices, the courts did develop special case law supporting the interests of workers,⁴ such as the doctrine of restrictions on discharge.⁵

However, over the past few years, a number of forces have applied pressure to lifetime employment and other traditional employment practices. Foremost among these pressures are the continuing recession in Japan, the international exchange of workers and information, and the harsh foreign criticism of Japanese employment practices as, for example, tolerating discrimination and distorting trade balances by encouraging overwork.

1. Shiteki Dokusen no Kinshi Oyobi Kōsei Torihiki no Kakuho ni Kansuru Hōritsu [Antimonopoly and Fair Trade Maintenance Act], Law No. 54 of 1947 [hereinafter Antimonopoly Law], art. 22 (activities exempt from the Antimonopoly Law), art. 24-2 (resale price maintenance contracts), art. 24-3 (depression cartels), and art. 24-4 (rationalization cartels). See also MITSUO MATSUSHITA, INTRODUCTION TO JAPANESE ANTIMONOPOLY LAW 88-92 (1990).

2. Daikibo Kouri Tenpo ni Okeru Kourigyō no Jigyō Katsudō no Chōsei ni Kansuru Hōritsu [Act Concerning Adjustment of Retail Business Activities of Large-Scale Retail Stores], Law No. 109 of 1978.

3. Jennifer Friesen, *Remade in Japan*, 83 MICH. L. REV. 982, 989 (1985) (citing Karl J. Duff, *Japanese and American Labor Law: Structural Similarities and Substantive Differences*, 9 EMPLOYEE REL. L.J. 629, 637 (1984)).

4. See, e.g., case cited *infra* notes 26 and 27 and accompanying text.

5. See *infra* part I.B.

This Article explores three evolving areas of law and custom in Japanese employment: the erosion of lifetime employment, the reduction of work hours, and the growing recognition of sex discrimination claims. Part I discusses the legal foundation for the lifetime employment standard and contrasts the incursions made by mandatory early retirement plans with Japanese courts' adherence to the doctrine of restrictions on discharge. Part II surveys recent statutory changes restricting work hours and increasing overtime wages and examines how courts and employers have effectively skirted them to maintain traditional practices. Finally, Part III briefly examines the status of sex discrimination in employment, contrasting the minimal effectiveness of antidiscrimination legislation and persisting sexist attitudes with recent court awards for sexual harassment claimants.

I. EROSION OF THE LIFETIME EMPLOYMENT SYSTEM

Japanese employment law is grounded in Article 27 of the Constitution of Japan,⁶ which has been interpreted as requiring the government to support a person's right to work and to set standards for wages, hours, rest periods, and other working conditions.⁷ The Diet (the Japanese parliament) has met this political obligation by fashioning labor and employment law after the principle set out in the Constitution. Japanese employment laws, including the Labor Standards Act,⁸ which is the most important statute governing working conditions, have functioned to preserve an employment structure in which male employees support their families by working in one company and its affiliates for nearly a lifetime.

A. THE CONCEPT OF LIFETIME EMPLOYMENT

A lifetime employment system does not literally exist throughout Japan. Rather, lifetime employment is an expectation shared by the Japanese employer and its employees, an expectation springing from common values of loyalty and social harmony. In Japan, loyalty is evidenced by low mobility of the work force (both labor and management) and active employer

6. Article 27 of the Japanese Constitution provides in relevant part: "All people shall have the right and the obligation to work. Standards for wages, hours, rest and other working conditions shall be fixed by law." *KENPO* [Constitution] art. 27 (Japan).

7. KAZUO SUGENO, *JAPANESE LABOR LAW* 17 (Leo Kanowitz trans., 1992).

8. *Rōdō Kijun Hō* [Labor Standards Act], Law No. 49 of 1947 [hereinafter *Labor Standards Act*]. This comprehensive statute includes regulations concerning wages and compensation, protection from discharge, working hours, rest periods, holidays, annual paid vacations, and company employment rules.

avoidance of unemployment; both quitting and lay-offs are all much less common than in the United States.⁹ Japanese companies promote employees on the basis of subjective criteria, such as company loyalty, seniority, and similar criteria unrelated to objective ability.¹⁰ Accordingly, Japanese employees generally rise in their company by remaining with the company for many years and by working long hours.¹¹

Customarily, employees stay with their company and its affiliates until reaching retirement age, particularly if they work in government agencies or large or medium-size companies. However, under the lifetime employment scheme, employees who wish to work beyond retirement possess job security only until their company's mandatory retirement age.¹² Retirement allowances or benefits serve as incentives for employees to remain working for a long time for the same employer, although they are, in fact, voluntary and discretionary rather than legally obligatory.¹³

Preferential income tax treatment for retirement benefits magnifies the importance of retirement allowances for Japanese employees. The longer an employee works for the same employer, the greater the tax exemption for his retirement pay, which is a one-time lump sum paid on retirement. In calculating how much of his retirement allowance is subject to tax, the Japanese retiree first subtracts either: (a) ¥400,000 multiplied by the number of years of employment, if the person worked twenty years or less for the employer; or (b) ¥8,000,000 (representing the first twenty years) plus ¥700,000 multiplied by the number of years of employment in excess of twenty years, if the person worked more than twenty years for the employer. Only half of

9. Marcia J. Cavens, *Japanese Labor Relations and Legal Implications of Their Possible Use in the United States*, 5 Nw. J. INT'L L. & BUS. 585, 594-99 (1983). See also Paul Lansing & Laura Palmer, *Sumitomo Shoji v. Avagliano: Sayonara to Japanese Employment Practices in Conflict with Title VII*, 28 St. Louis U. L.J. 153, 166-67 (1984).

10. Eileen M. Mullen, *Rotating Japanese Managers in American Subsidiaries of Japanese Firms: A Challenge for American Employment Discrimination Law*, 45 STAN. L. REV. 725, 751 (1993).

11. On the other hand, the United States sustains the worker's mobility and management flexibility that characterize the at-will employment system. Friesen, *supra* note 3, at 983. American businesses do not enjoy "fierce loyalty" among their corporate executives and technical personnel. Lansing & Palmer, *supra* note 9, at 167. Accordingly, American employees often achieve promotion by moving from one company to another.

12. See generally TADASHI HANAMI, *LABOR RELATIONS IN JAPAN TODAY*, 25-41 (1979). Cf. Non-regular employees, such as part-time, temporary, or fixed term employees make up a peripheral or flexible work force and possess inferior economic benefits and job security. SUGENO, *supra* note 7, at 65.

13. Kenichiro Nishimura, *Labor Law*, in 6 *Doing Bus. in Japan* pt. XII, ch. 1, § 1.03 [5] [a] [ii] (Zentaro Kitagawa ed., 1994).

the remaining amount is subject to income tax.¹⁴ For example, for a person who worked forty years for a company and received ¥30,000,000 (approximately US\$300,000 at ¥100 = US\$1) on retirement, ¥22,000,000 (US\$200,000) of the retirement allowance is tax-exempt and only half of the remaining amount, or ¥4,000,000 (US\$40,000), will be taxed. This special treatment, which does not exist in the U.S., gives Japanese employees a strong incentive to stay with one employer more than twenty years.

The foregoing three concepts—shared values of loyalty, seniority-based promotion, and preferential tax treatment for those who retire after long employment with a single employer—are all that constitute the so-called lifetime employment system in Japan. Not only does Japanese law not provide for lifetime employment, it also does not prevent a company from discharging employees on the basis of age. Unlike the U.S., which prohibits companies from imposing a mandatory retirement age under the Age Discrimination in Employment Act (“ADEA”),¹⁵ Japan permits companies to establish a mandatory retirement age through company rules¹⁶ or employment contract. A retirement age set forth in company employment rules or in an employment contract at the time a person is hired is deemed a valid method of ensuring that older people retire and enjoy life after a certain age.¹⁷

B. DOCTRINE OF RESTRICTIONS ON DISCHARGE

The lifetime employment system rests on an unwritten doctrine of restrictions on discharge. Certainly, an employment contract for an indefinite term may be terminated upon mutual agreement of the parties, or upon notice of rescission. The majority of Japanese legal commentators also endorse the principle

14. Shotokuzei Hō [Income Tax Law], Law No. 33 of 1965, art. 30, para. 2. See Vicki L. Beyer, *Taxation System*, in 1 Japan Bus. L. Guide (CCH) ¶ 24-340 (Apr. 23, 1994).

15. The 1986 amendments to the ADEA prohibit setting any mandatory retirement age. 29 U.S.C.A. §§ 621, 623(f)(2) (West 1985 & Supp. 1994). Before the amendments, employers could require retirement at age 70 or above.

16. Article 89 of the Labor Standards Act provides that an employer who employs ten or more workers continuously shall draw up Rules of Employment on matters pertaining to retirement, and if a retirement allowance is stipulated, the range of applicable workers, determination of whether to pay a retirement allowance, method of calculation and payment, and payment date shall be included. When the employer deems it necessary, he may make separate rules concerning wages, retirement allowance, safety and sanitation or accident compensation, and relief for injury and illness unrelated to work. Labor Standards Act, art. 89.

17. See SUGENO, *supra* note 7, at 391 (noting that a mandatory retirement age is universally adopted by Japanese firms).

that an employer has the right to discharge an employee when the discharge contravenes no statute.¹⁸

However, Japanese law contains a far-reaching prohibition against employers "abusing" their termination rights.¹⁹ Abuse of termination rights makes a termination void. Courts have identified abuse of termination rights in a broad variety of circumstances. The Japanese Supreme Court has held that even where cause for termination exists, a termination is void when it is unreasonable in light of the circumstances of the case and prevailing social norms.²⁰

For example, if an employee whose livelihood depends upon his salary is unproductive or incompetent, his employer may not discharge him unless the employer has already made efforts to provide productive work or further instruction or training.²¹ Under prevailing Japanese social values, it is considered unfair to fire an employee based solely on grounds of unproductivity or incompetence. Since the employer controls when and how an employee works for the company on the basis of the employer's own strategic concerns, prevailing social norms make the employer responsible for the result of an employee's placement.

18. Termination is specifically prohibited in certain instances. See Nishimura, *supra* note 13, § 1.03 [10] [b] [i]. For example, termination in retaliation against an employee who reports a violation of the Labor Standards Act or the Labor Safety and Health Act is specifically prohibited. Labor Standards Act, art. 104, para. 2; Rōdō Anzen Eisei Hō [Labor Safety and Hygiene Act], Law No. 57 of 1972, art. 97, para. 2. Termination for certain union activities is specifically prohibited. Rōdō Kumiai Hō [Labor Union Act], Law No. 174 of 1949, art. 7, para. 4. Also, the Labor Standards Act prescribes certain procedures for terminating employees:

When an employer wishes to terminate a worker, he must give at least 30 days advance notice. The employer who does not give 30 days notice in advance shall pay money equivalent to 30 days average wage or more. However, this provision does not apply when the continuance of the enterprise is made impossible by reason of some natural calamity or other inevitable cause, or when the employer terminates the worker by reason for which the worker is responsible.

2. The number of days of advance notice under the preceding paragraph may be reduced in case an employer pays the average wage for the number of the reduced days.

Labor Standards Act, art. 20.

19. Article 1 of the Japanese Civil Code states: "No abuse of rights is permissible." MINPŌ [Civil Code], art. 1, para. 3.

20. Judgment of Apr. 25, 1975, Saikōsai [Supreme Court], 29 Minshū 1; Nishimura, *supra* note 13, § 1.03 [10] [c] [iii]. See also SUGENO, *supra* note 7, at 402; Hiroshi Oda, *Labor Law*, in JAPANESE LAW 331 (1992).

21. E.g., HANAMI, *supra* note 12, at 31 (noting that "inefficient or lazy workers, rather than being dismissed, are assigned to unimportant jobs and not promoted"). Although the worker's incompetence, or the worker's lack or loss of skills or qualifications required for job performance, can be one factor in determining the reasonableness of discharge, a court will take into consideration every circumstance favoring the discharged employee in order to avoid excessively harsh results for the employee. SUGENO, *supra* note 7, at 402-03.

That is why Japanese companies rarely discharge incompetent employees, instead assigning them to unimportant jobs without promotion opportunities.²² Accordingly, any termination that contravenes the public policy of protecting employees' job security will likely be prohibited as an abuse of employer termination rights. In practice, discharge disputes almost always boil down to the issue of whether the employer had a justifiable cause to terminate a particular employee. When an employer who attempts to discharge an employee cannot demonstrate a justifiable cause for the discharge, the discharge is null and void and the employer must allow reinstatement and back pay.

Moreover, discharged employees have used what is called "provisional disposition" (*kari shobun*) to obtain reinstatement to their original positions and other relief, including monetary remedies.²³ Provisional, or temporary, disposition originated as an optional special proceeding for the purpose of securing temporary relief, in addition to and separate from a regular lawsuit.²⁴ Although this proceeding was designed for use in an emergency situation during or prior to a lawsuit, it can provide relatively quick relief for a discharged employee.²⁵ And that relief frequently leads to a fast, final resolution because often the parties resolve the dispute by settlement during the provisional disposition proceedings. In practice, provisional disposition is so important in termination disputes that it has become as critical as the principal lawsuit. Accordingly, Japanese employees may assert procedural as well as substantive protection against involuntary discharge.

In another example of social norms shaping employment law, Japanese courts appear to have determined that the special protections covering Japanese employees do not extend to foreigners working in Japan. In a 1969 landmark case involving an American manager employed by a branch of a New Jersey corporation in Japan, the Tokyo District Court held that American

22. Cavens, *supra* note 9, at 598 n.116.

23. Minji Hozen Hō [Civil Provisional Relief Act], Law No. 91 of 1991, art. 23, para. 2.

24. Article 23 of the Civil Provisional Relief Act requires a need to avoid "serious damages" or "urgent danger" in order to obtain a provisional disposition. *Id.* Since most employees, whose livelihoods depend upon their salaries, have such a need, it appears that *kari shobun* is more likely to be granted than the somewhat comparable temporary restraining orders of the U.S., which require "irreparable harm." See 2 Japan Bus. L. Guide (CCH) ¶ 81-420 (Aug. 20, 1993).

25. In fact, many employees seek a *kari shobun* simply for the purpose of obtaining a quicker resolution than that available through a regular lawsuit. In general, Japanese lawsuits consist of short hearings held once every one to three months, making for a slow, extended process. In contrast, in *kari shobun* proceedings, often two or three hearings are held per month.

workers were not protected under the doctrine of restrictions on discharge for employees in Japan, offering this explanation:²⁶

In Japan, the labor market is not fluid. Employers have had great advantages [over employees], and unity and negotiation power of labor unions have not been enough [to protect employees' interests]. In general, a pay scale based on seniority and large retirement allowances on the basis of long-term employment are widely adopted. As a result, discharged employees, regardless of age or sex, will suffer so severe damages [that they shall be given generous monetary relief to sustain their livelihood], because it is very difficult for them to immediately get another job with the same or better conditions including salary, title in the workplace and the calculation of retirement allowance. Therefore, [Japanese] courts would weigh the circumstances around the employees and the requirements for employers to operate the business and demarcate an appropriate line in Japanese society. Consequently, the freedom to discharge in general will be restricted substantially due to the above reasons. However, in this case, quite different from Japanese workers, the labor environment described above cannot apply to [American employees]. Accordingly, non-application of the doctrine of restrictions on discharge will not be contrary to the public order and good morals proscribed in Article 30 of Hōrei.²⁷

Because determining abuse in termination relies on imputed social norms, the lifetime employment system has been viewed as a kind of "law-in-custom."²⁸ Although the freedom to terminate employment contracts is extensively restricted in practice by case law, lifetime employment is not mandated by statute. Rather, courts have either purposefully or inadvertently applied the doctrine of restrictions on discharge to perpetuate the lifetime employment system and long-term employment relationships.

26. Judgment of May 14, 1969, Tōkyō Chisai [Tokyo District Court], 20 Kaminshū 5 (Japan).

27. *Id.* In this case, the American employee (defendant) argued that the employment contract should be governed by Japanese law, which has restrictions on termination of employment, but the court held that the laws of New York State governed the contract because the employment agreement was executed in New York. Article 33 (previously Article 30) of Hōrei provides, in part, "In the cases where the law of a foreign country is to govern and application of the provisions in such law is contrary to public order and good morals, such provisions shall not apply." Hōrei [Act Concerning the Application of Laws], Law No. 10 of 1898, art. 33 (current version at Law No. 27 of 1989), translated in [Statute Volume] *DOING BUSINESS IN JAPAN* (MB) app. 3B-10 (1994). The defendant (the American employee) argued that New York law is contrary to public order and good morals in Japan and therefore Japanese law should be applied, but the court rejected the argument, holding that the American at-will employment system can be applied to American employees working in Japan.

28. Friesen, *supra* note 3, at 991.

C. EARLY RETIREMENT PROGRAMS

Japan's lifetime employment system arose from labor union activities during the period of rapid, continuous economic growth after World War II.²⁹ By and large, most companies had no need to terminate employees before retirement age because they needed an increasing supply of employees to meet the growing demands of business.

But economic conditions have changed. Now some Japanese commentators point out that large Japanese companies employ so many more managers (particularly those in their forties and fifties) than needed that they will have difficulty maintaining the lifetime employment system.³⁰ During previous recessions, Japanese enterprises have attempted, unsuccessfully, to reduce protective employment practices.³¹ However, a recent movement among employers to promote early retirement by middle and senior employees appears to be gaining ground, and many people expect this trend to continue even after the recession.³² In fact, many companies have responded to the extreme competitive pressure of the world market and the current recession in Japan by attempting to create exemptions from the lifetime employment standard. Among the well-known companies exploring this strategy, Japan IBM, Pioneer, TDK, and Clarion³³ have recently announced early retirement programs, citing as a reason the increasing value of the yen, which has exacerbated the high cost of surplus managers when compared to the costs of leaner foreign competitors.³⁴

29. See, e.g., Hirohide Tanaka, *Hataraku gawa no ronri o taisetsu ni* [Valuing Employees' View of the Lifetime Employment System], *NIHON KEIZAI SHINBUN* [hereinafter *NIKKEI*] (Japan's leading economic daily newspaper), May 25, 1993, at M25. (All *Nikkei* citations are to the Japanese domestic pocket edition. *M* before a page number indicates the morning edition.)

30. *Sōki taishoku seido de katsuryoku iji* [Maintaining Corporate Vitality Through the Early Retirement System], *NIKKEI*, Apr. 19, 1993, at M44. See also *Headhunters on Trail of Middle Managers*, *NIKKEI WEEKLY*, May 17, 1993, Industry Section, at 12.

31. Masaru Takanashi, *Nihonteki koyō kankō kuzurezu* [Japanese Employment Practices Will Not Give Way], *NIKKEI*, June 16, 1993, at M25.

32. Yasuhiro Suzuki, *Kawaru Nihonteki koyō* [The Changing Structure of Japanese Employment], *NIKKEI*, Oct. 18, 1993, at M1.

33. See *Koyō chōsei: Shinro sadamarazu* [Adjusting Employment: Course Uncertain], *NIKKEI*, Feb. 16, 1993, at M3; *Nihon IBM: Konshū kara seidoka* [IBM Japan: Institutionalizing Early Retirement Beginning This Fall], *NIKKEI*, July 29, 1993, at M1; Masaru Sakuma, *Howaito-karā kaiko wa kiken* [Discharging White Collar Workers Is Dangerous], *NIKKEI*, Feb. 4, 1993, at M25.

34. Wakin Kamishiro, *Howaito karā no koyō: Endaka jūtan de kajō rotei* [White Collar Employment: Excessive Exposure from the Yen's Appreciation and Reduced Work Hours], *NIKKEI*, Sept. 15, 1993, at M25.

Various types of early retirement programs have emerged.³⁵ Under the most drastic programs, like that at Pioneer, despite a standard company retirement age of 60 years, a company designates specific white-collar employees in a certain age group, such as 50 to 59 years, to accept early retirement with certain retirement benefits, while other white-collar employees in the same age group do not have to accept early retirement.³⁶ In the extreme, the company actually discharges designated employees who refuse the offer of early retirement.³⁷ In milder situations, a company may announce that it is accepting applications for voluntary retirement with certain early retirement incentives. As the number of Japanese companies announcing various early retirement programs has grown, early retirement has become a controversial issue in Japan.

With increasing corporate attempts to terminate employees through early retirement programs, courts will probably be forced to decide whether the recession justifies such terminations. In general, Japanese courts have allowed employers to fire employees for economic reasons, provided that the employer first takes steps to combat economic adversity without terminating employees and then, only as a last resort, finds it must terminate them.³⁸ Japanese courts have considered a number of factors in determining whether a particular termination is legal or illegal, including: the necessity of personnel reduction for continued company operations; the lack of alternatives such as reassignment or transfer; the fairness or reasonableness of designating certain employees for termination; and the process of

35. Of 277 companies surveyed by Nihon Keizai Shinbun, 57.7% had adopted some kind of early retirement system. *Sōki taishoku yūgū seido: Kigyō no roku wari ga jūshi* [Sixty Percent of Firms Launch Early Retirement Plans], *NIKKEI*, Apr. 8, 1993, at M34.

36. *Kanrishoku ni sōki taishoku o dōshō: Hitei nara kaiko* [Encouraging Managers to Retire Early: Refusal Brings Discharge], *NIKKEI*, Jan. 8, 1993, at M12.

37. *Id.* Although the retirement age at Pioneer was age 60, the company urged 35 managerial employees from age 50 through 59, selected on the basis of personnel evaluations, to retire from the company. Younger members were offered two years' salary as severance pay, while older members were offered one year's salary. Those who did not accept early retirement would be discharged at month's end.

38. Nishimura, *supra* note 13. See, e.g., Judgment of June 27, 1989, Ōsaka Chisai [Osaka District Court], 545 Rōdō Hanrei 15, 23 (1989) (holding that employers must (i) establish the necessity of personnel cuts, (ii) make efforts to avoid termination, (iii) establish that terminated employees were reasonably selected, and (iv) discuss the problem fully with labor unions or discharged employees before discharge, because employees will lose their livelihoods through no fault of their own but rather due to the employer's inability to surmount a business predicament. The court invalidated the personnel cuts at issue for failure to meet requirements ii, iii, and iv.).

terminating particular employees.³⁹ For example, if a company must reduce its staff to avoid bankruptcy, and the employer made every effort to avoid the reduction, terminations will be allowed. Such employer efforts include negotiation with employees or labor unions, offering extra severance pay for resigning employees, and transferring employees to affiliated companies.⁴⁰ While courts may be expected to apply the foregoing factors, it is difficult to predict the actual outcome of these cases.

Some pro-retirement commentators in Japan believe that early retirement is inevitable and acceptable, but others criticize such programs for damaging employee loyalty to employers, failing to reward employees for past contributions, and making re-employment difficult for employees stigmatized by selection for early retirement.⁴¹ In fact, the effects of such social criticism hampered some early retirement programs.⁴² One Japanese commentator condemns these retirement programs as a form of age discrimination,⁴³ although Japanese law does not specifically prohibit discrimination based on age.⁴⁴ If mandatory early retirement programs become more commonplace, it may be necessary for Japan to develop legal remedies like the ADEA, which protects the rights of older employees in the United States.

In addition, since Japanese companies have not generally followed the American practice of making regular, ostensibly objective evaluations of employee performance, it is questionable whether it is appropriate in Japan to designate early retirees based on job evaluations.⁴⁵ In this regard, Japanese companies must develop job descriptions and evaluation procedures before shifting from a seniority system to a performance evaluation system like that of the United States.

Since the doctrine of restrictions on discharge of employees will likely remain a feature of Japanese law, the legal supports of the lifetime employment system will not soon disappear. Ac-

39. Judgment of Oct. 29, 1979, Tōkyō Kōsai [Tokyo High Court], 30-5 Rōminshū 1002 (Japan); Judgment of Apr. 3, 1980, Saikōsai [Supreme Court], 1045 Rōdō Keizai Hanrei Sokuhō 9 (Japan).

40. See, e.g., Judgment of Oct. 29, 1979, *supra* note 39 (upholding personnel cuts although plaintiff employees refused to resign from the company, because the employer repeatedly negotiated with the labor union, the labor union approved the employer's decisions, and the employer agreed to pay extra severance allowance if employees resigned from the company).

41. Sakuma, *supra* note 33.

42. Koyō chōsei, *supra* note 33.

43. Sakuma, *supra* note 33.

44. However, the Tokyo District Court held in 1981 that an employer may not terminate an employee solely because he reached the age of 70, as such termination is unreasonable. Judgment of July 8, 1981, Tōkyō Chisai [Tokyo District Court], 1045 Rōdōjunpō 69.

45. Koyō chōsei, *supra* note 33.

ording to one survey, many Japanese employers still consider lifetime employment to be desirable and many Japanese employees desire job security.⁴⁶ Employment consultants continue to advise American investors to adopt the lifetime employment system in order to attract competent employees in Japan, because better employees place a premium on job security.⁴⁷

One commentator argues that the expansion of the "temp" (temporary employee) business may promote the trend away from lifetime employment to more flexible hiring and firing standards. However, the Japanese Employee Dispatching Business Act⁴⁸ restricts the type of work that temporary employees can handle to only sixteen types, jobs that require special knowledge, technique, or experience. Therefore, the temporary employee business will not affect ordinary workers under the lifetime employment system.⁴⁹

Nowadays, executives and the more elite of Japanese workers, especially those who have studied in the U.S., are able to secure jobs at other companies. However, an employee making a lateral transfer often finds advancement stymied by a glass ceiling, since Japanese employers still tend to judge company loyalty on the basis of length of service.⁵⁰ On the whole, it is unlikely that Japanese employees will approach the mobility of their U.S. counterparts in the near future.⁵¹ For the time being, full mobility of employees and performance-based evaluation of lateral employees are not elements of the Japanese employment system.

As for the future, the trend toward early retirement programs and the infusion of workers who have experience overseas

46. *Id.* For example, the president of Toshiba stated that a company has the responsibility of protecting its employees, and the president of Chichibu Cement called the discharge of employees the worst sin of an employer. *Id.*

47. *Rikurūto, beikigyō ni shinan* [Recruit Advises U.S. Firms to Follow Japanese Employment Practices], *NIKKEI*, Sept. 27, 1993, at M17.

48. The full name of the Act is *Rōdōsha Haken Jigyō no Tekisetsu na Un'ei no Kakuho Oyobi Haken Rōdōsha no Shugyō Jōken no Seibi to Nikansuru Hōritsu* [Act Concerning the Securement of Adequate Management of the Employment Dispatching Business and Rearrangement of Working Conditions of Dispatched Workers], Law No. 88 of 1985.

49. Takanashi, *supra* note 31.

50. At large manufacturing companies (those that employ 1000 or more workers), the number of senior management positions occupied by male university graduates who had worked 25 years or more for the firm exceeded that of male university graduates who had worked 24 years or less for the firm by approximately 20% in 1991. Ministry of Labor, *HEISEI 5 NENBAN RŌDŌ HAKUSHO* [White Paper on Labor, 1993] 258-59 (1994) [hereinafter *HAKUSHO* 1993]. See also Mullen, *supra* note 10, at 750-52.

51. In addition to the tax disadvantage, see *supra* note 14 and accompanying text, employees in their forties who change companies stand to earn approximately ¥25,000,000 (US\$250,000) less over their lifetime than those who do not change companies. *HAKUSHO* 1993, *supra* note 50, at 258-60.

should serve as catalysts to stimulate further changes in traditional lifetime employment practices. Furthermore, if the social expectations of employer and employee behavior undergo change, the application of the doctrine of restriction on discharge must also change because courts consider the reasonableness of termination in light of the circumstances of the case and the prevailing social consensus.

II. WORK HOURS

A. BASIC RULES GOVERNING WORK HOURS

Although Japanese employers and employees possess a shared common interest in long-term employment systems that promote both company loyalty and job security, like employers and employees everywhere they confront an unavoidable conflict of interest regarding work hours. While employers wish to make employees work as many hours as effectively possible, employees wish to take time off and reduce their work hours to a level they find commensurate with the level of their salaries. Because the Liberal Democratic Party, Japan's ruling political party in most postwar years, has generally supported employers' interests, Japanese employment laws have favored employer interests over employee leisure time. As a result, many Japanese employees find themselves compelled to work long hours. Foreign commentators have criticized Japanese enterprises for relying on excessive work from employees and have blamed this method of enhancing productivity for trade imbalances in the world market.⁵² Japanese commentators predict that, conversely, reduction of work hours in Japan will reduce the trade imbalance between Japan and foreign countries.⁵³

According to the Labor Standards Act, employers cannot require employees to work more than forty hours in one week ("standard work hours"), excluding rest periods during work

52. See Shimada, *infra* note 53. Average annual work hours per worker in manufacturing industries in 1991 were as follows:

	Japan	U.S.	U.K.	Germany	France
Hours per year	2,080	1,943	1,902	1,582	1,682
Days off	120	139	147	157	154
Hours per day	8.49	8.60	8.72	7.61	7.97

1993 HAKUSHO, *supra* note 50, at 68. The figures for Japan represent a reduction over prior years.

53. Haruo Shimada, *Rōdō jikan tanshuku de "sanjūku" dasshutsu* [Escape from "The Three Problems" Through Reduction of Work Hours], NIKKEI, Nov. 25, 1991, at M21; Wakin Kamishiro, *Rōdō jikan tanshuku o kangaeru (4)* [Thoughts on Reducing Work Hours 4], NIKKEI, Apr. 19, 1993, at M20.

hours.⁵⁴ However, employers can extend those hours without limit if employees consent to what is called a "36 Agreement."⁵⁵ Furthermore, a limit of overtime for female workers (150 hours per year) does not apply to male workers.⁵⁶ In essence, then, there is absolutely no limit on work hours for male employees.

Moreover, like U.S. wage and hour laws, provisions of the Japanese Labor Standards Act concerning work hours do not apply to employees in supervisory or other managerial positions, to employees who handle confidential matters, and to certain other employees.⁵⁷ Protected or not, employees generally work hard because they want to be promoted further under the lifetime employment system in the company, because they may not have anything to do outside of the company, or because they may feel peer pressure to do so. In the lifetime employment system, competition for limited promotion opportunities within one company is so fierce that many employees feel compelled to sacrifice their private lives by putting in many overtime hours and by not using paid vacation time in order to stay in the running for promotion.⁵⁸

Like U.S. law, Japanese law requires additional compensation for overtime work and work performed on holidays. For the purposes of calculating overtime wages, wages in Japan are divided into two components: basic wages and supplemental

54. Article 32 of the Labor Standards Act provides that an employer shall not make the workers work for more than 40 hours per week, excluding recesses. However, Article 131 provided until April 1994 that "40 hours" in Article 32 shall temporarily be read to mean "the hours stipulated by the administrative order between 40 hours and 48 hours." The administrative order concerning Article 32 of the Labor Standards Act provided 44 hours for general employers and 46 hours for certain limited employers.

However, pursuant to the amendment of the Labor Standards Act on June 2, 1993, effective from April 1994, the standard work hours are currently set at 40 hours, except that the amendment does not apply to certain medium- and small-size employers until April 1997. *Warimashi-ritsu hikiage wa kohaba* [Overtime Wages Increase Marginally], NIKKEI, Oct. 11, 1993, at M31.

55. See SUGENO, *supra* note 7, at 233. Article 36 of the Labor Standards Act provides in part:

[r]egardless of the provisions of Article 32 . . . [the employer may] extend the working hours or have workers work on the rest days in accordance with an agreement if he reaches the agreement with the labor union when there is such a union composed of a majority of the workers at the working place, or with persons representing the majority of workers when there is not such a union and submits the written agreement to the administrative office.

56. Labor Standards Act, Article 64-2, generally provides that, even if an employer reaches an agreement under Article 36, the employer shall not require women over 18 years of age to work overtime for more than two hours per day, six hours per week, or 150 hours per year.

57. Labor Standards Act, art. 41.

58. Emiko Takeishi, *Jitan rōdōsha no sairyō kakudai de* [Achieving a Reduction in Work Hours by Expanding Workers' Discretion], NIKKEI, May 12, 1993, at M25.

wages.⁵⁹ Employers must compensate for overtime work by increasing the basic wage rate of pay by at least twenty-five percent.⁶⁰

In connection with work hours, *karōshi*, which literally means "death from excessive work," has come to exemplify the extent to which the Japanese will work. It is true that in Japan some people have died of heart failure or stroke due to extremely excessive work.⁶¹ Typically, when the spouse of a deceased employee attempts to claim worker's accident compensation, a dispute arises between the employer and the spouse over whether the worker's death was actually work-related. Although few claimants have successfully proven that a worker died from overwork, perhaps due to the restrictive definition of overwork, the Japanese media have found audiences eager for reports of *karōshi* because of the sympathetic plight of the spouses of the deceased employees. Some Japanese believe

59. Article 37 of the Labor Standards Act, as amended in 1993, provides in part:

1. When an employer extends work hours or employs workers on rest days under the provisions . . . he shall, for the labor of the hour or the day, pay the increased wage rates stipulated by administrative order of between 25% and 50% of the normal wages.

2. The administrative order in the preceding paragraph shall be determined on account of workers' welfare, the labor trends regarding off-hours or days-off, and other factors.

3. When an employer employs workers between 10 p.m. and 5 a.m. (or 11 p.m. and 6 a.m. if the Minister of Labor deems [it] necessary . . .), he shall pay an increased wage rate of at least 25% of the normal wage rates.

4. Family allowance, commutation allowance, and other wages prescribed by administrative order are excluded from the normal wage upon which increased wage rates should be computed under the first and the preceding paragraph.

60. *Id.*

61. The *Karōshi Bengodan Zenkoku Renraku Kaigi* [National Liaison Conference of Attorney Groups for Death from Excessive Work] [hereinafter KBZRK] provided consultation regarding 3121 cases over the five years preceding June 1993. *40-50 dai chūshin hansū ga tsuma kara* [Most Victims in Forties or Fifties; Half of Consultation Requests from Wives], *NIKKEI*, June 12, 1993, at M34. On one special nationwide consulting event, KBZRK provided consulting regarding 181 cases on one day. *Zenkoku kara sōdan ichinichi de 181-ken ni* [Consultation on 181 Cases in One Day Nationwide], *NIKKEI*, June 20, 1993, at M30. Many cases are also reported in the newspaper. *E.g., Rōsai nintei motomeru* [Seeking Workers' Accident Compensation], *NIKKEI*, Oct. 22, 1993, at M35 (family of deceased seeks compensation for sudden death from a brain hemorrhage due to excessive quota demanded by employer); "*Kōmu mo gen'in*" *nintei*, [Decided: Public Work Is Also Cause of Death by Excessive Work], *NIKKEI*, Oct. 1, 1993, at M35 (Tokyo High Court grants workers' accident compensation for public high school teacher's death from myocardial infarction); *Karōshi de 4100-man shiharai* [¥41 Million [US\$410,000] Paid for Death from Excessive Work], *NIKKEI*, Sept. 30, 1993, at M35 (settlement is reached for death by cerebral hemorrhage after victim worked more than 400 hours per month for five consecutive months—536 hours per month at the peak); *Baburu hōkai de karōshi* [Bursting of Japan's Economic Bubble Leads to Death from Excessive Work], *NIKKEI*, June 17, 1993, at M35.

overseas media have exaggerated this issue to highlight the "dark side" of Japanese economic growth and to demonstrate that the long hours Japanese employees are famous for result from employer pressure rather than simple devotion.⁶²

Japanese workers do indeed work longer hours than their counterparts in industrialized nations. Although the figure varies depending on the method of calculation, one survey shows that in 1992 the average Japanese employee worked 1,972 hours, based upon an average of 2,066 hours for males and 1,802 hours for females that year.⁶³ According to the same survey, average annual work hours decreased from 2,426 hours in 1960 to 2,077 hours in 1975.⁶⁴ The statistics indicate a trend in recent years toward a reduction in work hours. A number of factors, including changes in lifestyle, international pressure, the recession, the entrance of more part-time female workers into the labor force, and reports of *karōshi* have been cited as explanations for the change.

B. RECENT TRENDS

In 1993, the Diet amended the Labor Standards Act to reduce standard work hours and to raise the rate of overtime wages to between 25% and 50% over the basic wage.⁶⁵ One of the goals of the amendment was to realize a five-day work week and annual overall work hours similar to those in the advanced industrial nations of Europe and America.⁶⁶ The amendment came on

62. See, e.g., *ILO hōkoku ni rōdōshō mō hanpatsu* [The Ministry of Labor Strongly Opposes ILO Report], *NIKKEI*, Apr. 19, 1993. The Ministry of Labor ("MOL") strongly objected to an International Labor Organization ("ILO") report stating that 40% of Japanese workers may die from excessive work and 88% of Japanese companies rely on "service overtime." "Service overtime" means voluntary overtime work without compensation. The MOL criticized the ILO report for lack of adequate evidence. *Id.*

63. Wakin Kamishiro, *Rōdō jikan tanshuku o kangaeru* (6) [Thoughts on Reducing Work Hours 6], *NIKKEI*, Apr. 21, 1993, at M27. The disparity in work hours between the sexes is due to several factors: greater legal restrictions on overtime for women, greater use of annual vacations by women, and more part-time workers among women. Of women workers, 23% work part-time compared to 3% for men.

64. *Id.* Wakin Kamishiro, *Rōdō jikan tanshuku o kangaeru* (3) [Thoughts on Reducing Work Hours 3], *NIKKEI*, Apr. 17, 1993, at M24. Figures are for workers in companies of 30 or more employees. Due to the high economic growth rate, take-home pay increased over this period despite the decline in number of work hours. See also SUGENO, *supra* note 7, at 207-13.

65. Labor Standards Act, art. 37. This law still permits employers to continue paying only a 25 percent premium for overtime unless the MOL stipulates a higher percentage. The MOL may increase the premium rate in the future. See *supra* note 59.

66. See THE REPORT OF THE ADVISORY GROUP ON ECONOMIC STRUCTURAL ADJUSTMENT FOR INTERNATIONAL HARMONY SUBMITTED TO THE PRIME MINISTER, MR. YASUHIRO NAKASONE, ON APRIL 7, 1986 (also known as the *Maekawa Report*).

the heels of a law promoting the reduction of work hours,⁶⁷ adopted in 1992 as a political compromise among powerful employer associations and affiliated labor unions.⁶⁸ The law only encouraged, but did not require, employers to reduce work hours by, for example, instituting shorter work days.

Because of the current recession, employers strongly opposed the amendment. Employers argued that if overtime rates increased, wages would become so costly that employers would ultimately have to terminate employees.⁶⁹ During the recession, employers faced with temporarily increased workloads have avoided hiring new employees, because they cannot be terminated easily, and instead have required present employees to work more overtime hours. From labor's point of view, the amendment is a mixed blessing. Since the reduction in work hours has expanded the demand for labor, Japanese workers appear to have the benefit of keeping their jobs but the disadvantage of declining income.⁷⁰

The judiciary appears likely to maintain the position that it will not discourage long work hours. In 1991, the Supreme Court upheld an employee's discharge because the employee refused to work overtime.⁷¹ Under this holding, a company may terminate people who work less overtime than others (or who do not work overtime at all). Accordingly, the judiciary appears to be indifferent to recent social pressures to reduce work hours; rather, it preserves employers' discretion to demand hard work from employees.

While it is unlikely that the freedom of employers to demand long work hours (and the "freedom" of employees to consent to the hours) will be significantly restrained in the near future, this may be the appropriate time to begin establishing a legal framework for limiting work hours. Although Japanese employment laws ostensibly encourage the reduction of work hours, various economic and political obstacles persist. First, employees

67. Rōdō Jikan no Tanshuku no Sokushin ni Kansuru Rinji Sochi Hō [Temporary Measures Law Concerning Promotion of Reduction of Work Hours], Law No. 40 of 1992.

68. *Rōkihō kaisei shingi ōzume*, [Labor Standards Act Amendments: The Final Deliberations], NIKKEI, Nov. 24, 1992, at M3.

69. *Id.* In the United States and Sweden, the increased rate for overtime wages is 50%, and in Germany, it is 50% after three hours. Japan's relatively low rate of 25% does not dissuade employers from demanding overtime work. Shimada, *supra* note 53.

70. Kamishiro, *supra* note 34.

71. Judgment of Nov. 28, 1991, Saikōsai [Supreme Court], 45 Minshū 1270 (Japan). The Supreme Court held that as long as the company employment rule is reasonable within the agreement under Article 36 of the Labor Standards Act, the employee is obligated to work overtime or on vacation days in accordance with the employment rule. See also *supra* note 56.

tend to work long hours in order to earn as much as possible by receiving overtime pay. Second, powerful employer factions such as Nikkeiren (Japan Federation of Employers' Associations) and Keidanren (Japan Federation of Economic Organizations), traditionally allied with the Liberal Democratic Party, still wield political influence although the LDP is no longer the dominant ruling party. Given the disparity between the goals of wage and hour reform on one hand and the economic imperatives felt by employer and employee alike on the other, average work hours in Japan may be expected to fall only gradually to the level of most industrialized nations.

III. ANTIDISCRIMINATION LAWS GOVERNING EMPLOYMENT

Japanese laws are not indifferent to discrimination.⁷² Japanese laws generally prohibit unreasonable discrimination in employment.⁷³ However, the global media and various commentators in the U.S. have unfairly portrayed Japan as a place where racism and sexism are rampant.⁷⁴ Certainly, in Japan, age is considered a reasonable factor to consider in personnel decisions, as the aforementioned early retirement programs demonstrate.⁷⁵ Japan does not have the powerful and comprehensive mechanisms used to enforce antidiscrimination laws in the U.S., such as the "disparate impact doctrine" and punitive damages. Also, because a prospective plaintiff employee in Japan lacks the benefits of a jury system, broad discovery in civil procedure, and easy accessibility to lawyers, employees may have difficulty establishing that they are victims of discrimination.

A. SEX DISCRIMINATION PROBLEMS

In Japan, the most important discrimination issue in terms of size of population affected is sex discrimination.⁷⁶ The Japanese

72. Article 14 of the Japanese Constitution provides in part:

All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.

KENPO [Constitution] art. XIV, para. 1 (Japan).

73. Labor Standards Act, Article 3, provides that no employer shall discriminate by reason of a worker's nationality, creed, or social status in wages, working hours, and other working conditions. Labor Standards Act, art. 3.

74. See, e.g., William H. Lash III, *Unwelcome Imports: Racism, Sexism, and Foreign Investment*, 13 MICH. J. INT'L L. 1 (1991).

75. See *supra* part I.C.

76. In 1992, the total population of Japan was 124,300,000—61,030,000 males and 63,270,000 females. Of the working population in 1992, 38,990,000 were male and 26,790,000 were female. HAKUSHO 1993, *supra* note 50, at 334-35. The largest ethnic minority is Koreans (including Japanese of Korean origin), who number

Constitution contains an equal protection clause,⁷⁷ and the Labor Standards Act also prohibits discrimination in employment based on nationality, creed, and social status.⁷⁸ But these provisions fall short of ensuring equal treatment in all aspects of employment. For example, "guaranteed equal treatment" refers only to treatment after an employment relationship has been formed and not before hiring. Furthermore, the Labor Standards Act does not specifically prohibit discrimination on the basis of sex except regarding wages.⁷⁹ In fact, the Labor Standards Act actually imposes different treatment by providing protective measures for female workers, such as restricting work on night shifts and on holidays, restricting dangerous and harmful work, and granting maternity leave, nursing hours, and menstruation leave.⁸⁰ None of these measures has a counterpart for male workers.

In 1985, the Japanese government enacted the Danjo Koyō Kinto Hō, or Equal Employment Opportunity Act ("EEOA"), to promote equal opportunity and treatment in employment for men and women.⁸¹ The EEOA prohibits an employer from discriminating against female workers with regard to retirement age, termination, and voluntary resignation.⁸² However, the Act only obligates an employer to make good faith efforts to avoid discrimination when recruiting, hiring, placing, and promoting female and male workers.⁸³ Accordingly, an employer is not legally liable if discriminatory treatment actually occurs despite the

about 600,000. Chinese and Japanese of Chinese origin account for fewer than 50,000 of the total population of Japan. Foreigners in total constitute less than 0.4% of the labor force. 1 Japan Bus. L. Guide (CCH) ¶ 52-000 (Dec. 22, 1993).

77. See *supra* note 72.

78. See *supra* note 73.

79. Article 4 of the Labor Standards Act provides that an employer shall not discriminate between women and men concerning wages.

80. Labor Standards Act, art. 64-2 to 68. SUGENO, *supra* note 7, at 304-16.

81. Law No. 45 of 1985 (amending Law No. 113 of 1972). The full name of the statute is Koyō no Bun'ya ni Okeru Danjo no Kintō na Kikai Oyobi Taigū no Kakuho to Joshi Rōdōsha no Fukushi no Zōshin ni Kansuru Hōritsu [literally, Act Concerning the Improvement of Female Workers' Welfare, Including Equal Employment Opportunities and Treatment of Men and Women]. See Masahiro Ken Kuwahara, *The Equal Employment Opportunity Act*, in 6 *Doing Bus. in Japan* (MB) pt. XII, ch. 4, § 4.01 (1994).

82. *Id.* Article 11 of the EEOA provides that an employer may not discriminate on the basis of sex in setting a retirement age and in firing workers. Nor may an employer stipulate in the company rules that marriage, pregnancy, or childbirth are cause for early resignation, because such stipulation may improperly induce female employees to resign from the company in such situations.

83. Tadashi Hanami, *Equal Opportunity in Employment*, in 1 Japan Bus. L. Guide (CCH) ¶ 52,015 (Dec. 22, 1993). The EEOA provides:

Article 7. An employer shall make efforts to allow equal opportunities for women and men concerning recruitment and hiring of workers.

Article 8. An employer shall make efforts to treat equally female workers and male workers concerning placement and promotion.

employer's efforts. If viewed as a tool to combat discrimination, the most discouraging feature of the EEOA is that it imposes no sanctions for violation of the Act.

One can see that even with the EEOA, Japanese women still face serious obstacles to attaining managerial status.⁸⁴ According to a poll in a major Japanese newspaper,⁸⁵ personnel managers believe that women encounter difficulty in achieving promotion to managerial positions because: they lack seniority (about 75% of managers polled gave this response), companies fail to provide women with training for managerial positions (about 45%), and companies embrace the popular belief that women are not very business-minded (about 40%).⁸⁶ Also, the same poll showed that because of the recession, about 25% of the companies surveyed planned not to hire women in 1993 who had graduated from four-year universities. The poll suggests that companies would rather hire men instead of women, if they hire any employees during the recession. Overall, the poll showed that even under the EEOA Japanese women still experience discriminatory treatment born of differing expectations of male and female workers among personnel managers.⁸⁷

According to a leading personnel placement firm, even if a woman had the highest score among all female employees on an examination for a managerial position, that same woman could be ranked thirtieth in comparison to male candidates, because the most important factor is not a high score on the exam but the ability to act as a manager.⁸⁸ Most companies continue to be bound by the stereotype that women cannot be leaders.

Many companies have unwritten rules that when a female worker marries, she must quit the company. Although this so-called "marriage retirement system" is illegal under Japanese law,⁸⁹ a good number of companies nevertheless appear to con-

84. According to JAPAN EXTERNAL TRADE ORGANIZATION, JETRO NIPPON BUSINESS FACTS AND FIGURES 125 (1994), women occupied 1% of managerial positions in Japan in 1992, while the comparable figure in the United States in 1991 was 11.1%. Japanese women have attained the level of general manager at only 12.2% of companies with 5,000 or more employees. Oda, *supra* note 20, at 325.

85. Kei Kashima, *Bimyō ni kotonaru danjo no kitaido* [Subtle Differences in Expectations for Men and Women], NIKKEI, Dec. 13, 1992, at E12. This research was based on the responses from those in charge of personnel or employment at 28.7% of the 2,000 largest companies in Japan. Each surveyor can respond to multiple answers for one question as long as it is applicable.

86. The Ministry of Labor reported similar attitudes in 1993. HAKUSHO 1993, *supra* note 50, at 170-72.

87. *Id.*

88. *Senbetsu ni yureru jousei sōgōshoku* [Women Workers Are Shaken Up by the Selection Process for Managerial Positions], NIKKEI, Jan. 18, 1993, at E13.

89. See Catherine W. Brown, *Japanese Approaches to Equal Rights for Women: The Legal Framework*, in LAW AND SOCIETY IN CONTEMPORARY JAPAN 197 (John

tinue to enforce this custom informally.⁹⁰ These companies argue that married women do not devote themselves to their work and tend to leak inside information.⁹¹

B. ELIMINATION OF SEX DISCRIMINATION

Japanese employers tend to hesitate in hiring female workers due to customary factors, such as women's traditionally short employment duration (i.e., until they marry), as well as to such legal factors as the Labor Standards Act's restrictions on women's work hours and acceptable work environments.⁹² Many Japanese companies still follow the traditional employment practice of cutting back the number of female workers during economic downturns. However, two significant recent changes deserve special notice.

First, more women have been developing careers and working overseas. While male workers' average education level has not changed recently, more female workers have graduated from universities or other institutions of higher education,⁹³ and more female workers are engaged in white-collar positions than ever before.⁹⁴ The effect of this trend is that employers and workers alike have begun to accept female workers as an important work force and decline unreasonable sex discrimination in employment.

Second, Japanese employment laws have begun to recognize the concept of sexual harassment, due in part to an awareness of proliferating anti-sexual harassment laws in the United States. For example, in response to the growing controversy in Japan over sexual harassment, in 1991 Japan's Ministry of Labor established a commission to study the employment of female workers, to enhance the exchange of information among researchers in the area of sexual harassment, and to prepare a report about sexual

O. Haley ed., 1988) (analyzing the *Sumitomo Cement Co.* case—Judgment of Dec. 20, 1966, Tōkyō Chisai [Tokyo District Court], 17 Rōminshū 1407 (Japan)—which stands for this proposition).

90. In a poll conducted by the Ministry of Labor in fiscal 1990, 46% of the women respondents answered that their companies have an unwritten rule requiring them to quit before retirement age. *Koshū-suru kigyō, naku OL* [Female Office Workers Lament as Firms Persist in Old Ways], NIKKEI, Dec. 5, 1991, at E17.

91. *Id.*

92. See *supra* note 80 and accompanying text.

93. From 1975 to 1992, the percentage of female workers who were university graduates increased from 10% to more than 16%, and the percentage of female workers who had graduated from universities or two-year colleges increased from about 30% to about 50%. HAKUSHO 1993, *supra* note 50, at 151-52.

94. In 1960, 29.6% of male workers and 26% of female workers were white-collar employees. In 1990, 46.1% of male workers and 55.7% of female workers were white-collar employees. HAKUSHO 1993, *supra* note 50, at 143-44.

harassment issues in Japan.⁹⁵ The report, two years in the making, categorized sexual harassment into two types, "quid pro quo" sexual harassment and "environment" sexual harassment,⁹⁶ the same categories applied in the United States.

Japanese courts have also granted damage awards in recent sexual harassment cases. In 1990, the Shizuoka District Court held that supervisors must not abuse their status as supervisors by demanding sexual favors from female workers.⁹⁷ The court noted that such conduct by a supervisor constitutes a tort because it denied the *jinkaku* (personality) of female workers.⁹⁸ Also, in 1992, the Fukuoka District Court held that an employer is liable for failure to maintain a work environment in which female workers can comfortably work.⁹⁹ In that case, after a supervisor criticized his female subordinate regarding her sexual conduct, she resigned from the company.¹⁰⁰ In the 1990 case, the Shizuoka District Court granted ¥1 million (approximately US\$10,000) for infliction of emotional distress and ¥100,000 (US\$1,000) for attorneys' fees.¹⁰¹ The Fukuoka District Court similarly granted ¥1.5 million (US\$15,000) for infliction of emotional distress and ¥150,000 (US\$1,500) for attorneys' fees.¹⁰²

These cases bear witness to the fact that Japanese employment laws are influenced by trends in U.S. employment laws. The harassment cases can also be viewed as the beginning of a trend to eliminate sexual discrimination in Japan.

95. *Sekuhara: Keihatsu katsudō de mizen ni fusegu* [Preventing Sexual Harassment Through Education], NIKKEI, Sept. 18, 1993, at M34.

96. *Rōdōshō "sekuhara" o bunrui* [The Ministry of Labor Classifies "Sexual Harassment"], NIKKEI, Oct. 19, 1993, at M34. The comparable U.S. term is "hostile environment," which the U.S. Supreme Court last year defined as one in which discrimination, intimidation, or ridicule was severe or pervasive, as determined by the reasonable person standard. *Harris v. Forklift Systems Inc.*, 114 S. Ct. 367, 368 (1993).

97. Judgment of Dec. 20, 1990, Shizuoka Chisai [Shizuoka District Court], 580 Rōdō Hanrei 17 (Japan).

98. The court stated that "the defendant's course of conduct shows that the defendant regards females as only subjects of pleasure or play and does not regard them as human beings with *jinkaku* [personality, character]." *Id.* at 18. Although the court did not explain what it meant by *jinkaku*, the term here appears to mean human dignity or the fundamental right of privacy of female workers.

99. Judgment of Apr. 16, 1992, Fukuoka Chisai [Fukuoka District Court], 1426 HANJI 49 (Japan).

100. The court found that (1) the defendant had reported to the director of the company, without any objective evidence, that a customer terminated business with the company because the plaintiff's sexual relationship with the customer ended, (2) the defendant stated the plaintiff received a prize for writing a pornographic novel based on her actual experiences, and (3) the defendant stated that the plaintiff committed adultery with an employee of a customer. *Id.* at 62.

101. Judgment of Dec. 20, 1990, *supra* note 97, at 18.

102. Judgment of Apr. 16, 1992, *supra* note 99, at 65.

IV. CONCLUSION

Change in employment law and practice in Japan is obviously painfully slow. Although the final result of such change may be an employment system that substantially resembles that of the United States, the methods of change promise to differ in various respects.¹⁰³ Since employees throughout the world have common demands and since the exchange of labor between countries is becoming more widespread, it is desirable and necessary for Japanese employment practices to become more uniform with industrialized nations' employment practices.

Such internationalization of Japanese employment practices has been fueled in recent years by two developments. One is foreign legal developments, which have influenced the anti-sexual harassment movement and work hour regulations in Japan, prodding Japanese practices toward parity with those of other developed nations. The other is the pressures of world economic conditions, which have forced change in traditional domestic employment practices. The erosion of lifetime employment and the movement toward greater worker mobility can be viewed as examples of the latter.

The recent trends toward erosion of the lifetime employment system, reduced work hours, and adoption of an anti-sexual harassment doctrine may merely be window-dressing designed to placate foreign and domestic critics of old ways. Nevertheless, the influence of foreign law will inevitably accelerate these trends as continuing international exchange of personnel and information educates the Japanese work force in foreign employment standards. Employment regulators and the judiciary in Japan will confront economic, political, and even cultural obstacles to internationalizing employment practices. But it must be remembered that Japanese culture influences employment practices not merely through its own force, but also through the inadvertent support of traditional practices by Japanese courts, who embroider them onto the fabric of the law. Therefore, despite the changes already forced by the continuing recession, foreign demands, and the influx of foreign legal concepts into Japan, the full evolution of Japanese employment law remains a fundamental legal challenge dependent on concomitant changes in social norms.

103. For example, as illustrated, the way employees are protected from unreasonable discharge in Japan as opposed to in the United States is quite different.