

## Article

# Labor Law Policy on Freelance Work

HAMAGUCHI Keiichiro

The year 2021 saw continued developments in labor law with respect to freelance work: a number of new policies made an appearance, and progress in the EU culminated in the proposal of a Directive on platform work by the end of the year. These developments inspired the booklet *Labor Law Policy on Freelance Work*,<sup>1</sup> which builds on the issues I addressed in a special lecture for the JILPT Tokyo Labour College in March 2021. This article focusses on summarizing that lecture and the subsequent developments, and therefore seeks to convey, as far as possible, a clear overview of current trends, rather attempting an earnest debate on the related labor law. It introduces a few of the key aspects of the labor policy developments, addressing trends both in Japan and several other countries.

## 1. Historical background to the issues of freelance work

There has been a long history of issues surrounding the kinds of work that do not quite fall under employment contracts. Craftspeople in the premodern era were more akin to subcontractors than employees, as they pursued their work according to their own individual methods, without detailed supervision or directions. Employed labor typically took the form of roles as domestic workers, such as butlers or maids. However, the Industrial Revolution prompted dependent labor—labor under the direction of an employer—to become the norm. Workers came to be regarded as the vulnerable, and therefore provided with social protection in the form of labor laws and social security. The self-employed, on the other hand, were not seen as such, and were

consequently excluded from the social protection of labor laws and social security.

In fact, already then, there were persons who, while in legal terms self-employed, were socially and financially more struggling than employed workers. Namely, the persons engaged in “industrial homework” (*naishoku*), where factories outsourced portions of their manufacturing and assembly processes to be carried out by individuals in their homes for low piece rate wages. These “homeworkers” (*kanai rōdōsha*) thereby formed the lowest level of the economic structure. Albeit following a number of road bumps along the way, the Industrial Homework Act, enacted in 1970, set out provisions on minimum piece rate wages by work type. However, the said Act applies only to the manufacturing and processing of goods. The number of homeworkers has dropped dramatically, from 1.81 million persons at the time of the Act’s enactment to 110,000 persons in 2017.

In contrast, an ever-increasing number of persons are working from home via the internet. In 2000, the Japanese Ministry of Labour (currently the Ministry of Health, Labour and Welfare, MHLW) sought to address such workers by formulating the *Guidelines for the Proper Implementation of Work from Home*, obliging employers to stipulate the contract conditions in writing and preserve them in document, and to pay remuneration within 30 days of receiving the products of work, among other provisions. In 2018, MHLW’s revised guideline, the *Guidelines for the Proper Implementation of Self-employed Type*



*Teleworking*, was formulated in response to the 2017 Action Plan for the Realization of Work Style Reform. This guideline also covers cases in which intermediaries that have already done business with the worker place reorders (including crowdsourcing). The guideline also prescribes the protection of intellectual property rights in the event of competitive bids and the provision of notice when annulling a contract. However, the guidelines are merely government notifications with no legal grounds and are therefore not legally binding. Violations of the Industrial Homework Act are investigated by a labor standards inspector, but these guidelines lack legal force.

## 2. Criteria for determining worker status: Analysis of labor standards inspection cases

Once the protection of workers was established through labor and employment law and social security, persons in the borderline category began to seek to claim their status as a worker (*rōdōsha*). Benchmarks for such cases were compiled in the “Criteria for determining ‘worker’ under the Labor Standards Act,” which were set out as part of the 1985 report of the Ministry of Labour’s Study Group on the Labor Standards Act (*Rōdō kijyun hō kenkyū kai hōkoku-sho*; Ministry of Labour, 1985). According to the report, worker status is determined on the basis of whether the person in question is subordinate to and dependent on an employer (*shiyō jūzoku sei*)—that is, whether an employer provides direction and supervision, and pays wages. In doing so, a combination of all the relevant elements—such as whether the person in question is a business operator, and whether the person is working exclusively for a certain organization—is taken into consideration.

I analyzed the content of documents on individual labor standards inspection cases, over a two-and-a-half-year period from April 1, 2017, to October 2, 2019, focusing on any labor standards inspection reports (*kantoku fukumeisho*) or declaration processing records (*shinkoku shori daichō*) containing the terms “worker status” and/or “sole

proprietors” (*kojin jigyōnushi*)<sup>2</sup>. This encompassed a total of 122 documents: 80 inspection reports and 42 declaration processing records.

The different industry types covered in these documents included 54 cases (44.3%) in the construction industry, 16 cases (13.1%) in the field of food and drink services, serving customers and providing amusement services, 11 cases (9.0%) in the transport industry, and 10 cases (8.2%) in commerce. In terms of occupation types, 56 persons (45.9%) were working on construction sites as independent contractors (*hitori oyakata*), 13 persons (10.7%) were drivers, 13 persons (10.7%) were serving staff, 9 persons (7.4%) were barbers or hairdressers, 7 persons (5.7%) were marketing and sales staff, 4 persons (3.3%) were information and communications technologists, and 3 persons (2.5%) were chefs. The issues addressed in the cases were unpaid wages, which accounted for 54 cases (44.3%), and issues related to occupational health and safety, which accounted for 40 cases (32.8%). Finally, a breakdown of the cases according to whether worker status was recognized shows that worker status was recognized in 27 cases (22.1%) and not recognized in 37 cases (30.3%), while in 58 cases (47.5%) no decision was made either way.

Looking at the distinctive characteristics of each occupation, among independent contractors (56 persons)—who make up the lowest extreme of the several layers of contracting that takes place in the construction industry—the common approach is to combine the forms of work, such that it may not for instance be clear even for the person themselves whether they are working under an employment contract or a subcontracting agreement, or such that a person may sometimes work as a contracted business operator and sometimes as an employed worker, rendering the differences between the two unclear. This may pose considerable difficulty in reaching an unequivocal judgment according to the aforementioned criteria set forth by the Study Group on the Labor Standards Act in their report. In many cases, independent contractors also come about their work through highly informal personal relationships such as those with relatives, friends or acquaintances,

which in turn renders it difficult to clearly identify whether the work is being conducted under an employment contract or a subcontracting agreement.

Drivers (13 persons) include not only owner-drivers (*yōsha untenshu*; drivers who own their vehicle and use it to transport goods on commission from a freight company) but also a number of cases of drivers who transport goods using a truck or other such vehicle loaned to them by the company commissioning the work (in a total of 13 cases, 10 involved trucks belonging to the client company). This prompts the question of whether it is appropriate to presume such drivers to be business operators, as is the case for owner-drivers, who, according to the report of the Study Group on the Labor Standards Act, “are tentatively presumed to be business operators given the high expenses of owning their own truck, etc.”

In the case of serving staff (13 persons), given that the nature of the work at hostess bars, pubs, and other such entertainment establishments serving food and drink requires such staff to serve customers from evening to late night, remuneration is determined according to an hourly rate (a factor that indicates worker status). On the other hand, such staff do not receive detailed direction and supervision from their place of work regarding the specific means by which service is provided to customers. Likewise, while the work of barbers and hairdressers (9 persons) does to some extent involve constraints on the place and times of work—in the form of the salon or similar place of work and its opening times (factors that indicate worker status)—as, due to some extent to the fact that it requires specialist skills (often nationally certified), providing such services entails high levels of individuality and involves very little detailed directions or orders, such roles seem to fit well in the category of sole proprietor.

For marketing and sales staff (7 persons), in the event that such staff engage in marketing and sales outside of the default workplace—in other words, not at a shop or sales office—the lack of restriction on time or place of work lends itself to classification as a sole proprietor. As employed workers who engage in marketing work outside of the default

workplace also work under a system by which they are deemed to have worked their prescribed hours, there has in fact been little necessity for persons in such roles to be classified as sole proprietors in legal terms. Likewise, in the case of information and communications technologists (4 persons), who are eligible for the application of the discretionary working system for specialist work (by which they are deemed to have worked their prescribed hours), there has been relatively little need to adopt the category of sole proprietor in legal terms.

### **3. The 2021 Guideline on freelance work, a joint guideline by Cabinet Secretariat, Fair Trade Commission, Small and Medium Business Administration, and MHLW**

In recent years, new forms of employment utilizing information and communications technology—such as platform work, gig work, and crowd work—are becoming increasingly common across the world. Likewise in Japan, the Uber Eats food delivery service developed particular prominence due to the COVID-19 pandemic. Among its mid- to long-term goals established in the 2017 Action Plan for the Realization of Work Style Reform, the Japanese government intended to explore the necessity of legal protection for non-employment type teleworking and other such types of employment-like working styles. The MHLW responded by convening the Meeting on Employment-Like Working Styles that year. The subsequent Meeting on Points of Controversy with regard to Employment-Like Working Styles published a preliminary review of its findings, the Interim Report, in June 2019, establishing that rather than (i) expanding the scope of protected worker status or (ii) creating an intermediate category between employees and the independent self-employed, the appropriate direction to pursue would be to (iii) separately provide the self-employed persons who require a certain level of protection with the special protection they require as suited to the type of protection.

The JILPT survey results reported to these expert meetings recorded the estimated number of persons in employment-like working styles (namely, persons

who receive a request to carry out work from an ordering party, provide their services primarily as an individual, and receive remuneration in return for those services) as 2.28 million persons (of which, 1.69 million persons pursue such work as their primary employment and around 590,000 persons pursue it as secondary employment). Of this number, 1.7 million persons (1.3 million persons pursuing the work as primary employment, 400,000 persons pursuing it as secondary employment) work directly with businesses.

Meanwhile, the *Guidelines for Secure Working Conditions for Freelancers*, formulated in March 2021, clarified approaches to the application of the Japan Fair Trade Commission's Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Antimonopoly Act, the provisions on the unjust use of a superior bargaining position) and Act against Delay in Payment of Subcontract Proceeds, etc. to Subcontractors (Subcontract Act). According to said guidelines, the Antimonopoly Act and Subcontract Act are also applied to transactions with freelancers, such that if a party ordering work (the client) has a superior bargaining position to the freelancer and utilizes that position to unjustly cause the freelancer disadvantage contrary to typical business practices, such a case constitutes the abuse of a superior position and is regulated under the Antimonopoly Act. Failure by the client to provide the freelancer with written clarification of the terms of the transaction at the time of order is also deemed inappropriate under the Antimonopoly Act and a violation of the Subcontract Act. Furthermore, intermediaries with superior bargaining positions to freelancers utilizing said position to impose unilateral changes to the agreed terms and thereby unjustly impose disadvantages on freelancers contrary to typical business practices also constitute the abuse of a superior position.

#### **4. Special industrial accident insurance coverage and health and safety**

The *Guidelines for Secure Working Conditions for Freelancers* also address special insurance coverage under the industrial accident insurance

program. Developments toward special coverage began with the establishment of a system to address the high risk of workplace accidents faced by independent contractors in the construction industry, through the 1965 amendment to the Industrial Accident Compensation Insurance Act allowing such contractors to cover their own industrial accident insurance contributions, thereby ensuring that they receive industrial accident insurance benefits when they suffer an accident.

With the growing numbers of freelancers in recent years, this was expanded in April 2021 to include persons engaged in performing arts-related work, persons engaged in animation production, judo therapists, and persons pursuing businesses in accordance with the assistance for the establishment of new businesses and other such support measures under the 2020 amendment of the Act on Stabilization of Employment of Elderly Persons.

September 2021 saw the addition of two new occupation types: food delivery businesses such as Uber Eats, and IT freelancing. Under the provisions of a ministerial ordinance, the former is described as "businesses utilizing motorized bicycles or bicycles for transporting goods," and not limited to platform work. The Uber Eats Union, formed by delivery workers, responded to this addition with the assertion that as long as platform enterprises are generating profits from the work of delivery workers, those enterprises should cover the costs of industrial accident insurance premiums. Other occupation types now eligible for special coverage are masseuse, chiropractor, acupuncturist, and moxibustion practitioner, which were added in April 2022.

Meanwhile, the national government's responsibility to an independent contractor has been recognized, in a May 2021 Supreme Court judgment regarding asbestos used in construction. It is difficult to argue that the Industrial Safety and Health Act automatically excludes persons not classified as workers from protection in the event that they handle items that may potentially damage their health, even when they are working alongside persons classed as workers. The MHLW therefore established the Committee on Occupational Safety and Health under

the Labor Policy Council to set to work on reviewing the regulations. As a result, protection under Industrial Safety and Health Act policy, which had previously been limited to workers (including those in indirect employment relationships), was expanded to cover independent contractors and other such self-employed persons not classified as workers.

## 5. Leave for business suspension and unemployment safety nets

When former Prime Minister Shinzo Abe declared the closure of schools in March 2020 as part of measures to address the COVID-19 pandemic, the MHLW established the Subsidy for Guardians Affected by School Closures for Business Owners Who Have Employees (*shōgakkō kyūgyō tou taiō joseikin*) for employed workers with children to take paid leave. This prompted criticism highlighting the fact that freelancers were also having to look after their children while working. In response, the MHLW urgently set up the equivalent subsidy (financial support) for freelancers (Subsidy for Guardians Affected by Elementary School Closures for Individual Contract Workers, *shōgakkō kyūgyō tou taiō shienkin*), providing freelancers with 4,100 yen, equivalent to approximately US\$35, per day (an amount that was later increased to 7,500 yen per day, then to 4,500 yen per day from March 2022).

Meanwhile, measures by the Ministry of Economy, Trade and Industry included the establishment of the Subsidy Program for Sustaining Businesses in May 2020 to provide 2 million yen to corporations and 1 million yen to individual business operators seeing declines of 50% or more in year-on-year monthly revenue. It would typically be assumed that freelancers would also be covered by such a subsidy, as “sales” referred to the amount recorded as business income on the tax return. However, since freelancers have generally, under the instruction of the tax office, recorded their earnings as salaried income (*kyūyo shotoku*) and miscellaneous income (*zatsu shotoku*), there was a succession of cases of freelancers being declared ineligible for the subsidy. Following criticism, persons who had recorded their earnings as salaried income and miscellaneous

income also finally became able to apply for the subsidy as of late June 2020. This could be described as a case which exposed a discrepancy with the worker status concept in tax law.

The aforementioned financial support for freelancers provides, albeit in quite limited circumstances, freelancers with similar allowances for business suspension (allowances for absence from work) as that received by employed workers. This raises another question—namely, do surely freelancers also require compensation for unemployment? Unlike employed workers, in the case of freelancers it is difficult to draw a clear distinction between absence from work and unemployment in legal terms, as this would typically be determined according to whether an employment contract is in place. However, in reality, many freelancers are financially dependent on their primary client, placing them at real risk of being forced to take absence from work or becoming unemployed should orders from said client cease. There is surely some means of providing assistance through a system similar to that of employment insurance.

In fact, in November 2019, the Council of the European Union adopted the Council Recommendation on access to social protection for workers and the self-employed, calling for social protection covering unemployment and five other fields to be extended to the self-employed, as it is to workers. Looking at the actual circumstances in EU countries, as many as 20 countries apply unemployment insurance to self-employed persons in some form (full, partial, or voluntary application). South Korea likewise determined in December 2020 the successive steps to apply, as part of national employment insurance, employment insurance to persons in special types of employment work not covered under the South Korean Labor Standards Act. This entails the person engaging in the work and the business owner equally sharing the costs of insurance premiums, and is being expanded, step by step, to the occupations of parcel delivery drivers, motor cycle messengers and persons providing replacement driver services.

Likewise in Japan, the amendment of the

Employment Insurance Act adopted in March 2022, addresses persons eligible for the basic allowance who launch a business after leaving employment (that is, after they become eligible to receive the said allowance), proposing that the period for which the said business is implemented, up to a maximum of 4 years, not be included when calculating the period for which the allowance can be received. While a highly localized form, this can be seen as unemployment benefit for freelancers (who were formerly workers).

## 6. Labor law policies on freelancers in countries other than Japan

As noted above, in recent years, the platform economy has been attracting increasing attention across the world, highlighting the issue of the worker status of persons who obtain work through platforms, also known as gig workers. Let us very briefly summarize the developments in various countries.

France is the only country to have legislation aimed at persons working through platforms. The 2016 El Khomri Act (*Loi n. 2016-1088 du 8 août 2016 relative au travail, à la modernisation du dialogue social et à la sécurisation des parcours professionnels*) recognized platform workers' right to be insured against industrial accidents (with platform enterprises responsible for covering the premiums of those platform workers who chose to do so), right to form and join a labor union, and right to continuous professional training. Furthermore, although the 2019 Mobility Orientation Act (*Loi d'orientation des mobilités*) incorporated a policy that sought to ensure the establishment of charters for appropriate labor conditions in the transportation industry by allowing for platform workers to be recognized as self-employed persons where such charters were in place, France's supreme court (*Cour de Cassation*) passed a judgment recognizing the employee status of such a worker. In Germany, *Fair Work in the Platform Economy*, published by the Federal Ministry of Labour and Social Affairs in November 2020, explores shifting the burden of proof with regard to the potential misclassification of platform workers.

Turning to the trends in court precedents, it is

again France's supreme court blazing the trail—a judgment recognizing a food delivery platform worker to be in an employment relationship with the platform (the *Take Eat Easy* case, November 28, 2018) was also followed by a judgment recognizing the employee status of a driver for a ride-hailing platform (the *Uber* case, March 4, 2020). Likewise in Spain, a Supreme Court judgment recognized the existence of an employment relationship between a food delivery platform rider and the platform (the *Glovo* case, September 23, 2020). In Germany, a Federal Labor Court (*Bundesarbeitsgericht*) judgment recognized the employee status of a crowd worker conducting the small, task-based job (micro job) of checking product displays at gasoline stations (the *Roamler* case, December 1, 2020). Moreover, while no longer an EU member since 2020, the UK has similarly seen a Supreme Court judgment recognizing ride-hailing platform drivers as workers (a status differing from that of an employee, according to a concept unique to the UK) as opposed to self-employed (the *Uber* case, February 19, 2021).

Meanwhile, developments in the US state of California have been marked by considerable seesawing back and forth. A California Supreme Court judgment recognizing employee status (the 2018 *Dynamex* case, in which a class of same-day delivery drivers asserting that they had been misclassified as independent contractors were recognized as employees) was subsequently incorporated into legislation with the enactment of California Assembly Bill 5, commonly known as the “gig worker bill,” only for this progress to be overturned by the results of a referendum (which saw voters support legislation exempting gig workers from the application of the bill). The referendum was, however, later declared unconstitutional in a Superior Court decision.

## 7. The EU proposal for a Directive on platform workers

Amid the developments touched on above, the European Commission, as the EU's governing body, published a proposal for a Directive on improving the working conditions of persons working through

digital platforms on December 9, 2021. These proposals have attracted considerable interest given their considerably bold proposals regarding the presumption of worker status.

Article 4 of the proposed Directive prescribes that the contractual relationship between a digital labor platform that controls, within the meaning of Paragraph 2 of said article, the performance of work and a person that performs platform work through that platform shall be legally presumed to be an “employment relationship,” that said legal presumption should apply in all relevant administrative and legal proceedings, and that the competent authorities shall be able to rely on that presumption as they verify compliance with or enforce relevant legislation. The legal framework is such that Paragraph 2 of the said article lists five factors as requirements for this; if at least two of the five requirements are fulfilled, it is legally presumed that the person conducting platform work is in an employment relationship.

- (a) effectively determining, or setting upper limits for the level of remuneration;
- (b) requiring the person performing platform work to respect specific binding rules with regard to appearance, conduct towards the recipient of the service or performance of the work;
- (c) supervising the performance of work or verifying the quality of the results of the work, including by electronic means;
- (d) effectively restricting the freedom including through sanctions, to organize one’s work, in particular the discretion to choose one’s working hours or periods of absence from work, to accept or to refuse tasks, or to use subcontractors or

substitutes, and

- (e) effectively restricting the possibility of building a client base or performing work for any third party.

These requirements all draw on characteristics that have been noted as the distinctiveness of platform work. Given that for the legal presumption of an employment relationship, just two—not all—of these requirements need to be fulfilled, they are fairly lenient requirements.

Of course, as the relationship is thereby “legally presumed” rather than “deemed” to be an employment relationship, it is possible to provide facts to rebut that legal presumption. And yet, when a digital labor platform asserts that the contract relationship at issue is not an employment relationship, the burden of proof falls on the digital labor platform. Although such procedures are being pursued, the legal presumption of an employment relationship does not cease to be applied. While in some respects, this may be due to the tailwind provided by the judgments of the domestic courts in recent years, the proposed Directive adopts an unquestionably severe stance toward platform businesses.

1. Detailed analysis is provided in the booklet *Labor Law Policy on Freelance Work (Furiransu no rōdōhoseisaku)*; The Japan Institute for Labour Policy and Training, JILPT, March 22, 2022, only available in Japanese). The booklet is a compilation of a presentation and related materials from a special lecture held by the JILPT Tokyo Labour College on March 3, 2021. Moreover, following a similar process, the booklet *Telework: Government, Management and Labor Initiatives in the COVID-19 Pandemic* (JILPT 2021, only available in Japanese), incorporates the results of survey research on telework.

2. JILPT Research Report No.206, Content Analysis of Labor Standards Inspection Documents Related to Worker Status (February 2021, only available in Japanese).

### **HAMAGUCHI Keiichiro**

Research Director General, The Japan Institute for Labour Policy and Training. Research interest: Labor policy.

<https://www.jil.go.jp/english/profile/hamaguchi.html>