

THE IMPACT OF ELECTRONIC TECHNOLOGY ON WORKPLACE DISPUTES IN JAPAN

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I. INTRODUCTION

An era existed in Japan when it was said that those other than the Taira family were not human. Today it seems as if those who cannot use information technology (IT) are not human. Children at school, housewives at home, and older people at “Silver Human Resources Centers”¹ are grappling with their personal computers, despite not understanding what IT actually means. Regardless of this ignorance, in the last year of the twentieth century, “IT Revolution” had the honor of being awarded the Word of the Year prize.

Compared to children, housewives, and older people, employees might, in a sense, be happier that they are compelled to use IT. According to the “Study Report on the impact of the IT Revolution upon the Japanese Working Style” published by the Ministry of Health, Labor and Welfare in April, 2001, 88.2% of companies in Japan have some form of IT system and more than 70% of companies have introduced e-mail, Internet, or LAN systems. What is more, about 40% of companies provide each full-time white-collar employee with one or more computers. Almost 75% of companies provide one

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1. They are regional, independent organizations that systematically obtain and offer opportunities for temporary and short-term work to retired, older persons. According to the Older Persons’ Employment Stabilization Law, the prefectural governors may designate as benevolent corporations “Silver Human Resources Centers,” limited to only one such corporation to be designated in each city, town, or village. The main target of the program is retirees who are age sixty-five or over. A private enterprise or a government office in need of temporary or short-term work pays the Center in the region to supply older workers and the Center pays them for performing such work under contracts for work, not under labor contracts. For details, see Hideyuki Morito, *Law and Policy for Older Workers in Japan*, 43 SEIKEI HOGAKU (THE JOURNAL OF LEGAL, POLITICAL, AND SOCIAL SCIENCES) 15, 16 (1996).

computer to be shared by three or less employees. About 95% of full-time white-collar employees use personal computers at the office and about 90% of those computers are connectable to the network.

This article focuses on the labor law issues that the IT Revolution raises. It deals with the subject from four points of view adumbrated below.

The first problem is the employers' reduced oversight of work activity. Traditional labor law regulations are based on the premise that employees work under the supervision of their employers. However, with the progress of the IT Revolution, there have been more and more cases in which employer supervision is limited, such as teleworking.

Second, the growth of IT will possibly strengthen employer oversight, contrary to the previous point, and engender employee privacy concerns. This article will examine the regulation of electronic monitoring of performance and e-mail communications.

Third, this article highlights various legal issues caused by simplified electronic data communication and electronically-processed employer property. For example, employees' misappropriation of employers' electronic property, pirated software problems, and employee criticism of their employers through electronic media are new issues.

Fourth, this article sets forth how the growth of IT has influenced the law and policy concerning vocational training and retraining. It deals not only with vocational training legislation, but also with cases in which employees take new jobs utilizing special training and skills gained at the expense of their previous employers.

II. REDUCED EMPLOYER OVERSIGHT OF WORK ACTIVITY: TELEWORKING ISSUES

While the term "teleworking" generally includes both employment and non-employment relationships, this article first refers to the former type, in other words, teleworkers as "employees" under labor contracts. IT has made it easier for employees not to work at the employer's premises or offices in a traditional sense. In this circumstance, what are the labor law issues?

A. *The Concept of "Enterprise"*

"Enterprise" is the basic regulatory unit in the Labor Standards Law (LSL). Every employee must belong to an enterprise. The number belonging to an enterprise affects various aspects of labor

regulations, such as the duty to draw up work rules,² conclusion of labor-management agreements,³ particularly, “Article-36” overtime agreements,⁴ and appointment of safety and health supervisors.⁵ According to the administrative interpretation, a) when located in a single place, an employer will, as a rule, be deemed to be an individual enterprise; however, b) if it is an especially small-scale and non-independent operation like a branch office, it may be regarded as merely an extension of the higher entity, although it extends over diverse locations.⁶

Under this interpretation, both the so-called “mobile type” teleworkers, with no fixed workplaces, and employees who work at home only temporarily and irregularly, can be deemed to work outside the enterprise. Also teleworkers who work at home or in satellite offices on a full-time basis will be regarded in many cases as employees belonging to the enterprises where their bosses work, since the teleworker’s home or the satellite offices are not under the employer’s supervision. However, when a full-scale office is set up in the worker’s home and, for example, the employer supplies machinery and work equipment and demands a certain style in their arrangement and the layout of the room, it can be regarded as a branch office. In this case, the at-home office falls within the definition of “an especially small-scale and non-independent operation” and, therefore, is “an extension of the higher entity.” This means that the employee’s house, or a part thereof, is a part of an “enterprise.”

When a teleworker’s house is considered a part of an “enterprise,” a labor standards inspector can, in theory, make an on-site inspection.⁷ However, from the standpoint of the protection of privacy, an inspector’s entry into an employee’s house should be restricted. This is the *raison d’être* behind regarding a part of a

2. An employer shall draw up work rules if ten or more employees are continuously employed at the enterprise. Labor Standards Law, Law No. 49 of 1947, art. 89 [hereinafter LSL].

3. A labor-management agreement is an agreement between the employer and the majority union or a representative of the majority of employees. It must be formed to be exempt from some regulations of the LSL.

4. An employer may extend working hours beyond the maximum working week in the LSL by entering into an agreement with the majority union or representative at the enterprise. LSL, *supra* note 2, at art. 36.

5. For example, an employer shall appoint a health supervisor if fifty or more employees are continuously employed at the enterprise. The Industrial Safety and Health Law (ISHL), Law No. 57 of 1972, art. 12; *see also* Industrial Safety Health Enforcement Regulation, art. 4.

6. *Hatsuki* (Circular from the Vice-Minister for Labor) 17 (Sept. 13, 1947); *Kihatsu* (Circular from the Director-General of the Labor Standards Department, the Ministry of Labor) 511 (Mar. 31, 1948); *Kihatsu* 90 (Feb. 13, 1958).

7. LSL, *supra* note 2, at art. 101.

teleworker's house as an "enterprise" only in exceptional cases. Of course, without visits by labor standards inspectors, an at-home office can be left in an unhygienic state and a home teleworker can be forced to work too long—such circumstances should be avoided. Therefore, in the case of an at-home office that cannot be regarded as a branch office, the government should establish a supervisory system by which labor standards inspection can reach full-time teleworkers at home.

So far, there have been few cases in which a worker's house could be regarded as an independent enterprise. However, if in the future a company appears that has no head office building, but has many at-home offices linked by a computer network, it will be necessary to consider a new framework of regulation.

B. Management of Working Hours

The LSL regulates the "actual working hours" of employees. Therefore, in principle, employers always have to know how long teleworkers actually work. Some "teleworking manuals" set forth available ways to manage working hours without the need to introduce any new or special arrangements. For example, teleworkers can make phone calls at the beginning and end of each day's work, or they can notify the managers in advance or *ex post facto* of the number of hours worked.⁸ However, these means would violate the LSL if they were put into operation as an "honor system." The law requires employers to direct the teleworkers to work from a certain time until a certain time, not to work after a certain time, to get permission for any overtime work, and so on.

In reality, it is difficult for employers to manage teleworkers' working hours in the way the LSL normally requires, without injuring the benefits of teleworking.⁹ As a result, the flexi-time system and the "conclusive presumption scheme of working hours" must be examined.

8. See, e.g., TELEWORK GUIDEBOOK 44 (Telework Suinshin Kaigi (Council for Promoting Teleworking) ed., 1998); NIHON SATELLITE OFFICE ASSOCIATION (JAPAN SATELLITE OFFICE ASSOCIATION), TELEWORK DONYU MANUAL (MANUAL FOR INTRODUCING TELEWORKING) 27 (1999).

9. Yasuo Suwa, *Telework no Jitsugen to Rodoho no Kadai (The Realization of Teleworking and Labor Law Issues)*, 1117 JURIST 83 (1997).

1. Flexi-time Systems

Employers may adopt flexi-time systems for teleworkers provided that the statutory requirements¹⁰ are met, namely, specification of the work rules and the conclusion of labor-management agreements. Even teleworkers must comply with the “core-time” and “flexible-time” provisions of the enterprise work rules, if any.¹¹ In the case of a “complete flexi-time system,” with neither a specified core-time nor flexible-time, employees can decide, at their full discretion, when to start and end each day’s work. However, the “total working hours” per pay settlement period, specified in the labor-management agreement, functions as the scheduled working hours and the “total working hours” per week may not, on average, exceed the weekly maximum working hours in the LSL.

2. The Conclusive Presumption Scheme of Working Hours for Outside Work

When an employee works outside the workplace and it is difficult to calculate the working hours, it is presumed that the employee has worked for the scheduled working hours or the hours normally required to accomplish the duties.¹² The length of time provided for in the labor-management agreement, if any, shall be presumed to be the number of “hours normally required for the duties.”¹³

In fact, the above presumption does not apply to many teleworkers. There are a number of reasons for this. First, it is possible that a teleworker is not deemed to work outside the workplace since his or her home or satellite office is regarded as a part of an enterprise, namely, “an extension of the higher entity.” Second, even if the employee is deemed to be working outside the workplace, formulated regular teleworking will not, in many instances, fall within the definition “difficult to calculate the working hours.”¹⁴ This applies as well to formulated “partial” teleworking, namely, regularly working at home or in a satellite office a few times a week. Thus, it seems that

10. LSL, *supra* note 2, at art. 32-3.

11. “Core-time” refers to the periods that employees are required to work and “flexible-time” means the periods during which employees can start or finish work.

12. LSL, *supra* note 2, at art. 38-2, ¶ 1.

13. *Id.* ¶ 2.

14. For details, see Hideyuki Morito, *Wagaya ga Ichiban? Joho Ka ni Tomonau Telework EZaitaku-Shuro no Hoteki Shomondai (There's No Workplace like Home?: Legal Issues Concerning Telecommuting and Home-Based Work)*, 467 NIHON RODO KENKYU ZASSHI (THE MONTHLY JOURNAL OF THE JAPAN INSTITUTE OF LABOUR) 48 (1999).

the conclusive presumption scheme for outside work is only applicable to the “mobile type” of teleworking in which workers have no fixed working place and to the cases in which employees “take their jobs home” temporarily and irregularly because, as noted above, in almost all cases, it is not “difficult to calculate the working hours” since employers can manage teleworkers’ working hours by such means as making phone calls at the beginning and end of each day’s work or notifying the managers on a prior or *ex post facto* basis of the number of hours worked.

3. The Conclusive Presumption Scheme of Working Hours for Discretionary Work

Under the discretionary work scheme, an employee is presumed to have worked for the hours prescribed in the labor-management agreement, regardless of his or her actual working hours. The activities covered by the scheme are “duties stipulated by Ministerial Order as duties for which it is difficult for the employer to give concrete directives regarding such decisions as the means of accomplishment and allocation of time and the like, because, due to the nature of the duties, the methods for accomplishment must be largely left to the discretion of the employees engaged in such duties.”¹⁵ The Enforcement Regulation of the LSL stipulates eleven activities covered by the scheme such as the research and development of new products and technology; the planning and analysis of information-management systems; the gathering of information and editing in the mass media, design, copy writing, and the like.¹⁶ Discretionary and professional work evaluated by its quality rather than quantity comes under the remit of teleworking, which presupposes teleworkers’ self-management.

On April 1, 2000, the duties covered by the regulation were extended to more white-collar jobs by the “new discretionary work scheme.” The new scheme may be adopted at workplaces where “important decisions” regarding the operation of the enterprise are made, on the condition that the labor-management committee is set up at the workplace. The activities covered under the new scheme are duties of planning, research, and analysis that are performed at the discretion of the employees engaged in such duties and for which the employer does not give any concrete directives.¹⁷

15. LSL, *supra* note 2, at art. 38-3, ¶ 1.

16. Labor Standards Law Enforcement Regulation, art. 24-2-2, ¶ 2.

17. LSL, *supra* note 2, at art. 38-4.

Employers are exempted from their duties to manage teleworkers' working hours by making use of flexi-time systems or conclusive presumption schemes of working hours for outside or discretionary work. However, these are not total "exemption" schemes; unlike exemption for supervisors and managers,¹⁸ the LSL's regulations on rest periods,¹⁹ rest-day work,²⁰ and night work²¹ still apply to teleworking under flexi-time systems or conclusively presumption schemes.

C. The "Right" and "Duty" to Teleworking

1. The Right to Engage in Telework

Employees have no right to engage in teleworking unless it is expressly promised in the work rules. Employers have broad discretion as to whom they allow to engage in teleworking. However, they must not discriminate against female employees or labor union members in deciding whether to permit teleworking.

2. The Duty to Engage in Telework

Is it an employer's right to order the undertaking of teleworking within the content of the labor contract?²² Basically the same theory can be applied as in the case of an employer's right to order transfers.²³ However, because an ordinary labor contract is entered into on the premise that an employee will work at a place managed by the employer, the conclusion is that the employer cannot order teleworking against an employee's will, unless otherwise expressly stated in the work rules. This leads to the next issue: If the work rules have been changed to include an explicit basis of an order to engage in teleworking, can it be considered a reasonable change of working conditions?²⁴ To answer this question, a balance should be struck

18. *Id.* at art. 41.

19. *Id.* at art. 34.

20. *Id.* at art. 35.

21. *Id.* at art. 37, ¶ 3. Even supervisors and managers are covered by the regulations concerning increased wages for night work.

22. Sometimes an employer's "order to work at home" in name can be virtually considered as a disciplinary "confinement at home" or as "harassment." Suwa, *supra* note 9, at 85.

23. The courts require that the employer's transfer order: a) be within the scope of the agreed-upon matters in the labor contract concerning the locations and types of work; and b) not constitute an abusive exercise of a right. The order will be regarded as invalid and an abuse of right if it is not necessary for the business or causes the maximum disruption of an employee's life. KAZUO SUGENO, JAPANESE LABOR LAW 369 (1992).

24. Current caselaw permits a change in the work rules to the disadvantage of an employee only when the change of their working conditions stays "within a reasonable range." For

between business necessity and the extent to which it would be of detriment to employees.

D. Safety and Health at the Workplace and Industrial Accidents

1. Safety and Health

Usually teleworkers are white-collar employees and, thus, the Health Standards Regulations for Offices (HSRO) apply to their workplaces.²⁵ The HSRO establishes minimum standards for office air capacity, ventilation, temperature, air conditioning, lighting, and so on. Do teleworkers' houses fall under the term "offices" as defined in the HSRO? To apply the above-mentioned prevailing interpretation about "enterprise," if a part of a house is deemed to be an independent enterprise or an extension of the higher entity, the HSRO will apply to the house; in any other case, that is, if a teleworker is construed to be working outside the workplace, the HSRO will not apply. However, it is obvious that the HSRO was enacted without taking account of teleworking. Accordingly, this is a matter to be solved by legislation, not by interpretation. Compliance with the regulations regarding workplace safety and health is an important factor in deciding if employers have met their "duties to care for safety"²⁶ in industrial accident civil lawsuits.²⁷ In this respect, safety and health regulations, at least guidelines or the like, covering teleworking at home or in satellite offices should soon be enacted. At the same time, the existing *Guide on Safety and Health of VDT (Video Display Terminal) Work*²⁸ and *Guide to Prevent Lumbago in the Workplace*²⁹ need to be reviewed to take into account the fact that many teleworkers are sitting at their personal computers for long periods of time.

example, see Daishi Ginko, MINSHŪ (THE SUPREME COURT REPORTER (CIVIL CASES)) 51-2-705 (S. Ct., Feb. 28, 1997).

25. Health Standards Regulations for Offices, art. 1, ¶¶ 1-2.

26. In 1975, the Supreme Court held that, ". . . on the basis of certain legal relations, the aforesaid duty to care for safety, when the parties have entered into relations involving special social contacts, will also be generally recognized as developing on one or both parties toward the other based on the doctrine of good faith." Jieitai Sharyo Seibi Kojo, MINSHŪ 29-2-143 (S. Ct., Feb. 25, 1975). Pursuant to this judgment, the concept of "an employer's duty to care for safety" in a labor contract relationship became firmly embedded in case law. See SUGENO, *supra* note 23, at 335-337.

27. In Japan, even when the Workers' Accident Insurance Law provides insurance benefits, damage claims under the Civil Code are still allowed for the portion of a loss that exceeds the amount of the benefits.

28. *Kihatsu* 705 (Dec. 20, 1985).

29. *Kihatsu* 547 (Sept. 6, 1994).

2. Industrial Accidents

It appears that courts have never dealt with cases involving teleworkers and industrial accidents. However, since teleworkers are “employees,” they are entitled to workers’ accident compensation insurance benefits if they get injured while working or if they develop industrial diseases due to their work. There are already many judicial precedents and administrative interpretations on industrial accidents occurring on business trips and, thus, these can be cited in cases when teleworkers are construed to be working outside the workplace.

An injured employee can also claim damages caused by the employer’s tort or intentional or negligent violation of “duty to care for safety.” A typical case, for example, is when an accident has occurred due to a defect in the equipment supplied by an employer for a home-based teleworker. It is also possible that teleworkers work excessively long hours because, in general, they are not under close supervision. If an employer neglects any prior provision to prevent a teleworker from working longer hours, the employer might be charged with the violation of the “duty to care for safety.”

It is rare, if not impossible, for industrial “accidents” to occur in teleworking because of its very nature. Rather, industrial “illness,” including lumbago, and dry eyes, to name but a few, resulting from VDT work may be a serious problem.

E. Jurisdiction

1. Civil Lawsuits

When an employee brings an action against his or her employer, the proceedings can be initiated at a district or summary court where the head office of the company is located,³⁰ where the office or place of business to which he or she belongs is based,³¹ or the place where the duty of paying salaries is to be performed.³² Hence, in theory, compared to the “traditional” type of employees, it could be harder for teleworkers to sue their employers. For example, if the work rules applying to a home-based teleworker living in a distant location expressly provide that the place of paying salaries shall be the same place as the head office, then the teleworker may not bring an action at his or her residence unless the home office falls within the “office or

30. Civil Procedure Law, Law No. 109 of 1996, art. 4, ¶ 4 [hereinafter CPL]; *Id.* at art. 5, No. 8.

31. *Id.* at art. 5, No. 5.

32. *Id.* at art. 5, No. 1.

place of business” referred to in Article 5, No. 5 of the Civil Procedure Law. There has been one interesting judicial decision on the jurisdiction of a lawsuit by a teleworker seeking nullification of dismissal and payment of outstanding wages. In that case, the employee, based in a room of his house in Kobe, was working for a company whose head office was located in Tokyo. The company installed a telephone circuit in its name in the employee’s house, lent him a cellular phone, a fax machine, and a computer, and gave him the title of “Manager, Western Japan Sales Department.” He was allowed to sue in his home jurisdiction, but only because the employer deposited his pay in a bank account located in that locale.³³ However, such confusion and inconvenience in jurisdictional areas may not actually occur, because courts will probably grant discretionary transfer of the case³⁴ if the original jurisdictional area is detrimental to a teleworker.

If over-the-border teleworking flourishes in the future, international jurisdiction will become an issue. While, generally speaking, agreement of jurisdiction³⁵ has not often been the issue in labor and employment disputes, the need for such agreement will possibly increase in the future when high-speed data communication is more prevalent and home-based teleworking takes root. Needless to say, no agreement unfavorable to employees shall be forced upon them.

2. Local Labor Commissions

An employee may file a complaint of unfair labor practice at the Local Labor Commission in the district where he or she resides,³⁶ as well as in the district where the office of his or her labor union or employer is located, or where the unfair labor practice is committed. In theory, teleworkers of a company dispersed throughout Japan can

33. Paaru Systems, HANTA (HANREI TIMES) 998-259 (Osaka High Ct., Apr. 30, 1998). In the first instance, the court ruled that the Tokyo District Court should have jurisdiction over the case, stating that the employee’s house did not fall under the definition of an “office or place of business” referred to in Article 9 of the former Civil Procedure Law. Concerning the place where the employer’s duty to pay salaries was performed, the company’s domicile was deemed to be the “place where an obligation is to be performed” referred to in Article 5 of the Law because the salary was remitted directly into the employee’s bank account. Paaru Systems, HANTA 998-263 (Kobe Dist. Ct., Mar. 31, 1998). To the contrary, the Osaka High Court concluded that the employer’s duty to pay salaries was performed in the employee’s domicile and gave the jurisdiction to the Kobe District Court, although the court denied that the employee’s home office was the “office or place of business.”

34. CPL, *supra* note 30, at art. 17.

35. *Id.* at art. 11

36. Trade Union Law Enforcement Order, art. 27, ¶ 1.

file a complaint at their respective addresses all at once. In such a case, as a rule, the labor commission at which the first complaint has been filed has jurisdiction over the matter.³⁷ However, it is possible that the Central Labor Commission will designate another Local Labor Commission to handle it.³⁸

III. EMPLOYER'S INCREASED OVERSIGHT OF WORK ACTIVITY: STRENGTHENED MONITORING OF PERFORMANCE AND COMMUNICATION

Since the essence of labor contracts is to work under the direction and supervision of employers, employers have the power to monitor and supervise their employees. But the growth of IT has made possible forms of monitoring previously unimaginable.

A. *Performance Monitoring by Video Cameras and Computers*

Video monitoring of the workplace has already been implemented, mainly for quality control. In recent years, the accumulated records of computer use have been utilized to monitor employees' work activities. Unlike humans, video cameras and computers do not feel tired and "IT monitoring" is certainly more detailed than monitoring conducted by human supervisors. However, it is doubtful if it will result in an improvement in productivity. In some other countries, a trend can be observed toward restricting the electronic monitoring of performance at a certain level in order to prevent "work dehumanization."

Although there have been no cases in which electronic monitoring itself has been the issue, some illustrative cases do exist. First of all, it goes without saying that employers have no right to infringe upon employee privacy. Therefore, case decisions hold that it is unlawful and an infringement of privacy for an employer to set a wiretap in an employee waiting room so as to probe into the union's activities,³⁹ or to search an employee's locker without his permission and take photos on suspicion that he is a communist sympathizer.⁴⁰

However, this issue needs to be weighed from an additional perspective because, unlike the waiting room or locker room scenarios mentioned above, offices or factories are not private places. There

37. *Id.* ¶ 2.

38. *Id.* ¶ 3.

39. Okayama Denki Kido, ROHAN (RODO HANREI, LABOR CASE JUDGMENTS) 606-50 (Okayama Dist. Ct., Dec. 17, 1991).

40. Kansai Denryoku, ROHAN 680-28 (S. Ct., Sept. 5, 1995).

have been some cases of tape recording without notice. In the *Meguro Koko* case,⁴¹ the employer, without notification, recorded the class of a teacher who was suspected of giving lessons prejudiced toward Communism and dismissed him on these grounds. The Tokyo District Court, reasoning that such recording harmed the freedom and independence of teachers as protected by the Fundamentals of Education Law, concluded that the dismissal was against public policy and constituted an abuse of the right. In the *Hirosawa Jidosha Gakko* case,⁴² the employer placed a tape recorder in a training car to check an instructor's training methods. The Tokushima District Court stated that the use of a recorder in this way could infringe the personality rights of those recorded, including trainees, and that when the recording was required, the employer should have "told the instructors of it, heard their opinions, persuaded the objectors by offering its counterarguments, . . . had fully discussed how to do the recording, and in these ways made efforts to convince them."

The *Meguro Koko* case took place in an educational establishment and thus cannot be extended as a general example. However, monitoring employee speech and behavior electronically without their consent will, whether it is put into practice in schools or not, possibly constitute a tort of privacy infringement. It may be necessary to put monitoring into effect for the reasonable detection of misconduct, but it must be with the prior notification of employees or pursuant to the provisions in the work rules. This does not mean that electronic monitoring is justified whenever prior notice is given. Employees are not under any duty to devote themselves entirely to their work and give up their privacy, since they are not machines, but human beings, even while working. Monitoring employee performance by video cameras all the time could lead to the subordination of personality, and, thus, there ought to be some restraints. From this point of view, the *Behavioral Guide on the Protection of Workers' Personal Information* published by the Ministry of Labor on December 20, 2000, at Sections 2-6(4) (5) and 4-1, sets forth the following rules:

- When employers monitor employees' performance by video cameras, computers, etc. (hereinafter "electronic monitoring"), they shall previously notify the employees of the reason and period of time thereof, information collected thereby, etc., unless otherwise provided for by

41. *Meguro Koko*, ROMIN (ROMIN-SHU, COLLECTION OF JUDGMENTS AND DECISIONS ON LABOR CASES) 23-2-155 (Tokyo Dist. Ct., Mar. 31, 1972).

42. *Hirosawa Jidosha Gakko*, ROHAN 488-46 (Tokushima Dist. Ct., Nov. 17, 1986).

law or there is adequate cause to suspect serious misconducts including crimes.

- When electronic monitoring occurs, employers shall take care so as not to infringe employees' right for protection of their personal information.
- Constant electronic monitoring may be done only when it is necessary to ensure employees' health and safety or to preserve employers' business property.
- When introducing electronic monitoring, in principle employers shall previously notify the labor unions thereof, etc. and, if necessary, discuss it with them.

The *Guide* also requires employers to refrain from evaluating employees or making employment decisions based only on the result of electronic monitoring.⁴³ This is also based, though indirectly, on the belief that electronic monitoring and supervision should not be excessive.

B. Monitoring of E-mail and Network Use

Many employees use e-mail and the Internet casually at their workplaces for private purposes. Meanwhile employers may consider monitoring the company computer network, including e-mail use, to check whether employees fulfill their duty to give their undivided attention to the job, or from the viewpoint of preventing leakage of trade secrets, overloading the network, invasion of computer viruses and hackers, and sexual harassment. Generally, such monitoring with reasonable justification is not illegal since the computers and network systems are the employer's property. Compared to the electronic monitoring of performance, as mentioned above, concern for the possibility of dehumanization in the workplace and the subordination of personality is not as high.

However, such monitoring can be conducted in secret. If an employer engages in monitoring without notifying the employees while actually permitting their private use of e-mail and computers, privacy infringement will be an issue. Employers may not discipline employees for the private use of computers and e-mail if they leave the rules of usage vague.

While such equipment monitoring seems to already exist in Japan, no statute directly regulating it has yet been adopted. In addition, unlike the United States, no lawsuit has been brought so far.

43. MINISTRY OF LABOR BEHAVIORAL GUIDE, Section 2-6(6).

At the moment, employers should clarify the rules of monitoring and let employees know the manner and extent of such monitoring. The "Interpretation" of the above-mentioned Ministry of Labor's *Behavioral Guide* sets forth guidance in this direction. It states:

... it is considered appropriate that, when monitoring e-mail and the Internet connection, employers should previously notify the employees of the outline thereof by means of, for example, having express provisions thereon in the rules of e-mail and the Internet use. In practice, it is desirable that employers conduct the monitoring only within the limits essential to achieve the purposes and take full care so as not to infringe or harm the employees' rights or interests; for instance, employers should limit e-mail monitoring, as a rule, to recording of sending and receiving messages or, at most, checking the title of each message in addition to that, and should not go so far as the contents of each message except in case of compelling need.

C. *The Circumstances in Foreign Countries and Their Influence*

The United States and the European Union (EU) seem to be ahead of Japan, at least in legislation. In the United States, the Electronic Communication Privacy Act was enacted in 1986, which regulates monitoring of e-mail, and so on, and protects the privacy of electronic communication. Needless to say, the Act applies to Japanese companies doing business in the United States, but it is also possible that, depending on the case, companies in Japan exchanging data with U.S. companies through international computer networks will be dragged into U.S. courts.⁴⁴

In the EU, a Directive on personal information protection⁴⁵ became effective in 1995. The Directive has a provision prohibiting the transfer of personal information from an EU Member country to any non-Member nation that does not provide an "adequate level" of protection of personal information. If the protection level of Japan is regarded as below this level, it will be impossible to transfer any personal information that has business necessity from EU countries to Japan.⁴⁶ Thus, this is also a problem pertaining not only to Japanese companies doing business in the EU, but also to all Japanese

44. Rieko Mashima, *Shiyosha ni Yoru E-Mail no Monitoring to Jugyo-In no Privacy (E-Mail Monitoring by Employers and Employees' Privacy)* (1), 658 NBL 28, 29 (1999).

45. Directive 95/46/EC of the European Parliament and of the Council on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data (Oct. 24, 1995).

46. For details, see Kiyoshi Takechi, *Network Jidai ni Okeru Rodo-Sha no Kojin Joho Hogo (Protection of Employees' Personal Information in the Era of Network)*, 187 KIKAN RODO-HO (QUARTERLY LABOR LAW) 27 (1998).

companies. In fact, the Ministry of Labor's *Guide* mentioned above is in line with the ILO's Code of Practice on the Protection of Workers' Personal Data, adopted in 1996.

IV. PROBLEMS ARISING FROM SIMPLIFIED DATA COMMUNICATION AND ELECTRONIC CORPORATE PROPERTY

A. *Misappropriation of Electronic Property*

1. Disciplinary Actions

The more IT is introduced into workplaces, the greater employee personal use of the employer's electronic equipment or software increases (for example, surfing the Web, e-mail, Internet shopping, preparation of personal correspondence, and the like). As mentioned above, to date, not many companies have express rules for e-mail use. However, even if written rules do not exist, such actions by employees could constitute a neglect of duties, misuse of the employer's property, or interference with business, and, therefore, be grounds for disciplinary action. So far, there have been no judicial cases dealing with this problem, although newspapers and magazines often focus upon the issue.

In this connection, employer discipline of employees is legal under the following conditions. First, the action of an employee must fall under any disciplinable acts listed in the work rules. According to a Supreme Court precedent,⁴⁷ the provision of work rules, if reasonable in content, constitutes the terms of individual labor contracts. Most work rules enumerate neglect of duties and interference with business as misconduct.

Second, it is necessary that the employee's action has disturbed the order of the enterprise, that is, has adversely affected workplace morale.⁴⁸

Third, the disciplinary action should not be considered an abuse of right. To meet this requirement, the disciplinary action should not be too severe compared to similar acts in the past, nor should be it taken against any employees' actions that have been tacitly permitted to date. Also, the opportunity for explanation should be ensured for the employee.⁴⁹

47. Denden Kosha Obihiro Kyoku, ROHAN 470-6 (S. Ct., Mar. 13, 1986).

48. SUGENO, *supra* note 23, at 358.

49. KAZUO SUGENO, RODO-HO (LABOR LAW) 400 (5th ed., 2nd Supp. 2001).

2. Damage Claims against Employees

Japanese law prohibits an employer from adopting a contract that fixes in advance either a sum payable to the employer for breach of the labor contract or an amount payable as indemnity for damages.⁵⁰ However, if an employee misuses electronic hardware (such as personal computers) or software, and causes damage, injury, or loss to the employer, the latter has the right to claim damages from the employee on the grounds of non-performance of obligation or tort. For example, the court in the *Okuma Tekko-Sho* case⁵¹ stated that, in the case of an accident due to an employee's minor negligence in the course of work, the employer may not exercise the right to damages against the employee in view of the fairness doctrine in the employer-employee relationship. Thereafter, the court held that while the employee who dozed off during night work and damaged an expensive machine tool was grossly negligent and, therefore, liable due to his non-performance of obligation, the employer should have taken some damage-reducing measures such as insuring the machinery. In conclusion, the court allowed the employer's claim against the employee only up to a quarter of the actual damage.

In the *Ibaragi Sekitan Shoji* case,⁵² an employer was held liable for a third party's damage caused by an employee-driven tank truck under the Civil Code's "employer liability" provision⁵³ and sought reimbursement⁵⁴ from the tortfeasor employee. Again, the court awarded the employer only a quarter of the actual damage, pointing out that the employer failed to buy insurance and the employee's work performance record was not especially poor. Judging from these cases, it is highly probable that, in case of an employee's misuse of the employer's electronic equipment, courts will reduce the damages payable by the employee based on "good faith"⁵⁵ and taking all things into account.

B. Unlicensed Copies of Software

Suppose that an employee has, without license, made a copy of software licensed only to the computer located in the company and is

50. LSL, *supra* note 2, at art. 16.

51. *Okuma Tekko-Sho*, HANJI (HANREI JIHO, JOURNAL OF JUDICIAL DECISIONS) 1250-8 (Nagoya Dist. Ct., July 27, 1987).

52. *Ibaragi Sekitan Shoji*, MINSHŪ 30-7-689 (S. Ct., July 8, 1976).

53. Civil Code, art. 715 (1896).

54. *Id.* at art. 715, ¶ 3.

55. *Id.* at art. 1, ¶ 2.

using the copy in his or her own computer. The employer may possibly be held liable under breach of contract or tort. First, if the employee has made the copy to take his or her work home, he or she can be considered the employer's "performance helper" (*Erfüllungsgelhilfe*) to the software license agreement, whose intent or negligence is regarded as that of the employer. Second, such a license agreement usually includes a provision to the effect that "the licensee shall guarantee and ensure its employees' compliance with all the provisions of this agreement." Therefore, in either case, the employer will be held liable under breach of contract. The above-mentioned employer liability under the Civil Code is also applicable.

Even when an employee has made a copy of the company's software not for work but solely for private use, it is still possible for the employer to be held liable. For example, an employer may be held liable for breach of the license agreement if it fails to keep the original CD-ROM at the place to which only the system administrator has access, such as a locked bookshelf. Also, under the "good faith" doctrine of contract, the employer may possibly be deemed to have failed to perform an obligation to supervise the employees to prevent making unlicensed copies.

An employer shall also be liable for his or her employees' torts "in the course of business" under the Civil Code. The courts interpret "in the course of business" fairly broadly in the majority of cases and scholars adopt the so-called "appearance theory." According to that theory, an employee's action that, from the outside, appears to be part of the employer's business, regardless of the actualities, should be treated as though performed in the course of the business.⁵⁶ The Supreme Court reached this result even when an employee caused an accident when he was driving his employer's car after work without permission.⁵⁷ Such trends in judicial decisions lead to the conclusion that there is a high possibility that, if an employee makes an unlicensed copy of a piece of software, even for entirely private purposes, this will be regarded as an act in the course of his or her employer's business.

An employer can be exempted from liability by proving that due care was taken in supervising the employee's work.⁵⁸ However, in general, the courts have been very reluctant to allow this exemption. Besides, it does not appear that many employers are putting their

56. TORU IKUYO, *HUHO-KOI (TORTS)* 191 (1977).

57. *MINSHŪ* 16-11-2255 (S. Ct., Nov. 8, 1962).

58. Civil Code, *supra* note 53, at art. 715, ¶ 1, proviso.

software under strict control. Here again, like the breach of contract case mentioned above, strict supervision, such as keeping the original CD-ROM in a locked bookshelf, will be needed.

An employee who has made unlicensed copies of a piece of software may be subjected to disciplinary actions because of the crime committed in making use of his or her occupational position; provided, however, that all the conditions for legally-effective discipline, mentioned above in II.B.1., are met.

There are no laws expressly prohibiting the retaliatory discharge of, or any other disciplinary actions against, an employee who has disclosed to outside sources that his or her employer's computer system uses pirated software. However, it is evident that an employee's disclosure of any illegal act cannot be a just cause for the discharge or disciplinary actions.

C. *Costs of Electronic Equipment and Software*

Although employers often lend their computers and software to the employees and often employees use them for private purposes, it is unlikely that employees ever are required to contribute to the costs of purchasing or maintaining the equipment or software. Needless to say, employers and employees could agree to share these costs equally, though in such cases it would be more difficult to prevent the employees' from using them privately. Such sharing may also create a problem from the standpoint of maintaining confidentiality.

Also of significance in deciding whether employees will pay equipment costs is the fact that one element that brings a person closer to the status of a "self-employed subcontractor," rather than an "employee," is that the individual bears the cost of expensive equipment used for work-related tasks.⁵⁹

59. RODO KIJUN HO NO MONDAITEN TO TAISAKU NO HOKO (THE LABOR STANDARDS LAW: PROBLEMS AND COUNTERMEASURES) 57 (Rodo-Sho Rodo Kijun Kyoku (Labor Standards Department, The Ministry of Labor) ed., 1986). Yet this element only provides one criterion of employee status; other elements related to remuneration, working hours, direction or supervision, and the like should be examined. For details, see SUGENO, *supra* note 23, at 77-79.

D. Criticism of Employers and the Dissemination of Opinions through Electronic Media

1. Validity of Disciplinary Actions

Does an employer have good cause to dismiss or otherwise discipline an employee who uses publicly accessible Web sites, electronic bulletin boards, or the like, to criticize an employer's policy on business or personnel management, or to complain about a particular manager? Let us weigh this in light of the previous description of the conditions for valid discipline. Work rules usually have no provisions to the effect that "an employee shall not criticize the employer on the Internet." Instead, they include general terms that the employer may subject an employee to disciplinary actions if the employee "has soiled corporate honor or reputation" or "has committed a crime or misconduct." The first task is to interpret these terms. In addition, as observed above, discipline must be justified by showing that the employee's act has disturbed the order of an enterprise and that the disciplinary action would not constitute an abuse of right.

To date, there have been no judicial decisions dealing with an employee's dissemination of opinions through electronic media. Thus, there are no alternatives but to refer to cases involving traditional media. It must be added, however, that the Internet is now so widespread that it should be considered a public space, rather than a private one.

First, in a case in which employees distributed bills, the Supreme Court set forth the general rule as follows:

Even when the bills are distributed outside the workplace and not during the working hours, if those bills contain false, exaggerative, or distorted statements on the employer's policy and business, and distributing them threatens to hinder the smooth operation of the company, the employer is allowed to subject the employees to disciplinary actions for the act of distribution to preserve and secure the order of the enterprise.⁶⁰

The *Jintan Terumo* case⁶¹ deals with the dissemination of opinions through public media. An employee appeared on television and with exaggerated statements, criticized and slandered his employer's measures to address a mercury poisoning case. The court ruled that his actions constituted a cause for disciplinary dismissal in the work

60. Chugoku Denryoku, ROHAN 609-10 (S. Ct., Mar. 3, 1992).

61. *Jintan Terumo*, HANJI 384-10 (Tokyo Dist. Ct., July 30, 1964).

rules, saying that such action is justified "... if an employee has heavily soiled the employer's reputation."

In the *Shuto Kosoku Doro Kodan* case, an employee contributed to a newspaper reader's column. The Tokyo District Court stated:

With some exceptions, on the one hand an employee shall have a duty of good faith not to announce or state his or her opinions in newspapers, even outside the workplace, if such dissemination is related to the preservation of the order of the enterprise because, for example, it threatens to hinder the smooth operation of the company, and thus, on the other hand, the employers can take disciplinary actions against the employee in breach of the duty from the standpoint of maintaining the order of the enterprise.⁶²

If an employee states his or her opinion on the Web during working hours or by use of the employer's computer, it will fall within the grounds for discipline based on a breach of the duty to give undivided attention to the job or infringement of property rights, regardless of what is stated. However, this does not mean that an employee is free to do anything he or she likes during non-working hours and using his or her own computer. The duty not to soil the reputation of the employer originates in the status as an employee and extends to non-working hours or outside the workplace.

In all of the above cases upholding discipline, the employee's statement of opinion was false, exaggerated or libelous and, thus, the disciplinary actions were valid. Such acts, if carried out on the Web, may constitute crimes such as defamation or insult as well as torts for impairing the reputation and social standing of the company, because it is probable that the operations of the company will be impeded and the enterprise order will be disturbed. Hence, these acts will come under grounds for discipline in the first instance. Even when the truth is revealed, the employee is in breach of confidentiality if he or she exposes an important company secret. An employee who discloses a boss's private matters or the company's internal affairs, will also be subject to discipline, even when the statements are true.

But, what if an employee brings to light the employer's malfeasance, like the violation of the LSL? As explained above regarding pirated software, an employer cannot discipline the employee for disclosing the employer's malfeasance to the labor standards' inspectorate, police, or mass media. Basically the same can be said of such accusations on the Web. "Some exceptions" in the above-mentioned *Shuto Kosoku Doro Kodan* case include a case in which the employer had been secretly engaging in socially improper

62. *Shuto Kosoku Doro Kodan*, ROHAN 718-17 (Tokyo Dist. Ct., May 22, 1997).

activity, such as malfeasance, and, in spite of the employees' efforts to address this problem within the company, matters had not improved. The employees were left no choice but to disclose this affair to the supervising agency and mass media with the intention of correcting the situation. In such a case, the court states that even if the company's interests may be harmed, public interest should be given priority. Therefore, if what is disclosed is true, or even when it is not but there is good cause to believe it to be true, the employees' disclosure shall be deemed to be a justifiable act and they shall neither be held liable for the violation of the work rules nor be subjected to any disciplinary actions.

A difficult question arises when it comes to a case in which an employee criticizes, based on accurate facts, his or her employer's policy on personnel and human resource management or business matters. It is very difficult to judge, since such a case has never arisen in the past judicial cases. Suppose that, on the Web, an employee criticizes the employer's introduction of the performance-based annual salary system because no clear performance evaluation standards have been established, or asserts that the company's decision to close its Ichiro plant is wrong, or that his or her university made a bad judgment in moving out to the suburbs of Tokyo or to establish a law school. Is it possible for the employer to discipline those employees?

They do not lie, libel, or slander the employer, nor do they divulge any company secrets. Rather, they constructively propose a better style of business or human resource management. Some may, on the one hand, contend that the employer cannot discipline the employees for such reasons. On the other hand, employees owe the duty of good faith to their employers. The duty of good faith, which is a basis of the labor-management relationship, is a duty not to act contrary to the interests of the employer. For example, if an employee who is opposed to the establishment of a law school, should have argued against the plan within the university. Once appeals are made on the Web to the public, people outside the university might have the impression that the university is divided against itself. This kind of behavior may impair the reputation of the company and disturb the order of the enterprise. As it is not an accusation of having violated the law, the viewpoint of "public interest," referred to in the above *Shuto Kosoku Doro Kodan* case, would not be applicable.

In contrast, an employer cannot take any disciplinary actions because an employee disseminated complaints as part of union

activities. Proper union activities are exempted from both criminal and civil liabilities⁶³ and free from disciplinary actions. This is a logical conclusion from Article 28 of the Constitution, which protects the workers' right to act collectively. As a result, there is a possibility that a non-union member can be disciplined by an employer for an action that, if done by a union member, would be exempted from any disciplinary actions.

Although generally it is very hard to decide if an activity is proper, criticizing the employer's labor or personnel management policy is considered to be a proper act if it is true as a whole. Also, criticizing the employer's business policy is proper if it is related to the working conditions of employees and is true as a whole.⁶⁴ However, the action must be under the labor union's control in order to be given propriety. The act loses its propriety once it is carried out during working hours. Exaggeration, libel and slander, charges of private affairs and the like, are not allowed, even if they contain the truth.

Basically this is also the case with employers in the public sector. However, the statement of opinions by public service employees can take on the character of "public interest" referred to in the above mentioned *Shuto Kosoku Doro Kodan* case—all the more because the employers are public service corporations, local municipalities, or the government. Accordingly, the possibility of discipline is reduced.

As mentioned in the first part of this section, even if a good cause exists for discipline, the disciplinary action is invalid if not appropriate to the circumstances. Above all, the disciplinary action should not be too severe in comparison with actions taken in response to previous similar acts. Accordingly, dismissal of an employee solely for criticizing the employer on the Web will probably be judged too severe. The criterion for judging abuse of the right to discipline depends on whether the employee is a manager or a rank-and-file employee, because this affects the extent to which the employee owes the duty of good faith to the company.⁶⁵

2. Damage Claims

An employee or an ex-employee criticizes the company or a particular manager on Web sites or electronic bulletin boards can be held liable for damages if the criticism is false or libelous. Even if the

63. Trade Union Law Enforcement Order, art. 1, ¶ 2; *Id.* at art. 8.

64. SUGENO, *supra* note 49, at 606.

65. *See* Yokohama Gomu, MINSHŪ 24-7-1220 (S. Ct., July 28, 1970).

criticism is based on the truth, there may be a claim for relief against the employee or ex-employee.

The first possibility is a damage claim for a breach of confidentiality. According to Article 2, paragraph 1, No. 7 and Article 4 of the Law against Unjust Competition (LaUC), if an employee to whom the employer has disclosed a trade secret makes use of it for the purpose of gaining unfair profits during or after the employment period, the employer can claim damages for the unjust competition. "Trade secrets" mean any technical information, such as production methods, that is safeguarded as a secret and is not publicly known. Since the good faith doctrine imposes an implied duty to keep an employer's secrets in confidence, the employer may claim damages for the breach of contract even when the secret does not fall within the above definition of trade secrets. However, in such situations it may be difficult to prove the damages as well as to verify the causation.⁶⁶

What if an employee disseminates complaints or criticism about the employer after leaving the company? If the exposure of a trade secret is involved, the LaUC will surely apply. If a confidentiality agreement is concluded between an employee and employer at the time of the employee's departure, the employer may claim damages for the breach of it even when no trade secret is involved in the exposure. Here again, deciding on the amount of damages as well as to verifying the causation may be very difficult. Moreover, a generally and abstractly-worded confidentiality agreement will not be found valid. In conclusion, it will be very difficult for employers to claim damages from former employees for a breach of confidentiality unless the disclosure of a trade secret is involved.

The second possibility is a breach of the duty of good faith. Suppose an employee criticizes the employer on the Web during the employment period. Even when it is a justified criticism based on the truth, theoretically, the employer may claim damages from the employee for violating the duty of good faith not to act contrary to the company's interests, unless it concerns the public interest. Here again the problem of calculating damages and verifying the causation comes into play. However, in principle, a former employee does not owe the duty of good faith, because the labor contract has been terminated. Therefore, unless otherwise specifically agreed, the employer cannot seek damages for a breach of the duty of good faith as long as the ex-employee's criticism is constructive and based on the truth.

66. For a case in which there is no verified causation, see Mino Yogyo, ROHAN 499-75 (Nagoya Dist. Ct., Sept. 29, 1989).

E. Communication with Labor Unions

Is an employee permitted to correspond with labor unions using the e-mail address provided by the company? It seems unreasonable to blame an employee for only receiving e-mail messages from labor unions. But what if an employee sends e-mail messages or browses labor unions' Web sites or bulletin boards through the employer's server?

It depends on the company rules for the use of the e-mail and computer systems. For example, browsing the Web site of Rengo, the Japanese Trade Union Confederation (JTUC) for a personal purpose, not as a union activity, means using the company's work equipment for private purposes. Unless such a personal use is authorized, the employee can be subjected to disciplinary actions for this personal use during working hours and also after work. When it is done during working hours, the conduct violates the duty to give undivided attention to the job.

When an employee uses e-mail to communicate with the labor union to which he or she belongs and visits the Web site of the union as a proper union activity, the employee enjoys exemption from civil liability and protection against disadvantageous treatment on the basis that these are union activities. Then what would be the definition of a proper union activity in this case? Unlike dispute acts, union activities are carried out at ordinary times, that is, under normal operations of the business. It means that the employees must perform union activities in such a way as not to violate the duty to give undivided attention to the job. Accordingly, communicating with labor unions during working hours is not a proper union activity; it should be done during the rest period or after work. In addition, the employer's consent is necessary. The court in the *Kokutetsu Sapporo Unten Ku* case held that it is not proper for a labor union to carry out union activities using corporate facilities without the company's consent, unless, under exceptionally special circumstances, the company's refusal to allow the union to use the facilities is considered to be an abuse of the right.⁶⁷ This general rule can also be applied not only in the case of using the company's computers, but also when an employee uses his or her own computer for correspondence, if the e-mail system is a part of the company's facilities and e-mail messages are sent and Web sites are visited through the company's servers. In

67. *Kokutetsu Sapporo Unten Ku*, MINSHŪ 33-6-647 (bill-posting case) (S. Ct., Oct. 30, 1979).

other words, an employee does not have a right to engage in union activities using the employer's e-mail system unless the employer allows employees to communicate via e-mail with all the organizations or persons except labor unions.

Can an employee browse the Web sites or electronic bulletin boards of governmental agencies such as labor standards' inspector offices or labor commissions? Basically, the foregoing applies here too. An employer cannot dismiss or discipline employees for disclosing the employer's malfeasance to the labor standards' inspector office. However, this does not necessarily mean that employees have a right to visit the Web sites of those agencies during working hours or by use of the employers' computers or e-mail addresses provided by the companies.

V. VOCATIONAL TRAINING IN THE AGE OF IT

A. *Promotion of IT Vocational Training*

Under the long-term employment system in Japan, developing human resources internally was the traditional and accepted *modus operandi*. Changing jobs was the exception and rather frowned upon. The government was not very keen on vocational training outside companies. However, with the rapid development and changes engendered by IT, it has recently become more and more difficult to train employees inside each company to have the required skills.

Recently the government set the goal of widely cultivating IT skills in the external labor market.⁶⁸ Especially in 2000, the former Minister of Labor decided to implement comprehensive measures aiming at "IT adaptability for all working people" under the slogan of "the promotion of broad plans to develop vocational ability leading to IT adaptability." These measures have substantially enlarged IT-related courses in public vocational training and budgeted larger sums for high-level IT training courses and for the development of the IT training system. The number of IT-related courses has also been increased in "education and training benefits"⁶⁹ under the Employment Insurance Law (EIL).

68. For Japan's policy shift from firm-specific job training to individual-based career development, see Hideyuki Morito & Shinya Ouchi, *The Role of Japanese Labour Law in Job Creation Policies*, in *JOB CREATION AND LABOUR LAW: FROM PROTECTION TOWARDS PRO-ACTION* 218, 218-221 (M. Biagi ed., 2000).

69. For details of these benefits, see Morito & Ouchi, *supra* note 68, at 219.

B. Vocational Training Leaves

In Japan, employers have no legal duty to grant the employees leaves of absence for vocational training. Some companies voluntarily have vocational training leave systems or individually consent to give such leaves in response to the employees' requests. Only the Vocational Ability Development Promotion Law (VADPL) encourages employers to grant paid leaves for vocational training⁷⁰ and the EIL also provides a subsidy for employers, namely, the "self-education assistance allowance."⁷¹ This allowance assists employers by subsidizing the costs of supporting the vocational training of employees who apply to take it. If employers grant paid leaves to employees for vocational training, their wages during the leaves of absence are also subsidized.

C. Protection of IT-Related Trade Secrets and Know-How

Employees are basically free to take new jobs or start businesses making use of IT-related skills gained under former employers. Employers cannot impose upon ex-employees any general duty not to use common skills they could easily acquire under other employers, even if the skills have been acquired at the expense of the former employers. Any agreement imposing such a duty will be judged to violate public policy and good morals⁷² because it may excessively hamper employee freedom to change jobs.

However, it is possible that some special skills are legally protected as technological know-how. As explained above, under the LaUC, an employer can obtain an injunction⁷³ or damages against a former employee making use of trade secrets for the purpose of gaining unfair profits. Although the LaUC is typically invoked when, for example, an employee runs away with the list of customers kept under wraps as a secret, intangible know-how is not completely excluded from the coverage.⁷⁴

70. Vocational Ability Development Promotion Law, Law No. 64 of 1969, art. 10-2.

71. Employment Insurance Law Enforcement Regulation, art. 125, ¶ 3.

72. Civil Code, *supra* note 53, at art. 90.

73. Law Against Unjust Competition, Law No. 47 of 1993, art. 3.

74. For example, in the *Sanwa Kako* case, the Osaka High Court stated that, "the so-called 'PE two-phase foaming method' owned by a company whose business is molding, processing, manufacturing, and selling plastics is a useful industrial technology developed by the company, and in our country the technology is exclusive to the company and indispensable to its business. To this end, the company has been keeping it under control as a secret in an appropriate way. Therefore, the technology is reasonably acknowledged as a trade secret or secret know-how worth duly protecting from any unfair act." *Sanwa Kako*, HANJI 1553-133 (Osaka High Ct., Dec. 26, 1994).

However, in order to fall within “trade secrets” to be protected, the know-how must be kept under wraps as a secret and not be publicly known. In short, the training has to be of a special nature that no other companies could give. Also the former employee must use it “for the purpose of gaining unfair profits.” This means that there must be the intention to damage the company or commit any act contrary to the doctrine of good faith. It should not be considered unfair to merely leave the company and start a new business, since competition is, in itself, not a bad thing. Ultimately, there will not be many cases in which IT-related training actually falls within the definition of trade secrets.

Although work rules or individual labor contracts sometimes stipulate that employees not compete even after leaving their jobs, judicial decisions have restricted such constraints within reasonable limits from the viewpoint of the employees’ freedom to choose their own occupations. Thus, courts have weighed whether the duty not to compete is within reasonable limits taking account of the length of the non-competition period, its geographical limits, types of prohibited occupations, compensatory measures, and the like.⁷⁵ On the other hand, courts have allowed work rules that provide for the reduction or forfeiture of retirement allowances of a former employee who takes a job in a competing company or starts a competing business. The courts explain that such provisions do not excessively hinder the employee’s freedom to choose his or her own occupation and that retirement allowances have two opposing aspects—namely, a deferred payment of wages and a reward for meritorious service.⁷⁶

D. Technological Innovation and Dismissal

According to the present caselaw in Japan, employers cannot dismiss the employees merely because technology renovation has eliminated their jobs. It is understood that the use of dismissals as a means of employment adjustment should be the last resort and that employers bear the duty to endeavor to avoid dismissals and pursue alternatives, such as the reduction of working hours, suspension of hiring of new graduates, transfers, and farming-out. If employers dismiss the employees without such efforts, the dismissal can be judged as an abuse of right.⁷⁷ Therefore, employers have the duty to

75. See, e.g., Foseco Japan Limited, HANJI 624-78 (Nara Dist. Ct., Oct. 23, 1970).

76. Sankosha, ROKEISOKU (RODOKEIZAI HANREI SOKUHO, EXPEDITIOUS LABOR CASE REPORTER) 958-25 (Supr. Ct., Aug. 9, 1977).

77. Asahi Hoiku-En, ROHAN 427-63 (S. Ct., Oct. 27, 1983).

search for the possibility of transfers, farming-out, and the like, for the employees who have been displaced from their jobs by the introduction of new technology. Recently some economists have criticized the caselaw for establishing overly strict and rigid rules and have proposed the easing of dismissal regulations.⁷⁸ However, since many labor contracts still imply long-term employment security, it will be quite natural, from the viewpoint of the doctrine of good faith, to impose on employers the duty to endeavor to avoid dismissals, at least to a certain extent.

VI. CONCLUSION: THE CONCEPTS OF “EMPLOYEE” AND “DUTY TO GIVE UNDIVIDED ATTENTION TO THE JOB”

Among the issues dealt with herein, the first two subjects (II and IV) are more important in that they are not only more interesting, but also point to the fact that one of the fundamental labor law concepts—the “employer’s direction and supervision”—ought to be reconsidered in the era of IT. Finally, this national report concludes by indicating problems for further discussion in the future in connection with these two subjects.

A. *The Concept of “Employee”*

In the past, being in the workplace meant being under the employer’s direction and supervision. Being under direction and supervision meant being subordinate to the employer. This very “subordination” has been a key concept in drawing the line between “employees” protected by labor law and non-employees. However, due to IT innovations, employees can do their jobs (jobs that previously could not be done at any place other than the employer’s premises) at home with their personal computers. IT has also made it possible to give instructions and send and receive job products instantly through the computer network. Moreover, IT has enlarged the possibility of non-employment teleworking called SOHO (small office/home office) or home-based work.

Legally speaking, employment-type teleworkers are “employees” working under labor contracts and thus are protected by labor protective statutes such as the LSL. Non-employment type teleworkers are “self-employed persons” working under contracts for

78. See, e.g., NAOHIRO YASHIRO, *KOYO KAIKAKU NO JIDAI (ERA OF EMPLOYMENT REFORM)* 85, 85-97 (1999).

work⁷⁹ or quasi-delegation contracts⁸⁰ and labor protective laws do not apply. However, now that the IT revolution is shaking the concept of “work under the direction and supervision,” such a traditional dichotomy might become obsolete. What is to be done if, in fact, these two types of work do not differ as much as they appear to under the current law’s treatment?

Because the LSL is a penal statute as well as a law of fundamentals for administrative supervision, the concept of “employee” in the LSL should be defined uniformly. However, the definition need not be uniform in all the levels of labor law. For example, as long as a person is working subordinately, he or she should enjoy the protection of labor contract theories such as the above-mentioned abusive dismissal doctrine, according to the extent of subordination, whether it is legally classified as a labor contract or a contract for work.⁸¹

B. The Duty to Give Undivided Attention to the Job

Article 101 of the National Public Service Employees Law and Article 35 of the Local Public Service Employees Law provide that employees shall devote all of their working time and attention to performing their duties. Many private companies also have in their work rules provisions stating that employees shall devote all their energies to their jobs. It is generally considered that, as an incidental duty under labor contracts, employees must give undivided attention to their jobs and refrain from any private activities during working hours. This is called the duty to give undivided attention to the job. Many judicial decisions have adopted the so-called “inclusive duty theory,” under which the aforesaid provisions in the work rules have been considered to impose on employees “the duty to give all their attention to the job.”⁸²

Paradoxically, the “duty to give undivided attention to the job” has been acknowledged as an incidental duty under labor contracts because, as a matter of fact, it is impossible for employers to supervise every action, however minor, of the employees. But as examined in this report, the future growth of IT might enable employers to know if their employees are really giving “undivided attention” to their jobs.

79. Civil Code, *supra* note 53, at art. 632.

80. *Id.* at art. 656.

81. Tokyo 12 Channel, ROMIN 19-5-1335 (Tokyo Dist. Ct., Oct. 25, 1968).

82. *See, e.g.*, Tokai Ryokuyaku Tetsudo (Shinkansen Shibu), HANJI 1626-38 (Tokyo High Ct., Oct. 30, 1997).

In such circumstances it would be very dangerous to adopt the inclusive concept of the duty to give undivided attention to the job.

In the well-known *Taisei Kanko* case,⁸³ Justice Ito concurred with the following observations:

If the employees' duty to give undivided attention to the job is interpreted so strictly that they shall devote all their energies to their jobs physically as well as mentally and shall pay no attention at all to anything else other than their jobs during working hours, they will subordinate, in a sense, their whole personality to their employers at least during working hours.

The so-called duty to give undivided attention to the job is nothing more than the employees' duty to do their jobs faithfully under the labor contracts and thus their actions, if consistent with the duty without any difficulty and not hindering operations of the employers' business, do not necessarily violate the said duty of undivided attention.

It is surprising that such a reasonable opinion that has resonance for the IT era at the beginning of the twenty-first century was stated as long ago as 1982.

83. *Taisei Kanko*, MINSHŪ 36-4-659 (Supr. Ct., Apr. 13, 1982).