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# Reasonable Accommodation for Persons with Disabilities in Japan

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In June 2013, the Act on Employment Promotion etc. of Persons with Disabilities was amended to prohibit employment discrimination against persons with disabilities and oblige employers to provide “reasonable accommodation.” Until then, Japan’s policy on employment of persons with disabilities had been focused on employment quotas, and the addition of this new element prohibiting discrimination signaled a major turning point for the policy. In this paper, the framework and characteristics of Japan’s anti-discrimination legislation on employment of persons with disabilities will first be clarified, including a comparison with legal systems in the USA and other countries. Next, problems concerning “reasonable accommodation” (which plays an important role in disability discrimination law) will be highlighted with reference to “Draft Guidelines” currently being discussed with a view to formulation. Finally, the position that should be occupied by reasonable accommodation within Japan’s unique employment system and legal system—including the legal principle of abuse of dismissal rights (Labor Contract Act, Article 16) and the obligation to consider safety (health) (Article 5 of the same)—will be discussed.

## I. Introduction

Until now, employment of persons with disabilities has mainly been promoted via the employment quota system in Japan, based on the Act on Employment Promotion etc. of Persons with Disabilities (abbreviated to AEPPD below). This system (the “employment quota approach”) obliges employers to employ persons with disabilities at or above a predetermined ratio. When the Act was amended in June 19th, 2013, however, Japan’s policy on employment of persons with disabilities took on the additional approach of prohibiting discrimination against persons with disabilities.

This “discrimination prohibition approach” first attracted attention with the enactment of the “Americans with Disabilities Act of 1990” (abbreviated to ADA below) in the USA, and was gradually adopted by other countries thereafter. Meanwhile, the Convention on the Rights of Persons with Disabilities, which has the basic principle of prohibiting discrimination on the basis of disability, was adopted by the United Nations in 2006 and has since been ratified by many countries.

In Japan, too, work was started on preparing domestic legislation with a view to ratifying the Convention.<sup>1</sup> First, the Basic Act for Persons with Disabilities was amended in

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<sup>1</sup> Without the target of ratifying the Convention on the Rights of Persons with Disabilities, it would probably have taken even longer for the discrimination prohibition approach to be introduced in Japan. Besides this, the change of government from the Liberal Democratic Party (LDP) / the New Komei Party (NKP) coalition to the Democratic Party in September 2009 ushered in a new structure for discussing disabled policy, and this also had a significant impact on subsequent amendments (the

August 2011, including provisions that prohibit discrimination on the basis of disability (Article 4 [1])<sup>2</sup> and make the provision of reasonable accommodation mandatory (Article 4 [2]). Next, to materialize the basic principle of prohibiting discrimination in Article 4 of that Act, the Act for Resolution of Discrimination of Persons with Disabilities (abbreviated to ARDPD below)<sup>3</sup> was enacted in June 2013.<sup>4</sup> The ARDPD prescribes more specific provisions on prohibiting discrimination on the basis of disability, as well as concrete measures to ensure compliance, among others. In the field of employment,<sup>5</sup> the AEPPD was amended in the same month.<sup>6</sup> In terms of action aimed at ratifying the Convention, new provisions were added on three issues: (i) prohibiting employment discrimination on the basis of disability, (ii) mandatory provision of reasonable accommodation, and (iii) support for processing complaints and resolving disputes.<sup>7</sup> Once domestic legislation had been adjusted in this way, a protocol ratifying the Convention on the Rights of Persons with Disabilities was deposited with the United Nations on January 20th, 2014, and came into force on February 19th.

Characteristic features of the discrimination prohibition approach adopted by ADA and the Convention on the Rights of Persons with Disabilities lie in the fact that it regards persons with disabilities not as objects of protection but as subjects of rights, and that it sets out to promote employment of persons with disabilities by prohibiting discrimination on the basis of disability. While the employment quota approach focuses (only) on the “quantitative expansion” of disabled employment, the discrimination prohibition approach could be said to take account of the “quality” of disabled employment as well. Again, rather than

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LDP-NKP coalition returned to power in December 2012).

<sup>2</sup> A provision on prohibiting discrimination was already embedded in the 2004 amendment, though this was generally understood merely to prescribe the basic principle but to have no effectiveness.

<sup>3</sup> For the content of the ARDPD, see the Commentary Editorial Committee on the Act for Resolution of Discrimination of Persons with Disabilities, ed., *Gaisetsu Shogaisha Sabetsu Kaishoho* [Overview of the Act for Resolution of Discrimination of Persons with Disabilities] (Kyoto: Horitsu Bunkasha, 2014).

<sup>4</sup> With effect from April 1, 2016.

<sup>5</sup> While the ARDPD governs discrimination against persons with disabilities in general life, prohibition of discrimination in the field of employment is entrusted to the Act on Employment Promotion etc. of Persons with Disabilities (ARDPD, Article 13).

<sup>6</sup> On factors leading to the 2013 amendment of the Act on Employment Promotion etc. of Persons with Disabilities, see Tamako Hasegawa, “Shogaisha Koyo Sokushinho no Kaisei [Amendment of the Act on Employment Promotion etc. of Persons with Disabilities],” *Hogaku Kyoshitsu* 398 (November 2013): 52ff.

<sup>7</sup> In the 2013 amendment, besides these points, employment of persons with mental disabilities became mandatory and the definition of persons with disabilities was revised. On the content of these, see “Recent Trends and Issues in Employment Policy on Persons with Disabilities” by Hitomi Nagano in this Special Edition. Sections concerning the prohibition of discrimination were to take effect from April 1, 2016, mandatory employment of persons with mental disabilities from April 1, 2018, and the revised definition of persons with disabilities from June 19, 2013 (the date of promulgation). In principle, article and paragraph numbers refer to those of April 1, 2018, when the amendment will come into full force.

simply prohibiting discrimination, the fact that it requires employers and others to provide “reasonable accommodation” for persons with disabilities could also be seen as another major characteristic not found in conventional frameworks for prohibiting sexual or other forms of discrimination.

As will be discussed later, the provisions on prohibiting discrimination against persons with disabilities and providing reasonable accommodation, adopted for the first time in Japan following the amendment of the AEPPD, have a number of important characteristics compared to those in other countries. In this paper, therefore, the first objective is to clarify the structure of the “Japanese version” of legislation prohibiting employment discrimination against persons with disabilities, including comparisons with legal systems in the USA and elsewhere (II). The second objective is to investigate the positioning of “reasonable accommodation,” which plays an important role in disability discrimination law, within Japan’s unique employment and legal systems (III).

Japan is attempting to create unique legislation on employment of persons with disabilities by opting to maintain the existing employment quota approach while embedding the discrimination prohibition approach within it. For sure, many issues still remain in this respect (IV), but the third objective of this paper is to introduce Japan’s initiatives amid a global rise in concern for problems of persons with disabilities. The aim in doing so is to connect it to the development of legislation on employment of persons with disabilities as a whole.

## **II. “Prohibition of Discrimination” and “Reasonable Accommodation” in the AEPPD**

In this section, of the content of the amended AEPPD, provisions on (i) prohibition of discrimination and (ii) reasonable accommodation will be surveyed. For (i), problems will also be examined, while problems concerning (ii) will be considered in the following section (III).

### **1. Prohibition of Discrimination**

#### **(1) Prohibited Discrimination**

Prohibition of discrimination on the basis of disability is divided into provisions related to recruitment and hiring and those concerning situations after hiring, in reference to the provisions of the Act on Securing, Etc. of Opportunity and Treatment between Men and Women in Employment (referred to below as the Equal Employment Opportunity Act). On the former, the amendment provides that “With regard to the recruitment and employment of workers, employers must give equal opportunities to persons with and without disabilities” (AEPPD, Article 34). On situations after hiring, it provides that “Employers must not engage in unfair discriminatory treatment in terms of the decision of wages, the implementation of education and training, the utilization of welfare facilities and other treatments for

workers, compared to workers without disabilities, on grounds that they are persons with disabilities” (Article 35). These provisions on prohibiting discrimination extend to all matters related to employment.

The Labour Policy Council Subcommittee on Disabled Employment, which had been conducting studies aimed at amending the Act, pointed out in its “Statement of Opinion” that although discrimination on grounds of disability (direct discrimination) should be prohibited, it would be difficult at the present stage to establish provisions prohibiting indirect discrimination. The reasons it gave for this were that (i) it is not clear what exactly constitutes indirect discrimination, and (ii) cases not falling under direct discrimination could be addressed by providing reasonable accommodation.<sup>8</sup> In other words, indirect discrimination is not considered to be prohibited in Japan. The AEPPD is construed as adopting the position of distinguishing direct discrimination from indirect discrimination in terms of whether or not there is an “intention to discriminate,” it prohibits direct discrimination as discrimination in which there is an intention to discriminate.<sup>9</sup>

To further clarify the specific content of prohibited discrimination and content of the obligation to provide reasonable accommodation, the Minister of Health, Labour and Welfare is to draw up guidelines (AEPPD, Articles 36 and 36–5). As preparatory work for this, a “Guidelines Research Group”<sup>10</sup> was set up within the Ministry of Health, Labour and Welfare in September 2013. Its deliberations included hearings on discrimination against persons with disabilities and reasonable accommodation, conducted with various disabled groups, business organizations, labor unions and other bodies involved in disabled employment. Its studies culminated in the publication of a report on June 6th, 2014 (referred to below as the “Guidelines Research Group Report”).<sup>11</sup> In response to this, the Labour Policy Council Subcommittee on Disabled Employment is now conducting studies aimed at draw-

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<sup>8</sup> The Labour Policy Council Subcommittee on Disabled Employment (chaired by Professor Koichiro Konno of Gakushuin University), the Statement of Opinion, “On the Future Enhancement and Reinforcement of Policy on Employment of Persons with Disabilities” (2013): 2. <http://www.mhlw.go.jp/stf/houdou/2r9852000002xeb3.html>. According to the Subcommittee’s Statement of Opinion, disadvantageous treatment on grounds of using wheelchairs, guide dogs or other support devices is regarded as included in direct discrimination.

<sup>9</sup> Koichi Tominaga, “Kaisei Shogaisha Koyo Sokushinho no Shogaisha Sabetsu Kinshi to Goriteki Hairyo Teikyo Gimu [Prohibition of discrimination against persons with disabilities and the obligation to provide reasonable accommodation in the Amended Act on Employment Promotion etc. of Persons with Disabilities],” *Quarterly Jurist* 8 (Winter 2014): 27, 29.

<sup>10</sup> “Research Group concerning the Nature of Guidelines on the Prohibition of Discrimination and the Provision of Reasonable Accommodation Based on the Amended Act on Employment Promotion etc. of Persons with Disabilities” (chaired by Professor Ryuichi Yamakawa of the University of Tokyo).

<sup>11</sup> “Report of the Research Group concerning the Nature of Guidelines on the Prohibition of Discrimination and the Provision of Reasonable Accommodation Based on the Amended Act on Employment Promotion etc. of Persons with Disabilities” (June 6, 2014). <http://www.mhlw.go.jp/file/04-Houdouhappyou-11704000-Shokugyouanteikyokukoureishougai koyoutaisakubu-shougaisakoyoutaisakuka/0000047633.pdf>.

ing up guidelines.<sup>12</sup>

## (2) Problems with Prohibiting Discrimination

Although various issues still remain concerning the provisions prohibiting discrimination, the following three will be examined in this paper.

Firstly, regarding the fact that indirect discrimination is not prohibited, one commentator points out that “What is regarded as indirect discriminatory discrimination could be added as a violation of the obligation to provide reasonable accommodation, but other cases in which an intention to discriminate can be discerned should be added based on flexible presumption of the intention to discriminate, judging from issues such as the employer’s behavior or the marked unreasonableness of treatment.”<sup>13</sup> Meanwhile, in cases where reasonable accommodation or indirect discrimination is the problem, it has also been asserted that provisions on indirect discrimination should be incorporated in law, in that the content to be verified by workers and employers differs, or that, even if reasonable accommodation is provided, indirect discrimination cannot necessary be ruled out, among other reasons.<sup>14</sup> The Guidelines Research Group Report states that, although it would be difficult at the present stage to establish provisions prohibiting indirect discrimination, the need to establish a provision prohibiting indirect discrimination will have to be considered in future, after amassing specific cases of consultation and judicial precedents, etc.<sup>15</sup>

Secondly, provisions prohibiting discrimination in the AEPPD (Articles 34 and 35) prohibit unfair discriminatory treatment compared to “persons without disability,” but do not presume discrimination between persons with disabilities. Consequently, it is thought that this Act cannot legislate for cases in which, for example, persons with mental disabili-

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<sup>12</sup> Based on the Guidelines Research Group Report, two sets of guidelines are to be prepared some time during fiscal 2015. Namely, (i) guidelines on prohibiting discrimination against persons with disabilities, and (ii) guidelines on the obligation to provide reasonable accommodation. As this paper is based on the state of discussions up to the end of October 2014, it should be borne in mind that the content of the guidelines could change in future. Meanwhile, according to the Draft Guidelines presented at the 64th meeting of the Labour Policy Council Subcommittee on Disabled Employment (October 23, 2014), the official titles will be (i) “Guidelines for employers to cope appropriately with matters prescribed in provisions on prohibiting discrimination against persons with disabilities (draft)” and (ii) “Guidelines on measures to be taken by employers to guarantee equal opportunities and treatment for persons with and without disabilities in the field of employment, and to improve situations that hinder the effective exercise of abilities by workers with disabilities (draft).” Below, these will be abbreviated to (i) “Draft Guidelines on Prohibiting Discrimination” and (ii) “Draft Guidelines on Reasonable Accommodation.” For the data, see the MHLW website (<http://www.mhlw.go.jp/stf/shingi2/0000062398.html>).

<sup>13</sup> Tominaga, *supra* note 9, at 29.

<sup>14</sup> Tamako Hasegawa, “Shogaisha Koyo Sokushinho ni okeru ‘Shogaisha Sabetsu’ to ‘Goriteki Hairyo’ [‘Discrimination against persons with disabilities’ and ‘reasonable accommodation’ in the Act on Employment Promotion etc. of Persons with Disabilities],” *Quarterly Labor Law* 243 (Winter 2013): 25, 33.

<sup>15</sup> “Report of the Research Group,” *supra* note 11, at 2.

ties are treated disadvantageously compared to those with physical disabilities, or persons with severe disabilities compared to those with mild disabilities.

The third point is that positive measures to correct discrimination and other advantageous treatment toward persons with disabilities are not thought to constitute discrimination. In Japan, where the employment quota system is used, a quota for persons with disabilities is generally set when hiring. To be sure, this kind of action increases the potential for hiring persons with disabilities, and could be regarded as a positive measure to correct discrimination. However, there are doubts as to whether all such cases should be treated as not being discrimination because they are positive measures to correct discrimination. For example, there could be cases in which workers hired within a disability quota are uniformly allocated to light work without taking their work performance ability or motivation into account, and their wages and other working conditions are reduced accordingly; or cases in which only persons with disabilities are given longer probation periods than usual, on grounds that it takes longer to ascertain their aptitude for the work. In the author's opinion, even if, in one sense, the system contributes to maintaining and expanding employment of persons with disabilities (i.e. as a positive measure to correct discrimination), it should not be permitted if it treats only persons with disabilities more or less uniformly without considering the situations of individuals, and as a result causes disadvantage for persons with disabilities.<sup>16</sup>

The first and second points above are prohibited as discrimination in other countries, and could be seen as important issues for study in future. The third point, meanwhile, should be used as an impetus to revise employment practices that have, until now, not been seen as particularly problematic in Japan, where the employment quota system is adopted, and to conduct studies aimed at an appropriate fusion of the employment quota approach and the discrimination prohibition approach.

## 2. Reasonable Accommodation

Provisions on the obligation to provide reasonable accommodation are similarly divided into (i) situations of recruitment and hiring and (ii) those after hiring. Firstly, employers must take measures for reasonable accommodation when recruiting and hiring workers, following a request from a person with disabilities, in order to improve situations that hinder the assurance of equal opportunities for persons with and without disabilities<sup>17</sup> (AEPPD, Article 36–2). After hiring, employers must take steps for reasonable accommodation of

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<sup>16</sup> For a more detailed discussion, Hasegawa, *supra* note 14, at 34ff.

<sup>17</sup> As the reason for making this dependent on a “request” from a person with disabilities, at the 59th meeting of the Labour Policy Council Subcommittee on Disabled Employment, it was explained that it would be difficult to make advance preparations on the assumption of various disabilities, since it could not be known what specific disability an applicant would have. There has been some criticism of this, however (Yoshikazu Ikehara, “Goriteki Hairyo Gimu to Sabetsu Kinshi Hori [The obligation for reasonable accommodation and the principle of prohibiting discrimination],” *Rodo Horitsu Junpo*, no. 1794 [June 2013]: 12).

workers with disabilities, in order to improve situations that hinder the assurance of equal treatment compared to persons without disabilities or the effective exercise of abilities by persons with disabilities (Article 36–3). The Articles in question do not specifically refer to “reasonable accommodation,” but prescribe “necessary measures, taking into account the characteristics of the disability” when recruiting and hiring, and, after hiring, “preparing the facilities necessary for the smooth performance of work, allocating support personnel and other necessary measures, taking into account the characteristics of the disability.” But if taking such steps for reasonable accommodation causes the employer “undue hardship,” the obligation to provide it may be waived (Article 36–2 proviso, Article 36–3 proviso).

When providing reasonable accommodation, employers must fully respect the wishes of persons with disabilities (Article 36–4 [1]), and must prepare a system necessary for responding to consultation from workers with disabilities (Article 36–4 [2]). The Minister of Health, Labour and Welfare may issue advice, guidance or recommendations to employers when they violate provisions on prohibiting discrimination and providing reasonable accommodation, etc. (Article 36–6).

### III. Examination of “Reasonable Accommodation”

#### 1. Birth of the Concept of Reasonable Accommodation and Its Expansion to Include Disability Discrimination

In the field of law prohibiting employment discrimination, the concept of “reasonable accommodation” was first used not in the context of disability discrimination but in that of “religious discrimination.”<sup>18</sup> In the USA, the Civil Rights Act of 1964 banned discrimination based on race, skin color, religion, gender or country of origin. However, a difference of opinion arose between the Equal Employment Opportunity Commission (EEOC) and the courts on whether or not employers should give a degree of accommodation (e.g. exemption from the obligation to work on the Sabbath) so that workers could observe their religious beliefs and commandments; the EEOC deemed it permissible while the courts opposed it. As a result, the Civil Rights Act was amended in 1972, stating that employers must provide reasonable accommodation for an employee’s religious observance or practice, provided this imposed no “undue hardship” on the conduct of the employer’s business (Civil Rights Act, Article 701 [j]).

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<sup>18</sup> On the chronological background to the concept of reasonable accommodation in the USA, see Jun Nakagawa, “Shogaisha ni taisuru Koyojo no ‘Bengiteki Sochi Gimu (1)’ to Sono Seiyakuteki Hori: Amerika, Kanada no Hikakau Kenkyu [The duty of reasonable accommodation for persons with disabilities: Comparative study between United States and Canada (1)],” *The Hokkai-Gakuen Law Journal* 39, no.2 (2003): 29 ff. Meanwhile, for recent research on (reasonable) accommodation by employers in the context of religious discrimination, see Ryoko Sakuraba, “Shiyosha no Hairyo o Michibiku Apurochi: Rodosha no Shukyo e no Hairyo o Sozai to shite [An approach to guiding accommodation by employers: Using accommodation of workers’ religion as a basis],” *Quarterly Labor Law*, no.243 (Winter 2013): 186 ff.

This concept of reasonable accommodation would later be expanded to include the context of disability discrimination. First, the enforcement regulations of the Rehabilitation Act of 1973 stipulated that employers subsidized by the federal government must provide reasonable accommodation for persons with disabilities, as long as this caused no undue hardship. Then ADA stipulated that not making reasonable accommodations and denying employment opportunities on the basis of need of reasonable accommodations would be necessary constituted discrimination on the basis of disability (Article 102 [b] [5]). Here, specific examples of reasonable accommodation are given, including “(A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities,” and “(B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities” (Article 101 [9]). In response to these provisions, enforcement regulations and various guidelines were produced for ADA. These introduced and analyzed examples of reasonable accommodation by type of disability and corporate scale, etc., as well as notes when implementing reasonable accommodation, and others in very great detail.<sup>19</sup>

The question whether providing reasonable accommodation imposes “undue hardship” is to be judged from factors including the nature and cost of the accommodation, the overall financial resources of the facility or facilities involved in providing reasonable accommodation, the number of persons employed, the impact upon operation of the facility, and the scale, type and location of the business entity (Article 101 [10]). If, as a result of this judgment, significant difficulty or expense were deemed to arise in the business entity, this would constitute undue hardship, and reasonable accommodation would not have to be provided.

## 2. Action Similar to Reasonable Accommodation in the Employment Quota System

The rationale of reasonable accommodation, originating in the USA, is that, if persons with disabilities are hindered from performing their work as a result of their disability, such hindrance should be removed by means of reasonable accommodation; not providing this accommodation would constitute “discrimination.” This would appear to be based on the reasoning that, in order to achieve equality between persons with and without disability

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<sup>19</sup> These regulations, guidelines and others have been published online ([http://www.eeoc.gov/laws/types/disability\\_guidance.cfm](http://www.eeoc.gov/laws/types/disability_guidance.cfm)). Partial Japanese translations of ADA as well as related enforcement regulations and guidelines can be found in “Legislation and Measures for Anti-Discrimination on Employment of Persons with Disabilities in Western Countries, Part 1: USA/UK” (2013) edited by the National Institute of Vocational Rehabilitation (NIVR) of the Japan Organization for Employment of the Elderly, Persons with Disabilities and Job Seekers (JEED). Besides this, the contents of reasonable accommodation are organized by type of disability and type of reasonable accommodation in John W. Parry, *Equal Employment of Persons with Disabilities: Federal and State Law, Accommodations, and Diversity Best Practices* (Chicago: American Bar Association, 2011), 177–93.



amid a social framework created on the premise of persons without disability, standards and rules built around persons without disabilities must be changed flexibly to suit the situations of individual persons with disabilities.

The rationale traditionally adopted in Japan, contrastingly, is that persons with disabilities should be subject to protection, and that prioritizing the provision of places of employment is indispensable to promoting employment of persons with disabilities. Thus, the rationale of prohibiting discrimination against persons with disabilities, and providing reasonable accommodation within the context of prohibiting discrimination, was arguably not evident in Japan's conventional policy on employment of persons with disabilities.

However, the approaches of these two countries, though differing greatly in theory, are found to have many points in common when considering the specific content of accommodation actually provided to persons with disabilities. That is, many of the response actions regarded as "reasonable accommodation" in the USA could also be said to have existed under Japan's employment quota system.

For example, according to the 2008 Survey on the Employment Situation of Persons with Disabilities,<sup>20</sup> 72.6% of employers were found to provide accommodation in employment for persons with physical disabilities, 61.9% for persons with intellectual disabilities, and 52.4% for persons with mental disabilities. In other words, the majority of employers already provide accommodation for persons with disabilities. As for the actual content of this accommodation, the most common type for persons with physical disabilities is "Accommodation in terms of personnel reassignment and other human resource management" (51.1%), followed by "Accommodation in terms of hospital outpatient visits, medication management and other healthcare" (41.7%) and "Improvement of facilities, equipment and machinery, making it easier to work and move in the workplace" (33.0%) (multiple response; the same applies below). For persons with intellectual disabilities, a characteristic is that high scores were recorded for "Simplification of work processes and other accommodation in terms of the work content" (64.5%) and "Assignment of personnel to assist with work execution" (43.8%) ("Accommodation in terms of personnel reassignment and other human resource management" [41.1%]). For persons with mental disabilities, "Accommodation in terms of personnel reassignment and other human resource management" (54.2%) and "Accommodation in terms of hospital outpatient visits, medication management and other healthcare" (46.3%) were high, as they were for persons with physical disabilities. However, a characteristic here is that these were followed by "Short working hours and other accommodation in terms of working hours" (38.6%). Thus, on examining the content of accommodation actually provided, "Accommodation in terms of personnel reassignment and other human resource management" is found to be high for all types of disability (physical 51.1%, intellectual 41.1%, mental 54.2%), while differences are found in the ac-

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<sup>20</sup> Ministry of Health, Labour and Welfare, "Summarized Results of the FY2008 Survey on Disabled Employment" (in Japanese) (November 13, 2009).

commodation required, depending on the type of disability.

Furthermore, some of the various “subsidies” provided under the employment quota system can be regarded as resembling reasonable accommodation. For example, “Grants for the provision of workplace facilities, etc. for persons with disabilities” subsidize part of the cost incurred by employers who improve working facilities or install toilets or slopes for persons with disabilities when newly employing or continuing to employ such persons. Besides this, there are also “Grants for workplace attendants, etc. for persons with disabilities” to subsidize part of the cost incurred when using caregivers, job coaches and others to assist with work execution, “Workplace adaptation supporter subsidies,” and others.

The provision of “reasonable accommodation,” made mandatory for employers under the amended AEPPD, is said to have caused considerable anxiety and confusion among employers because the concept had not previously existed in Japanese law.<sup>21</sup> In many aspects, however, its content overlaps with the various forms of accommodation for persons with disabilities already practiced by employers under the existing employment quota system and others, and should not cause any particular anxiety. Even so, because reasonable accommodation has become mandatory in the context of prohibiting discrimination, it differs from previous accommodation in terms of its conditions and effects. In connection with Japan’s unique employment system and labor legislation, moreover, it may not be so simple to import the discussion on reasonable accommodation in western countries into Japan. For these and other reasons, the significance given to the new concept of reasonable accommodation within Japan’s legislation on labor and disabled employment will be very important.

### 3. Draft Guidelines on the Obligation to Provide Reasonable Accommodation

As mentioned above, the Labour Policy Council Subcommittee on Disabled Employment is currently studying guidelines on the obligation to provide reasonable accommodation. In the following, as well as introducing these Draft Guidelines on Reasonable Accommodation, the issues raised by them will also be indicated.

The Draft Guidelines on Reasonable Accommodation consist of (i) Purpose, (ii) Basic concept, (iii) Procedure for reasonable accommodation, (iv) Content of reasonable accommodation, (v) Undue hardship, and (vi) Development of a consultation system, among others. On (iii) Procedure for reasonable accommodation, it has been proposed that the guidelines be divided into those at the time of recruiting and hiring and those for workplaces after hiring; they should indicate what employers and persons with disabilities should do at each stage, from confirming the need for reasonable accommodation until finalizing the content

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<sup>21</sup> For example, Masahiko Iwamura, Yoshimi Kikuchi, Satoshi Kawashima, and Tamako Hasegawa, “Shogaisha Kenri Joyaku no Hijun to Kokunaiho no Aratana Tenkai: Shogaisha ni taisuru Sabetsu no Kaisho o Chushin ni [Ratification of the Convention on the Rights of Persons with Disabilities and new developments in domestic law: With focus on eliminating discrimination against persons with disabilities],” *Quarterly Jurist* 8 (Winter 2014): 4.

of accommodation through dialog between the parties.<sup>22</sup> At the time of recruiting and hiring, the start of procedures is conditional upon a request from a person with disabilities. But in cases after hiring, if the employer has ascertained that the worker is a person with disabilities, the employer is required to confirm whether there are any hindrances to the execution of work, even without a request from the person with disabilities. On this point, in the US system, the responsibility for conveying the need for reasonable accommodation to the employer is thought to lie with the person with disabilities, both before and after hiring.<sup>23</sup> This could therefore be seen as a point of divergence between the two countries. In Japan too, however, the basic concept in (ii) above states that “It is obligatory upon the employer to provide reasonable accommodation, but with regard to reasonable accommodation after hiring, when it was not possible for the employer to know that a worker employed by said employer is a person with disabilities even after making the necessary checks, there shall be no question that the obligation to provide reasonable accommodation has been violated.” As such, there is potential for disputes to arise over the exact circumstances under which the employer could be said to have ascertained the disability.

With respect to (iv) Content of reasonable accommodation, the Guidelines Research Group was divided on what specific examples should be given in the guidelines as reasonable accommodation. That is, whether the guidelines should be positioned (a) as a means of enhancing the understanding of persons with disabilities by society as a whole, including employers and workers, or (b) as minimum standards that must be observed. If (a) were to apply, the guidelines should ideally list as many examples of accommodation as possible; but if (b) were true, they would merely need to include the minimum required content already established in many sites of disabled employment. In the case of (a), understanding of

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<sup>22</sup> The importance of a flexible interactive process between employers and persons with disabilities when determining and implementing reasonable accommodation has also been pointed out in the USA. According to the EEOC enforcement regulations (29 C.F.R. Part 1630 Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act [2011]), steps in this process are (i) Analyze the particular job involved and determine its purpose and essential functions, (ii) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual’s disability and how those limitations could be overcome with a reasonable accommodation, (iii) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position, and (iv) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer (29 C.F.R. §1630.9 [2011]). Although there is no legal obligation to comply with this process, a court precedent has shown that if the employer does not engage in this process in good faith and as a result reasonable accommodation is not provided, the employer will bear liability for damages (EEOC v. Convergys Customer Mgmt. Group, Inc., 491 F.3d 790 [8th Cir. 2007]). As discussed below, however, unlike the US employment system, where job contents are specified, it is extremely difficult to specify job contents for regular employees in Japan. Consequently, the US-style process premised upon the specification of job content cannot be adopted unmodified in Japan. Nevertheless, the emphasis given to “labor-management dialog” will also provide hints for when the issue is discussed in Japan.

<sup>23</sup> 29 C.F.R. §1630.9 (2011).

persons with disabilities might certainly be enhanced among some employers and workers, but this approach could even weaken the very binding force of the guidelines, which had no legally normative character in the first place. In the case of (b), conversely, although the possibility remains that courts could regard the guidelines as an objectively reasonable interpretation of law,<sup>24</sup> they would not make employers and others broadly aware of pioneering initiatives and other case studies that could constitute reasonable accommodation. The Guidelines Research Group Report adopts a stance close to (b), as do the Draft Guidelines on Reasonable Accommodation formed in response to it. The aim of these appears to be that “the guidelines should describe measures that could conceivably be applied by many employers as case studies.”<sup>25</sup>

In the Draft Guidelines on Reasonable Accommodation, reasonable accommodation is divided into (i) situations when recruiting and hiring, and (ii) situations after hiring, for each of nine types of disability (visual impairment, auditory and speech impairment, motional disabilities, internal disorders, intellectual disabilities, mental disabilities, developmental disabilities, disability caused by intractable disease, and higher brain dysfunction).<sup>26</sup> The examples of accommodation shown here are all very basic and, moreover, do not entail significant cost. As such, they feel inadequate. However, the direction taken by the Guidelines Research Group may be unavoidable for the time being, at least, as a way of first clarifying the minimum required compliance for employers and others who feel anxious about the opaque content of reasonable accommodation, and also to give the guidelines some realistic binding force. Nevertheless, the Guidelines Research Group wants the guidelines to state that the examples of reasonable accommodation they present are merely “illustrations” and need not necessarily be implemented by all enterprises,<sup>27</sup> and the Draft Guidelines on Reasonable Accommodation have been drawn up with this in mind. In that case, guidelines which should clearly specify the content of accommodation to be provided as the minimum requirement could ultimately be regarded as not requiring compliance. Moreover, the scope of what is required as reasonable accommodation remains unclear, and disputes could arise over the extent of employers’ obligations.

Although there is uncertainty over the positioning of these reasonable accommodation guidelines, such problems may be addressed for the time being through advice, guidance or recommendations from the Director of the Prefectural Labour Bureau (AEPPD, Article 74–6 [1]), conciliation by the Dispute Coordinating Committee based on the Act on Pro-

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<sup>24</sup> For a discussion on how the guidelines on the Equal Employment Opportunity Act are evaluated by the courts, see Sugeno Kazuo, *Rodoho* [Labor law], 3rd ed. (Tokyo: Yuhikakau, 2012), 189ff.

<sup>25</sup> “Report of the Research Group,” *supra* note 11, at 8; “Draft Guidelines on Reasonable Accommodation,” *supra* note 12, at 4.

<sup>26</sup> 64th meeting of the Labour Policy Council Subcommittee on Disabled Employment, data material 2–2 (Table). [http://www.mhlw.go.jp/file/05-Shingikai-12602000-Seisakutoukatsukan-Sanjikanshitsu\\_Roudouseisakutantou/0000062547.pdf](http://www.mhlw.go.jp/file/05-Shingikai-12602000-Seisakutoukatsukan-Sanjikanshitsu_Roudouseisakutantou/0000062547.pdf).

<sup>27</sup> In fact, the guidelines are to state that there are other forms constituting reasonable accommodation besides those illustrated in them.

moting the Resolution of Individual Labor-Related Disputes (Article 74–7 [1]), and other aspects of the administrative dispute resolution system. It is hoped that the guidelines will be applied appropriately within this system.<sup>28</sup> What will need to be tackled in future, moreover, is the formulation of detailed guidelines and Q&A on reasonable accommodation, by type of disability and corporate scale.<sup>29</sup> Within this, it should be possible to materialize the rationale in (a) above, i.e. broadly specify not only pioneering examples of reasonable accommodation but also specific individual cases of accommodation in guidelines, etc., and enhance understanding of persons with disabilities by society as a whole.

#### 4. The Need for a Uniquely Japanese Concept of Reasonable Accommodation

##### (1) The Japanese-Style Employment System and Reasonable Accommodation

In the USA and other western nations, jobs are usually fixed from the point of hiring, and the content of essential functions of those jobs are thought to be clear. As a result, the ability of persons with disabilities to perform jobs and the content of reasonable accommodation thought necessary for them to perform those jobs are relatively easy to evaluate and judge. By contrast, in the “Japanese-style employment system” characterized by “long-term employment practices” and “seniority-based treatment,” jobs are not limited in this way; employees are expected to be reassigned to various departments and jobs within a company under the principle of long-term continuous service, especially in the case of regular employees. As a result, even if we wanted to measure the ability to perform jobs, the “jobs” themselves are often unknown, and moreover, it is often unclear what jobs should receive reasonable accommodation in order to meet the obligation.

Let us imagine a situation in which an applicant with a disability can perform duties in one of five jobs (departments) in a given company, but not in the other four, even if reasonable accommodation were provided. Thinking solely in the context of prohibiting discrimination, giving disadvantageous treatment to a disabled person who can only perform one job compared to a person without disabilities who can perform all five cannot be called unfair discriminatory treatment. However, if the concept of “reasonable accommodation” is incorporated into this, the same no longer necessarily applies. That is, (i) continuing to assign a worker only to a single job but not to the four others that the worker cannot perform could be regarded as “reasonable accommodation,” and as long as it does not cause undue hardship, the employer could be seen as obligated to provide this kind of accommodation. Alternatively, though it might be difficult to regard this as reasonable accommodation, (ii) if four of the jobs could be performed and only one could not, would it be regarded as includ-

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<sup>28</sup> As a study on ensuring the effectiveness of provisions prohibiting discrimination in the Act on Employment Promotion etc. of Persons with Disabilities, see Satoshi Hasegawa, “Shogai o Riyu to Suru Koyo Sabetsu Kinshi no Jikkosei Kakuho [Ensuring the effectiveness of prohibiting employment discrimination on grounds of disability],” *Quarterly Labor Law* 243 (Winter 2013): 38.

<sup>29</sup> The above-mentioned guidelines and Q&A produced by EEOC are expected to serve as reference when drawing up guidelines in Japan.

ed in reasonable accommodation if the worker were not assigned to that single job? If we consider fulfilling various jobs in accordance with nationwide transfers as the essential function of an employee (i.e. an approach approximating [ii] above), many persons with disabilities would be excluded from the framework of prohibition of discrimination. On the other hand, if not assigning a worker to several jobs that the worker cannot perform, as in (i) above, could be said to constitute reasonable accommodation, the potential for employment of persons with disabilities would expand; whereas conversely, the employer's burden would increase, and dissatisfaction could arise among other employees without disabilities.<sup>30</sup> In the AEPPD, reasonable accommodation is regarded as a measure "necessary for the smooth performance of work, taking account of the nature of the disability" (AEPPD, Article 36-3); providing this is positioned as the employer's obligation. This differs from the system in the USA and other countries, where not providing reasonable accommodation is determined as discrimination and reasonable accommodation is positioned as a means of achieving equality. When considering the range and content of reasonable accommodation in Japan, this difference in systems should be kept in mind. On this basis, the government should indicate the directionality for the range and content of "reasonable accommodation" as provided in the AEPPD, based on the relationship with Japanese-style systems including the employment system and the employment quota system. The answer to the two examples given above could be seen as depending on this directionality.

Another important characteristic arising from the Japanese-style employment system is the "legal principle of abuse of dismissal rights" (Labour Contract Act, Article 16). Taking this as their justification, courts have demanded various forms of accommodation from employers in cases where, due to personal injury, illness or disability, labor cannot be provided without accommodation, or cases that have led to dismissal. Examples are when a worker who has taken leave due to personal injury or illness is permitted to engage in familiarization work for a short while after returning to the workplace,<sup>31</sup> when a worker who is no longer able to perform the previous duties is permitted to be reassigned to another department where the duties can be performed,<sup>32</sup> and when, even after reassignment to another department, the work duties are further reduced.<sup>33</sup> Also, when a worker is injured, falls ill or dies because the employer has not given appropriate accommodation, the employer

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<sup>30</sup> In a case contesting whether accommodating persons with disabilities to the extent of violating "neutral rules" inside a company could constitute reasonable accommodation, the US Supreme Court deemed there to be situations in which preferential treatment should be given to persons with disabilities in violation of neutral rules, as a general principle in order to achieve equality of opportunities as the basic target of ADA. It ruled nevertheless that, in relation to a "seniority system" that gives expectations of fair and equal treatment as an important interest of the employees (a system in which employee reassignments, promotions, dismissals, layoffs, re-employment, etc., are treated preferentially depending on years of service), personnel reassignments that run counter to seniority do not constitute reasonable accommodation as a rule (US Airways, Inc. v. Barnett, 535 U.S. 391 [2002]).

<sup>31</sup> Air France Case (Tokyo Dist. Ct., Judgment, Jan. 27, 1984, Rohan 423-23).

<sup>32</sup> Katayama Gumi Case (Sup. Ct., Judgment, Apr. 9, 1998, Rohan 736-15).

<sup>33</sup> JR Tokai (Termination) Case, (Osaka Dist. Ct., Judgment, Oct. 4, 1999, Rohan 771-25).

has been deemed liability for damages due to default, in violation of the obligation to consider safety (health) (Labour Contract Act, Article 5).<sup>34</sup>

In Japan, therefore, due to a strict legal principle of abuse of dismissal rights and the obligation to consider safety (health), if a worker who is already working sustains a disability in the process, there is a tendency to demand that the employer gives flexible accommodation as a measure to avoid dismissal. The JR Tokai Case, in which the employer was required to reduce work duties even further after personnel reassignment, is similar to the case given as an example above, in which the worker could not perform four jobs but was able to perform just one.<sup>35</sup> However, most cases in which such generous accommodation is recognized have involved regular employees with no limit on work duties, on the assumption of long-term employment.<sup>36</sup> The fact that reasonable accommodation has been explicitly specified in law means that accommodation will undoubtedly be expanded to cover non-regular employees and others with specified employment terms or restricted work duties as well. However, if premised on the framework for judgment in existing judicial precedents,<sup>37</sup> disparities are expected to arise between reasonable accommodation for non-regular employees compared to that for regular employees.<sup>38</sup>

Further study is needed on how reasonable accommodation should be positioned and developed within these uniquely Japanese systems of labor legislation and employment.

## (2) Privacy and Reasonable Accommodation

Because information concerning disability is closely related to privacy, it has to be treated carefully. This requirement is particularly acute in the case of mental disabilities, which still carry a strong stigma, as well as internal disorders and others that are not evident from the outside. However, for persons with disabilities to continue working in the workplace (while receiving reasonable accommodation), the understanding of the people around

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<sup>34</sup> Dentsu Case (Sup. Ct., Judgment, Mar. 24, 2000, Rohan 779–13).

<sup>35</sup> In the JR Tokai (Termination) Case, the employer was required to reduce the workload even further for the one job to which the worker could be assigned.

<sup>36</sup> When demanding accommodation in the JR Tokai (Termination) Case and others, courts seem to have taken account of “corporate scale, the possibility of employee assignment or transfer, and the possibility of sharing or changing work duties,” and demanded a higher level of accommodation from companies above a certain scale. In future, these elements will most likely be taken into consideration when judging undue hardship as well.

<sup>37</sup> However, since the obligation to consider safety (health) and the obligation to provide reasonable accommodation differ in both intent and purpose, it would not be appropriate to apply the framework for judgment in existing court precedents directly to cases of reasonable accommodation; a more careful consideration needs to be made.

<sup>38</sup> Moreover, regarding the “restricted regular employees” that have been attracting attention in recent years (employees who have no specified employment period but have restrictions on their work duties or place of employment), “reassignment to a vacant position” is taken to constitute reasonable accommodation in the USA, even if duties are restricted (ADA 101 [9] [B]). In Japan, too, it should be possible to seek reassignment to other duties or locations as reasonable accommodation, even when there are restrictions on work duties or the place of employment.

them (e.g. other employees) is also important. When support from other employees itself serves as reasonable accommodation, or when dissatisfaction between employees arises over the fact that persons with disabilities receive accommodation that other employees without disability do not, the employer will be compelled to convey some kind of information to the other employees.

On this point, in the USA, the employer's duty of confidentiality concerning information related to disability is viewed rigorously. The employer must not disclose the fact that a given employee has a disability, or that such a person is receiving reasonable accommodation for this reason, to other employees, etc.<sup>39</sup> As an exception, however, employers are permitted to tell supervisors and managers about restrictions on the employee's work and about necessary accommodation. In addition, companies are permitted to tell other employees that they intend to support all employees who suffer difficulties in the workplace, and that they respect the privacy of employees as a company policy.

In Japan, when it became possible to add persons with mental disabilities to employment quotas (in 2005), "Guidelines on Ascertaining and Confirming Persons with Disabilities with Consideration for Privacy" were drawn up, and awareness of the need to consider privacy has been growing. However, the US style of regulation with maximum priority placed on protecting privacy is not thought amenable to Japan, for a number of reasons. Firstly, when employing persons with disabilities, many employers see it as their task to make other employees understand the nature of those disabilities (physical disability 27.3%, intellectual disability 40.0%, mental disability 43.4%).<sup>40</sup> Secondly, among the examples of reasonable accommodation that should be stated in the guidelines, the Guidelines Research Group Report includes "Explaining the content and other details of a disability to other employees, having considered the privacy of the person in question" for all classes of disability.<sup>41</sup> Moreover, the understanding of persons with disabilities is strongly sought by disabled groups. And thirdly, Japan's existing policy on employment of persons with disabilities includes various measures based on clarifying that a given employee is a person with disabilities. Nevertheless, when persons with disabilities themselves do not wish information concerning their disability to be disclosed, accommodation from the viewpoint of protecting privacy is required.

#### **IV. Tasks for the Future**

Following the amendment to the AEPPD, discrimination against persons with disabilities in the workplace is now prohibited and employers are obliged to provide reasonable accommodation. As a result, Japan's legislation on the employment of persons with disabili-

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<sup>39</sup> EEOC Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, 15 (1997).

<sup>40</sup> Ministry of Health, Labour and Welfare, *supra* note 20, at 18.

<sup>41</sup> "Report of the Research Group," *supra* note 11, 12ff.



ties is expected to reach a major turning point. However, with only just over a year remaining until the amendment comes into force, many issues still remain.

On the positioning of reasonable accommodation in Japan, this paper has pointed out that it is difficult to determine job performance ability and the scope of reasonable accommodation under Japan's unique employment system, where the ability to perform a wide range of job contents is expected of employees. It has also made it clear that the various accommodations already given (particularly for regular employees) under the legal principle of abuse of dismissal rights and the obligation to consider safety (health) need to be scrutinized, as well as their relationship with reasonable accommodation. Besides these, while action similar to reasonable accommodation has already been undertaken in line with the employment quota system, which provides a scheme for cost sharing known as the disability employment levy system, we need to study how employers should be expected to undertake such action within the framework of the reasonable accommodation, which does not have such a scheme.

In Japan until now, the main focus has been on giving special treatment to persons with disabilities in employment situations. As a result, problems concerning the employment of persons with disabilities have tended to be seen as separate from general labor legislation. On the other hand, under the Japanese-style employment system, treatment enabling workers who have been employed for a long time to continue working without being dismissed, even when (temporarily) suffering illness or injury, has developed around a core of judicial precedents. In the sense that they secure and maintain employment for people with disabilities or health problems, these two approaches share the same purpose. But in spite of that, the two are hardly ever mentioned in the same breath, and this has been partially to blame for disparities in the generosity of protection towards workers. It is to be hoped that, with this amendment to the AEPPD, the newly incorporated provisions prohibiting discrimination and obliging employers to provide reasonable accommodation will be seen as bridging the gaps in this debate, and that coherent legislation on the employment of persons with disabilities will be created as a result.