Legal Protection of the Health and Safety for Gig Workers: The Present Status and Future Prospects in Japan

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Abstract: Labor laws in Japan are generally soft laws, and the Japanese legal system has not recognized platform mediated gig work sufficiently; however, different laws with different principles exist in order to combat labor issues and regulate behaviors of business owners with the help of group dynamics (such as worker and customer trust in business owners). One reason to value an agreement with management in setting work rules is to ensure that management strictly follows these rules once they have been established. In terms of versatility and flexibility, labor laws in Japan may, to some extent, serve as a useful reference in a global context.

In Japan, the scope of significant labor protection laws for individuals (*Labor Standards Act*, *Industrial Safety and Health Act*, *Labor Contracts Act*, and *Industrial Accident Compensation Insurance Act*) is not broad enough to appropriately cover all kinds of platform mediated gig work. The laws permit several interpretations, but they have limited flexibility. Laws that govern labor-management relations, including the *Labor Union Act*, may apply to gig work. In cases where they do, employers cannot refuse to bargain collectively with the representatives of the workers, which would allow the representatives to discuss safety and health matters with the employer. The *Industrial Safety and Health Act* includes provisions reflecting the principle that a person who generates risk is responsible for risk management. The scope of the Act has been gradually extended through legal interpretation and amendments. Still, it may not apply to all kinds of gig jobs. The *Home Work Act* for homeworkers or home handicraft workers requires both clients and contractors to implement diverse health and safety controls. Although the Act has been applied to limited types of work, given its similarity in terms of formative background to laws (including the prohibition of evasion of responsibility by employers), some amendments could make the Act applicable to gig work. The civil responsibility of employers to provide a safe workplace may bolster the principle that a person generating risk is responsible for risk management, and this part of the law has the highest potential to be applied to gig work. This would require, however, a relationship between the platform and the gig worker such that the platform can establish, control, and manage work conditions or command authority over the worker, which would allow the risks of work-related accidents (damages) to be easier to predict and control. Regarding economic laws, the *Small and Medium-Sized Enterprise Cooperatives Act* provides a legal basis for the solidarity of sole proprietors and for negotiations with their clients. Still, it has been utilized very rarely to date.

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Note: Mishiba and Kurashige contributed equally to this work. As for considerations from a legal perspective, Kurashige prepared a draft, and Mishiba reconstructed and finalized it. The article therefore reflects the views of both authors. Mishiba also constructed a theory about the characteristics of Japanese laws and regulations and about ensuring the health and safety of the gig economy. Nakazawa conducted a data investigation about gig workers as well as literature review regarding occupational health. Mishiba reviewed the JILPT's 2019 study and ILO/WHO technical brief.

As described above, there are almost no direct restrictions on health and safety in the gig economy or its users; if serious cases of law evasion occur, however, courts will, based on the intent of applicable laws, attempt to offer remedies for workers with flexible judicial discretion with regard to the employer's duty of care, and this initial step may lead to the formulation of concrete laws in the future. In the future, essential duties to be imposed on platforms after new legislation is formulated are risk investigation, provision of investigation results to gig workers, and sincere response to collective bargaining, while measures to be taken by the Government include investigations of general risks associated with gig work and of ideal countermeasures and the provision of relevant information. In addition, a scheme is necessary to make it possible that in cases where cooperatives that are protected under the *Small and Medium-Sized Enterprise Cooperatives Act* assign industrial physicians to conduct interviews with cooperative members, when the physicians deem it necessary to do so, cooperatives can approach clients, etc. (including platforms) to improve the working conditions of the members in question. Furthermore, as experts in occupational health or other fields have pointed out a number of gig work-related risks, their findings need to be utilized in formulating new legislation, flexibly applying the employers' duty of care, and conducting mandatory negotiations between platforms and gig workers.

Key words: Gig worker, Platform, Industrial Safety and Health Act, Employers' duty of care, Risk assessment, Risk-creator's liability, Small and Medium-Sized Enterprise Cooperatives Act, Home Work Act

1. INTRODUCTION

This article indicates the possibility and limitations of the application of labor and economic laws of Japan, which are mainly soft laws and unique in the global context, to the gig economy. It also examines legal initiatives to overcome these limitations based on suggestions from occupational health studies. First, we describe the features of the legal system of labor-related laws in Japan in comparison to international standards.

A. Features of the Legal System of Labor-Related Laws in Japan

People in Western culture often find it challenging to comprehend many features of the legal system of Japanese labor laws. The advantages of the Japanese legal system lie in its versatility and flexibility in approaching issues, while its disadvantages lie in its ambiguity and slow response. In general, the difference between labor and management is a relative concept, and the attributes of "labor" and "management" have almost no relation to social and economic class differences. If an employee is regular and a candidate for an executive position, the person is likely to be promoted to manager. Labor and management often attach importance to their connection (sense of belonging) with the organization or community they belong to (such as a business and department). Even some non-regular employees[1)] also value their connection with the organization they belong to. Employers,

1) This could be interpreted almost the same as contingent workers. In Japan, they usually work under a fixed term contract or with a condition that a dispatching company and a client company that receives the dispatching service

therefore, tend to consider a trust-based relationship with their employees and parties concerned (such as clients) important. Employers often voluntarily consider the interest of employees without engaging in the labor-management dialogue. Although laws strictly regulate the dismissal of employees, the rules of employment that set out primary working conditions of employees are at times decided at the sole discretion of employers without an agreement between labor and management, and these conditions are binding for employees. Until recently, there was almost no limit on long working hours as long as employers carried out specific procedures. If an employee becomes ill due to his or her job, the employer assumes only the responsibility to make compensation for such illness.

Laws are, at best, inducements to sensible action by employers, and the behavior of employers is influenced by diverse factors, including trust from employees, public reputation, the manager's conscience, tax exemption for profit sharing, and the market. If requirements by laws and other factors are inconsistent with each other, laws are often disregarded or evaded. The courts and administrative bodies apply laws considering the context of each case, social background, and other conditions comprehensively. In responding to a new arising issue, a single law is rarely enacted within a short period with mandatory provisions that are specific, clear, and dogmatic. Multiple laws with different intentions and courses of the enactment process have direct and indirect influences on behaviors of employers.[2)] Issues are to be addressed with mild restrictions (including those that might not be applied directly), and if cases of law evasion occur, courts will, based on the intent of the applicable regulations, attempt to offer remedies for workers with flexible judicial discretion. This initial step may lead to the formulation of concrete laws in the future. It is, of course, possible that even if there is no judicial precedent, social movements may result in the enactment of a law.

In the case of standard terms of a contract, for example, by which consumers in a weaker position in dealings enter a contract semi-compulsorily under unfavorable conditions, the Japanese authorities have not adopted a way to establish an independent adhesive contract regulation law to directly render any of these contracts illegal and invalid. The courts have attempted to offer remedies for consumers in accordance with the general provisions of the Civil Code and separate laws and regulations by industry (which regulate behavior in business by granting the authority of supervising business operators to an administrative body). In reality, however, the behaviors of business operators depend on the supervision and direction authorized by the administrative bodies, voluntary regulations by industrial organizations, customer reputation, and other factors that correlate with each other. For this reason, companies focus on brand

are different, which often causes unstable employment. Non-regular employees in Japan frequently suffer lower wages and other inferior working conditions compared with regular workers.

2) This article will refer to laws about compensation and rehabilitation as long as they relate to prevention. This is because the laws are a part of prevention in a broad sense and, in fact, have a strong impact on prevention measures by employers in Japan.

image strategies. An Act to directly regulate consumer contracts was enacted in the Diet only recently (in 2000), and its content is vague and its illegality criteria are unclear. Therefore, consumers not suffering from great injustice have not been helped by this act. Conversely, in the event of great injustice, affected people have been helped by means of legal interpretation, even without direct conflict of laws. The above mechanism of behavior control is not much different from that in the labor law field.

The industrial safety and health laws and regulations in Japan attempt to improve working hours, placement, and other general working conditions, considering past suicides and deaths due to overwork. In other words, the scope of regulations has extended to social protection, from technical protection for workers such as machinists and builders. These laws also aim to improve business communication with a view to reducing stress. Recently, they have actively supported the employment of patients with cancer or severe illness. They are trying to provide a sense of safety and security comprehensively. Hence, legal fields to be applied in cooperation with each other to realize the health and safety of employees are widening (for example, the Labor Standards Act, economic laws, company management laws, the Social Welfare Act, and the Medical Care Act). The advantages mentioned above of the legal system of Japanese labor-related laws (i.e., versatility and flexibility) may be effective in addressing these complex, different, and multi-layered problems.

The *Industrial Safety and Health Act* has made a model specific to Japan, while the laws of the UK have influenced it in terms of its establishment and amendments. The incidence of work-related accidents in Japan has been and still is very low compared to other countries.[3] However, like other countries, Japan has not yet succeeded in controlling excessive occupational stress (Mishiba 2022, 69–75).

B. Purpose and Structure of this Article

Based on these features of the Japanese legal system, in the following sections, this article aims to describe the current status and issues regarding legal measures for the health and safety of workers in the gig economy in Japan, recommend the development of a collective bargaining framework between risk generators and workers as well as the utilization of industry health professionals through the legal system, and present reference material applicable to the world at large.

Section 3, Gig Workers and Issues about Their Health and Safety in Japan, argues that Japan is also wrestling with the challenge of what measures are to be taken to ensure the health and safety of gig workers while the status of gig workers as "employees" has not been clearly defined because there are incompatible theories. First and foremost, we should make an effort to flexibly interpret the status of gig workers as employees and protect them under existing labor laws; concerning health and safety, without regard to a discussion on the workers' status as employees, both legal interpretation and the legislative process should be based on the principle that

3) Japan Industrial Safety and Health Association, various data listed on "Safety and Health Statistics (by nation)." https://www.jisha.or.jp/international/field/disaster.html, last visited March 12, 2022.

a person generating risk is responsible for risk management (risk generators include those who have risk information and/or the authority to control and manage risk), and; since there are various risks depending on the type of industry and employment, we should enhance the bargaining power of gig workers with risk generators such as clients and platforms.

Section 4, The Current Circumstances of Gig Workers, clarifies that, according to the results of a social survey about freelancers, including gig workers, such workers feel motivated at work but are not satisfied with their pay, and potential risks might vary as gig workers are distributed among various types of industry and job.

Section 5, The Possibility and Limitations of Application of the Status as Employees/ Workers, indicates the definition of employee under the pertinent labor laws in Japan, namely, the *Labor Standards Act*, *Labor Contracts Act*, and *Labor Union Act*. The applicability of the definition of the employee/worker is broader under the Labor Union Act. If a person falls under the definition of "proprietorship to a significant degree" (for example, a person to whom business profit is attributable), the category of the "employee/worker" is unlikely to be recognized. Even though a person does not fall under the definition of "employee/ worker," he or she should be protected if their contracts with the clients include accessoriness, adhesiveness, or economic dependency (vertical relationship because one person's livelihood depends on the other). In gig jobs, however, there are a number of issues, including that it is unclear who should be treated as the employer (or equivalent).

Section 6, The Possibility and Limitations of Expanding the Scope of the *Industrial Safety and Health Act*, include the following: the *Industrial Safety and Health Act* of Japan has provisions to embody the principle that a person generating risk is responsible for risk management, but its scope of application and restrictions are limited; however, a recent judgment from the Supreme Court of Japan stated that, because the *Industrial Safety and Health Act* aims to improve the workplace environment, the subjects of requirements about the provision of information on chemical substance risks include non-workers, and from this standpoint, may include gig workers.

Section 7, The Possibility and Limitation of Application of the Civil Law Concepts of Employers' Duty of Care, presents the following: the civil responsibility of employers to provide a safe and healthful workplace is applicable in a relatively wide range. In both academic papers and judicial precedents in Japan, this responsibility is commonly called the "duty of 'safety' consideration," but this term also covers health issues such as the handling of toxic substances. Whether the duty of safety consideration covers well-being issues such as measures against fatigue and stress has been a controversial topic in academia, but judicial precedents have included them in the past. In this article, the term "duty of 'safety' consideration" is deemed to cover employees' safety, health and well-being, and is called "duty of care" hereinafter. Platforms may have this responsibility to their gig workers; in this case, however, the gig workers should be working under the direction and order of the platforms, or the platforms should govern and manage gig workers' working conditions.

Section 8, A Labor-Related Law: The *Home Work Act*, includes the following: the *Home Work Act* in Japan has been

established against a backdrop of the evasion of labor regulations by business owners by consigning tasks to industrial home workers and the exposure of home workers to toxic chemicals; this act requires both clients and industrial home workers to take specific risk prevention measures; and, although this act is not applicable to the emerging gig economy, it would be worth revising the act to make it applicable.

Under these circumstances, it is difficult to protect the health and safety of gig workers only with the current labor laws and labor-related regulations in Japan (even though the civil responsibility for the employer's duty of care is applicable in a relatively wide range). We should, therefore, explore the possibilities of applying economic laws.

Section 9, Economic Laws and the Health and Safety of Platform Mediated Gig Work, presents the following: as economic laws in Japan, there are laws to ensure the payment of subcontracting fees from principal contractors (the *Act against Delay in Payment of Subcontract Proceeds, etc. to Subcontractors*) and to regulate the exclusion of, or control on, new entrants and cartel formation (the *Act on Prohibition of Private Monopolization and Maintenance of Fair Trade*) but they do not secure transactions (such as obligatory conclusion of a contract); there is also a law for small- and medium-sized businesses, which are economically weak, to organize trade associations or guilds, enhance bargaining power with clients, and promote mutual assistance (the *Small and Medium-Sized Enterprise Cooperatives Act*); this act has the potential to cover gig workers and would make it easier for them to solve the various health and safety issues they are facing through negotiation with clients; however, it is difficult to force clients to enter into negotiations.

Section 10, Suggestions from Occupational Health, presents the results of a review of articles from the area of occupational health concerning risks inherent to gig work and control measures, as information to be considered for theories of legal interpretation such as for the duty of care and bargaining between relevant parties, as well as legislative processes in the future. The results indicate a) hazards inherent to the work, such as traffic accidents (occupational vulnerabilities), b) poor protection (precarity), and c) hazards arising from the use of platforms, such as loneliness (platform-based vulnerabilities). In addition, the increase in the risk of infection from COVID-19 is associated with algorithmic management.

Section 11, Conclusion: The Necessary Legal Response, includes the following: health and safety are essentially managed by the assessment of different risk factors at work, and risk generators should be legally responsible for implementing the duty of care regardless of the labor-management relationship; nevertheless, there are cultural differences around the world, and in Japan, it is not always desirable to force the above policy in all cases; the risk factors in the gig economy are diverse and should be addressed according to the level of risk through collective bargaining between the parties concerned; in addition, a scheme should be planned to allow gig workers to receive occupational health services including occupational medicine, and; concerning general risks inherent to the work, the government should conduct an investigation and publish the results.

2. RELATED STIPULATIONS UNDER STATUTORY LABOR LAWS

The following are key provisions of statutory labor laws in Japan related to health and safety in the gig economy:

A. Provisions Applicable in Case the Person Falls under the Definition of Being an "Employee"

The *Labor Standards Act* (Act No. 49 of 1947): This law aims to specify the minimum standards for working conditions to be complied with by employers with regard to their employees and to ensure inspection and guidance by labor standard inspection bodies, criminal penalties for flagrant violations, and governance on labor contracts (causing contracts under statutory standards to become void and providing direct discipline). It sets out the limitation on working hours, a guarantee of the minimum wage, and the obligation to create rules of employment, etc.

In this Act, the term "employee" is defined as "a person who is employed at a business or office and to whom wages are paid, regardless of the occupation" (Article 9). The term "employer" is defined as "a person acting on behalf of the person in control of the business in matters concerning the employees of the business" (Article 10). The term "wage" is defined as "anything that the employer pays to the worker as remuneration for labor" (Article 11).

The *Labor Contracts Act* (Act No. 128 of 2007): This law stipulates the critical points for interpreting rules of employment to be created by employers or labor contracts presented by judicial precedents. Most of its provisions have been deemed enforceable. Not all indications from precedents, however, are expressly stipulated. Later, innovative concepts exceeding precedent indications were incorporated in a revised edition of this act. It prescribes that the appropriate content of the rules of employment constitutes a labor contract. A repeatedly renewed fixed-term labor contract should be changed into a contract without a fixed term, in addition to balanced and equal treatment between fixed-term and non-fixed-term contract workers.

In Article 2, Paragraph 1, the term "employee" is defined in the same way as in the *Labor Standards Act*. In Paragraph 2, the term "employer" is defined in the same way as in Labor Standards Act.

The *Industrial Safety and Health Act* (Act No. 57 of 1972): This law separates fourteen provisions concerning health and safety from those initially prescribed in Chapter 5 of the *Labor Standards Act* and improves its contents. To ensure health and safety (effectiveness), this act provides regulations concerning the speedy development of elaborate standards for hazard prevention, the establishment of a safety and health management system, various administrative actions by administrative officers with expertise, and the education and utilization of health and safety experts. Thoroughness, flexibility, and a high degree of specialization are features of this act. Many provisions target a person other than the employer. This act aims to "facilitate the creation of comfortable work environments" and ensure employees' health and safety.

Article 2: In Item 1, the term "industrial injury" is defined as "an employee being injured, contracting a disease, or dying due to a construction, equipment, raw material, gas, vapor, dust, or the like that is connected with the employee's employment, or as a result of an employee's work activities or other duties."

In Item 2, the term "employee" is defined as "an employee" as prescribed in Article 9 of the *Labor Standards Act* for the most part, and in Item 3, the term "employer" is defined as "a person that is engaged in an undertaking, and that employs an employee(s)."[4)]

The *Labor Union Act* (Act No. 174 of 1949) includes provisions about the formation of a labor union by workers, standards to protect justifiable acts by workers, including collective bargaining and strikes through a labor union, and administrative remedies.

Article 1: Paragraph 1 describes the purpose of this act: to elevate the status of workers; to defend the exercise of collective action by workers; and to promote the practice of collective bargaining and procedures to conclude collective agreements between employers and workers. Paragraph 2 specifies immunity from criminal liability to labor unions for performing justifiable acts (Article 8 includes the exemption from civil liability for workers' justifiable strikes).

Article 3 provides that in this Act, the term "worker" is defined as "a person who lives on their wages, salary, or other equivalent income, regardless of the kind of occupation."

B. Provisions for Imposing General Obligations Concerning the Health and Safety of Employers and for Setting Relevant Ministerial Ordinances

The *Industrial Safety and Health Act*

Articles 20 through to 25-2 impose general obligations on business operators to take the necessary measures to prevent industrial injuries or diseases caused by various hazards, including: machinery, inflammable and other dangerous substances; work methods involved in excavation and cargo handling; places with a potential for landslides; raw materials, exhaust fumes, waste fluids, and other harmful materials, and; the work environment in an office, including the ventilation, temperature, floor, and stairs.

Article 26 requires workers to respond (cooperate and collaborate) to the measures taken by business operators under the provisions of Articles 20 through 25-2.

Under Article 27, the measures required to be taken by business operators pursuant to the provisions of Articles 20 through 25-2 are prescribed by the Order of the Ministry of Health, Labour and Welfare.

C. Provisions Related to Worker's Compensation

The *Labor Standards Act* requires employers to pay at their expense compensation for their workers who sustain an injury or suffer illness in the course of employment. In addition, the *Industrial Accident Compensation Insurance Act* (Act No. 50 of 1947) specifies that an industrial accident compensation insurance administered by the government takes over employers' responsibilities for worker's compensation and provides more support (pension and other measures to support the worker's livelihood) and medical rehabilitation for affected workers. There are seven types of

4) In Japan, therefore, the employer defined under the *Industrial Safety and Health Act* is different from that under the *Labor Standards Act* and refers to an employer of employees and a legal entity or sole proprietor to whom business profit is attributable.

insurance proceeds under this act, including medical treatment compensation benefits.

D. Provisions Related to the Civil Law Concepts of Employer's Duty of Care

The *Labor Contracts Act*

Article 5: This article prescribes that "the employer is to give the necessary consideration to enable his/her employees to work while ensuring their life and safety."

This act only specifies the obligations of employers to their employees and does not cover the entire framework of the duty of care that has been formed judicially. An administrative interpretation (Notice No. 0810 Article 2 of the Labour Standards Bureau of the Ministry of Health, Labour and Welfare, August 10, 2012) clarifies that the concept of "life and safety" includes "mental and physical health."

In the first place, the *Labor Contracts Act* was established by stipulating the essence of significant precedents from the Supreme Court decisions, mainly concerning labor disputes as civil affairs. Article 5 of this act also reflects the above context.

3. GIG WORKERS AND ISSUES ABOUT THEIR HEALTH AND SAFETY IN JAPAN

Technological development is driving the global expansion of new forms of work, such as gig jobs, where gig workers work using Uber[5] and other digital platforms. Japan is also seeing an upward trend in the number of gig workers.[6] Since they can be classified as "employees" in a sense, how to secure their health and safety is a problem. Prevention and compensation measures are required for, for example, traffic accidents during delivery, fatigue due to long working hours or poor mental health caused by work, and labor accidents such as occupational diseases (in this article, "labor accident" means any occupational accident resulting in injury, illness, death, and health impairment), and commuting accidents.

Of course, there are various gig jobs, and some gig workers have been determined as "employees."[7] For these workers, existing labor laws and regulations may provide adequate protection. In addition, even if a gig worker is a party to a contract/service agreement under the Civil Code in Japan, the worker is protected by provisions of the *Industrial Safety and Health Act* (mainly about machinery and equipment safety, provision of

5) Because Japan has regulations on general passenger vehicle transportation businesses under the *Road Transportation Act*, Uber (Uber Technologies, Inc.; a technology company in the US) is not well known in Japan and Uber Eats (an online food ordering and delivery service) is more popular as a platform for gig workers.

6) In this article, following Murata's view (Murata 2020), the term "gig economy" is defined as a way of working where workers undertake a one-time job mediated by the Internet without an employment relationship and "gig worker" is defined as a person who works in the gig economy.

7) The "employee" in this context is a comprehensive, superordinate concept that indicates a person protected under main labor laws. A definition of the employee in each law differs by the purpose of each law. Refer to Section 5 and 7 for details. The classification of the "employee" under the *Labor Standards Act* in Japan is determined primarily by the presence or absence of command and control as well as wages (consideration of labor), which is similar to the concept of "salarié" under French labor codes. The concept of a "worker" under the *Labor Union Act* in Japan is a person who works dependently to earn a living (like a person in the working class in Europe), which is similar to that of a "worker" under the *Trade Union Act 2016* of the UK in that it covers self-employed workers.

information on hazardous chemical substances, and the improving the work environment). In some cases, the civil law duty of care arises by consulting the Supreme Court judgments as described later.

In Japan, however, there are few studies available concerning how to protect gig workers and what protection is required for the health and safety of gig workers. Furthermore, the government has not clearly articulated its policy on whether gig workers should be treated as "employees" or "independent self-employed workers (hereinafter referred to as "self-employed workers").[8)]

A paper titled "Essay on Safety and Health Law Policy for Side Job Workers and Freelancers" (Mishiba 2020, 7) is one of few studies on this subject. In this paper, Mishiba proposed the principle of the risk generator being responsible for risk management, that is, a concept that a person who generates risk or can control and manage risk based on risk-related information he/she has obtained is responsible for risk management.[9)] Mishiba then indicated that the scope of health and safety laws should be extended to cover workers with employment-like working styles[10)] among freelancers, gig workers, and the like and that it is necessary to strengthen solidarity and enhance the bargaining power of these employee-like workers to the same level as workers in a labor union as much as possible. Based on this theory in general, our article aims to clarify what protection is required for gig workers in Japan and how to enhance their bargaining power in reality, in order to present reference material for the world.

Regarding health management for teleworking employees (the opposite concept to self-employed teleworkers), Ishizaki (2021) pointed out that, even for off-site employees, employers should establish a health and safety management system, provide health and safety education (Article 59 of the *Industrial Safety and Health Act*), develop a health consultation system (Article 13-3 of the same), and implement occupational hygiene measures (working environment control, administrative control, and health control) necessary against foreseeable health hazards causing such as mental instability.[11)] This opinion is applicable to gig jobs if gig workers do their jobs using computers and other digital devices at any

8) In California in the US, for example, the judge ruled that a California law backed by Uber and other gig economy companies, which ensures gig workers are considered independent contractors while granting them limited benefits, is unconstitutional under California's Constitution (https://www.nytimes.com/2021/08/20/technology/prop-22-california-ruling.html, last accessed February 16, 2022).

9) As mentioned above, the laws of the UK have had a significant impact on the legal system in Japan. The *Health and Safety at Work etc. Act 1974* (HSWA) of the UK requires every employer to conduct his/her undertaking in such a way as to ensure that "persons not in his/her employment" are not thereby exposed to risks to their health or safety (s.3(1)). "Persons not in his/her employment" include self-employed persons and visitors (Selwyn and Moore 2015, 117–118). The act also requires every self-employed person to act in such a way as to ensure that he/she and other persons who may be affected thereby are not thereby exposed to risks to their health or safety (s.3(2)).

10) In Japan, those who have not concluded a formal employment contract (but have concluded a contract or service agreement) and been working under the conditions similar to those for employed workers are called employment-like workers or dependent self-employed workers. If illegality is suspected, such a contract may be called a fraudulent contract.

11) Mishiba (2020) agrees with Ishizaki (2021) and examines relevant conditions, methods, and contents more closely.

place outside facilities operated by clients.

In general, ways of protection for dependent self-employed workers are as follows: (i) expanding the concept of a worker; (ii) defining the third category (a concept of "semi-worker" or "quasi-worker") in addition to the concepts of a worker and self-employed workers and partially expanding protection under labor laws to those under this category; and (iii) not adopting both (i) and (ii) but granting special protection by enacting independent legislation. Concerning occupational health and safety, another approach, similar to (ii) and (iii), requires a person conducting a business or undertaking to take measures to protect people engaged by and working for the person while defining them as a worker.[12)]

In the case of (i), instead of the conventional concepts and criteria of "employees" such as employment subordination or personal subordination (i.e., the state of being under the control of another), economic, and organizational concepts of subordination can be actively considered by establishing uniform criteria across various labor laws and regulations[13)] or by relatively applying relevant individual laws and regulations[14)] to recognize people as "employees."

In the case of (ii), self-employed workers such as gig workers are not uniformly recognized as "employees," but for parts where protections are needed as employees, partial protections should be provided (i.e., partial application of the "employee" status should be given).[15)] A similar stance is seen in, for example, a judgment by the UK Supreme Court (*Uber BV and others v Aslam and others* [2021] UKSC 5), which ruled Uber

12) In Australia, s.19 of the harmonized *Work Health and Safety Acts* target a person who conducts a business or undertaking (PCBU), not an employer, and requires them to ensure, so far as is reasonably practicable, the health and safety of workers engaged, or caused to be engaged by the person. The scope of these Acts has been set very broadly to cover all kinds of work arrangements and in order to avoid frequent revisions considering the speedy changes of modern business models. In these statutes, PCBUs include franchisers, principal contractors, and upstream vendors in the supply chain. A subcontracted self-employed person could be a PCBU and worker. The term "worker" broadly includes a person who carries out work in any capacity for a PCBU, such as a contractor and an employee of a contractor. A worker is not required to be a person who carries out work for a specific PCBU; it is enough to be a person who carries out work for an unspecified PCBU(s). Those who work in a downstream supply chain, therefore, fall under workers (see Bluff et al's article in this issue; also see Johnstone (2019) and Johnstone and Tooma (2022, ch 2). It is difficult to determine whether such a definition is applicable for a case where, for example, the digital platform only plays an intermediary role between an end user and a worker, like crowd work. According to Prof. Johnstone (2019), each case will depend on the exact nature of the relationship between the intermediary and the worker.

13) An example is described by Hashimoto (2021), who argues that, in Japan, judicial precedents so far (especially those relating to definition of "employee" under the *Labor Standards Act* and the *Labor Contracts Act*) are too focused on the concept of personal subordination to accept the broader concept of being the "employee." The author then argued that we should consider actively the concept of economic subordination by comparing with German laws and EU rules, and when a worker does not voluntarily bear any management risk and is under "de facto constraints," a definition of the "employee" should be applied consistently across different labor laws and regulations. This theory may aim to avoid the generation of a gray zone, which causes a gradual weakening of the protection for workers. Kawaguchi (2012) is on the same side. In a part, however, this perspective lacks the protection for those who are not (deemed to be) workers.

14) See, for example, Kezuka (2017).

15) See, for example, Kamata (2019); and its English version, Kamata (2020).

rideshare drivers must be treated as workers[16] because of the Uber's level of control over working conditions.[17] A white paper, Work 4.0, published by the Federal Ministry of Labour and Social Affairs in Germany[18] also takes the similar position. This white paper denied the status of "employee" for gig workers but concluded that "one-size-fits-all solutions will not meet the needs of all self-employed individuals. Legislators should therefore determine the appropriate level of protection which different types of worker's need, and include them in labour- and social-policy legislation accordingly." In addition, this white paper suggested the enactment of the *Crowdworking Act* (*Crowdwork-Gesetz*) and the application of conventional provisions of the *Home Work Act*.[19]

In the case of (iii), the legal status of employment-like workers and gig workers is put aside, and efforts are made to provide necessary protections by expanding the scope of existing laws and establishing new ones.[20] Work 4.0 in Germany is close to this position in terms of the legislative approach. France has taken this position as it has established a special law for crowd workers who meet specified requirements to make platforms share the costs for worker's compensation insurance, job training, and business career certification (Suzuki 2017; Kasagi 2019).

As a way of protection for dependent self-employed persons such as gig workers, this article first attempts to flexibly apply the concept of being an "employee" (without expanding it; without changing the concept itself) and adopt (iii) to deal with the portion not covered by such flexible interpretation. Specifically, it is necessary to set out the concept of the "worker" separately from the "employee" that is currently covered by the labor laws and "self-employed," by the economic law, to support the activities and protection of the workers, and to strengthen their solidarity.[21] Their health and safety should be ensured under this process. We will

16) In the UK, in addition to two categories of employment, employee and self-employed, there is an intermediate third category of a "worker." It is a term used in the *Employment Rights Act 1996* and the *Equality Act 2010*, and does not necessarily mean a party concerned to a labor contract. Prof. Diana Kloss MBE, one of the country's leading authorities on occupational health, stated as follows (via an email to Mishiba):
"The UK common law has maintained the master/servant viewpoint for several hundred years, but for protecting a "worker," we are under pressure to get rid of the viewpoint. Now, the courts are required to contemplate the reality of the situation and not what the employment contract says."
"But interestingly, the Supreme Court takes a different approach to vicarious liability. According to a judgment delivered immediately before this judgment, the Supreme Court ruled that employers could be liable for wrongful acts committed only by their employees but not by independent self-employed workers (*Barclays Bank v Various Claimants* [2020] UKSC 13)."

17) A judgment rendered by the Court of Appeal, the original decision of the case (*Uber BV and others v Aslam and others* [2019] IRLR 257) stated that the mechanism of the algorithmic management by Uber was coercive (if drivers maintain a low acceptance rate, the system offers less opportunities to them).

18) Federal Ministry of Labour and Social Affairs, *White Paper Work 4.0*, March 2017. https://www.bmas.de/EN/Services/Publications/a883-white-paper.html.

19) See Kamata et al. (2021, 23-52) and Yamamoto (2021, 72–93).

20) For example, Toki (2020, 372–373).

21) Ouchi (2021, 11) argues that the sole application of the economic law will not provide an adequate protection, and that the problem is how to include workers who are in the intermediate state not covered by the labor laws into the protection framework.

discuss the details of purposes and methods in the following.

Moreover, based on the idea of Prof. Hamamura, who recommends the expansion of the definition of the "worker" under the *Labor Union Act* and the utilization of the *Small and Medium-Sized Enterprise Cooperatives Act* for people working in the platform economy (Hamamura 2018), we also examine whether the Small and *Medium-Sized Enterprise Cooperatives Act* is applicable to protect gig workers.

4. THE CURRENT CIRCUMSTANCES OF GIG WORKERS

There are various types of gig workers, including crowd workers on crowd sourcing platforms and ridesharing drivers, but they have points in common. As shown in Figure 1 below, digital platforms on the Internet provide job opportunities for workers; thus, a tripartite structure exists. A recent example is Uber Eats, which is well known in Japan, which has a system where workers register on the platform and deliver food from restaurants to destinations during whatever time slot they prefer.

Although there are no official statistics that would make it possible to know the exact number of gig workers, in research on freelancers (independent self-employed workers) conducted by the Japan Institute for Labour Policy and Training (JILPT 2019), the investigation results about crowd workers are informative. This is because most gig workers are those who work via digital platforms without entering a labor contract, and most crowd workers[22] are more or less gig workers. According to JILPT (2019), crowd workers represented 12.9% (1,068 people) of the total

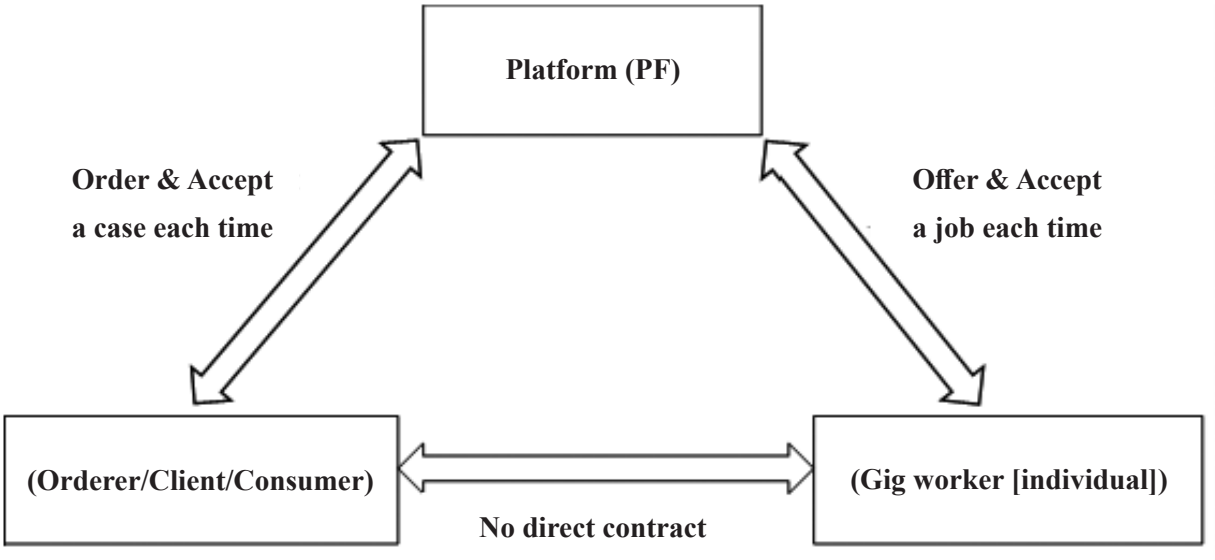

Figure 1 Basic Structure of the Gig Economy

22) People who receive work orders via crowd sourcing platforms that outsource tasks online to an unspecified number of people (JILPT 2019). Some of them are considered to be gig workers.

samples (8,256 freelancers).[23] The research provided the following breakdowns by industry type in descending order: clerical support (54.9%), professional and technical (20.3%), field construction work (8.9%), IT (6.8%), design/video production (6.0%), and life service and barber/beautician (3.1%).

This research shows a tendency that crowd workers (i) are young, female, university graduates, and/or married, (ii) have multiple freelance jobs, (iii) provide labor to multiple clients, (iv) have difficulty receiving orders due to the substitutability of their work, (v) are under the directions of their clients concerning contents of and ways to perform tasks without specified work place and time, and (vi) receive low wages (less than 500,000 yen annually in many cases). The cases of ending the relationship before the contract termination were unexpectedly few (10-15%). It also shows that an agent usually determines the working condition under a contract with a client and responds to any problems. Moreover, crowd workers demand to ensure the properness of their working conditions and develop conditions to avoid problems with their clients (caused by payment delays, pay reduction at clients' own discretion, etc.) more keenly than freelancers.

Of all 8,256 freelancers, this research shows a comparatively higher satisfaction with their working time, sense of accomplishment, and motivation. Many of them, however, are not satisfied with their income.

These data do not directly show the state of health and safety of freelancers and gig workers but are worth referring to because, as mentioned before, the *Industrial Safety and Health Act* in Japan covers stresses (psychosocial risks) related to general working conditions such as workers' placement and working hours. The result suggests that workers overwork themselves to make a living and cannot avoid risks of falling or traffic accidents. However, it also shows that there should not be comprehensive restrictions on their jobs.

5. THE POSSIBILITY AND LIMITATIONS OF APPLICATION OF THE STATUS AS EMPLOYEES/ WORKERS

In some cases, even gig workers might be recognized as "employees or workers" under Japanese labor laws. Suppose the status of being an "employee" under the *Labor Standards Act* and the *Labor Contracts Act* is recognized—in this case, gig workers will be protected as general employees under these laws and the *Industrial Safety and Health Act*. In addition, if the status of being a "worker" under the *Labor Union Act* is recognized, they can join an organized group with specific bargaining powers to conduct collective bargaining concerning safety and health issues, which could lead to the establishment of the safety and health measures appropriate for the occupational type and other conditions. In this context, we will first examine to what extent the concept of "employee/worker" can be controlled (i.e., interpreted flexibly).

23) This research defines freelancers as "people running a business without employees and physical stores, whose occupation is not agriculture or fishery" and estimates there are about 3.67 million people who perform freelance work, either as their principal or side source of income. Freelancers and gig workers have a point in common; they are usually not treated as employees and work as an individual.

A. The Status of an "Employee" under the Labor Standards Act and the Labor Contracts Act

Based on judicial precedents[24] and the government's views,[25] the concept of an "employee" is the same under the *Industrial Accident Compensation Insurance Act* and the *Labor Standards Act*. The concept of an "employee" under the *Industrial Safety and Health Act* and that under the *Labor Standards Act* is also the same. Moreover, the concept of an "employee" under the *Labor Standards Act* and that under the *Labor Contracts Act* (Article 2) is almost the same. Essential elements commonly seen in the "employee" concept under these laws are (i) employment subordination (the state of being under the command and control of an employer) and (ii) the receipt of reward as remuneration for labor.[26] Element (i) is satisfied when a person is under the direction of an employer and works for the employer in a broad sense even without performing tasks following the employer's direction to the letter, and (ii) is satisfied when the reward is paid as remuneration not for the completion of a task but for the provision of labor. As specific decision factors, the courts have comprehensively considered the following (they are not requirements and it is not always necessary to meet all of them): (i) the presence or absence of freedom to accept or reject a work order, task direction, etc., (ii) the presence or absence of command and control on the content of and how to perform a task, (iii) the presence or absence of a designation or control of the workplace and working hours, (iv) the presence or absence of alternative labor sources, (v) the presence or absence of a reward as remuneration for labor, (vi) the presence or absence of proprietorship (ownership or the share of responsibility for machinery and equipment, and the amount of remuneration), (vii) the degree of exclusivity, and (vii) responsibility for taxes and public dues (with or without a deduction for withholding tax and social insurance premiums). There are various forms of gig work, but a common form is that in which a worker receives an order from a client via a platform and completes the order. In many cases, the order has a service agreement or contract, the worker maintains a certain independence, and remuneration is paid not for labor but for a product. Hence, it would be difficult to recognize the "employee" status under the *Labor Standards Act* as this requires employment subordination as a precondition.

Appropriate worker's compensation is a part of occupational health and safety in a broad sense and is highly called for by workers working in a situation similar to that of employed workers. As mentioned earlier, the concept of an "employee" under the *Industrial*

24) *Chief of Fujisawa Labor Standards Office Case* (Supreme Court of Japan First Petty Bench decision, June 28, 2007), Labor Case, No. 940, 11; *Chief of Yokohama Minami Labor Standards Case* (*Asahi Paper Industry*) (Supreme Court of Japan First Petty Bench decision, January 18, 1996), Labor Case, No. 714, 14; *Asahi Shimbun Case* (*International Editorial Department journalist*) (Tokyo High Court decision, September 11, 2007), Labor Case, No. 951, 31; *Japan Broadcasting Corporation Case* (Osaka High Court decision, September 11, 2015), Labor and Economic Case Newsletter, No. 2264, 2; *Chief of Shinjuku Labor Standards Office Case* (*movie shooting engineer*) (Tokyo High Court decision, July11, 2002), Labor Case, No. 832, 13; etc.

25) See Labor Management Relations Law Study Group (2011).

26) See Labor Standards Law Study Group (1985).

Accident Compensation Insurance Act is the same as that under the *Labor Standards Act*. The former has, however, established a unique scheme to allow self-employed carpenters (independent craftsmen who undertake construction jobs) to obtain coverage. The subjects of this special insurance coverage scheme were limited to the automobile driving service industry, construction industry, fishery, forestry, and the like. Following a revision in September 2021, the scheme started to cover those who perform delivery services using a bicycle, such as Uber Eats. However, many industries where gig workers and freelancers exist have not been covered yet. The worker's compensation insurance under this unique scheme is deemed to cover cases almost the same[27] as those under the insurance for general employees, such as commuting accidents occurring on the way to or from the workplace. Still, the availability of protection could be different in some cases. For cases such as an accident occurring when a worker takes his or her child between home and nursery school or back pain caused by work at home, the compensation insurance might not apply to general employees,[28] but we should consider the possibility of offering compensation to gig workers. For other cases, such as long working hours and mental health conditions, general employees would be covered, but there should be higher requirements to give compensation to gig workers according to the level of their independence during work.

B. The Status of a "Worker" under the Labor Union Act

According to judicial precedents in Japan, the status of being a "worker" defined under the *Labor Union Act* is often considered a concept covering a more comprehensive range of people than the definition of "employee" under the *Labor Standards Act* and the *Labor Contracts Act*. Therefore, even though the conditions for the latter are not met, those for the former may be met in some cases. When only the worker criteria under the *Labor Union Act* is deemed to be applicable to an individual, he or she would not be protected directly by the *Labor Standards Act* and the *Industrial Safety and Health Act* but would become able to join a labor union or form a new one, and thereby become able to negotiate with the employer through collective bargaining (which the employer must participate in), regarding specific health and safety conditions.[29] This is effective in developing health and safety measures by job type.

In Japan, the "worker" defined under the *Labor Union Act* has been interpreted to "include those who should be defended by organizing a labor union and practicing collective bargaining."[30]

In addition, relevant precedents[31] have

27) Ministry of Health, Labour and Welfare: https://www.mhlw.go.jp/new-info/kobetu/roudou/gyousei/rousai/dl/040324-5-08.pdf, accessed February 9, 2020.

28) Because the former case is not considered as having occurred during commuting, and the latter is not a task performed in the workplace.

29) In Japan, unreasonable refusal by an employer to engage in collective bargaining with a labor union would be deemed to be an unfair labor practice, and a labor relations commission would give a relief order or a court would order payment of damages, which is practically compulsory.

30) Labor Management Relations Law Study Group (2011).

31) *CBC Orchestra Labor Union Case* (Supreme Court of Japan First Petty Bench decision, May 6, 1976), Supreme

decided that, in determining whether a person falls under the definition of a "worker" under the *Labor Union Act*, basic decision factors are as follows (they are not requirements, and it is not always necessary to meet all of them): (i) inclusion in a business organization, (ii) one-sided/adhesion contract provisions, and (iii) receipt of reward as remuneration for labor; the following are considered as supplementary positive decision factors (the presence of these factors may lead to recognition of the person as a "worker"): (iv) a relationship in which a person must accept a work order and (v) labor provision under control and supervision in a broad sense as well as a certain restriction by place or time; the following are negative decision factors (the presence of these factors may lead to less recognition): (vi) the presence of significant proprietorship. In this context, the "worker" under the *Labor Union Act* is deemed applicable not only to employees with a labor contract but to some independent self-employed workers and artists (maintenance service contractors of electrical equipment manufacturers,[32] opera singers,[33] etc.). Gig workers, therefore, could be protected by the *Labor Union Act* as "workers" under this act if the above positive factors are met.

There is a limitation, however, in controlling (i.e., interpreting flexibly) the concept of a "worker" under the Labor Union Act. A representative case is the order of the Central Labour Relations Commission[34] (CLRC Order March 15, 2019, Labor and Economic Case Newsletter, No. 2377, p.3) issued on March 15, 2019, regarding a franchise contract for a convenience store (a small supermarket[35] that sells mainly groceries with consumer-friendly characteristics such as multi-store operation and 24/7/365 opening hours). One of the common factors, in this case, is that both a franchisee and a gig worker are formally proprietors but they are bound under contract and working conditions that are specified solely by the other party. In this case, the owner of the convenience store, one party of the franchise contract, was argued against by the other party, a franchiser of the convenience store (hereinafter referred to as "franchise headquarters"), regarding whether the owner is a "worker" or not. The order denied such status and concluded as follows. There are "de facto constraints" and "one-sided contract provisions" in the relationship of the owners

Court Reports, Vol. 30, No. 4, 437; *New National Theatre Tokyo Incident Case* (Supreme Court of Japan Third Petty Bench decision, April 12, 2011), Supreme Court Case, Vol. 65, No. 3, 943; *INAX Maintenance Case* (Supreme Court of Japan Third Petty Bench decision, April 12, 2011), Supreme Court Case, No. 236, 327; *Victor Service & Engineering Incident Case* (Supreme Court of Japan Third Petty Bench decision, February 21, 2012), Supreme Court Case, Vol. 66, No. 3, 955; etc.

32) The aforementioned *INAX Maintenance Case* Supreme Court decision.

33) The aforementioned *New National Theatre Tokyo Incident Case* Supreme Court decision.

34) An independent administrative agency (quasi-judicial body) established to deliver settlements of collective labor-management disputes under the Labor Union Act. The agency promotes more technical and flexible settlements than the courts. It also treats individual labor-management disputes. It has the formal powers of conciliation, mediation, and arbitration. Its arbitration decisions are binding on the parties concerned. The first instance is to be determined by a prefectural labor relations commission, but if a party has an objection, it can appeal the decision to the Central Labour Relations Commission. If a party has an objection to the decision of the Central Labour Relations Commission, it can apply to the court for cancellation of the decision.

35) There are nearly 60,000 stores in Japan as of December 2021 (Japan Franchise Association website: https://www.jfa-fc.or.jp/particle/320.html, accessed February 20, 2022.

of each convenience store with the franchise headquarters, such as the requirement of 24-hour operation, no closing day, and payment of a specified loyalty; however, these binding conditions are rooted in the nature of the franchise contract. On the other hand, because the convenience store owner is an employer and a person who conducts a business or undertaking, the significant proprietorship is recognized. Therefore, the "worker" status under the *Labor Union Act* does not apply.

The Central Labour Relations Commission indicates the necessity of the development of a scheme to ensure social protection and dispute settlements because "concerning the issues arising from [...] a disparity of bargaining power between a person and a business, even if the person does not have a legal right to bargain collectively under the *Labor Union Act*, the development of an appropriate problem-solution mechanism, efforts of both parties toward it, and especially the company's consideration are desirable."

Given the broadness and flexibility of the concept of a "worker" under the *Labor Union Act* on the one hand, and conditions such as constraints on and economic dependency (a vertical relationship due to livelihood dependency) of gig workers caused by accessoriness and adhesiveness of contracts, the labor relations commission or courts might recognize that they fall under the category of a "worker" under the *Labor Union Act*.[36] There should be a certain level of protection for them, such as ensuring the right of solidarity and bargaining.[37] When the status of "worker" is recognized for gig workers, however, a complex problem about who should be deemed the "employer" may arise.

It is, therefore, necessary to examine how to protect gig workers who cannot be covered by controlling (interpreting flexibly) the concept of a "worker" under the *Labor Union Act* and other labor laws.

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36) There is a case that an organization called Uber Eats Union formed by 30 Uber Eats delivery staff applied the Tokyo Metropolitan Government Labor Relations Commission to examine a platform, the Uber Eats Japan Co., Ltd., and give a relief order to begin collective bargaining concerning a way to determine pay, compensation for injuries due to work, and other matters. On November 25, 2022, the Commission ordered the platform to engage in collective bargaining. The platform argued against the validity of the organization as a labor union but the Commission decided the delivery staff are workers under the *Labor Union Act* based on a general judgment as follows (Bengo4.com News, November 25, 2022, https://www.bengo4.com/c_5/n_15309/):
(i) Although the delivery staff worked without the restriction of place or time and have freedom to accept or reject a work order, their behaviors were controlled in reality by algorithmic management, performance evaluation, and other schemes so that they cannot refuse the requests from clients easily.
(ii) Significant proprietorship is not recognized for the delivery staff, and they were included in the business organization as the essential labor force of the platform by offering incentives to secure delivery staff working exclusively the company. The delivery wage is in fact a consideration for performed work.
(iii) The Uber Eats determines at its sole discretion the terms and conditions of an adhesion contract with its delivery staff.

37) Based on the guarantee of basic labor rights, Mishiba (2020, 7–8) stated as follows: "the development of a system to promote the solidarity should be considered" also for employment-like workers. The author continues, "it would be necessary to at least establish support measures such as imposing restrictions on contracts that interfere with collective bargaining or class action taken by employment-like workers, and requiring the orderer (and the like) to intermediate between an employment-like worker to other employment-like workers who work for the same orderer (and the like) to allow them to communicate each other, if so requested by the worker."

6. THE POSSIBILITY AND LIMITATION OF EXPANDING THE SCOPE OF THE INDUSTRIAL SAFETY AND HEALTH ACT

In principle, the *Industrial Safety and Health Act* in Japan specifies provisions that require the business operator (a person who employs a worker or workers and to whom business profit is attributable, including a sole proprietor or legal entity) to protect his or her employees from various occupational health and safety risks related to industrial activities, including physical risks caused by machinery operation, dangerous substances, construction work, etc., as well as psychosocial risks such as fatigue and stress. This law also has many provisions that require those other than business operators to protect people other than those employed by them. For example, a person who places an order (original orderer) contracting out a job categorized as the construction industry, etc. and also carries out some portion of the job him- or herself (called "principal business operator") is required to engage in the overall control and management of the safety of workers including subcontractors, lower-tier subcontractors, etc. working at the same construction site (including risk information sharing and safety patrol) (Article 30). Article 31 of this law specifies that orderers contracting out a job categorized as construction etc. who carry out a part of the job themselves and meet specified requirements must take similar necessary measures to prevent industrial injuries for subcontractors and the like as they would do for workers they employ, when they make the workers use structures and other dangerous materials (including scaffolding, formwork supports, and alternating-current arc welders) for which the orderers have the risk information and management right. Article 30 has provisions about site management, and Article 31, material management. In addition, there are provisions to require manufacturers and importers of specified dangerous and hazardous chemical substances to provide potential users of them risk information about these substances by labeling or other means (e.g., Article 57). The *Worker Dispatch Act* (the *Act on Securing the Proper Operation of Worker Dispatching Businesses and Protecting Dispatched Workers*) imposes obligations to impose more strict health and safety regulations on the person acting as the undertaking business operator who directly command and control workers than on the dispatching business operator (Article 45).[38)]

These regulations assume that, to effectively ensure health and safety, it is not sufficient to make business operators protect the workers they employ. Hence, these regulations require those who have the right to manage information about and control the sites and materials with potential hazards and risks to provide such information and perform necessary protection measures (Toki 2020, 368).[39)] It may be said that these provisions reflect the principles such as

38) For the features of the *Industrial Safety and Health Act* in Japan, refer to Mishiba et al. (2022, 1-180).

39) Toki (2020) says that the targets of these provisions are given a duty to observe the labor regulations (in this case, the *Industrial Safety and Health Act*) because they are exercising the authority of the employer under a labor contract. That is certainly true for some undertaking business operators, but principal business operators, for example, are prohibited to directly give instructions to assigned workers such as subcontractors (which would be deemed as an

Equivalenzprinzip (the idea that a person who benefits from an activity must be responsible for the prevention of and compensation for any accident caused by such activity) and foreseeability and controllability (the idea that a person who can foresee and control an accident must be responsible for the prevention of and compensation for such an accident). Essentially, however, these provisions are based on the nature of occupational health and safety which primarily pursues the prevention of industrial accidents. Because many of these regulations target constructors, shipbuilders, chemical substance manufacturers, etc., it is difficult to generally apply them to industries that commonly provide gig jobs.[40] In addition, the *Industrial Safety and Health Act* in Japan and relevant ministerial ordinances do not always clarify the subjects of the protection (according to Article 1 and Paragraph 1 of Article 3 of this act, it aims to the protection of employees in general, but there are not many individual provisions that designate employees as the subject to be protected). In this context, the protection subjects may be interpreted naturally as employees or interpreted to include a wider range of people.

Recently, a precedent was decided that interpreted the scope of the protection under some provisions of the *Industrial Safety and Health Act* to be broader. That was a case of *construction asbestos lawsuit* (*Kanagawa first party*) (Supreme Court of Japan First Petty Bench decision, May 17, 2021; Supreme Court Reports, Vol. 75, No. 5, 1359). Employees of construction companies and self-employed carpenters who had been suffering from asbestos lung, lung cancer, or other diseases caused by exposure to asbestos claimed compensation for damages against both the Japanese Government and construction materials manufacturers. The reasons were that nonuse of restriction power by the Japanese Government regarding the direction and supervision for the use of protective equipment, labeling and posting as to the danger of asbestos, and other measures was illegal under the *State Redress Act*, and the failure of duty of care by construction companies such as the failure of warning about risks of the products was an unlawful act. Japan banned the manufacturing of asbestos in September 2006 under the Order for Enforcement of *Industrial Safety and Health Act*,[41] but some people engaged in construction work who had performed building construction or demolition up to then (both employees and non-employees such as self-employed carpenters) had

evasion of the law because they should be treated as workers under a dispatch arrangement. Refer, for example, to "Standards regarding the Division between Businesses Performed by Worker Dispatching Businesses and Businesses Performed under Contract" (Notification of the Ministry of Labor No. 37 of 1986)). Historically, the *Industrial Safety and Health Act* was derived from the *Labor Standards Act* to play a technical and flexible role to pursue the prevention of industrial accidents. It is, therefore, not appropriate to identify who is responsible for hazard prevention measures because of the similarity to employers in their status.

40) The workers' home falls under neither the category of "workplace" that is mostly covered by the *Industrial Safety and Health Act*, nor the "office" that is subject to the relevant Office Hygiene Standards Regulations (Ordinance of the Ministry of Labor No. 43 of 1972).

41) The Supreme Court confirmed the details that the Government had required business operators to "prepare (not confirm the use of equipment)" the protective equipment and raised the level of controls to be taken depending on the assessed level of asbestos hazards by providing notification and other means (not legally binding).

developed mesothelioma, lung cancer, or other asbestos-related diseases. Victims filed a class action against the government and construction materials manufacturers to eight district courts across the country. The case mentioned above is one of these lawsuits.

A point of issue, in this case, was whether the *Industrial Safety and Health Act* that aims to secure the health and safety of the "employee" in principle also covers self-employed carpenters under a contract/service agreement or not, and in the event of failure of restrictions (including establishment or revision of legally binding rules or issuance of notifications not legally binding) for protecting them, whether nonuse of restriction power by the Japanese Government could be illegal or not.

At that time, Article 57 of the *Industrial Safety and Health Act* required a person who puts specified chemical substances into a container, or packages or transfers them to others, to inform the parties concerned of related risks or other information by putting a label identifying this information on a container. In addition, Article 38-3 of the Ordinance on Prevention of Hazards Due to Specified Chemical Substances required business operators to indicate hazards and precautions for handling carcinogenic substances and other specified substances in the workplaces where these substances are handled. The Ordinance on Industrial Safety and Health at that time had required business operators to prepare respiratory protective equipment but had not required them to ensure that people engaging in work use the equipment.

The point of contention, in this case, was whether the Government had committed an illegal act under the *State Redress Act* by failing to specify restrictions with the issuance of notifications (not legally binding) and to make adequate rules (legally binding). Concerning the latter issue, the question was whether self-employed carpenters were included in the subjects of protection under these rules.

The Supreme Court decided that the government is liable under the *State Redress Act* for not providing sufficient information or guidance regarding asbestos risks and the importance of wearing protective equipment by means of labeling, posting, or notification, and for not making it mandatory for those engaging in work to use protective equipment. In short, the Supreme Court affirmed the Government's compensation responsibility under the *State Redress Act* for self-employed carpenters, based on the following grounds. The Court said:

1) The main purpose of the *Industrial Safety and Health Act* is to protect employees but this act also specifies provisions to ensure the improvement of the workplace environment. In addition, because Article 57 of this act focuses on material hazards, the subjects of the protection under this article include non-employees who access the workplace.

2) The labeling requirement provided for by the Ordinance on Prevention of Hazards Due to Specified Chemical Substances also aims to protect people engaging in work including non-employees at the workplace where dangerous substances are handled.

Based on this ruling, it is considered that the regulations regarding communication about risks of dangerous and hazardous substances and the improvement of the workplace environment under the *Industrial Safety and Health Act* are applicable to gig workers as

long as they work at construction/work sites that are managed and administered by business operators.[42] There is a limitation, however, in the flexible interpretation by the courts. In fact, the current *Industrial Safety and Health Act* has contributed to the realization of only a part of the principle that a person generating risk is responsible for risk management, and may not protect all gig workers in different types of industries and jobs.

7. THE POSSIBILITY AND LIMITATION OF APPLICATION OF THE CIVIL LAW CONCEPTS OF EMPLOYERS' DUTY OF CARE[43]

Even if the status of being an "employee/worker" as defined under the *Labor Standards Act* and the *Labor Union Act* is denied, the protection under the civil law (usually, damage compensation but could exceptionally include prevention, i.e., refusal of work or demand for performance) could be applied for health and safety. According to precedents in Japan, the orderers' duty of care toward people who receive work orders may arise under a complete contract/service agreement. The duty of care is a civil law obligation generally incidental to a contract established by precedent. Regarding precedent indications, Mishiba (2014)[44] paraphrased the duty of care as a duty of (i) a "person who potentially has a practical influence (in particular, potential control and management)" on (ii) the "health and safety of a subject," that assumes the presence of (iii) "the possibility of avoiding a consequence" (iv) based on the "foreseeability" of accidents and diseases, of (v) "implementing procedures or giving his/her best attention to avoid such a consequence." Article 5 of the *Labor Contracts Act* enacted in 2007 clarified the duty of care in a labor-management relationship, but it goes even further than this. Even if there is no breach of a statutory duty, a violation of this duty of care might arise. Depending on the context of a case, a violation of guidelines not legally binding may constitute a violation of the duty of care.[45] Its broad scope and contents are close to those of the UK's HSWA (*Health and Safety at Work etc. Act 1974*) as well as the Management of Health and Safety at

42) Following this judgment, Article 22 of this Act and eleven relevant ordinances have already been revised and amended (e.g., to require constructors to develop the measures in stages to be taken for protecting self-employed carpenters and others who are not in their employment but engage in work or access their construction sites, even without the state of being under the command and control of the constructors). For details, refer to "Concerning the Enforcement of the Ministerial Order Partially Amending the Ordinance on Industrial Safety and Health, etc." Labour Standards Notice No. 0415 Article 1, dated April 15, 2022. In addition, the Committee to Review the Health and Safety Measures for Sole Proprietors and Other Individual Business Operators has held meetings since May 2022. Its agenda includes the necessity of more strict regulations for protecting self-employed carpenters and others, how to regulate digital platforms, and rules necessary for assuring the health of sole proprietors. The author (Mishiba) is a member of the Committee and reported on the UK and Australian legal systems.

43) As mentioned in Section 1, in Japan, this concept is commonly called the "duty of 'safety' consideration," but it also covers mental and physical health issues.

44) For details, see Mishiba (2014); Mishiba (2017).

45) The Ministry of Health, Labour and Welfare of Japan issued a notice under the joint signatures of relevant administrative bodies to raise awareness about road safety among food delivery service platforms and delivery staff (Safety Division Chief, Ministry of Health, Labour and Welfare "Prevention of a traffic accident in food delivery using the bicycle and motorized bicycle." Issued October 26, 2020. Safety Division Notice 1026. No.2, Attachment). It is not legally binding but might be used as a reference by the judiciary to examine the detail of a duty of care.

Work Regulations 1999, general duty clauses specified by laws related to the industrial safety and health including in those European countries, and Canada's Part II, Canada Labour Code of 1985.

A leading case of the Supreme Court concerning the duty of care is the *Japan Ground Self-Defense Force Hachinohe Vehicle Maintenance Factory* Case (Supreme Court of Japan Third Petty Bench decision, February 25, 1975, Supreme Court Reports, Vol. 29, No.2, p.143). In this case, a Self-Defense Force official was run over and killed by a large vehicle driven by a peer, and the bereaved family sued the Government for compensation. The Supreme Court ruled that "between the parties who are involved in a social contact with each other following certain legal relations, the duty of care should be commonly recognized as an obligation one party owes to the other, or the parties owe to each other in good faith, that is ancillary to such legal relations." That means even if there is no employment relationship, the parties with some social contact between them may be bound to the duty of care under the principle of good faith. Following this judgment, decisions were made that a principal contractor owed the duty of care to its subcontractors without an employment relationship (a representative case is *Mitsubishi Heavy Industries Kobe Shipyard Case* (*Hearing Impairment*); Supreme Court of Japan First Petty Bench decision, April 11, 1991, Supreme Court Reports, No.162, 295).

Therefore, when an incident occurs, caused by work materials (such as raw materials, means to work, etc.) supplied by a platform business to its gig workers, or when an orderer's dangerous instructions (such as requesting transportation of excessively heavy goods or speeding up delivery) result in a traffic accident, the platform may be liable to damages due to its failure of performing its duty of care, given that the party enters into a special social contact relationship with the other. This, however, does not apply unconditionally. To impose the duty of care on those other than the employer, there must be "a special social contact relationship." Moreover, civil liability for damages requires the failure to perform the duty of care, that is, a reason adequate to make the party liable (fault) and negligence. This would require, therefore, a relationship between the platform and the gig worker such that the platform can establish, control, and manage work conditions with high accident rates or command authority over the worker, which would allow the risks of work-related accidents (damages) to be easier to predict and control. In addition, even if the failure to perform the duty was recognized, claims for prevention, such as demanding performance of the duty, are not accepted in most cases.[46)]

8. A LABOR-RELATED LAW: THE HOME WORK ACT (ACT NO. 60 O/F 1970)[47)]

This law aims to protect industrial home workers (non-employees) who usually engage in material processing. In Japan, the *Factory Act*, which came into force in

46) For example, *Takashimaya Kosakusho Co., Ltd. Case*, Osaka District Court, November 28, 1990. Labor Economy Court Precedent Preliminary Report. No.1413, p.3.

47) In this section, the authors referred to Hashimoto (2009), Hamaguchi (2020), and Kitaoka (2022).

1956 and aimed to protect people working at factories (especially minors and women), was a predecessor of the *Labor Standards Act* (Act No. 49 of 1947). A system was later developed where independent self-employed workers, according to a legal framework, perform cottage labor (homework) for factory owners to avoid the application of this law and compensation for workers' injuries or diseases. This system has remained to date. In around 1958, deadly accidents occurred where homeworkers who had glued the soles of wedge mules, which were in fashion at that time, in a closed space died due to the exposure to benzene contained in rubber adhesive.

Based on these circumstances, the *Home Work Act* likens the relationship between homeworkers and businesses who outsource jobs to that between labor and management. In other words, although homeworkers were excluded from the subjects of the *Factory Act*, the necessity of social protection for them was recognized from economic, health, and safety aspects and the *Home Work Act* was established.

Accordingly, this law aims to extensively improve the working conditions of homeworkers by, for example, requiring persons who outsource work to prepare a slip that clarifies details of outsourced tasks, deadline/delivery date, wages, payment due date, and other conditions so that clients themselves and third parties (supervisory authority, etc.) can check the appropriateness of these conditions. Worthy of special note is Article 4, which is only an efforts clause but aims to dissuade the clients from asking homeworkers to work long hours.

The circumstances of its enactment are similar to those surrounding the gig economy in a sense (business operators try to evade their responsibility as an employer), and some protection measures prescribed by this law may be effective also in ensuring the health and safety of gig workers. In specific, the viewpoint of "extensively improving working conditions" will support psychological and physical health measures, which are regarded as of major importance by recent occupational health and safety laws.

For general health and safety issues, Paragraph 1 of Article 17 of this Act requires businesses who outsource jobs to take hazard prevention measures when they provide or supply machines and tools, raw materials, and other materials to homeworkers. Paragraph 2 of the same article specifies the obligations of homeworkers to "take" measures to prevent hazards due to machines tools and raw materials, as well as gas, steam, and dust. Paragraph 3 of the same article specifies the obligations of a homeworker's relatives residing together who are used by the homeworker as "assistants" to "perform" hazard prevention measures under Paragraph 2. Paragraph 2 is considered to impose on homeworkers obligations to protect the health and safety not just of themselves but also of their "assistants."

This law assumes workers work from home, and in the course of its enactment, the necessity of privacy protection was called for. The law thus focused mainly on supporting homework(ers) and adopted an approach to minimize restrictions. These circumstances may lead to a difference from the *Industrial Safety and Health Act*. For example, the *Industrial Safety and Health Act* has provisions the *Home Work Act* does not have, that require a person obliged to take measures (such as a business

operator) to make the subjects of protection (such as employees) adhere to "Dos" (such as having the worker wear personal protective equipment under Paragraph 1 of Article 327 of the Ordinance on Industrial Safety and Health) and "Don'ts" (such as prohibiting workers from entering the dangerous area under Article 245 of the same Ordinance).[48)]

Major executive authorities of the *Home Work Act* are Chiefs of the Labour Standards Inspection Office and Labour Standards Inspectors (Article 29) and in the event of non-compliance with Paragraph 1 or 2 of Article 17 concerning general health and safety matters, they can order the non-compliant person (orderer or homeworker) to stop issuing or accepting contract and/or using machines, tools, raw materials, etc. (Article 18). In violation of Article 17 concerning general health and safety matters or Article 18 concerning administrative dispositions, a penal provision (fine) will apply (Article 35).

The *Home Work Act* with these provisions may not suit modern gig workers who usually engage in data processing, system construction, or similar tasks. However, there is an opinion that legal measures should be taken in reference to the *Home Work Act*.[49)] In particular, it is worth learning the approach of this law to make a person, who outsources work, control risks generated by the person him/herself and to require both the client and contractor to take necessary health and safety measures. Revising this law for gig jobs may be possible.

It is, therefore, difficult to protect the health and safety of modern gig workers only with the current version of labor and labor-related laws and regulations.

The following sections will consider the feasibility of ensuring health and safety protection under economic laws. The Japanese *Industrial Safety and Health Act* actively addresses workers' psychosocial stress such as by developing a new stress test system[50)] (Article 66-10). In this regard, workers' working and economic conditions could be general issues at least in the context of the *Industrial Safety and Health Act*.

9. ECONOMIC LAWS AND THE HEALTH AND SAFETY OF PLATFORM MEDIATED GIG WORK

A. Act against Delay in Payment of Subcontract Proceeds, etc. to Subcontractors (Act No. 120 of 1956)

This law targets people (parent enterprises) who are, for a particular transaction, a party involved in the transaction themselves (contracting for work from a client) and entrust a subcontractor to all or a part of their duties. It aims to prevent parent enterprises from abusing a dominant bargaining position as an orderer to the subcontractor (sole proprietor or legal entity whose capital is less than that of the parent enterprise). Transactions to be regulated under this law are: the manufacture, repair, processing, etc., of goods and consignment of these processes (Paragraphs 1 and 2 of Article 2); consignment where the parent enterprise engaging in the creation, provision, or use

48) Kitaoka (2022).

49) Emeritus Prof. Sugeno proposes the introduction of a scheme which ensures the minimum wage under the *Home Work Act* also for freelance workers (Keidanren 2019).

50) See Mishiba (2021).

of the information-based product including software, video content, and different designs entrusts the subcontractor all or part of their duties (Paragraph 3 of the same); service contract where the parent enterprise entrusts the subcontractor all or part of the provision of a service the parent enterprise is engaging in (Paragraph 4 of the same). Under its provisions, these parent enterprises are obligated to deliver documents containing the details of work of the agreement (Article 3) and to fix the due date of payment of the proceeds of the subcontracted work (Paragraph 2 of Article 2) and are prohibited from refusing to receive the work from a subcontractor or return the goods once received without adequate reasons (Items (i) and (iv) of Paragraph 1 of Article 4), delay the payment or reduce the amount of the proceeds of the subcontracted work (Items (ii) and (iii) of Paragraph 1 of Article 4), and retaliate against a subcontractor because the subcontractor informed the Fair Trade Commission or other administrative organs of any of these acts (Item (vii) of Paragraph 1 of Article 4). The law has provisions applicable in case of a violation of the above provisions, such as recommendation or collection of reports by the relevant authority and sanctions in case of failure to meet these requirements. The penal provisions, however, have not applied in general (Kanai, Kawahama, and Sensui 2018, 363), and successive illegal acts have taken place; thus, the Fair Trade Commission started to publish a list of companies the Commission gave notification of a need for improvement.[51)]

Gig workers could be protected under this law as long as they are engaged in business specified in the law but the scope is limited. In addition, the law does not have a provision concerning general health and safety protection, such as a requirement for occupational risk assessment on parent enterprises. As a natural result, the law does not work for securing a transaction itself between a parent enterprise and a subcontractor.

B. Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of 1947)

In principle, this law intends to regulate any act that practically contributes or may contribute to impeding or restraining fair competition, falling under any of the following: (i) private monopolization, (ii) unreasonable restraint of trade, and (iii) unfair trade practices. The purpose of this law is such as to promote fair competition and the wholesome development of business activities and secure the interests of general consumers. Case (i) means an act such that an existing enterprise, in conspiracy with other enterprises, "excludes" new or other enterprises by, for example, impeding their entry into the market, or "controls" them and hinders their autonomous decision-making process by placing them under its umbrella (Paragraph 5 of Article 2). Case (ii) means an act such that existing enterprises form a cartel or use other means to fix the transaction price (for example, bid-rigging). Case (iii) means an act such that an existing enterprise refuses or causes another enterprise to refuse to supply to a certain enterprise with goods, or unjustly

51) Japan Fair Trade Commission website: https://www.jftc.go.jp/shitauke/shitaukekankoku/index.html, accessed February 11, 2022.

fix responsibility for or inflicts a loss on a certain enterprise by making use of its superior bargaining position over the counterpart such as a continuous business relationship (Paragraph 9 of Article 2). The ways to secure the implementation of regulations (i) and (ii) include an order by the Fair Trade Commission to cease and desist a relevant act of violation (the Cease and Desist Order; Article 7), and to pay to the national treasury a surcharge of an amount as an administrative penalty (Paragraph 2 of Article 7-2), and a criminal penalty (Item (i) of Paragraph 1 of Article 89). The ways to secure the implementation of the regulation (iii) include the Cease and Desist Order (Article 7).

The Fair Trade Commission has also published "The Policy on the Franchise System under the *Antimonopoly Act* (June 23, 2011)"[52] and has conducted research on the current situation of the convenience store industry in an attempt to protect franchisees (member stores) that had not been covered under the *Labor Contracts Act*.

Hence, this act may apply to self-employed gig workers. If applied, however, it would directly modify the principle of a free economy; thus, this law tends to be interpreted and applied very carefully.[53] The scope of the provisions governing the abuse of a superior bargaining position, whose applicability is most frequently examined, is limited. In reality, these provisions have been applied in a controlled manner and so it cannot be said that they are flexibly and individually applicable to settle various disputes. Moreover, the general obligations of business operators to ensure health and safety are not governed by this act.

C. Act on Improving Transparency and Fairness of Digital Platforms (Act No. 38 of 2020)

In the economic and industrial field, the *Act on Improving Transparency and Fairness of Digital Platforms* (TFDPA) was established (promulgated on June 3, 2020) and enforced in 2021. This law well represents the soft-law nature of Japanese laws.

The Act targets the digital platform providers and aims to control (not forbid) certain of their behaviors such as, by using their superior bargaining position, imposing unfair transaction conditions to a counterparty to transactions, and unilaterally changing an agreement once concluded. On the other hand, the law specifies that the involvement of the state must be kept to the minimum necessary (Article 3). This law adopts a mechanism (called "co-regulation") whereby the law forms a broad framework of regulations and encourages designated digital platform providers to voluntarily take measures to ensure transparency and fairness in transactions.

52) The Commission says as follows: "Under the franchise system, the member is integrated into the system of the head office, including the system of comprehensive guidance. It is especially important, therefore, that a party contemplating becoming a member makes the proper judgment before deciding to participate. It is desirable that the head office discloses sufficient information to a party contemplating becoming a member when the member is invited to participate in the franchise. In addition, the business transactions between the head office and the member after the franchise agreement has been signed should not cause a disadvantage to the member unilaterally nor should it place unjust restrictions on the member."

53) Japan Fair Trade Commission website: https://www.jftc.go.jp/dk/guideline/unyoukijun/gyouseishidou.html, accessed February 11, 2022.

Specifically, among digital platform providers with a specific business category and scale, this law targets only those designated by the administrative body (designated digital platform providers). Its basic regulation policy is to require those subject to the law to submit annual self-evaluation reports about measures taken, following which the administrative authority will review the business status of the platforms based on their submitted reports and publish the results. Basic measures required to be taken by the designated digital platform providers include the disclosure of transaction conditions and the establishment of systems and procedures necessary to ensure fair transactions and handle complaints.

In April 2021, five companies including Amazon Japan G.K., Rakuten Group, Inc., and Yahoo Japan Corporation became designated digital platform providers.

Although this Act may not be commonly thought of as a law to protect gig workers, it is significant that some restrictions have now been placed on digital platforms. Future amendments could contribute to the broader protection of gig workers using digital platforms.

D. Small and Medium-Sized Enterprise Cooperatives Act (Act No. 181 of 1947)[54]

The purpose of this act is to provide for the organizations (each small- and medium-sized enterprise cooperative and the federation of small- and medium-sized business associations) necessary for persons engaged in a small- and medium-sized commercial business, industrial business, mining business, transport business, service business or any other business and other workers (both of these types of member are cooperative members), and to achieve an improvement in their economic status. Small- and medium-sized enterprise cooperatives (hereinafter referred to as the "cooperatives") are categorized into five groups based on the member's business types and other factors (Article 3),[55] but must be a juridical person (Article 4), and the member is able to join or withdraw from the cooperative voluntarily (Article 5). The member has equal voting rights and the cooperative has the purpose of serving its members through its activities (Article 5). A cooperative consisting of members whose amount of capital and number of employees do not exceed the specified values will be exempted from the application of the *Act on Prohibition of Private Monopolization and Maintenance of Fair Trade* (Article 7). The

54) In 2020, a legislation introduced by a Diet member, the *Worker Cooperatives Act* (Act No. 78 of 2020), was established. It aims to protect workers who are actively engaged in public services (such as visiting care, after-school childcare, self-reliance support for unemployed youth) as laborers. The act will be enforced on October 1, 2022, except for some provisions. This is a part of the process to create a legal system for the consumers' co-operative that was originally founded by Robert Owen in the UK and has been developed uniquely in Japan. This act takes over the *Small and Medium-Sized Enterprise Cooperatives Act* in many parts, but its most characteristic point is that the act defines the cooperative member is an individual and aims to protect the member as laborer in light of the relationship with the worker cooperative (i.e., acknowledging the legal status of the individual as a person who is a member of management and a laborer at the same time). Although this act does not have enough compelling force, it might be useful for some types of gig jobs in the future.

55) A worker's collective is one of the groups where a worker or other member starts and runs business by providing one's own capital and also provides labor.

main activities conducted by the cooperative include joint activities related to the business of members, loaning of business funds, and the conclusion of collective agreements with clients to improve the economic status of members (Paragraph 1 of Article 9-2, emphasis added).

Worthy of special note is that, under this Act, counterparties on transactions with the cooperative and member have an obligation to negotiate in good faith for the conclusion of collective agreements by the cooperatives. Paragraph 12 of Article 9-2 specifies that an enterprise (excluding small-scale enterprises) that has a business relationship with a cooperative or a member is to start negotiations with sincerity when the representative person of the cooperative or the member states an intention to start negotiations to conclude a collective agreement on the trade terms and conditions. This act has no sanctions in this regard, but a collective agreement is valid directly for members. In the case that the conditions of an agreement are inconsistent with the terms of the collective agreement, only these inconsistent terms would be corrected pursuant to the collective agreement. When the parties concerned do not reach an agreement through the negotiations for concluding a collective agreement or the interpretation and application of the collective agreement, either of them may file a request for mediation or conciliation with an administrative authority (who is usually a competent authority governing the cooperative operation; if there is no competent authority, then it is the Small and Medium Enterprise Agency) (Article 9-2-2).

Importantly, the Federation of Small Business Associations (FSBA), which governs each cooperative, may make proposals on the particulars concerning small- and medium-sized enterprises directly to the Diet, a council of a local government, or an administrative authority (Articles 74 and 75). The provisions aim to secure the political influence of small- and medium-sized business associations through the FSBAs.

As shown above, this act intends to enable small and medium-sized business operators, who are generally economically weak, to organize trade associations or guilds, enhance bargaining power against clients and economic power, and promote mutual assistance (note that Paragraph 3, Article 5 of this act requires political neutrality). The small- and medium-sized enterprise cooperative under this law is both a profit-making corporation and nonprofit corporation, and thus is theoretically regarded as an intermediate corporation (NFSBA 2016, 10). Examples of cooperatives under this law include the Federation of Akabou Light Vehicle Transportation Cooperatives, which is organized by sole proprietors engaging in the transportation business under the same brand, and the Soka Senbei Cooperative which is organized by local manufacturers of rice crackers. This law has been applied in few cases (there have been no cases in which a party filed a request for mediation in negotiations with its client) and has not been focused on in the labor field in Japan, but it may be useful for gig workers. If gig workers set up a cooperative, they would be able to conduct collective bargaining under legal protection for improving working conditions and occupational health and safety based on the characteristics of each occupational type.

This Act, however, has the following problems for practical use.

First, the law is not compulsory as

compared with the provisions of the *Labor Union Act* in terms of restricting unfair labor practices (for example, employers cannot refuse to bargain collectively and must not treat any cooperative member in a disadvantageous manner). The administrative body does not have the authority to give a relief order to correct an illegal condition. Therefore, even for an important problem such as health and safety, there are no countermeasures available when a platform or an orderer refuses to engage in collective bargaining with the cooperative.

Second, there are no guarantees for gig workers such as the right to strike or take part in other collective activities, and they have no exemption from civil liability or indemnity from prosecution for reasonable cooperative operations, which are guaranteed for labor unions by the Constitution or the *Labor Union Act* (Paragraph 2 of Article 1 and Article 8), respectively. If a cooperative makes a protest or takes disputing action, it would have civil liabilities including that the cooperative would become liable to compensate damages to an orderer or the platform would be able to terminate a contract because of the breach of the contract. Moreover, the cooperative would be subject to criminal punishment depending on the method/mode of its acts, such as forcible/fraudulent obstruction of business (Articles 233 and 234) or breaking into a residence (Article 130). Therefore, if the cooperative holds collective bargaining with the platform or orderer and the parties are at an impasse, the cooperative does not have any effective solutions.

Third, if the platform's office or the address of a company that operates the platform is located abroad, the practical problem of where they will engage in bargaining may arise (but this problem may arise in labor unions as well).

We should address a number of challenges to using the *Small and Medium-Sized Enterprise Cooperatives Act* for gig workers to realize that important working conditions such as health and safety are correctly ensured; however, since there are various gig jobs such as transportation and software development, the industry type, job type, region, and other factors should be considered in collective bargaining to ensure feasible health and safety. The government should commit to providing information and collecting data about the best practice and notices by publishing guidelines,[56] and establishing the minimum requirements, if necessary.

Moreover, considering the income insecurity and the current expanding scope of health and safety regulations, it is desirable that the government includes the following matters in the subjects of collective bargaining between a gig workers' cooperative and a client: clarifying contract terms, determining proper remuneration and securing payment, providing social security (for illness, aging, unemployment, etc.), supporting career development, guaranteeing pay during leave

56) The Ministry of Health, Labour and Welfare has already issued the Guidelines for the Appropriate Introduction and Implementation of Off-Site Work Using Information and Communications Technology on February 22, 2018, and the Occupational Health Guideline for VDT Work (Labour Standards Notification No.0405001) on April 5, 2002. The National Institute of Occupational Safety and Health, a comprehensive research institute for occupational safety and health in Japan, has also conducted research on occupational risk during teleworking, etc. However, the purpose of both of them is to provide the protection only for employees.

for childbirth, childcare, and nursing care, preventing harassment, covering liability for damage caused to a third party and securing dispute resolution measures (when a platform is based overseas).[57, 58)]

10. SUGGESTIONS FROM OCCUPATIONAL HEALTH

This section presents the findings from a review of occupational health literature concerning risks inherent to gig work and control measures, as reference materials to be considered for theories of legal interpretation and bargaining between relevant parties about the duty of care, as well as for future legislative processes.

In Japan, no research has been conducted on the health management and occupational health and safety of gig workers. In other countries, a few studies have been published on gig workers' health and safety. A study in the U.S. warned that the health and safety risk has been increasing because many gig workers use their own cars for work or work at home, which invalidates the existing protection against the known occupational risk factors (Tran and Sokas 2017). In addition, Bajwa et al. (2018) gave the following three categories in examining the factors influencing the health of gig workers: a) hazards inherent to the work (occupational vulnerabilities), b) poor protection (precarity), and c) hazards arising from the use of platforms (platform-based vulnerabilities). Factors for category a) include the increase in the risk of traffic accidents for drivers and musculoskeletal injury due to prolonged typing and other repetitive movements. Factors for category b) include the necessity to prepare tools and equipment through one's own efforts as well as the limited opportunity for training and career development. The above two categories are applicable also for other jobs, but category c) is unique to gig work. In using a platform, for example, the feeling of loneliness among workers who have no personal relationship in the platform, discriminatory treatment due to uncontrollable factors, and stress due to the income decrease have been observed.

A German researcher's study of crowd workers in Germany (using the Somatic Symptom Scale-8; SSS-8) showed a significant increase in the number of physical conditions among crowd workers compared to general workers (Schlicher et al. 2021). A study in the US examined the piecework system (the amount of pay is directly linked with the volume of products produced or services delivered by workers) of the gig economy and indicated that such a system is a risk factor for health (Davis and Hoyt 2020). This study analyzed the results of a cohort study (questionnaire survey of gig workers and comparison of outcomes) conducted

57) See JILPT (2011).

58) Note that JTUC Research Institute for Advancement of Living Standards (2018) examines the framework to protect "workers (not employees)," stating, "because in many cases, the conventional theory of including workers in a business organization is not applicable for people, especially crowd workers, if there is inequality of bargaining power in a relationship with the other party, a status of being a 'worker' under the *Labor Union Act* should be broadly applied for them" and "even if they are considered as self-employed workers, it should be accepted to conclude a collective agreement with similar effect as in a labor agreement and require the other party to do collective bargaining by applying the *Small and Medium-Sized Enterprise Cooperatives Act*." Hamamura (2018, 12) holds a similar view.

by the Bureau of Labor Statistics (BLS). The questionnaire survey asked a question about the presence or absence of "health obstacles" (whether there is any health problem that may restrict the daily life or work life regardless of whether it is caused by work) and self-evaluation data was collected. It was a subjective scale, but annual and cumulative odds ratios of health obstacles were significantly higher among piece workers than wage and salary workers (95% CI: annual 1.75 (1.16, 2.62); cumulative 1.42 (1.03, 1.96)).

A paper indicated various influences of the COVID-19 pandemic on gig workers. Research conducted in Seattle in the US revealed that only 31% of app-based drivers were given appropriate masks and disinfectants from their companies (Beckman et al. 2021). A result of research analyzing the responses of an interview survey on gig workers during the COVID-19 pandemic showed that some gig workers accepted diverse dangerous jobs that entailed direct contact with other people, mainly caused by the mechanism of the algorithmic management (if workers maintain a high customer satisfaction rate, the system offers more opportunities to them) (Cameron, Thomason, and Conzon 2021). The research also revealed that some of the gig workers figured out a way to mitigate physical risks, while some of them could not accept the risks and temporarily stopped doing gig work.

Gig work is similar to teleworking in that computers and other digital devices are used and tasks are performed outside the sites of clients and platforms. Concerning the risks inherent in teleworking and the recommended controls, a joint technical brief was published recently by the WHO and ILO (2021). This article seemed to grasp the immediate expansion of teleworking during the COVID-19 pandemic and adopted the approach of firstly securing teleworkers' health and safety, but did not mention a controversial issue, the teleworkers' status of being a "worker/employee." This technical brief took into account an employment relationship in principle and used the term "employer" but did not use the term "employee" and rather used "worker." Generally, this technical brief listed the advantages of teleworking (based on investigation results including job opportunities for individuals with chronic conditions, reduction of blood pressure, mitigation of the risks of developing depression, and increase of physical activities) and aimed to promote a proper teleworking arrangement. Assuming the difficulty of the health and safety management that could be taken in practice in the offices, the article also listed the following inherent occupational risks: (i) physical conditions due to prolonged computer use (musculoskeletal injury, eye strain), (ii) social isolation, (iii) cyberbullying and harassment, (iv) disorder of the daily rhythm, (v) too much or too little work, and (vi) increase of mental stress due to interruptions caused by family members, especially children.

Concerning the controlling measures, these papers, based on the difficulty of supervision and management by employers, highlight the importance of cooperation among workers and labor-management consultations (especially, consultations in the safety and health committee and with a representative in charge of safety and health). They also place importance on the following factors: periodic social communication (such as online meetings, etc.), flexible working schedule (such as introduction of flexitime, etc.),

avoidance of contact from employers during days off, clarification of work performance and the priority order of tasks, proper labor management using rules on work hours and disciplines (e.g., no drinking, no smoking, etc.), workplace risk assessment using online checklists, online education based on risk assessment results, response to overworked workers, positive feedback, promotion of exercises, and support by occupational health services. In addition, they recommend that employers provide workers with supplies necessary for work, including computer hardware and software, office furniture, and insurance including worker's compensation insurance and home contents insurance. They require that the government authorities monitor and analyze matters about occupational diseases and/or disorders. These statements are also suggestive for the gig economy. However, periodic social communication, proper labor management using work rules, online education, promotion of exercises, and other matters are founded on the employment relationship. It is, therefore, difficult to require those other than employers to realize these conditions.

11. CONCLUSION: THE NECESSARY LEGAL RESPONSE

This section concludes the article by drawing out its key points.

First of all, concerning the status of gig workers as "employees," expanding the scope of the category of being "employees" is difficult. We should apply labor-related laws properly to protect people falling under this category by flexibly interpreting these laws. Especially for important law-protected interests such as health and safety, efforts should be made to achieve protection under laws including the *Industrial Safety and Health Act*, the *Labor Standards Act*, and the *Labor Union Act* by flexibly interpreting the existing criteria. However, there are limitations to this approach. People who do not fall under this category but need to be protected in a similar manner to employees should be protected by applying, for example, the *Small and Medium-Sized Enterprise Cooperatives Act* (See Section 9(D) above, i.e., a law for small- and medium-sized businesses to strengthen the solidarity, enhance bargaining power, and promote mutual assistance and political influence) and by revising the same act, the *Home Work Act* (See Section 8, i.e., a law to ensure the health and safety of industrial home workers who work at home under contracts from clients).

In principle, health and safety are to be managed by the assessment of different risks inherent (incidental) to work (risk management for health and safety within the scope of one's work). Therefore, (i) labor-management consultations, (ii) the utilization of industry health professionals,[59] and (iii) investigation of common risks inherent to work (by industry and job), creation of guidelines, and other measures by the Government would be effective.

Since the *Industrial Safety and Health*

59) The Ministry of Health, Labour and Welfare of Japan has established prefectural occupational health and safety support centers to offer free consultation services for workers and employers about occupational health. Mishiba (2020, 13) recommend the utilization of these centers partly because the Japanese Government is committed to promoting freelance work.

Act focuses on the prevention of industrial accidents rather than a legal systematization or consistency, it imposes obligations on not only employers who directly employ workers but other certain, various individuals. This law values a normative way of thinking about who should be liable for health and safety while adopting a practical way of thinking about who can fulfill health and safety obligations more easily and effectively.

The UK's HSWA, which has often been referred to by the Japanese Safety and Health Act, identifies targets (subjects who are bearers of obligations) in a broader manner including employers and risk generators (persons who have risk-related information and can control risk, such as those who control and manage work conditions), focusing comprehensively on health, safety, and welfare. The HSWA has general regulations with sanctions that require the targets to take reasonable and feasible measures to protect not only their employees but other persons who may be affected thereby (S.2 through S.7). In addition, a significant fine is specified for a breach of this law and is implemented accordingly. As mentioned in footnote 12, in Australia, S.19 of the harmonized *Work Health and Safety Acts* targets all persons who conduct a business or undertaking (PCBU), including an employer, and requires them to ensure, so far as is reasonably practicable, the health and safety of workers engaged, or caused to be engaged by the person. The policy of these laws is similar to the concept that a person who generates risk or can control and manage risk must ensure the health and safety of the workers exposed to the risk.

Although the *Industrial Safety and Health Act* in Japan does not have radical provisions as the UK and Australian laws do, the concept of civil responsibility for the employer's duty of care formed by judicial precedents in Japan plays a similar role as the provisions of these laws. In other words, this concept of the duty may contribute to the protection of self-employed workers and other non-employees by imposing obligations on those who are not employers for risks specified and not specified by laws. The original scope of this duty, however, is not as broad as that of the Australian *Work Health and Safety Acts*. In addition, the courts tend to consider the background of each case (individual circumstances and social background) comprehensibly to determine a specific obligation and the presence or absence of the violation; therefore, even the text of the *Industrial Safety and Health Act* does not always directly represent the practical duty of care. Since this is a civil liability, an affected person needs to actively claim and verify a violation by a person obliged to take measures to the court, which indicates the passive nature of the act (adversary system and dispositive principle). Even if the claim is accepted, a remedy will be only the payment of damages. It is difficult to use this concept of duty to enable the demand for the performance of the duty and other preventive approaches.

The point in question is whether Uber and other platforms are risk generators because of their algorithmic management. It is reasonable that orderers and clients decide whether they conclude a new contract/service agreement with the other party according to the work performance of the other party. However, if algorithmic management is a strong factor causing a large number of ride-share drivers' traffic accidents or health damage under the

conditions that there is a contractor's economic dependency and a one-sided contract, the legislation discussed herein will be required. Mishiba considers that there could be a legal interpretation theory with a social policy approach to regard an individual as an "employee," even to a limited extent, until proper legislation is established. The co-author Kurashige has a different view on this point. Kitaoka (2022) emphasizes the need to control risks, especially for young and/or unskilled workers.

In an attempt to control (interpret flexibly) the concept of being an "employee" for gig workers, flexibly apply existing laws and regulations (the *Industrial Safety and Health Act* and the *Labor Union Act*, and those listed herein) to those not falling under the category of "employees," and protect gig workers with new legislation, the basic grounds are the economic dependency and accessoriness of contracts (a contractor must accept terms specified by a client or operation manager to conclude a contract). In addition, when considering the broader health and safety concept including mental health, the facts that clients and operation managers generate risk (liability for risk), control and manage gig workers' working conditions, and have a close social contact relationship with a contractor may be additional grounds. In some cases, there may arise the obligation to protect contractors under civil and penal laws based on these backgrounds.[60] Since these factors are often observed among platforms, they are to be those obliged to ensure health and safety in most cases.

Duties to be imposed on platforms are risk assessment, provision of assessment results to gig workers, and a sincere response to collective bargaining, while measures to be taken by the government include investigations of general risks associated with gig work and of ideal countermeasures and the provision of relevant information. In Japan, the government has taken initiative to promote freelance work; therefore, providing a sense of security is necessary by preparing a proper social safety net as a public policy, regardless of whether freelance workers fall under the category of "employees" or not. At present, financing systems (such as those offered by the Japan Finance Corporation), health check-up systems (for example, a community health system run by municipal governments, services of health insurance societies by industry, and specific lifestyle health check-ups and health guidance[61]) are available for those who are

60) In Japan, Article 218 of the Penal Code specifies that when a person who is responsible for the care of a person of old age, a child, a person with a disability or illness, abandons or fails to provide the necessary care to them, the person is punished. The protection responsibility hereunder may be deemed to arise due to the presence of an antecedent action as well as an applicable law and contract (Tokyo High Court decision, May 11, 1970, Hanrei Times Co.,Ltd., No.252, 231). In a civil context, delivery obligation and at least between a creditor and a debtor, it is said that both parties are liable to protect the other party as duty of care (Schutzpflicht) not to cause death or bodily injury or infringement of property of the other party, in addition to contractual basic performance and concomitant duties (Okuda 1992, 18).

61) A scheme where, in accordance with the *Act on Assurance of Medical Care for Elderly People*, each medical insurer executes specific lifestyle health check-ups to find diabetes and other lifestyle-related illnesses for the insured aged 40 or over by measuring chest circumference, BMI, blood pressure, neutral fats, high-density lipoprotein (HDL) cholesterol, and other indicators, and gives specific health guidance for those with metabolic syndrome.

not employees. Startup support facilities called "Incubation Centers" have also been founded that are run by public organizations providing entrepreneurs with a workspace and access to expert advisors.[62] However, according to JILPT (2019), there is an increasing need among freelancers for unemployment insurance and worker's compensation insurance. At least, it is necessary to expand the scope of coverage of worker's compensation insurance including compensation for commuting injuries (the special insurance coverage scheme). Demands for occupational health services such as health care consultation seem not to be developing. That is partly because such consultation does not always result in a solution. Hence, the promotion of collective bargaining is required using such as the *Small and Medium-Sized Enterprise Cooperatives Act*.[63] For example, it is necessary to establish a scheme as follows: if cooperatives that are protected under this law assign industrial physicians to conduct interviews with cooperative members (gig workers) when the physicians deem it necessary to do so, cooperatives can approach platforms or clients to improve the working conditions of the members in question.

Furthermore, in the modern labor-related law context, the structure of conflict between labor and management has been transformed into a conflict between artificial intelligence (AI) and human intelligence, or between legal restrictions and human society and interdisciplinarity of academic fields. The problem is how to provide values differentiating from what AI provides and how to harmonize legal restrictions with human society and use them effectively. More specifically, we should find a way to realize dialogue and cooperation between the parties concerned for problem solving, by using applicable laws and regulations. This challenge is highlighted in the gig economy. The gig economy has certainly created new styles of work. None of the Japanese laws have addressed issues in the gig economy sufficiently; however, different laws with different principles exist in order to combat labor issues and monitor behaviors of business owners with the help of group dynamics (such as worker and customer trust in business owners). As a result of monitoring, if the legislative body decides there is a lack of support, a more advanced statutory approach will be developed. In terms of versatility and flexibility, labor laws in Japan may, to some extent, serve as a useful reference in a global context.

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62) A good example is an incubation center run by Tokyo Metropolitan Small and Medium Enterprise Support Center (https://www.tokyo-sogyo-net.metro.tokyo.lg.jp/incu_office/kosha/).

63) Mishiba (2020, 7) stated that statutory restrictions are required on any contract that interferes with collective bargaining by freelancers.

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No conflict of interest to disclose.