

# The Regulation of Aged Workers: Lessons from Japan

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## I. INTRODUCTION

The global phenomenon of ageing populations has triggered debate in many countries about the role of older workers in the economy and how to financially support retirees. Until recently many developed countries such as Australia promoted early retirement, resulting in the decreased participation of older workers in the workforce. GHOSHEH et al. argued that such policies were a product of governments, employers and unions pushing aged workers out of the labour market.<sup>1</sup> However this approach has recently changed in many countries as older people are encouraged to remain in employment in order to reduce the financial stress on the social welfare system and to address labour shortages within the economy.<sup>2</sup> Yet this approach has existed in Japan since the 1960s and various forms of regulation have been implemented to ensure workers are employed into their 60s and now 70s.

This article focuses on Japan as a case study on the regulatory mix to promote the employment of aged workers, which includes legislation, judicial development of doctrine, government policies, informal regulation and normative practice. A broad aim of this regulatory mix is to ensure that older workers receive training and do not have their employment terminated in order to deal with the perception of being expensive and possessing outdated skills.<sup>3</sup> Japanese workplaces are increasingly occupied by older workers as its generation of *dankai no sedai* ('baby boomers') enter their twilight years.<sup>4</sup> Japan's population of 127 million is composed of a labour force of 66.73 million people and in 2016 8.1 per cent workers aged between 60 and 64 years and 11.8 per cent over 65 years of age.<sup>5</sup> Thus nearly 20 per cent of workers are over 60 years (over 30 per cent of Japan's population).<sup>6</sup> Compared to other countries, the ageing workforce in Japan has

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- 1 N. S. GHOSHEH JR/S. LEE/D. MCCANN, Conditions of work and employment for older workers in industrialized countries, Understanding the issues, International Labour Office (2006) 1–2, 7, 9.
  - 2 P. TAYLOR, Conclusions: the prospects for ageing labour forces, in: Taylor (ed.), Ageing Labour Forces: Promises and Prospects (2008) 204, 204–205.
  - 3 GHOSHEH JR/LEE/MCCANN, *supra* note 1, 8.
  - 4 D. SCHOFIELD/E. J. CALLANDER/S. J. KELLY/R. N. SHRESTHA, Working Beyond the Traditional Retirement Age: The Influence of Health on Australia's Older Workers, *Journal of Aging and Social Policy* 29(3) (2017) 235, 235.
  - 5 CABINET OFFICE, 第1章 高齢化の状況 [Part 1: The Situation of Aged Workers], available at [https://www8.cao.go.jp/kourei/whitepaper/w-2017/html/zenbun/s1\\_2\\_4.html](https://www8.cao.go.jp/kourei/whitepaper/w-2017/html/zenbun/s1_2_4.html).
  - 6 NATIONAL INSTITUTE OF POPULATION AND SOCIAL SECURITY RESEARCH, Population the Statistics of Japan 2017, Table 2.6 Indicators of Age Structure of Population: 1884–2015, available at <http://www.ipss.go.jp/p-info/e/psj2017/PSJ2017.asp>. Official Japanese population statistics are measured based on the following age

been accelerated by a combination of low birth rates and long life expectancy.<sup>7</sup> FUJIMOTO observed that these factors caused concern in Japan regarding the sustainability of the pension system, knowledge and skill transfer to younger workers and the decrease in the size of the labour force.<sup>8</sup>

The regulation of Japanese aged workers is complex and extends beyond legislation. FREIBERG recognised that while regulation can be conceptualised narrowly as government endorsed rules, it is broader in that it includes all mechanisms of social control or influence that affect behaviour.<sup>9</sup> The regulation of aged workers in Japan reflects FREIBERG's broad concept of regulation. In addition to several acts, relevant forms of aged worker regulation in Japan include the *keiretsu* structure of corporate groups, internal employment practices of firms, informal work rules, economics, culture and normative practice. This article will explore how these forms of regulation interact so as to enhance the understanding of how Japanese regulation facilitates and promotes high levels of employment in workers over 60 years of age. Not only will this research analyse Japan's regulation of older workers, it will also set out lessons to assist foreign governments, industry and unions to enable them to identify and understand different regulatory techniques to deal with the challenge of an ageing workforce. This article will also contribute to current scholarship in this field by consolidating the voluminous multidisciplinary and bilingual literature on Japanese aged workers into a single and current research source that examines all forms of relevant regulation.

This article is divided into five parts. Part II will begin with a broad overview of the literature on issues facing older workers generally and in Japan, including the definition and characteristics of aged workers in Japan.

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groups: 0 to 14, 15 to 64 and 65 and over. The measurement of aged people may be a product of the Japanese aged pension now being set at 65. In 2015 26.6 per cent of the Japanese population was aged over 65.

7 Since 1974 the fertility rate in Japan has been below 2.0 and in 2015 the rate was 1.45: NATIONAL INSTITUTE OF POPULATION AND SOCIAL SECURITY RESEARCH, Fertility, Table 4.13 Total Fertility Rates and Mean Age at Birth by Birth Order: 1950–2015, undated, available at <http://www.ipss.go.jp/p-info/e/psj2017/PSJ2017.asp>. The life expectancy of Japanese has been increasing each year since the end of World War II. In 2015 the life expectancy for men was 80.79 years and for women it was 87.05 years: NATIONAL INSTITUTE OF POPULATION AND SOCIAL SECURITY RESEARCH, Life Expectancy, Table 5.8 Life Expectancy at Birth, Age 15 and Age 65: 1921–2065, undated, available at <http://www.ipss.go.jp/p-info/e/psj2017/PSJ2017.asp>.

8 M. FUJIMOTO, Employment of Older People after the Amendment of the Act Concerning Stabilization of Employment of Older Persons: Current State of Affairs and Challenges, *Japan Labor Review* 5(2) (2008) 59, 59.

9 A. FREIBERG, *The Tools of Regulation* (2010) 2–3.

Next, Part III will explore the laws that regulate aged workers. Part IV will analyse other forms of regulation that govern older workers. The relevant case law on retired workers will be reviewed in Part V. The article concludes by arguing that, with Japan as a case study, understanding the complex regulatory factors that drive the decisions of employers and employees can assist in increasing participation rates and ‘decent work’ for older workers. Part VI also includes some specific suggestions for improvements to the regulatory and policy context.

## II. ISSUES FOR OLDER WORKERS GENERALLY AND IN JAPAN

### 1. *Themes in the Literature on the Employment of Aged Workers*

There are several key themes in the literature on employment at older ages. First, the limits of the law and individual-based litigation<sup>10</sup> and the need for attitudinal change<sup>11</sup> which contributes to subtle pressures on older workers to retire<sup>12</sup> and strategies to circumvent the law.<sup>13</sup> Second, the need for other support measures such as labour policy and employment services,<sup>14</sup> life planning and other assistance for retrenched older workers<sup>15</sup> and public policy measures in the fields of taxation and social security.<sup>16</sup> There is also the requirement to facilitate older worker participation by adjusting the workplace to accommodate disability and age-related illness and consider additional insurance costs.<sup>17</sup> Third, debates about differences in productivi-

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10 A. BLACKHAM, *Why Do Employment Age Discrimination Cases Fail? An Analysis of Australian Case Law*, *Sydney Law Review* 42(1) (2020) 35.

11 See eg. M. EINFELD, *The Rights of Older Australians*, *Elder Law Review* 1 (2002) 1, 5.

12 R. PATTERSON, *The Eradication of Compulsory Retirement and Age Discrimination in the Australian Workplace: A Cause for Celebration and Concern*, *Elder Law Review* 3 (2004) 65.

13 A. WALT, *The Treatment of Age and Age Discrimination in Employment in the United States, Canada and South Africa*, *Elder Law Review* 3 (2004) 42.

14 M. MATSUMOTO, *Japan’s retirees heading back to work as firms face labor shortages*, *Japan Times*, 21 June 2016.

15 PATTERSON, *supra* note 12.

16 S. E. RIX, *Rethinking the role of older workers: promoting older worker employment in Europe and Japan*, *Issue Brief*, *American Association of Retired Persons* (2005) 13.

17 J. MCCALLUM/J. PARSONS, *Older workers in an ageing society: the case for legal and policy reform*, *Reform* 2002, 81; P. ALON-SHENKER, *The Duty to Accommodate Senior Workers: Its Nature, Scope and Limitations*, *Queen’s Law Journal* 38 (2012) 165; *Japan to allow hearing aid-dependent people to drive taxis, buses*, *Japan Times*, 22 October 2015; J. BLACK, *Unfinished Work: The Struggle to Build an Aging American Workforce*, *Berkeley Journal of Employment and Labor Law* 2016, 37, 162, 167.

ty, if any, between younger and older workers,<sup>18</sup> whether part-time and casual employment is beneficial or exploitative to older workers,<sup>19</sup> and whether increased opportunities for older workers come at a cost for younger workers and women.<sup>20</sup> Fourth, feminist perspectives that emphasise the special disadvantage faced by older female workers.<sup>21</sup>

Fifth, there is extensive literature on the merits of age discrimination legislation, including its potential effect on participation rates,<sup>22</sup> the role of statutory wording<sup>23</sup> and countervailing cultural norms<sup>24</sup> and whether its scope should include a wider range of fields than just hiring and dismissal<sup>25</sup> or alternative approaches such as ‘safe harbor’ rules to counteract hiring aversion.<sup>26</sup> This theme includes the jurisprudence on bona fide occupational qualifications (eg. under the US *Age Discrimination in Employment Act 1967*)<sup>27</sup> or inherent requirements of the job,<sup>28</sup> and whether these rules are always rigorously applied<sup>29</sup> or instead reflective of a preoccupation with economic imperatives.<sup>30</sup> Debates surround whether mandatory retirement is ever appropriate, including whether its discriminatory impacts can be softened through graduated retirement, alternative work arrangements, retraining-  
ing, constitutional tests of proportionality<sup>31</sup> or socialisation of the burden.<sup>32</sup>

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18 RIX, *supra* note 16.

19 M. SAMI, Elderly Australians clinging to work for longer shows cultural shift: researchers, *The World Today* (ABC Australia), 14 June 2015.

20 H. MORITA, The Law on the Stabilization of Employment of Elderly Persons: the significance of the 2004 revisions, *Japanese Journal of Labour* 64(2) (2014) 5, 9.

21 PATTERSON, *supra* note 12.

22 MCCALLUM/PARSONS, *supra* note 17.

23 R. J. HARTE, Unreasonable Distinctions: A Comparative Analysis of the Definitional Framework of Korea’s New Anti-Age Discrimination Law, *Journal of Korean Law* 9 (2010) 245.

24 HARTE, *supra* note 23.

25 L. DESHAIES, Old Age Is No Place for “Sissies”: The Rise of an Aging Workforce and Age Discrimination Issues in the Workplace, *Employment & Industrial Relations Law* 24(2) (2014) 32, 33.

26 S. ESTREICHER, Achieving Antidiscrimination Objectives Through “Safe Harbor” Rules for Cases of Chronic Hiring Aversion, *University of Pennsylvania Journal of Law & Public Affairs* 2 (2017) 1.

27 WALT, *supra* note 13.

28 PATTERSON, *supra* note 12.

29 Japan to allow hearing aid-dependent people to drive taxis, buses, *Japan Times*, 22 October 2015.

30 DESHAIES, *supra* note 25.

31 WALT, *supra* note 13; L. LURIE, Should Age Discrimination be an Integral Part of Employment Discrimination Law?, *Theoretical Inquiries in Law* 21 (2020) 103.

Also, debates involve the purpose of antidiscrimination legislation and different conceptions of dignity as autonomy, social respect, or both.<sup>33</sup>

Finally, there is a large body of comparative law, including studies of Japan's employment extension programs,<sup>34</sup> its deployment of civil society to assist the transition from work to community life, and (more questionably) its entrenched transitions from the public sector to the private.<sup>35</sup> The comparative literatures has lessons for the debate regarding the relative merits of hard law versus soft regulation and business led initiatives to increase labour participation for older workers,<sup>36</sup> Japan's model of reliance and relational contracting in labour and welfare<sup>37</sup> and the related debates on administrative guidance versus 'rule of law' reforms, though mindful of the robust, even activist role of Japanese courts in certain private law disputes<sup>38</sup> connected to debates elsewhere on whether 'sympathetic and purposive judicial interpretation' might be needed to materialise the goals of age discrimination legislation.<sup>39</sup> This article adds a regulatory lens to this literature to argue that all jurisdictions (including Japan) can successfully increase participation rates and 'decent work' for older workers through an understanding of the complex regulatory factors that drive the decisions of employers and employees.

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32 ALON-SHENKER, *supra* note 17, 208; C. W. SUMMERS, Worker Dislocation: Who Bears the Burden? A Comparative Study of Social Values in Five Countries, *Notre Dame Law Review* 70 (1995) 1033, 1073.

33 A. BLACKHAM, Interrogating the "dignity" argument for mandatory retirement: an undignified development?, *Industrial Law Journal* 2019 48(3), 377; J. SWIFT, 'Justifying Age Discrimination', *Industrial Law Journal* 35(3) (2006) 228; S. BISOM-RAPP/A. FRAZER/M. SARGEANT, Decent Work, Older Workers and Vulnerability in the Economic Recession: A Comparative Study of Australia, the United Kingdom, and the United States, *Rights and Employment Policy Journal* 15 (2011) 43.

34 RIX, *supra* note 16, 24.

35 MCCALLUM/PARSONS, *supra* note 17.

36 K. DOBBS BUNTING/C. SIGNS, Towards Equality: Anti-Discrimination Efforts in Japan, *Employment & Industrial Relations Law* 24(2) (2014) 20; A. D. MADISON, The Context of Employment Discrimination in Japan, *University of Detroit Mercy Law Review* 74 (1997) 187, 208.

37 T. RYAN, Administering Welfare in an Ageing Society, in: Wolff (ed.), *Who Rules Japan?* (2015) 108.

38 One example is employment dismissal on the basis of amorphous standards in Japan's Civil Code such as 'public order and morals' and 'abuse of rights': N. KADOMATSU, Judicial Governance Through Resolution of Legal Disputes? A Japanese Perspective, *National Taiwan University Law Review* 4 (2) 2009, 141.

39 A. BLACKHAM, Why Do Employment Age Discrimination Cases Fail? An Analysis of Australian Case Law, *Sydney Law Review* 42 (1) (2020), 34.

## 2. *Who are Aged Workers?*

A threshold question shared by the issues above is the definition of aged workers. A common method of identifying aged workers focuses on social security policy, an approach adopted by the International Labour Office ('ILO') in 2006. GHOSHEH et al. identified that aged workers are typically viewed as people approaching or at retirement age, who are between 55 and 64 years of age. But GHOSHEH et al. observed that this metric needed to be reconfigured to 55 to 70 years due to the rapid ageing of workforces around the world.<sup>40</sup> This article adopts the later approach on the basis that employment laws and practices in Japan effect aged workers as people from 55 years to over 70 years.

## 3. *Japan's Ageing Workforce*

Japan's population has been rapidly ageing for a number of decades. In 1970 Japan became an 'ageing society' when 7 per cent of the population were aged over 65 years. Japan was labelled an 'aged society' in 1994 when this number increased to 14 per cent. Then, in 2007, Japan was classed as a 'hyperaged society' as 21 per cent of its population were aged over 65 years. The rapid ageing of Japanese society continued into the 2010s. In 2015, 26.6 per cent of Japanese were over 65 years, a percentage that increases to 30 per cent when including people over 60 years. Between 1990 and 2015 the average age of Japanese increased from 37.6 to 46.4 years. These trends are projected to continue. By 2050 it is expected that 37.7 per cent of Japanese people will be aged over 65 and that the average age will be 51.9 years.<sup>41</sup>

The Japanese government predicted that in 2020 there would be 12.49 million workers aged over 60 years (and over 14 million in 2030).<sup>42</sup> In addition, HIGO and KLASSEN observe that most Japanese retire after they attain the age of 65 and become eligible for the public pension and therefore the average actual retirement age is 69.1 years for men and 66.7 years for women.<sup>43</sup> Japanese labour force participation is also high by interna-

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40 GHOSHEH JR/LEE/MCCANN, *supra* note 1, 7, 11.

41 GHOSHEH JR/LEE/MCCANN, *supra* note 1, 7, 11.

42 NATIONAL INSTITUTE OF POPULATION AND SOCIAL SECURITY RESEARCH Population the Statistics of Japan 2017, Table 8.4 – Projected Population in the Labor Force by Age and Sex: 2014-30, available at <http://www.ipss.go.jp/p-info/e/psj2017/PSJ2017.asp>.

43 M. HIGO/T. R. KLASSEN, Reforms of Retirement Policies: Three Common Paths in Aging in Japan, *Journal of Aging and Policy* 29(1) (2017) 70, 73–74; M. HIGO/H. SCHRODER/A. YAMADA, Japan: Determinants of Retirement in a Hyper-Aged So-

tional standards. In 2015 76 per cent of Japanese men aged 60 to 64 years were labour force participants, compared to 57.4 per cent of men in the Organisation for Economic Co-operation and Development ('OECD'). For Japanese men aged 65 to 69 years, 50.7 per cent were active in the workforce compared to 31.4 per cent in the OECD. Similarly, the participation rate for women aged between 60 and 64 was 47.4 per cent in Japan and 38.9 per cent in the OECD. For Japanese women aged 65 to 69 years, 29.8 per cent were active labour market participants compared to 18.6 per cent in the OECD.<sup>44</sup>

#### 4. *Forms of Work for Aged Workers: Regular Work, Irregular Work and Self-employment*

Many older workers are employed as *sarariman* ('salary man') in large *keiretsu* structured corporations, a form of employment classed as 'regular' work in Japan. As the term suggests, workers in these firms are dominated by men, who enjoy 'lifelong' or 'long-term' employment, which is an implicit promise from the employer to white-collar employees to provide a job for their working life. This promise is not formalised in an employment contract and is described as an unwritten guarantee, a social norm or a moral imperative.<sup>45</sup> CASEY argues that lifelong employment arose after World War II not only as a cultural response to the movement of rural workers to cities but due to labour shortages.<sup>46</sup> Lifelong employment engages with the system of *nenkō* wages (seniority based wages and promotion) and Part IV will examine how these informal methods of regulation interact with other forms of regulation to influence the employment of workers aged over 50. Lifelong employment accounts for approximately 20 per cent of Japanese workers.<sup>47</sup> Though as will be seen below there have been modifications in recent decades, for example WATANABE identifies regular workers now encompasses 'professionals', 'specialists' and 'peripheral' employees.<sup>48</sup>

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ciety, in: Hofacker/Hess/Konig (eds.), *Delaying Retirement: Progress and Challenges of Active Ageing in Europe, the United States and Japan* (2016) 241, 247.

44 T. KODAMA, *Elderly Employment in Japan: Policy for Extending Work Life*, Daiwa Institute of Research, 21 October 2015, 11.

45 J. BENSON/P. DEBROUX, *The changing nature of management and culture in Japan*, in: Warner (ed.), *Managing across diverse cultures in East Asia: issues and challenges in a changing globalized world* (2013) 206, 216.

46 B. H. CASEY, *The Employment of Older People: Can We Learn from Japan?*, *The Geneva Papers on Risk and Insurance* 30 (2005) 620, 621.

47 L. WOLF, *The death of lifelong employment in Japan?*, in: Nottage et al. (eds.), *Corporate Governance in the 21st Century. Japan's Gradual Transformation* (2008) 53, 57, 59.



Over 70 per cent of workers older than 65 years of age are employed in ‘irregular’ work<sup>49</sup> such as part-time employment or temporary contracts.<sup>50</sup> This form of employment provides lower job security compared to regular employment. According to the Nippon Institute for Research Advancement it is common for aged workers to shift from skilled jobs (eg. manufacturing, clerks and general business)<sup>51</sup> to low-skilled irregular jobs in industries like transportation, cleaning, agriculture and fishing. This trend demonstrates that employers may not value the skills older workers accrued during their careers such as communication, organisation and management. Lifestyle and family ties may be another factor. CASEY argued that the high number of older workers in agriculture is partly attributable to retired corporate employees returning to their rural hometowns to work on small lots of family land.<sup>52</sup> There may also be some exploitation of older workers. LINCOLN and NAKATA argued that many companies take advantage of the flexibility of temporarily employing aged workers as a ‘cheap’ source of labour and with limited employment options.<sup>53</sup>

A third form of employment for older workers that is becoming increasingly common is self-employment. Importantly, self-employment provides flexibility for older workers in that they choose how much to work and can work as long as they want.<sup>54</sup> In 1979 the average age of self-employed workers was 49.2 years and had risen to 57.3 years in 2007. Since 1997 the number of self-employed workers aged over 65 years has almost doubled.<sup>55</sup> In 2017, the largest group of self-employed workers were aged over 65 (2.08 million people), followed by workers aged between 55 and 64 years (1.1 million people).<sup>56</sup>

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48 H. R. WATANABE, Labour Market Dualism and Diversification in Japan, *British Journal of Industrial Relations* 56(3) (2018) 579, 579.

49 CABINET OFFICE, *supra* note 5.

50 HIGO/SCHRODER/YAMADA, *supra* note 43, 246.

51 NIPPON INSTITUTE FOR RESEARCH ADVANCEMENT, 職業特性と高齢者特性 [Occupational characteristics and characteristics of aged workers], August 2016, available at <http://www.nira.or.jp/pdf/monograph40.pdf>.

52 CASEY, *supra* note 46, 626.

53 J. R. LINCOLN/Y. NAKATA, The Transformation of the Japanese Employment System: Nature, Depth, and Origins, in: Cornfield et al. (eds.), *Working in Restructured Workplaces: Challenges and New Directions for the Sociology of Work* (2001) 187, 190–191.

54 A. SATO, Prospects of Employment and Life Design of *Dankai No Sedai*, or the Japanese Baby-Boom Generation, *Japan Labor Review* 5(2) (2008) 35, 38.

55 JAPANESE GOVERNMENT, SMALL AND MEDIUM ENTERPRISE AGENCY, 中小製造業集積の維持・発展のために必要な取り組み [Measures necessary for the maintenance and development of the clustering of small and medium manufacturing businesses] undated.

### 5. *Economic Challenges Presented by Japan's Ageing Population*

Japan's demographics presents economic challenges if all workers were to retire at 60 years (or earlier). First, the Japanese aged pension system would not be able to fund such high numbers of retirees. To be sustainable there would need to be an increase in taxes, a reduction in government benefits,<sup>57</sup> a combination of both of these options or another approach. Second, government spending would be adversely affected from the significant reduction in the tax base. Third, PEJOVIĆ notes that many employees in the corporate world continue working after reaching mandatory retirement age because of the significant decrease in income connected to receiving the pension.<sup>58</sup> Fourth, due to the 'mushroom' shape of Japan's population age, if the standard practice among workers aged in their late 50s and early 60s was to retire, the existing labour shortage in Japan would be exacerbated.

### 6. *Why Does Japan Have so Many Older Workers?*

A number of factors contribute to the high number of aged workers in Japan. Physical and mental capacity is a key factor. In 2016 the Nippon Institute for Research Advancement found that workers aged between 65 and 79 years are physically and mentally five to ten years younger than the previous generation incorporating that age group.<sup>59</sup> While older Japanese have the ability to continue working beyond the age of 60, WILLIAMSON and HIGO observed that this phenomenon is also due to a mix of financial necessity, cultural values and government policy.<sup>60</sup> The Japanese pension system creates a financial disincentive to retire as the income replacement rate of the pension is only 37.5 per cent (the OECD average is 57.9 per cent), which is partly attributable to the low benefits of the Japanese pension.<sup>61</sup> Also, eligibility for the full pension is 65 years.<sup>62</sup>

Finances are interconnected to culture in that there is a societal expectation in Japan that grandparents will provide financial support for their children and

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56 JAPANESE GOVERNMENT STATISTICAL BUREAU, 労働力調査年報 [Annual report on the labor force survey] 2017, available at <http://www.stat.go.jp/data/roudou/report/2017/index.html>.

57 C. PEJOVIĆ, Challenges of an Ageing Japan: Effects, Efficiency and Effectiveness of Law Reforms, Asian Law Institute, Working Paper Series No. 039, 2017, 11.

58 PEJOVIĆ, *supra* note 57, 11.

59 JAPANESE GOVERNMENT STATISTICAL BUREAU, *supra* note 56.

60 J. B. WILLIAMSON/M. HIGO, Older Workers: Lessons from Japan, Center for Retirement Research at Boston College, Series 11, June 2007, 2.

61 KODAMA, *supra* note 44, 11.

62 WILLIAMSON/HIGO, *supra* note 60, 2; P. DEBROUX, Elderly workers in Japan: the need for a new approach, *The Review of Business Administration* 40 (2016) 19, 25.

grandchildren.<sup>63</sup> Another cultural factor is that many older Japanese want to retain their *ikigai* ('purpose and meaning of life'). *Ikigai* is underpinned by Japanese Confucius principles that value lifelong productivity and respect for elders.<sup>64</sup> BASS noted that while some Japanese retirees find purpose through interests and hobbies, it is more difficult for others to replace their *ikigai* attained from work and these people sometimes encounter health problems, including depression and alcoholism.<sup>65</sup> Similarly, ROBERTS commented that in Japan work is closely aligned with a person's identity and represents maturity.<sup>66</sup> Interconnected to *ikigai* are the societal values of a strong work ethic and a belief that work is beneficial to health. Adding to these factors is an underdeveloped leisure industry.<sup>67</sup> But HIGO et al. argue that the influence of these cultural factors can be overridden by gender, caring responsibilities, education, finances and the health of an individual and their family.<sup>68</sup>

### III. REGULATING JAPANESE AGED WORKERS THROUGH LEGISLATION

#### 1. Overview of Relevant Legislation

Since the 1960s the Japanese government has utilised a number of statutes to achieve its policy of keeping older Japanese employed. While the *Labor Standards Act*<sup>69</sup> and the *Labor Contract Act*<sup>70</sup> generally govern the employment relationship,<sup>71</sup> a number of Japanese labour laws regulate specific facets of the employment relationship related to older workers.<sup>72</sup> The *Law on the Stabilization of Employment of Elderly Persons*<sup>73</sup> was introduced in

63 WILLIAMSON/HIGO, *supra* note 60, 3.

64 DEBROUX, *supra* note 62, 22–23.

65 S. A. BASS, An Overview of Work, Retirement, and Pensions in Japan, *Journal of Aging and Social Policy* 8(2-3) (1996) 57, 66.

66 G. S. ROBERTS, Between Policy and Practice: Japan's Silver Human Resource Centers as Viewed from the Inside, *Journal of Aging and Social Policy* 8(2) (1996) 115, 116.

67 S. E. RIX, The Challenge of an Aging Work Force, *Journal of Aging and Social Policy* 8(2-2) (1996) 79, 84–85.

68 HIGO et al., *supra* note 13, 260.

69 労働基準法 *Rōdō kijun-hō* [Labor Standards Act], Act No. 49/1947 (as amended through Act No. 147 of 1 December 2003).

70 労働契約法 *Rōdō keiyaku-hō* [Labor Contract Act], Act No. 128/2007.

71 See generally C. PEJOVIĆ, The Japanese Employment System in the 21st Century: Under Reconstruction, *ZJapanR/J.Japan.* 42 (2016) 234.

72 K. KOSHIRO, Policies for a Smoother Transition from Work to Retirement, *Journal of Aging and Social Policy* 8(2-3) (1996) 97, 98.

73 高齢者等の雇用の安定等に関する法律 *Kō-nenrei-sha-tō no koyō no anteitō ni kansuru hōritsu* [Law on the Stabilization of Employment of Elderly Persons], Act No. 68/1971.

1971 to govern older workers and has been revised several times to address new regulatory problems. Other legislation and policies relevant to aged workers that Part III will now examine are pension laws, employment insurance, employment protection laws and a policy of subsidies and grants to encourage companies to employ older workers.

## 2. *The Law on the Stabilization of Employment of Elderly Persons*

The primary legislative tool to regulate the employment of aged workers is the *Law on the Stabilization of Employment of Elderly Persons*. This Law aims to promote the welfare of elderly workers and simultaneously assist in the development of the economy and society by securing the continuous employment of older workers.<sup>74</sup> Despite a number of amendments to deal with the normative employment practices of employers related to aged workers, KODAMA recognises a significant limitation which continues its failure to provide incentives to the elderly to work.<sup>75</sup>

An important feature of the *Law on the Stabilization of Employment of Elderly Persons* is the regulation of the *teinen* ('mandatory retirement age') system. Amendments in 1986 provided subsidies to companies that increased their mandatory retirement age from 55 to 60 years. But by this time the reform was embedded as a normative practice in most large companies, which had set mandatory retirement age at 60 years in response to a 1973 amendment to the *Employment Measures Act* that required firms to voluntarily raise the mandatory retirement age through subsidies and 'administrative guidance'.<sup>76</sup> The minimum *teinen* age of 60 years was not formalised in legislation until 1994 (taking force in 1998) because of protracted negotiations between employers, unions and government.<sup>77</sup>

In 1998 the Ministry of Labour set a policy goal of allowing anyone willing to work to do so until 65 years of age.<sup>78</sup> Shortly after the *Law on the*

74 Art. 1 Law on the Stabilization of Employment of Elderly Persons.

75 KODAMA, *supra* note 44, 7.

76 Administrative guidance is a form of regulation in Japan where the national government promotes compliance with a law without initiating legal proceedings.

77 C. KAMABAYASHI, Increase of Elderly Employment and Functional Changes of Retirement System : Focusing on the Elderly Employment Stabilizing Act of 2004, Departmental Bulletin Paper March 2008, 63-74, available at [https://hosei.repo.nii.ac.jp/?action=pages\\_view\\_main&active\\_action=repository\\_view\\_main\\_item\\_detail&item\\_id=21050&item\\_no=1&page\\_id=13&block\\_id=83](https://hosei.repo.nii.ac.jp/?action=pages_view_main&active_action=repository_view_main_item_detail&item_id=21050&item_no=1&page_id=13&block_id=83).

78 EMBASSY OF JAPAN – THAILAND, 高齢者雇用の現状と対策 *Kō-nenrei-sha koyō no genjō to taisaku* [The status of employment of elderly people and relevant policies], available at <https://www.th.emb-japan.go.jp/jp/jis/2016/1617mhlw-jp.pdf>; THE JAPAN INSTITUTE FOR LABOUR POLICY AND TRAINING, 高齢者雇用安定法 *Kō-nenrei-sha koyō antei-hō* [The Law on the Stabilization of Employment of Elderly

*Stabilization of Employment of Elderly Persons* was amended in 2004 to require employers to take steps to allow the employment of workers up to 65 years by implementing one of three ‘employment security measures’. Employers could maintain mandatory retirement age at 60 years but implement a ‘continuing employment system’ up to 65 years of age. Alternatively, mandatory retirement age could be extended to 65 years. A third option for firms was to abolish mandatory retirement age.<sup>79</sup> While OKA was critical of these reforms, he argued that they provided statutory protection for workers until they were 65, enabled the re-employment of retired workers (see below in Part IV) and secured diversified job opportunities for older workers.<sup>80</sup> In addition, the 2004 reforms required employers with more than 51 employees to annually advise the Ministry of Labour of their ‘older worker situation’, including reporting policies designed to keep elderly workers employed in their existing position.

In 2012 revisions to the *Law on the Stabilization of Employment of Elderly Persons* removed the option for companies to attach conditions by a majority-endorsed labour-management agreement (*rōshi kyōtei*)<sup>81</sup> to the rehiring of older workers who reached retirement age.<sup>82</sup> Despite the continuation of the rapid ageing of Japan’s population in the 2010s, no additional amendments were made. Then the *Law on the Stabilization of Employment of Elderly Persons* was again altered in 2020. The changes that took effect in April 2021 extend the 2012 revisions by requiring firms to make a reasonable effort to ensure the employment of older workers until 70 years of age.<sup>83</sup> To meet this new requirement companies must either raise the mandatory retirement age to 70, implement a ‘continuing employment system’ for employees until the age of 70 years or eliminate mandatory retirement.

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Persons], January 2014, available at <https://www.jil.go.jp/institute/zassi/backnumber/2014/01/pdf/005-012.pdf>.

79 Art. 9 Law on the Stabilization of Employment of Elderly Persons.

80 M. OKA, Japan: towards employment extension for older workers, in: Taylor (ed.), *Ageing Labour Forces: Promises and Prospects* (2008) 40, 46.

81 An agreement of lesser status than a collective agreement, rules of employment, or a contract of employment, that allows for agreement on certain matters stipulated in legislation.

82 Note that these agreements are still valid as a transitional measure for those able to receive certain pension benefits as the age for this increases to 65 gradually until 2025: MINISTRY OF HEALTH LABOUR AND WELFARE, 平成 24 年「高年齢者の雇用状況」集計結果 [‘2012 Employment’ Status of the Elderly’ Aggregated Results], 18 October 2012, <https://www.mhlw.go.jp/stf/houdou/2r9852000002m9lq-att/2r9852000002m9q0.pdf>.

83 Law to Amend the Employment Insurance Act and Other Laws, No. 14, 2020, available at [http://www.shugiin.go.jp/internet/itdb\\_housei.nsf/html/housei/20120200331014.htm](http://www.shugiin.go.jp/internet/itdb_housei.nsf/html/housei/20120200331014.htm).

Alternatively, firms must allow an employee's request to continue working as a contractor or work in the organisation's social contribution businesses until 70 years of age.<sup>84</sup>

### 3. *The Employment Measures Law*

Introduced in 1966, the *Employment Measures Law*<sup>85</sup> (previously the *Employment Promotion Measures Law*) regulates some aspects of the employment of aged workers. The Law established as a national priority the assistance of older workers who were close to the mandatory retirement age (at the time 55 years) to find new work.<sup>86</sup> Amendments in 1973 required firms to increase the mandatory retirement age from 55 to 60 years. However, no future date was set for compliance with the new mandatory retirement age. The legislation lacked enforcement mechanisms and the Ministry of Labour used administrative guidance and subsidies to encourage firms to voluntarily adopt the new retirement age.<sup>87</sup> Instead of using anti-discrimination law to prohibit employment practices that disadvantaged older workers, the Japanese government amended the *Employment Measures Law* in 2001 to mandate corporations advertise jobs without reference to age<sup>88</sup> and provide equal opportunities to workers of all ages when recruiting.<sup>89</sup> Despite these measures discrimination against aged workers may continue through discrete hiring practices.

### 4. *The Employees Pension Law*

Since its enactment in 1944 as the *Workers Insurance Pension Law*, the *Employees Pension Law*<sup>90</sup> also regulates aged workers. Oka noted that in the 1980s the pension system was reformed by increasing premiums and eligibility ages and reducing benefits to negate the pending solvency crisis that was linked to Japan's rapidly ageing society.<sup>91</sup> Then, in 1994, the *Employees Pension Law* changed both the national old age pension system and the welfare pension system for workers at or approaching retirement age in

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84 MINISTRY OF HEALTH, LABOUR AND WELFARE, Explanatory Material on the Amendments to the Law on the Stabilization of Employment of Elderly Persons, available at <https://www.mhlw.go.jp/content/11600000/000626609.pdf>.

85 雇用対策法 *Koyō taisaku-hō* [Employment Measures Law], Act No. 132/1966.

86 Art. 1 Law on the Stabilization of Employment of Elderly Persons.

87 RIX, *supra* note 67, 82.

88 OKA, *supra* note 80, 47.

89 Art. 10 Employment Promotion Measures Law.

90 厚生年金保険法 *Kōsei nenkin hoken-hō* [Employees Pension Law], Act No. 115/1954.

91 OKA, *supra* note 80, 45.

several ways. First, the number of older workers able to receive an ‘in-work’ pension increased significantly when the Ministry of Health and Welfare raised ‘work earnings’. Second, the age of eligibility for a full pension gradually increased between 2001 and 2013: the age for men rose from 60 to 65 years. Between 1995 and 2018 the age for women increased from 58 to 65 years.<sup>92</sup> Unions agreed to these changes on the basis that the employment conditions for older workers were improved.<sup>93</sup>

More pension law reforms related to older workers occurred in the 2000s. In 2000 a series of changes to the *Employees Pension Law* included raising the age to 65 years for eligibility to receive a proportion of the pension by 2025, changing how pension revisions are calculated, adjusting the pension and increasing the pension coverage for people aged 65 to 69 years. To offset the adverse effects of these reforms some insurance fees were abolished.<sup>94</sup> In 2004 the Law was amended to gradually reduce by 2023 the replacement rate of the pension from 60 to 50 per cent of the average disposable income of the pension premium.

##### 5. *The Employment Insurance Law*

The Japanese government’s policy to promote people working until 65 interacts with wage regulation. As Part IV will highlight, informal and normative regulatory practices see many older workers in regular work transfer to another company prior to reaching retirement age or receiving a decrease in wages when rehired after voluntarily retiring. The move from a reduced wage to a pension may not allow some elderly people to maintain their lifestyle or cost of living. In recognition of this problem the *Employment Insurance Law* was amended in 1994 to allow low-wage workers aged between 60 and 64 years to have their income supplemented when they work after retirement age and are temporarily unemployed. The new wage must be 85 per cent of their average earnings six months prior to mandatory retirement.<sup>95</sup> Also, the government introduced a subsidy of 25 per cent of wages for older people who work after 60 years if their earnings are at least 15 per cent less than their previous income.<sup>96</sup>

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92 M. OKA/T. KIMURA, *Managing an Ageing Labour Force: The Interplay between Public Policies and the Firm’s Logic of Action – The Case of Japan*, *The Geneva Papers on Risk and Insurance* 28(4) (2003) 596, 598.

93 KOSHIRO, *supra* note 72, 107.

94 GOVERNMENT OF JAPAN, MINISTRY OF HEALTH, LABOUR AND WELFARE, 公的年金制度の歩みとこれまでの主な制度改革 [The course of the public pensions system and its main reforms until now], available at <https://www.mhlw.go.jp/shingi/2002/04/s0419-3d.html>.

95 OKA/KIMURA, *supra* note 92, 598.

### 6. *Anti-discrimination Law?*

In Japan anti-discrimination law is not a regulatory tool commonly used to govern the discriminatory nature of some employer practices related to older workers. To use anti-discrimination law to challenge the age discrimination associated with the *teinen* system would not be without ramifications for the broader system of regular employment in Japan. It would also be likely to encounter fierce resistance from powerful industry associations such as the *keidanren*. Instead, the Japanese government has used employment legislation to prohibit specific labour practices by firms that discriminate against aged workers. For example, it was common for employers in the 1990s and early 2000s when recruiting to limit the age of new employees in advertisements to 41 years of age.<sup>97</sup> Anti-discrimination legislation was not introduced to prohibit this practice, rather the *Employment Measures Law* was amended in 2001 but is limited in that firms may still informally implement policies that place age limits on the recruitment of new employees.

### 7. *Government Financial Assistance*

Government policy on aged workers is also implemented through various subsidies, grants and financial assistance to employers. These forms of assistance began in the 1970s when subsidies helped to enforce the new voluntary retirement age of 60 years. Over the years the Japan Organization for the Employment of the Elderly, Persons with Disabilities and Job Seekers ('JEED')<sup>98</sup> has administered numerous subsidies.<sup>99</sup> Other forms of government financial assistance include the In-Work Employee Pension and the Grant for a Joint Job Creating Scheme of Older Persons. Despite the good intentions of these various forms of financial assistance, little research exists on the effect on employment of older workers and OKA argued that there was a limited positive effect on labour force participation by older workers.<sup>100</sup>

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96 KOSHIRO, *supra* note 72, 99.

97 R. J. GRAINGER/T. MIYAMOTO, Human Values and HRM Practice: The Japanese Shukko System, *Journal of Human Values* 9(2) (2003) 105, 111.

98 See the JEED website at <https://www.jeed.or.jp/english/index.html>.

99 Including the Subsidy for Continuous Employment, the Subsidy for Employers with Numerous Older Employees, the Special Subsidy for the Employment of Older Workers, the Subsidy for Employment Development for Specified Job Seekers, the Subsidy for Urgent Employment Development for Middle Aged Older Persons and the Subsidy for Improving the Employment Environment for Older Workers.

100 OKA, *supra* note 80, 50.



### 8. *Evaluation of Legislative Approach to Aged Workers*

It is difficult to assess the impact of the various revisions to the *Law on the Stabilization of Employment of Elderly Persons* and other policies due to a lack of research data and possible confounding factors such as demographic change and the economic circumstances faced by Japan.<sup>101</sup> Nevertheless, since the revisions in 2004, there has been an increase of 17.7 per cent as measured in 2013 in companies keeping employees on at least until the age of 65 (about two thirds of corporations).<sup>102</sup> Driving this change has mainly been large companies and reflects increases in both regular and casual and fixed term employment.<sup>103</sup> Transfers within corporate groups have declined.<sup>104</sup> There has also been an increase in mid-career recruiting, in particular in smaller companies, who may find it harder to compete with larger companies for new graduates.<sup>105</sup> It is also contested as to whether the reforms have constituted a restraining effect on youth employment, especially female part-time and casual workers and further research on this point is required.<sup>106</sup> The lack of definitive data on these matters means that the hotly debated issue of whether to abandon the ‘Japanese model’ of older worker regulation for an anti-discrimination based model is unlikely to be resolved soon.<sup>107</sup> Nevertheless, the continued trend by which the significance of retirement age is reduced through increasing judicial and social tolerance of dismissals for economic reasons of workers before retirement age might make the anti-discrimination model a more plausible alternative to laws and policies premised on retention of retirement age and worker rights protected by the courts (see below).<sup>108</sup>

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101 A. KONDO, 雇用確保措置の義務化によって高齢者の雇用は増えたのか—高年齢者雇用安定法改正の政策評価 [Has older worker employment increased through the duty to take measures to guarantee employment? A policy evaluation of the Law on the Stabilization of Employment of Elderly Persons], *Japanese Journal of Labour Research* 642 (2014) 13, 20.

102 Two-thirds of Japanese firms employ workers until age 65, *Japan Times*, 30 October 2013.

103 KONDO, *supra* note 101.

104 KONDO, *supra* note 101.

105 Hiring of mid-career workers to increase 32% in FY 2006: survey, *Japan Times*, 7 February 2006.

106 KONDO, *supra* note 101; MORITA, *supra* note 20, 9.

107 F. YANAGISAWA, 我が国およびヨーロッパにおける高齢者雇用政策 [Older worker policy in Japan and Europe], in: National Diet Library (ed), *Declining Fertility, Ageing and Countermeasures* (2005) 161.

108 T. YANAGISAWA, The New Law on the Stabilization of Employment of Elderly Persons, *Jurisuto* 1282 (2005) 112, 113.

#### IV. OTHER FORMS OF REGULATING JAPANESE AGED WORKERS

The complex regulation of the employment of aged workers consists of a diverse mix of legislation and informal regulation, culture, organisational policies and normative practices. Forms of regulation other than command and control regulation that can sometimes interact with the legislation discussed in Part III will now be examined.

##### 1. *The nenkō Wage System and Older Workers*

Informal practices in firms and normative responses to legislation play a pivotal role in shaping the employment of many aged workers and the effectiveness of related policies and legislation. The rules and practices that govern the regulatory system of lifelong employment in Japanese firms are central to the employment of workers aged over 55 years. The *nenkō* wage system is a seniority-based wage system that provides regular incremental increases in wages throughout an employee's working life that underpins lifelong employment. Wages therefore tend to be comparable for workers of a similar age and education.<sup>109</sup> MITANI described the *nenkō* wage system as a 'deferred pay system' that is 'age neutral' in that workers are paid less early in their career when their productivity is low, but later in their career receive remuneration that is greater than their output. The result is a wage system that rewards a worker's lifetime contribution.<sup>110</sup> However a major drawback is that *nenkō* wages make the employment of older workers expensive.<sup>111</sup>

The *nenkō* wage system is now facing stress due to Japan's ageing population. After World War II employers preferred *nenkō* wages as they allowed underpayment of a firm's young workers. But as Japan's demographics have undergone a dramatic transformation in recent decades, the rapid growth in the number of older workers has heightened the pressure on the *nenkō* system.<sup>112</sup> As will be seen in the next section, *nenkō* wages are interconnected to the normative regulatory response by employers of the 'reject and retain' re-employment policy.<sup>113</sup> This policy contributes to both the high levels of aged workers in Japan<sup>114</sup> and the actual retirement age. These pressures have led to recent modifications of the *nenkō* wage system. Importantly, since the 1990s some firms have introduced performance-based pay for employees after 10 to

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109 T. INAGAMI, *The Japanese Flexicurity System and the Community Firm*, *Comparative Labor Law & Policy Journal* 31 (2010) 773, 781.

110 N. MITANI, *Mandatory Retirement of Baby Boomers and Human Resource Strategies of Business Firms*, *Japan Labor Review* 5(2) (2008) 7, 19.

111 CASEY, *supra* note 46, 620.

112 LINCOLN/NAKATA, *supra* note 53, 189.

113 See eg. OKA/KIMURA, *supra* note 92, 609.

114 CASEY, *supra* note 46, 622.

15 years of service.<sup>115</sup> The impact is however limited as performance-based pay has not become wide-spread, in large part due to LINCOLN and NAKATA's observation that it may threaten the important role of harmony within Japanese corporations.<sup>116</sup>

## 2. *The teinen Mandatory Retirement System and Older Workers*

The re-employment policy of reject and retain affects workers prior to and when they reach the mandatory retirement age of 60 years. Some of these employees change jobs within the same firm, while others may be rehired by a subsidiary at a lower wage.<sup>117</sup> Employees that are rejected by a company are frequently retained due to labour shortages and lobbying by government and unions.<sup>118</sup> Prior to *teinen* age some employees are temporarily or permanently transferred to related firms in the *keiretsu* through the *shukkō* system. Thus, the *teinen* and *shukkō* systems lead to some employees changing careers, delaying retirement after mandatory retirement age is reached<sup>119</sup> and can result in decreased income.<sup>120</sup> Another function of these systems is to allow the hiring of younger workers.<sup>121</sup> Despite the Japanese government's desire to increase the *teinen* age, DEBROUX identified that both businesses and unions are reluctant to raise the mandatory retirement age to 65 years. Businesses view such a reform as unrealistic. Meanwhile, union concerns focus on the fear that increasing the *teinen* age would flatten wages for employees early in their careers and therefore harm the interests of younger members.<sup>122</sup>

The *teinen* system was modified in the 1970s after the Japanese government increased the retirement age from 55 to 60 years. Managers in many large firms who are lower than a section chief at the age of 55 are required to retire under the rules of *yakushoku teinen*, a practice commonly called 'first' *teinen*. Employees who retire under *yakushoku teinen* can be rehired as a specialist or adviser and may mentor junior managers.<sup>123</sup> Alternatively, *yakushoku teinen* employees may be transferred to a subsidiary.<sup>124</sup> Research by the Japan Organization for Employment of the Elderly, Persons with Disabil-

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115 PEJOVIĆ, *supra* note 57, 61; MITANI, *supra* note 110, 16.

116 LINCOLN/NAKATA, *supra* note 53, 197.

117 OKA/KIMURA, *supra* note 92, 597.

118 OKA/KIMURA, *supra* note 92, 609.

119 DEBROUX, *supra* note 62, 24.

120 CASEY, *supra* note 46, 623.

121 RIX, *supra* note 67, 82.

122 DEBROUX, *supra* note 62, 29.

123 OKA/KIMURA, *supra* note 92, 602.

124 JAPAN INSTITUTE OF LABOR, Japan Labor Bulletin 38(6) (1999) 14.

ities and Job Seekers found that when *yakushoku teinen* is part of a firm's *shugyō kisoku* ('work rules'),<sup>125</sup> 46.3 per cent of workers that were rehired continue working in the same workplace. Only 3.7 per cent changed employer. There were variations for the remaining 48.5 per cent of rehired employees that depended on the individual employee.<sup>126</sup> Other research conducted by the Meiji Yasuda Research Institute concluded that of the workers who retire under *yakushoku teinen*, 70 per cent do not change departments, 64 per cent of men aged 60 to 64 years continued employment with their employer and 28 per cent sought external employment opportunities.<sup>127</sup>

### 3. *The shukkō System and Older Workers*

Many older workers may also be subject to transfer to a subsidiary or related company within their *keiretsu* through the *shukkō* system (these transfers are not limited to older workers).<sup>128</sup> *Shukkō* transfers typically involve the movement of workers from large companies with over 1,000 employees to smaller firms.<sup>129</sup> There are different types of *shukkō* transfers. *Tenseki shukkō* is the permanent transfer of employees to subsidiaries or related firms prior to *teinen*. OKA and KIMURA noted this type of transfer represents an early retirement system where the parent firm usually financially compensates the employee for the likely reduction in income.<sup>130</sup> According to the Japanese government, the largest group of *shukkō* transferred in 2016 were employees aged 55 to 59 years (followed by employees aged 40 to 44 years).<sup>131</sup> However not all employees can be transferred or re-employed at

125 These are written by the employer in consultation with employees and cover working conditions including hours, wages, and retirement. Their status sits above an employment contract but below collective agreements.

126 JAPAN ORGANIZATION FOR EMPLOYMENT OF THE ELDERLY, 高齢・障害・求職者雇用支援機構 第2章 「役職定年制」・「役職の任期制」の機能とキャリア意識の状況 [Part 2 The operation of "age limit systems for managerial personnel" and "fixed-term appointments for managerial positions" and fostering career awareness].

127 MEIJI YASUDA RESEARCH INSTITUTE, 50代・60代の働き方に関する意識と実態 [The awareness and current situation of workers older than 50 and 60 towards ways of working], 26 June 2018.

128 H. SAITO, Keeping Employees Employed: Shukko and Tenseki Job Transfers – Formation of a Labor Market within Corporate Groups, *Japan Labor Bulletin* 35(12) (1996) 7, 8.

129 SAITO, *supra* note 128, 10.

130 OKA/KIMURA, *supra* note 92, 603.

131 JAPANESE GOVERNMENT, e-Stat, 雇用動向調査 [Labour trend survey] 2016, available at [https://www.e-stat.go.jp/stat-search/files?page=1&layout=datalist&toukei=00450073&tstat=000001012468&cycle=7&year=20160&month=0&tclass1=0000101012469&tclass2=000001012472&result\\_back=1&second2=1](https://www.e-stat.go.jp/stat-search/files?page=1&layout=datalist&toukei=00450073&tstat=000001012468&cycle=7&year=20160&month=0&tclass1=0000101012469&tclass2=000001012472&result_back=1&second2=1).

*teinen* age. Many companies help these employees find a new job and make a retirement payment.<sup>132</sup>

The *shukkō* system performs various functions. Transfers provide a degree of employment security for older workers who would otherwise be made redundant. GRAINGER and MIYAMOTO observed that the *shukkō* system creates labour mobility in a firm's internal labour system and is in effect an intra-*keiretsu* human resources management system.<sup>133</sup> LINCOLN and AHMADJIAN stated that the key purposes of *shukkō* transfers are to reduce labour costs, create knowledge exchange within a *keiretsu* corporate group, diversify product lines in supply chains and avoid making workers redundant.<sup>134</sup>

#### 4. Redundancy and Older Workers

While companies in other countries may consider making older workers redundant, this option is difficult in Japan both under labour law and a policy of retaining older workers agreed to by government and unions. Japanese labour law provides strict protections for workers by establishing a high threshold that must be met before an employee can be made redundant.<sup>135</sup> Redundancies generally take place under the operation of the terms of the company's *shugyō kisoku* ('work rules') and are influenced by the *rōdō kyōyaku* ('collective bargaining agreement').<sup>136</sup> Work rules may stipulate that before a redundancy there must first be a restriction on overtime hours, a pause in recruitment, a *shukkō* transfer or a temporary shutdown of the business. If it is still necessary to initiate redundancies after the implementation of these measures there is usually a call for resignations with a generous severance payment. These practices demonstrate a general reluctance in Japan to terminate the employment relationship and a willingness to pursue all other options before making workers redundant.

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132 CASEY, *supra* note 46, 622.

133 GRAINGER/MIYAMOTO, *supra* note 97, 113.

134 J. R. LINCOLN/C. AHMADJIAN, *Shukkō (Employee Transfers) and Tacit Knowledge Exchange in Japanese Supply Networks: The Electronics Industry Case*, UC Berkeley Working Paper Series 2000, 7–8, 12.

135 See K. SUGENO, *労働法 [Labour law]* (11<sup>th</sup> ed., 2017).

136 These agreements are produced through collective bargaining and set standards for working conditions and the role of the trade union and management, if any. They have higher status than individual contracts and are binding on all employees concerned, even those who took no part in the agreement or are not union members. In Japan 90 per cent of collective bargaining takes place at the company level and not via an industry: K. KAWAI/M. NICHOL, *Labor in Nippon Professional Baseball and the Future of Player Transfers to Major League Baseball*, *Marquette Sports Law Review* 25(2) (2015) 491, 500.

Limited data is available on the prevalence of redundancies. Most recently a 2013 survey by the Japan Institute for Labour Policy and Training found that 8.6 per cent of respondent firms reported that they had initiated redundancies. The common practice was to implement special measures for redundant employees, for example a substantial severance payment.<sup>137</sup> This research provided no data on the number of elderly workers who were made redundant, though this number may be low due to the *shukkō* and *teinen* systems.

## V. CASE LAW ON AGED WORKERS

The advent of the *Law on the Stabilization of Employment of Elderly Persons* has generated a considerable amount of case law and commentary.<sup>138</sup> The focus of Part V is two main areas: the legalities of instituting mandatory retirement and the issues around re-employment after mandatory retirement. In the case law that will now be reviewed it is apparent that the courts in Japan have generally adapted a pre-existing trend of protecting worker rights of aged workers through a contextual and particularised approach routinely invoking social norms. On the other hand, as with other areas of law such as dismissal and reductions to employee pension entitlements,<sup>139</sup> the courts have also strived to balance these values with the economic pressures faced by businesses in an era of slower growth than that experienced in the post-war high-growth period when many employment law norms were formulated.

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137 JAPAN INSTITUTE FOR LABOR POLICY AND TRAINING, ここ 5 年間で約 2 割の企業が従業員の普通解雇や整理解雇を実施 普通解雇や整理解雇の際に約半数の企業が労組や従業員代表などと協議していない ～従業員の採用と退職に関する実態調査」調査結果～ 退職等の調査項目の結果をとりまとめた速報版 [In the past 5 years approximately 20 percent of companies have terminated employees or made them redundant. In the case of regular termination and redundancy, half of companies have not discussed this with employee representatives or the labour union. This is a press release about a survey on Employee Recruitment and retirement, focusing on items related to retirement, in a preliminary version summarizing the results.], 31 July 2013, available at <https://www.jil.go.jp/press/documents/20130731.pdf>.

138 See eg. H. MURATA, 高年齢者雇用安定法 [The Law on the Stabilization of Employment of Elderly Persons] (2<sup>nd</sup> ed., 2021).

139 T. RYAN, Japan's 2004 Pension Reforms in Response to Demographic Change: a legal critique, *Asian-Pacific Law and Policy Journal* 8(1) (2006) 35.

### 1. *Legalities of Instituting a Retirement Age*

The Tōkyō District Court held in the *RF Radio Nippon Case*<sup>140</sup> that Constitutional provisions such as Art. 27(1) on the right to labour and Art. 14(1) guaranteeing the right to equality under the law do not necessarily preclude mandatory retirement. Moreover, mandatory retirement does not necessarily contravene social expectations and thus infringe public order and good morals or constitute an abuse of rights, two standards by which legal acts (including dismissal) might be invalidated under Art. 90 and Art. 1(3) of the Civil Code.<sup>141</sup> These standards also inform the interpretation of other potential applicable legislation. For example the Nagoya District Court held in the *Japan Freight Rail Case*<sup>142</sup> that Art. 3 of the *Labour Standards Act* protects workers against age discrimination in wages and conditions with no rational basis, not merely the matters listed in the provision (eg. nationality, faith and social status) which are merely non-exhaustive illustrations of a deeper principle of non-discrimination on irrational grounds.

Nevertheless, every particular set of rules of employment or change there-to must be assessed on its merits to determine if it has rational grounds. For example, the Supreme Court in the *Nissan Motor Co Ltd Case*<sup>143</sup> invalidated work rules that set a retirement age that discriminates purely on the grounds of gender. In the *SK Service case*<sup>144</sup> the Tōkyō District Court rejected a retirement age due to the fact that work rules were insufficiently publicised or rooted in the custom of the company. Context is also crucial. In the *Akihoku Bus Case* this context was Japan's employment system, including a lifelong employment norm, the protection against dismissal afforded by courts, seniority wages and the specific goals of personnel management to make room for young workers. The context for upholding a mandatory retirement age of 55 (as applied in 1992) in *RF Radio Nippon* was the scale of the business, the financial situation of the employer and the company's re-employment system for older workers, despite the generally higher age of retirement in the broadcasting industry and the obligation to make efforts to set a retirement age of 60 under the *Law on the Stabilization of Employment of Elderly Persons*. In the *Japan Freight Rail Case*, the Court referred to international public policy, the passage of the *Law on the Stabilization of Employment of Elderly Persons* (which did not yet set a limit on retirement age at 60) and the economic circumstances of Japan at the time.

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140 Tōkyō District Court, 12 July 2000, 勞判 Rōhan 790, 15.

141 *Akihoku Bus Case*, Supreme Court, 25 December 1968, 民集 Minshū 22, 3459.

142 Nagoya District Court, 11 December 1999, 勞判 Rōhan 780, 45.

143 Supreme Court, 24 March 1981, 民集 Minshū 35, 300.

144 Tōkyō District Court, 18 August 2015, 勞経速 Rōkeisoku 2261, 26.

In some cases employers have been permitted to discriminate based on age even for workers below the retirement age. In the *Japan Freight Rail Case*, a change in 1990 to rules of employment meant that until reaching the new retirement age of 60, workers between 55 and 60 would be transferred through the *shukkō* system at a basic wage of 65 per cent of their prior wage (noting that unemployment benefits in this case would have been 55 per cent) and incremental wage rises and promotion would be suspended for this cohort.<sup>145</sup> As the plaintiffs turned 55 from 1993 to 1997 they sued the employer company claiming for the reduced wages and argued that the change was illegal and invalid as lacking a rational basis and amounted to unreasonable discrimination on the basis of age. Nevertheless, the Nagoya District Court cited the above contextual factors and held that there was a rational basis and the change to working conditions did not contravene public policy, good morals (*kōjo ryōzoku*) and thus Art. 3 of the *Labour Standards Act*.

Similarly, the Tōkyō District Court in the *Kyowa Publishing House Case*<sup>146</sup> held in 2006 that alongside increasing the retirement age from 55 to 60, a system that employed workers over 55 as a fixed-term '*shokutaku*' employee, a customary device to employ workers after retirement age on reduced wages, was rational in light of the internal and external economic circumstances of the company, even if it did amount to a disadvantageous change to work rules. In contrast, in the *Ushine Fishery Cooperative Case*<sup>147</sup> the Kagoshima District Court invalidated a 2000 revision to work rules that reduced basic wages by 30 per cent for workers between 58 and 60 years along with an increase in the mandatory retirement age to 60. The Court held that after the 1998 entry into force of the *Law on the Stabilization of Employment of Elderly Persons* the entire mandatory retirement system (when set at 58) was invalid so the detrimental change to wages and conditions for workers between 58 and 60 had no rational basis.

There have also been cases that considered reductions in the retirement age itself. For example, several university professors were retrenched as a result of the retirement age being reduced from 70 to 67 in the *Ōsaka School of Economics and Law Case*.<sup>148</sup> The Ōsaka District Court held that

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145 The 1987 rules of employment of the company set a retirement age of 60, but with supplementary provisions to the effect that for the time being the retirement age would transition from 55 to 60 considering the severe financial circumstances of the company. These supplementary provisions were dropped in 1990 after the age for eligibility for the retirement mutual aid pension was raised to 60 and the retirement age was thus returned to 60, but with the special rules for workers between 55 and 60.

146 Tōkyō District Court, 24 March 2006, 勞判 Rōhan 917, 79.

147 Kagoshima District Court, 21 October 2004, 勞判 Rōhan 884, 30.

148 Ōsaka District Court, 15 February 2013, 勞判 Rōhan 1072, 38.



even if there was a degree of necessity in reducing the retirement age, the change was not rational due to inadequate compensation or transitional measures. In contrast, the Tōkyō High Court ruled in the *Shibaura Institute of Technology Case*<sup>149</sup> that a reduction in the retirement age from 72 to 65 did have a rational basis in the specific context.

## 2. Re-employment and Extension of Employment After Retirement Age

The second focus area is disputes over extension of employment (where wages and duties do not change without an amendment to the rules of employment) and reemployment (when a new contract is formed) upon reaching retirement age. Employers can also avail themselves of the Ministry of Health, Labour and Welfare's model work rules, which state that an employee who wishes to continue to be employed after the retirement age who does not meet the criteria for dismissal or resignation continues employment until the age of 65. However, since the 2004 revisions to the *Law on the Stabilization of Employment of Elderly Persons* discussed in Part IV that list a re-employment system as one of three options, re-employment has become increasingly common due to its role in restraining wages and facilitating flexibility in recruitment. The courts have been active in enforcing employers' duties within this framework.

In the *Tsuda Electric Instruments Case*,<sup>150</sup> pursuant to the rules of employment of the company, the plaintiff was employed as a fixed-term *shokutaku* employee for a one-year period after reaching retirement age of 60. In 2006 an employment continuation system was adopted according to the exception under the pre-2012 *Law on the Stabilization of Employment of Elderly Persons*, which allowed for majority-endorsed labour agreements to establish conditions for re-employment. The employer deemed that the plaintiff did not meet the criteria for re-employment and the fixed-term *shokutaku* contract was not renewed and the plaintiff argued he was singled out as a union official. The District Court, High Court and Supreme Court all found for the plaintiff, holding that a re-employment contract was established because the plaintiff met the criteria for re-employment established by the workplace agreement so there was no rational basis for the termination.

The courts' supervisory capacity was in question in the initial period after 2004 when there were disputes about the private law effect of Article 9. The *NTT West Japan Case*<sup>151</sup> found that the continuing employment rights in the *Law on the Stabilization of Employment of Elderly Persons* were

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149 Tōkyō High Court, 30 March 2015, 劳判 Rōhan 897, 72.

150 Supreme Court, 29 November 2012, 劳判 Rōhan 1064, 13.

151 Ōsaka High Court, 27 November 2009, 劳判 Rōhan 1004, 112.

rights against the administration rather than directly against the employer. However, subsequent cases applied the private law principle of abuse of rights in relation to dismissals to the *Law on the Stabilization of Employment of Elderly Persons* by analogous reasoning to enforce private law rights directly against the employer. For example, the Tōkyō District Court in the *University of Tōkyō Press Case*<sup>152</sup> relied on Art. 16 of the *Labor Contract Act* ('any dismissal that lacks objective and reasonable rational grounds and cannot be recognised as complying with social expectations amounts to an abuse of rights and is invalid') to find that a re-employment contract had been established. The Court rejected the employer's assessment that behaviour interrupting the publishing process, for example refusing to deliver manuscripts, failed to meet the conditions stipulated by the workplace agreement<sup>153</sup> for re-employment ('good health and desire and capacity to engage in standard work duties').

The *Nagasawa Transport Case*<sup>154</sup> used similar reasoning based on another article of the *Labor Contract Act* to declare illegal a 20 per cent reduction in wages of fixed-term *shokutaku* employees undertaking the same transportation work as regular employees. The former Art. 20 of the Act<sup>155</sup> stated that 'a difference in conditions between employees depending on whether one is employed for a fixed period must not be unreasonable taking into account the content of the work and the degree of responsibility.' The Tōkyō District Court held that the labour conditions were not rational and infringed Article 20 and invalidated the contract and directed the employer to pay the standard wages for regular employees.

The Tōkyō High Court overruled this judgment, finding that the arrangement did not breach Article 20, nor was it unlawful to reduce wages without altering the content of the work. The High Court emphasised the practicalities of running the business, finding that the discrepancy had the purpose of bringing flexibility through savings on wages and adjustment of employment. Whereas the District Court had denied that it is customary for wages to be reduced without any change in duties, the High Court found that the arrangement adopted is widely used as a means of guaranteeing employment and surveys indicate that wage reductions in these cases are common. It also said that a reduction in wages was not irrational given the duty to secure employment, the necessity to materialise stable employment for all of its

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152 Tōkyō District Court, 28 August 2010, 劳判 Rōhan 1013,15.

153 Set through rules of employment after negotiations with the union rather than through a labour agreement.

154 Tōkyō District Court, 13 May 2014, 劳経速 Rōkeisoku 2278, 3; Supreme Court, 1 June 2020, 民集 Minshū 72, 202.

155 Removed with the passage of the Part-Time Employment Act.

workers and the existence of pension payments for those in employment. The High Court also pointed out that the gap in wages was less than the average gap for similar size companies among regular employees and the fact that the employer was running at a significant deficit. The Court also noted that the employer had made certain improvements to the working conditions of the plaintiffs through the intercession of the union.

On appeal the Supreme Court took a middle path. It held that matters such as the period of employment usually not planned to be for a long time and the entitlement to be paid a pension upon satisfaction of certain criteria are also matters that should be taken into account when considering whether the difference in working conditions is irrational. In considering whether they are irrational, it is appropriate to compare not only the wages in total but also individual wage items. Thus the Supreme Court found no irrational basis for the difference in payment of performance pay and title-based pay considering factors such as the increased amount after union negotiations, that the discrepancy was only 2 to 12 per cent and that a monthly Yen 20,000 amount was paid as an adjustment payment until the pensionable age. Similarly, the purposes of payment such as bonuses and allowances for housing and family maintenance were not necessarily shared across the two cohorts. Indeed, the employer had turned its mind to the stability of the income of the retired cohort by providing its own special payment as an adjustment until pensionable age. Meanwhile, the Supreme Court did find it irrational for a bonus for good attendance not to be paid: ‘the appellee’s regular attendance allowance is paid with the intention of encouraging employees to work without missing a single day other than holidays...As long as the content of duties is the same between the [employer’s] contract drivers and regular employees, there is no difference between the two types of workers in the necessity of encouraging their perfect attendance.’

In the *Toyota Motor Co Case*<sup>156</sup> a company instituted two forms of re-employment from 2012. The first track was for employees who satisfied criteria in a labour agreement and whose contracts were renewed yearly until the age of 65. The second track was for those who did not satisfy these criteria, in which case the period of re-employment was until pensionable age. The criteria were good health, capacity to complete duties and favourable attitude to work. The plaintiff was found by the employer not to satisfy the latter two requirements and was placed on the second track. This involved a reduction in work hours by half and a significant reduction in annual salary and being taken off desk work duties and placed on cleaning duties.

The Nagoya High Court found that the content of the duties in the re-employment contract for the second track was unlawful as it violated the

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156 Nagoya High Court, 28 September 2016, 劳判 Rōhan 1146, 22.

purpose of the *Law on the Stabilization of Employment of Elderly Persons* and thus breached the employment contract. It held that the criteria for re-employment will breach the Act where in light of social expectations they provide for an income too low to be consistent with the purpose of preventing the situation where a person was faced with no income or pension or stipulates duties that would be extremely hard to accept for the particular worker. In this case, the High Court found that the income was sufficient as it amounted to 85 per cent of the employment pension entitlement. However, the Court also stated that 'where the duties required are of a completely different nature, this loses the character of 'continuing employment' and instead amounts to dismissal and new employment, so this cannot be permitted unless the conditions for standard dismissal are present such as lacking suitability for the former duties. In this case, the employer did not sufficiently turn its mind to the possibility of assigning duties other than cleaning or whether the plaintiff was suitable for the duties at all and indeed the situation gives rise to doubts as to whether the intention was instead to force retirement by requiring duties engendering a sense of humiliation. The remedy ordered was solatium of Yen 1,271,500, which would have been the wages had the plaintiff been employed for a year under the second track.

## VI. LESSONS FROM THE REGULATION OF JAPANESE AGED WORKERS

### 1. *Reforming the nenkō Wage System and Mandatory Retirement Age*

An obvious starting point for extending the careers of corporate employees is to reform the system of mandatory retirement age, a reform necessitated by the cost of older employees created by the *nenkō* wage system. The last increase of mandatory retirement age to 60 years was initiated in the 1970s and met resistance from employers. Any attempt to increase the *teinen* age is likely to again face opposition from employers and Japan's powerful industry associations due to the potential impact on the cost structure of a firm's internal labour force. Unions have also resisted increases to the *teinen* system based on fears of potential lower wages for younger workers. Also, increasing the mandatory retirement age would potentially reduce flexibility for employers as they would incur higher costs that may make it difficult to determine which employees will be retained or have their employment terminated.<sup>157</sup> One possible solution is to reduce wages for workers aged 60 to 65 years, a reform that would dramatically reconfigure *nenkō* wage regulation. Also, HIGO and KLASSEN observe that Japanese politicians, employers and unions fear that increasing the mandatory retirement

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<sup>157</sup> RIX, *supra* note 67, 86.

age would result in reduced employment for younger workers.<sup>158</sup> Such fears are evidenced by PEJOVIĆ's support for mandatory retirement in that it is sustainable and allows new entry-level recruits to be hired each year to replace retirees and transferred workers.<sup>159</sup> A retirement age of 65 years would also affect other forms of aged worker regulation, including the internal labour practices associated with *shukkō* transfers.

## 2. *Employment Support Services for Aged Workers*

One important factor contributing to the high number of elderly workers in Japan is the unique approach to providing specialised employment support services through Silver Human Resource Centers.<sup>160</sup> Initially established in 1974 by the Tōkyō municipal government as 'Corporations for the Aged', they were renamed and nationalised by the Ministry of Labour in 1980. Roberts argued that the Centers are part of the Japanese government's aim of avoiding becoming a welfare state by making it difficult for older Japanese people to receive government support.<sup>161</sup> The Centers aim to improve employment opportunities for retirees, enhance the role and status of older Japanese people and provide opportunities for the elderly to contribute to the community.<sup>162</sup> Funding Silver Human Resource Centers are subsidies from national and municipal governments if they provide community employment opportunities for local residents aged over 60 years in irregular work<sup>163</sup> and also modest member contributions.<sup>164</sup> Most members are men who wish to regain a sense of purpose by working after retirement and participation by women is much lower, in part due to household duties and responsibilities.<sup>165</sup>

An amendment to the *Law on the Stabilization of Employment of Elderly Persons* in 2004 required the Silver Human Resource Centers to expand their services to include operating as a temporary labour exchange for older workers in certain industries.<sup>166</sup> Centers have since evolved to include promoting social networking.<sup>167</sup> The types of jobs offered to aged workers

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158 HIGO/KLASSEN, *supra* note 43, 72.

159 PEJOVIĆ, *supra* note 57, 4.

160 BASS, *supra* note 65, 70.

161 ROBERTS, *supra* note 66, 117–118.

162 S. A. BASS/M. OKA, An Older-Worker Employment Model: Japan's Silver Human Resource Centers, *The Gerontologist* 35(5) (1995) 679, 679.

163 WILLIAMSON/HIGO, *supra* note 60, 4.

164 BASS/OKA, *supra* note 162, 681.

165 ROBERTS, *supra* note 66, 122.

166 OKA, *supra* note 80, 48.

167 HIGO/KLASSEN, *supra* note 43, 76–77.

tends to be in low skilled, semi-skilled<sup>168</sup> or manual work.<sup>169</sup> While the type of available work is limited in that many members worked white collar jobs, members provide value in that they are typically employed in jobs that many younger people are unwilling to undertake (eg. groundskeeping, building maintenance and hotel service work). The number of hours worked and the amount of income varies and many members use their income as ‘pocket money’ to help pay for expenses or purchase presents for grandchildren.<sup>170</sup>

### 3. *The Unionisation of Aged Workers*

Unionisation in Japan is typically organised at the firm level.<sup>171</sup> While older workers represent an increasing percentage of union membership, they are outnumbered by younger workers. As discussed above there was union resistance in 2000 to raising the mandatory retirement age to 65 years based on the fear that the wage curve for younger workers would be the flattened.<sup>172</sup> It is an interesting approach given that younger workers will one day be subject to the mandatory retirement system. The question that arises is how unions represent the interests of workers aged over 50? Perhaps support for older workers is in the form of maintaining *shukkō* transfers, the re-hiring of mandatory retirees, providing emotional well-being for older employees and requiring firms to maintain a relationship with retirees once they leave the firm.

### 4. *Immigration Law and Policy*

Migrant labour is an alternative to aged workers as a solution to Japan’s labour shortage. Yet immigration is strictly controlled and foreign labour is typically used in specific industries or groups of foreigners. For example, migrant Brazilian factory workers were common in Japan from the 1980s. Foreign English teachers have been a source of temporary migrant labour for several decades. An emerging area of employment for temporary migrant workers is as clerks in convenience stores. Recently Japan’s four

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168 WILLIAMSON/HIGO, *supra* note 604.

169 ROBERTS, *supra* note 66, 123.

170 ROBERTS, *supra* note 66, 120, 123.

171 Firm based unions arose in Japan in the 1920s as a means of employers attempting to control the labour supply due to a shortage of qualified labour. Unions evolved to exchange information, bargain on working conditions specific to firms and to promote favourable agreements: BENSON/DEBROUX, *supra* note 45, 206, 210.

172 See eg. BASS, *supra* note 65, 73.

largest convenience stores had 55,300 foreign workers.<sup>173</sup> In 2018 the Japanese government introduced 126 measures designed to facilitate the migration of and integration of temporary labour in society.<sup>174</sup> Then, marking a historic moment in Japanese immigration policy, the Diet passed in the same year the *Immigration Control and Refugee Recognition Act*. This reform permits an increase in lower-skilled and semi-skilled foreign workers from April 2019 and allows up to 345,000 migrant workers to enter Japan on visas over a five year period.<sup>175</sup> Not only will it be interesting to see if this target is achieved but there will be significant language, communication and cultural challenges for the new migrant workers, their employers and society.

##### 5. *Understanding the Complexity of Regulating the Employment of Aged Workers*

The employment of aged workers involves a complex and diverse range of interconnected forms of regulation. The operation of this regulatory system is guided by the Japanese government's policy of extending the working life of aged workers in all forms of employment. This policy is largely driven by the chronic labour shortage caused by an ageing society and the potential economic effects of all workers retiring at or before mandatory retirement age. The use of different legislation highlights the need for multiple regulatory tools to achieve high levels of employment among aged workers and to gradually change the internal labour practices of companies. This article demonstrates the evolving interplay between regulatory actors as they respond to different forms of regulations and challenges.

##### 6. *Can Japan's System of Regulating Aged Workers be Transplanted to Other Countries?*

Systems of regulation are the product of multiple factors and this is particularly true in employment and aged worker regulation. While the complexity and evolving nature of aged worker regulation may limit the ability of countries to adopt the 'Japanese model' of aged worker regulation, some

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173 A. MCKIRDY, *Irasshaimase!:* Foreign-born clerks are becoming a familiar sight at convenience stores nationwide, but is Japan ready to welcome them?, *The Japan Times*, 8 December 2018.

174 Japan approves 126 measures to attract more foreign workers: New 'multicultural information' centers will help newcomers in 11 languages, *Nikkei Asian Review*, 25 December 2018.

175 M. TOSHIHIRO, *Japan's Historic Migration Reform: A Work in Progress*, *Nippon.com*, 6 February 2019, available at <https://www.nippon.com/en/in-depth/a06004/japan's-historic-immigration-reform-a-work-in-progress.html>>.

countries may be able to transplant or at least learn from specific regulatory tools, approaches and policies of Japan. A key aim for the regulation of aged workers is attaining a model that matches the capacity and desire of older workers to decent employment opportunities. In Japan an anti-age discrimination model has numerous problems and the Japanese regulatory system appears to be effective and allows for staged retirement without obviously disadvantaging younger workers. The contextual approach of the Japanese courts is balanced and counteracts market forces that might otherwise lead to exploitation, stereotypes and circumvention of the spirit of the new laws. Specific employment contexts and jurisdictions need tailored solutions and understanding the complex interaction between regulatory regimes and actors helps to generate improvement in regulation and employment outcomes for a vulnerable group of workers. While the Japanese model might not be a perfect fit in other countries and potentially even Japan in the future if it abandons attempts to reconcile a tradition of retirement age with the bare fact of its arbitrariness, there would be costs of abandoning the rest of the employment context that has provided security for many workers just when security is needed in an age where individuals and families find it difficult to plan ahead.

## VII. CONCLUSION

The regulation of Japan's hyperaged society provides interesting insight into the employment and work challenges faced around the globe related to ageing populations. Since the 1960s the emerging labour crisis has seen the Japanese government adopt a policy of prolonging the working life of those employed in regular work in Japanese companies, and more recently, workers in irregular employment. To achieve high employment rates among aged workers various forms of employment and non-employment legislation have been used, which engage with other forms of regulation such as informal rules, culture, normative practice and complementary development of principles in case law. Government assistance continues to be provided for all aged people wanting to work into their 60s and beyond and the Silver Human Resources Center helps older Japanese find jobs that are unpopular with younger Japanese. In other countries around the world similar labour shortages have been addressed by increasing the level of immigration. But the cultural importance of work in Japan also results in many older Japanese people needing to work into their 60s and 70s in order to maintain their sense of worth and mental health.



## SUMMARY

*Japan is one of the world's oldest countries and globally has the most aged workers. Culture, finances, economics and law all support a high number of people aged over 60 years working in Japan. Regulation plays an important role in creating employment for aged workers in Japan and the government utilises a number of different laws to achieve its policy aim of people working into their 60s and 70s. But legislation is part of a broader regulatory system for aged workers that includes culture, informal regulation and normative practice. This article will explore how these forms of regulation interact and influence one another in order to determine what lessons can be learned for government, statutory authorities, employers, industry associations, unions and most importantly aged workers. These lessons apply to Japan and other countries with ageing populations.*

## ZUSAMMENFASSUNG

*Japan ist eines der Länder mit der ältesten Bevölkerung der Welt und hat die weltweit ältesten Arbeitnehmer. Kultur, Finanzen, Wirtschaft und Recht bilden die Basis dafür, dass eine hohe Zahl der über 60 Jahre alten Personen in Japan berufstätig sind. Bei der Schaffung von Beschäftigungsmöglichkeiten für ältere Arbeitnehmer spielt der Rechtsrahmen eine wichtige Rolle, und die Regierung nutzt eine Reihe von unterschiedlichen Gesetzen, um ihr politisches Ziel zu erreichen, die Bürger bis 65 und sogar 70 arbeiten zu lassen. Aber die gesetzlichen Regeln sind nur ein Teil eines weiter gefassten Regulierungssystems, welches kulturelle Gepflogenheiten, informelle Regulierung und Vorgaben aus der Praxis umfasst. Der Beitrag untersucht, wie diese verschiedenen Regulierungsebenen interagieren und sich wechselseitig beeinflussen, um auf diese Weise zu bestimmen, welche Lehren sich daraus für die Regierung, Regulierungsinstitutionen, Arbeitgeber, Industrieverbände und vor allem und am wichtigsten für ältere Arbeitnehmer ziehen lassen.*

*(Die Redaktion)*