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## Recent Trends and Issues in Employment Policy on Persons with Disabilities

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Until now, Japan's employment policy on persons with disabilities has been based on the quota system. However, the 2013 Amendment of the Act on Employment Promotion etc. of Persons with Disabilities introduces some significant changes. Specific additions to the policy to promote employment of persons with disabilities under the Amendment are (i) the principle of prohibiting discrimination against persons with disabilities and (ii) the obligation on employers to provide reasonable accommodation. These reflect the adjustment of domestic legislation needed to ratify the Convention on the Rights of Persons with Disabilities (adopted by the United Nations General Assembly in 2006), and have been the focus of much social interest. The amendment also makes it obligatory for employers to employ persons with mental disabilities, who until then had only been counted in employment quotas. With these changes, Japan's employment policy on persons with disabilities can be said to have entered a new phase.

This paper reflects on the content of this amendment and discusses various issues the incoming disabled employment policy must face. Namely, what will be classed as discrimination on grounds of disability? What must employers provide as reasonable accommodation? How will the principle of prohibiting discrimination and the conventional quota system coexist? What other challenges will arise when employing persons with mental disabilities? These points will be extremely important when considering the employment of persons with disabilities in future.

### **I. Introduction**

Japan's policy on persons with disabilities went through some very big changes during the 2000s. Employment policy on persons with disabilities was no exception, as it was the subject of unprecedentedly lively debate. This was triggered by the Convention on the Rights of Persons with Disabilities (referred to below as "the Convention"), which was adopted by the UN General Assembly in December 2006 and came into effect in May 2008.

Japan signed the Convention in September 2007, but still needed to adjust domestic legislation in order to ratify it.<sup>1</sup> Among the general obligations, the Convention commits signatory countries to prohibiting discrimination on the basis of disabilities and taking all appropriate steps to ensure that reasonable accommodation is provided to persons with disabilities (Articles 4 and 5). On the issues of work and employment, in particular, signatories are committed to a number of pledges, including the following. (i) To prohibit discrimination on the basis of disability with regard to all matters concerning all forms of employment,

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<sup>1</sup> Japan ratified the Convention in January 2014.

including conditions of recruitment, hiring and employment, etc. (ii) To ensure that reasonable accommodation is provided to persons with disabilities in the workplace. (iii) To promote the employment of persons with disabilities in the private sector through appropriate policies and measures, which may include affirmative action programs, incentives and other measures. And (iv) to protect the rights of persons with disabilities, on an equal basis with others, to just and favorable conditions of work, safe and healthy working conditions, and the redress of grievances.

Partly due to these requirements of the Convention, steps to revise Japan's employment policy on persons with disabilities were set in motion, culminating in the 2013 Amendment of the Act on Employment Promotion etc. of Persons with Disabilities (referred to below as "the Employment Promotion Act"). With this, Japan's disabled employment policy can be said to have entered a new phase.

This paper takes the general theoretical viewpoint of the "Future Employment of Persons with Disabilities in Japan," as featured in this special issue which was drawn up in light of the situation above. First, moves to amend the Employment Promotion Act will be outlined (Section II). This will be followed by reflection on the content of the 2013 Amendment of the Employment Promotion Act (Section III). Finally, outstanding issues in employment policy on persons with disabilities after the amendment will be examined (Section IV).

## **II. Moves to Amend the Employment Promotion Act**

### **1. Progress to Date**

The number of persons with disabilities in employment has been increasing year by year.<sup>2</sup> This increase has been supported by various measures based on the Employment Promotion Act. Ever since it was first established as the Act on Employment Promotion of Physically-Disabled Persons in 1960, the Act has been used to promote the employment of persons with disabilities, with primary focus on the employment quota system. In 1976, the levy system was introduced, and the obligation to make efforts was changed to a legal obligation to employ persons with physical disabilities. Then, in 1987, the scope of application of the Act was changed from "persons with physical disabilities" to "persons with disabili-

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<sup>2</sup> According to the "2013 Aggregated Results on the Status of Disabled Employment," 408,947.5 disabled persons were employed by private companies (companies with a scale of 50 or more employees, i.e. subject to the employment quota system) as of June 1st, 2013. This breaks down into 303,798.5 with physical disabilities, 82,930.5 with intellectual disabilities, and 22,218.5 with mental disabilities. Meanwhile, there were 62,249 disabled persons working in government, local authorities and other public institutions, as well as public corporations and elsewhere. To this is added the number of disabled persons working for companies not subject to the employment quota system. Persons with severe physical disabilities and those with severe intellectual disabilities are counted as double, while part-time workers with physical, intellectual and mental disabilities other than severe categories are counted as half.

ties,” enabling persons with intellectual disabilities to be included in employment quotas (this “inclusion” means that, when employing persons with intellectual disabilities, they are counted as employed persons with disabilities in the same way as persons with physical disabilities). In 1997, it was also made mandatory to employ persons with intellectual disabilities. Again, in 2005, it became possible to include persons with mental disabilities in employment quotas. And in 2008, this was extended to include part-timers with working hours of at least 20 hours but less than 30. In the meantime, the employment quotas themselves were gradually raised, rising from 1.1% (private companies: site-based businesses) when the system was first launched to 2.0% (private companies) in April 2013. The employment quota system could thus be said to have developed as an important system aiming to promote the employment of persons with disabilities, while gradually expanding the scope of persons with disabilities to which it applies and expanding the applicable corporate scale by gradually raising the employment quotas themselves.<sup>3</sup>

## 2. Events Leading to the 2013 Amendment

While Japan’s employment policy on persons with disabilities has thus evolved with its focus on the employment quota system, a legal amendment that significantly changed the nature of the policy came into being in 2013.

One stimulus for the amendment can be found in the adoption of the Convention, as mentioned above. This is because Japan had to adjust its domestic legislation before it could ratify the Convention. In terms of the disabled employment situation, moreover, employment of persons with mental disabilities in private companies had been increasing and the scope of jobs available to them had also broadened, in response to the 2005 amendment that persons with mental disabilities could be included in employment quotas. These various circumstances contributed to moves aimed at amending the Employment Promotion Act.

The processes leading to the amendment can be summarized as follows. Firstly, after the Democratic Party came to power in 2009, the Cabinet decided “Basic Directions for Promoting Reforms of Systems for Persons with Disabilities” in 2010. This raised several matters for review in connection with work and employment. In response to this, three research groups were set up inside the Ministry of Health, Labour and Welfare to study various matters for review, and in August 2012, each group compiled a report on its findings. Then the Labour Policy Council’s Subcommittee on Employment of Persons with Disabilities held a review based on the content of these reports. The Subcommittee’s Statement of

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<sup>3</sup> On the historical development of disabled employment policy, see Noriomi Soya, *Shogaisha Koyo Taisaku no Riron to Kaisetsu* [Theory and commentary on disabled employment policy] (Tokyo: The Institute of Labour Administration, 1998); Naoki Tezuka, *Nippon no shogaisha koyo: Sono Rekishi, Genjo, Kadai* [Disabled employment in Japan: Its history, present status and issues] (Tokyo: Koseikan, 2000); Hitomi Nagano, *Shogaisha no Koyo to Shotoku Hoshō: Furansuho o Tegakari to Shita Kisoteki Kosatsu* [Employment and income security of persons with disabilities: A basic study taking hints from French Law] (Tokyo: Shinzansha, 2013): 41–52.

Opinion (“On the Future Enhancement and Reinforcement of Policy on Employment of Persons with Disabilities”) was published in March 2013. Finally, a bill reflecting the content of the Opinion Statement was submitted to the Diet on April 19, 2013, and after deliberation by both Houses, the “Act for Partial Amendment of the Act on Employment Promotion, etc. of Persons with Disabilities (Law No.46 of 2013)” was enacted with unanimous approval on June 13, 2013.<sup>4</sup>

### **III. Content of the 2013 Amendment**

The amendment that was enacted in 2013 introduced four important changes to the system. Namely, it (i) clarified the scope of persons with disabilities, (ii) introduced prohibition of discrimination against persons with disabilities and the obligation to provide reasonable accommodation for them, (iii) made it mandatory to employ persons with mental disabilities (revised the basis for calculating the statutory employment rate), and (iv) provided for support in processing grievances and resolving disputes.<sup>5</sup>

#### **1. The Scope of Persons with Disabilities**

The first change revises the definition of persons with disabilities. This serves to clarify the scope of persons with disabilities covered by the Employment Promotion Act.

Before the amendment, the Employment Promotion Act defined persons with disabilities covered by it as “those who, because of physical, intellectual or mental disabilities..., are subject to considerable restriction in their vocational life, or who have great difficulty in leading a vocational life, over a long period of time.” In the amendment, this was revised to “those who, because of physical, intellectual, mental (including developmental...) disabilities or other impairments of physical or mental functions..., are subject to considerable restriction in their vocational life, or who have great difficulty in leading a vocational life, over a long period of time” (Article 2 [i]). The purpose of this change is to clarify, in a form consistent with the provisions of the Basic Act for Persons with Disabilities as amended in 2011, that mental disabilities include developmental disabilities and that disabilities caused by intractable diseases are also included in disabilities provided under the Employment Promotion Act.

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<sup>4</sup> Employment Measures for Persons with Disabilities Division, Employment Measures for the Elderly and Persons with Disabilities Department, Employment Security Bureau, Ministry of Health, Labour and Welfare, “Kaisei Shogaisha Koyo Sokushinho no Gaiyo [Outline of the Amended Act on Employment Promotion etc. of Persons with Disabilities],” *Quarterly Labor Law* 243 (Winter 2013): 2–5; Tamako Hasegawa, “Shinpo Kaisetsu, Shogaisha Koyo Sokushinho no Kaisei [New law commentary: Amendment of the Act on Employment Promotion etc. of Persons with Disabilities],” *Hogaku Kyoshitsu* 398 (November 2013): 52–54.

<sup>5</sup> Of these, (i) came into force on the date the amendment was promulgated (June 19, 2013). (ii) and (iv) will take effect from April 1, 2016, and (iii) from April 1, 2018. The article and paragraph numbers below are as of April 1, 2018, when the 2013 Amendment will come into full force.

Incidentally, persons with disabilities covered by the principle of prohibiting discrimination under the Employment Promotion Act are the persons with disabilities provided in Article 2 (i). Of these, persons subject to the employment quota system are limited to those with physical or intellectual disabilities, and those with mental disabilities who have mental disability passbooks certifying that they have a mental disability (Article 37). In other words, there are discrepancies in the scope of persons with disabilities covered by different measures.

## 2. Prohibiting Discrimination and Providing Reasonable Accommodation

The second change is the introduction of provisions on “prohibiting discrimination against persons with disabilities” and “measures to secure equal opportunities for both persons with disabilities and persons without disabilities in the employment sector (obligation to provide reasonable accommodation).”<sup>6</sup> This is an important amendment that adds a “qualitative” improvement in disabled employment to the “quantitative” improvement previously targeted by disabled employment policy. Until this change, with no explicit provision on prohibiting discrimination on grounds of disability or providing reasonable accommodation, the general clauses of the Civil Code (e.g. public morality, the principle of good faith) and provisions of labor law (e.g. abuse of rights) had been used to outlaw discrimination against persons with disabilities, or to impose an obligation for reasonable accommodation.<sup>7</sup> However, it used to be very difficult for these clauses and provisions to be recognized in actual court cases. Therefore, the amendment could be seen as very significant in that it adds explicit provisions on prohibiting discrimination and providing reasonable accommodation to the Employment Promotion Act.<sup>8</sup>

### A. Prohibition of Discrimination

Provisions prohibiting discrimination are divided into those related to recruitment and

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<sup>6</sup> The Disabled Persons Discrimination Elimination Act was also enacted in 2013, as a general law prohibiting discrimination on grounds of disability. Article 13 of that Act states, “Measures to be taken by administrative organs, etc., and businesses as employers to eliminate discriminatory treatment against workers on grounds of disability shall be governed by the Act on Employment Promotion, etc. of Persons with Disabilities.” As such, the Discrimination Elimination Act merely imposes the obligation to *make efforts* to provide reasonable accommodation (Discrimination Elimination Act, Article 8). As discussed below, however, private businesses (employers) are legally obliged to *provide* reasonable accommodation to workers (Employment Promotion Act, Articles 36–2, 36–3).

<sup>7</sup> The Sun Oil (Dismissal of Person with Visual Impairment) Case (Sapporo High Ct., Judgment, May 11, 2006, Rohan 938–68; the Hanshin Bus (Consideration for Service) Case (Kobe Dist. Ct., Amagasaki Branch, Judgment, Apr. 9, 2012, Rohan 1054–38); the Company X Case (Tokyo Dist. Ct., Judgment, Dec. 25, 2012, Rohan 1068–5), etc.

<sup>8</sup> 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): 16, 17.

hiring situations and those concerning situations after hiring.<sup>9</sup> The provision on the former is that “Employers... must give equal opportunities to persons with disabilities as to persons without disabilities” (Article 34), and on the latter, that “Employers must not give 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). In other words, the prohibition of discrimination extends to all aspects connected with employment.

### B. Obligation to Provide Reasonable Accommodation

Similarly, provisions on the obligation to provide reasonable accommodation are also divided into recruitment and hiring situations, and situations after hiring. The provision on the former is that “Employers ... must take necessary measures, taking into account the characteristics of the disability, following a request from a person with disabilities” (Article 36–2), and on the latter, that “Employers ... must take steps such as preparing the facilities necessary for the smooth performance of work, the allocation of support personnel and other necessary measures, taking account of the character of the disabilities the workers have” (Article 36–3). The two differ on the point of whether a request from a person with disabilities is necessary or not. But both include a proviso to the effect that this does not apply when taking necessary measures would place “undue hardship” on the employer. This point is shared by both provisions.

Another provision states that, when providing reasonable accommodation, employers must fully respect the wishes of persons with disabilities, prepare a system necessary for engaging in consultation with workers with disabilities employed by them and appropriately responding to the same, and take other necessary measures in terms of employment management (Article 36–4).

### C. Preparation of Guidelines, etc.

On the prohibition of discrimination and the obligation to provide reasonable accommodation, the Minister of Health, Labour and Welfare is to draw up guidelines enabling employers to appropriately address the prohibition of discrimination, and to appropriately and effectively provide reasonable accommodation (Article 36, Article 36–5). The Minister may also, when deeming it necessary, issue advice, guidance or recommendations to employers (Article 36–6). The action to be taken by employers is to be made clear by such guidelines and advice, etc., from the Minister of Health, Labour and Welfare.

## 3. Mandatory Employment of Persons with Mental Disabilities

In addition to the above, this amendment has made it mandatory to employ persons

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<sup>9</sup> This is the same scenario as in the Equal Employment Opportunity Act for Men and Women.

with mental disabilities (revised the basis for calculating the statutory employment rate).

Under the existing employment quota system, when employing persons with mental disabilities, they can be included in employment quotas as persons with disabilities (exceptional application). However, persons with mental disabilities are not included in the basis for calculating the statutory employment rate.<sup>10</sup> This has now been amended so that persons with mental disabilities are added to the basis for calculating the statutory employment rate.

For the first five years after the amendment comes into effect, however, a measure will be adopted to enable the increase in the statutory employment rate resulting from the addition of persons with mental disabilities to the basis for calculation to be set lower than the rate calculated by using the usual formula. This measure is taken to reflect consideration for employers.

#### 4. Resolution of Disputes

In the amendment, finally, provisions on how to deal with disputes arising inside companies are added to the Employment Promotion Act.<sup>11</sup> Means of resolving disputes newly established in the amended Employment Promotion Act are divided into two types, namely (i) voluntary resolution by the employer and (ii) assistance in resolving disputes by the Director of the Prefectural Labour Bureau. The rationale behind these provisions is that the Convention requires persons with disabilities to be guaranteed a mechanism for redress against working conditions and grievances.

For type (i), the amendment states, in connection with prohibiting discrimination and the obligation to provide reasonable accommodation after hiring, that employers “must, when receiving a complaint from a worker with disabilities, endeavor to achieve a voluntary resolution by means such as entrusting the handling of said complaint to a complaint handling organ (which means an organ for handling complaints from workers at the place of business which is composed of the representative(s) of the employer and the representative(s) of the workers at said place of business)” (Article 74–4). The rationale adopted is that it is preferable for problems to be solved voluntarily as far as possible, through rigorous internal dialog and mutual understanding between workers and employers, when a dispute arises within a company.

For type (ii), on the other hand, the amendment states that the Director of the Prefectural Labour Bureau may, when receiving a request for assistance in the resolution of a dispute from both or either of the parties, provide necessary advice, guidance or recommendation to the parties to said dispute (Article 74–6 [1]); or alternatively, when deeming it nec-

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<sup>10</sup> Statutory employment rates are currently based on the proportion of all workers with physical disabilities and intellectual disabilities (including the unemployed) compared to all workers (including the unemployed) (Article 43 [2]).

<sup>11</sup> The system of support for processing grievances and resolving disputes under the Employment Promotion Act is basically the same as that used in the Equal Employment Opportunity Act for Men and Women, the Child Care and Family Care Leave Act, and the Part-Time Worker Act.

essary for the resolution of said dispute in cases where an application for conciliation is filed by both or either of the parties, the Director of the Prefectural Labour Bureau shall have the Dispute Coordinating Committee conduct conciliation (Article 74–7 [1]). These are stipulated as means of reaching a coordinated resolution when a dispute is not resolved voluntarily inside the company. Another provision is that employers must not dismiss or otherwise treat a worker with disabilities disadvantageously by reason of said worker having requested such assistance or conciliation (Article 74–6 [2], Article 74–7 [2]).

#### **IV. Analysis and Evaluation of the Amendment, and Its Issues**

Based on the content of the amendment as outlined above, the details will now be analyzed and evaluated, and outstanding issues will be examined. While the discussion will follow the content of the amendment in sequence, issues related to the resolution of disputes (Section III. 4) will be dealt with under the prohibition of discrimination and provision of reasonable accommodation (Section IV. 2), and those related to mandatory employment of persons with mental disabilities (Section III. 3) in the section on the employment quota system (Section IV. 3).

##### **1. The Scope of Persons with Disabilities**

The amendment can be said to have further clarified the scope of persons with disabilities covered by the Employment Promotion Act. Nevertheless, the following issues still remain with regard to this scope.

Firstly, although persons with developmental disabilities and other impairments of physical or mental functions have been added to coverage under the Act, in reality, the risk remains that persons without disability passbooks could still be omitted. While it is up to Public Employment Security Offices to judge whether or not persons without disability passbooks should be covered by the Act, there are no standards for making this judgment. Particularly in connection with prohibiting discrimination, moreover, employers will need to judge whether or not the workers they employ are persons with disabilities covered by the Act, but there are no standards for them to do so. As a result, one outstanding issue is how to judge whether persons without disability passbooks are included in the scope of coverage under the Employment Promotion Act.

Another issue is that some persons with disabilities will be omitted from the new definition of persons with disabilities. To be covered by the Employment Promotion Act, a person must be “subject to considerable restriction in vocational life, or have great difficulty in leading a vocational life.” Therefore, those with a mild degree of disability and only minor restriction on their work are not considered to be covered by the Act. Also, since the Employment Promotion Act is designed to promote employment for those who have difficulty in leading a vocational life because they “currently” have a disability, those who do not “currently” have a disability (i.e. those who had a disability in the past, or could have a



disability in the future) and those with disabled persons in their family are not covered by the Act.<sup>12</sup> On the subject of discrimination, in particular, persons with a mild degree of disability and only minor restriction on their work fall victim to this, as do those who do not “currently” have a disability and those with disabled persons in their family.<sup>13</sup> The fact that these people are not protected by the Act could be seen as an outstanding problem in the Employment Promotion Act remaining even after the amendment.

Furthermore, a problem that has always existed is the nature of the system in relying on disability passbooks. When judging whether someone is a “person with disabilities” under the Employment Promotion Act, disability passbooks based on various disability welfare laws play an important role. On persons with physical disabilities, in particular, the definitions of such persons in the Employment Promotion Act and in the Act on Welfare of Persons with Physical Disabilities are completely the same. As a result, whether a person is covered by the Employment Promotion Act is defined by whether that person has a disability passbook. Since the Welfare Act and the Employment Promotion Act have different objectives, there should be distinct means of defining the scope of persons with disabilities in the Employment Promotion Act.<sup>14</sup> In future, it will probably be necessary to study ways of certifying disability specific to the Employment Promotion Act. Hopefully, the problem mentioned above, which affects people who don’t have disability passbooks, will also be solved as a result.

## 2. Prohibiting Discrimination and Providing Reasonable Accommodation<sup>15</sup>

The provisions on prohibiting discrimination on grounds of disability and providing reasonable accommodation contain a number of problem areas, as follows.

### A. Prohibiting Discrimination

Firstly, based on the process of enactment, the only type of discrimination assumed to be prohibited under the amended Employment Promotion Act is direct discrimination on

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<sup>12</sup> Iwamura et al., *supra* note 8, at 18, 19.

<sup>13</sup> This is because, in Japan, it is not discriminatory treatment on grounds of “disability” but discriminatory treatment on grounds of being “a person with disabilities” that is prohibited (see 2. A below). 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): 32.

<sup>14</sup> For a criticism of the importance given to disability passbooks, see Jun Nakagawa, “Shogaisha Koyo Sokushinho no Sabetsu Kinshi Joku ni okeru ‘Shogaisha’ no Gainen [The concept of ‘persons with disabilities’ in clauses prohibiting discrimination in the Act on Employment Promotion etc. of Persons with Disabilities],” *Quarterly Labor Law* 243 (Winter 2013): 12, 13.

<sup>15</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): 27–34.

grounds of the disability itself. Indirect discrimination on grounds of facts connected with the disability is not explicitly prohibited.<sup>16</sup> The reasoning behind this was that the content of the prohibited discrimination had to be made clear, and that the problem of indirect discrimination could be resolved by providing reasonable accommodation. And while the need to establish provisions prohibiting indirect discrimination would have to be studied in future,<sup>17</sup> it was thought premature to incorporate them in this amendment.<sup>18</sup> In the Subcommittee's Statement of Opinion, however, disadvantageous treatment on grounds of using wheelchairs, guide dogs or other support devices, using means of compensating for social disadvantage such as having an attendant caregiver, and others that could be interpreted as indirect discrimination, are assumed to be included in "direct discrimination." Although the amended Employment Promotion Act does not explicitly prohibit indirect discrimination, it could perhaps be said to extend the concept of direct discrimination and essentially prohibit cases that would be taken to fall under indirect discrimination.<sup>19</sup> Moreover, cases of blatantly unreasonable standards that have the effect of excluding persons with disabilities could conceivably be treated as direct discrimination, since a discriminatory intention to establish direct discrimination can be inferred.<sup>20</sup> This kind of interpretation is expected to compensate for the absence of provisions prohibiting indirect discrimination. Meanwhile, the nature of this interpretation will likely be defined more clearly and specifically by the "Guidelines" currently being drawn up, as mentioned above.

Next, the amended Employment Promotion Act has been described as one-sided in prohibiting discrimination. That is, it prohibits discrimination against persons with disabilities, but not discrimination against persons without disabilities, and can therefore be said to condone advantageous treatment for persons with disabilities. This means that the amended Employment Promotion Act provides no redress at all for disadvantage suffered by persons without disabilities, compared to those with disabilities. Moreover, the amended Employment Promotion Act makes no provision at all for discriminatory treatment *between* persons with disabilities. This means that the provisions of the Employment Promotion Act cannot be used as justification when contesting differences in treatment between persons with disabilities. In addition, the Act is composed such that it prohibits discrimination not on grounds

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<sup>16</sup> Based on the text of the amended Employment Promotion Act and the background to its enactment, direct discrimination is distinguished from indirect discrimination in terms of the intention to discriminate. Direct discrimination is construed as being prohibited, in that it is intentional. *Ibid.*, 29.

<sup>17</sup> On this point, one published view states that provisions on indirect discrimination should be added in future, because (i) cases in which reasonable accommodation is the problem and those in which indirect discrimination is the problem differ in the content of proof that must be furnished by employers and workers with disabilities, and (ii) providing reasonable accommodation alone is not enough to stop problems of indirect discrimination from arising. Hasegawa, *supra* note 13, at 33.

<sup>18</sup> The Statement of Opinion of Labour Policy Council's Subcommittee on Employment of Persons with Disabilities, "On the Future Enhancement and Reinforcement of Policy on Employment of Persons with Disabilities," 2.

<sup>19</sup> Iwamura et al., *supra* note 8, at 24.

<sup>20</sup> Tominaga, *supra* note 15, at 31.

of “disability,” but on grounds that the person concerned is a “person with disabilities.” Consequently, discriminatory treatment against people with disabled persons in their family is not subject to regulation. This could be seen as a shortcoming of the amended Employment Promotion Act.<sup>21</sup>

Finally, because the amended Employment Promotion Act prohibits “unfair” discriminatory treatment, the question of what constitutes “unfair” discriminatory treatment is expected to cause problems. The point of prohibiting “unfair” discriminatory treatment is to make sure that affirmative action taken toward persons with disabilities, or different treatment when a difference in working abilities arises, cannot be called “unfair” discriminatory treatment. For example, if there is a system whereby persons with disabilities are prioritized when hiring as *shokutaku* employees (employees on temporary contracts), this would have an aspect of affirmative action. If this aspect is stressed, priority hiring as *shokutaku* employees would not constitute “unfair” discriminatory treatment. However, if only persons with disabilities were hired as *shokutaku* employees, or if hiring as *shokutaku* employees were the only option offered to persons with disabilities, and as a result, persons with disabilities were only guaranteed a low wage, this could constitute “unfair” discriminatory treatment.<sup>22</sup> Meanwhile, even when a difference arises in working ability, if a markedly unreasonable difference in remuneration is created in excess of that difference, this would also be “unfair” discriminatory treatment.<sup>23</sup> The question of what constitutes “unfair” treatment needs to be carefully interpreted in future. And it is to be hoped that, as a result of this interpretation, a “qualitative” improvement in employment of persons with disabilities can be achieved.

## B. Reasonable Accommodation

Another important point of this amendment is that it establishes the obligation on employers to provide reasonable accommodation. The Convention defines the denial of reasonable accommodation as one form of discrimination (Article 2 of the Convention). However, the amended Employment Promotion Act opts only for a provision obliging employers to provide reasonable accommodation, in that creating an obligation to provide reasonable accommodation and prohibiting the failure to do so, as a form of discrimination, are both equal in effect.<sup>24</sup> On the subject of providing reasonable accommodation, the amended Employment Promotion Act can be characterized as adopting a legislative format that does not clarify the rights of persons with disabilities.<sup>25</sup>

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<sup>21</sup> Iwamura et al., *supra* note 8, at 15, 16.

<sup>22</sup> Iwamura et al., *supra* note 8, at 20, 21.

<sup>23</sup> For details, see Tominaga, *supra* note 15, at 30, 31.

<sup>24</sup> The Subcommittee’s Statement of Opinion, *supra* note 18, at 2.

<sup>25</sup> 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): 11.

At the stage of recruitment and hiring, reasonable accommodation is to be provided following a “request” by a person with disabilities.<sup>26</sup> The reason for requiring a “request” is that, at the stage of recruitment and hiring, employers do not know the disability status of persons with disabilities. Conversely, after hiring, a “request” is not a requirement for providing reasonable accommodation. Nevertheless, the amended Employment Promotion Act holds that employers must fully respect the wishes of persons with disabilities when devising reasonable accommodation, and must adjust their systems so that they can respond to consultation from workers with disabilities. The content of reasonable accommodation is not determined uniformly. As to what sort of reasonable accommodation is specifically sought, the wishes of persons with disabilities must be respected. Therefore, although a “request” is not a requirement, it could be seen as desirable for the provision of reasonable accommodation after hiring also to be based on a request from a worker with disabilities, with a view to eliminating prejudice.<sup>27</sup> Here again, the “Guidelines” currently under review will likely play an important role in determining the specific content of reasonable accommodation.

Besides the above, how to judge “undue hardship” could also be a problem in connection with reasonable accommodation. “Undue hardship” is thought to comprise (i) disproportionate burden and (ii) excessive burden. Of these, (i) includes cases in which the cost of measures based on reasonable accommodation (not only monetary cost, but also including the difficulties of personal, organizational or work-related response) is not in proportion to the benefits of harnessing the ability and ensuring equality of opportunity and conditions for persons with disabilities. It also includes cases where there are other highly effective measures for the same cost, and cases where there are other measures with the same effect but at lower cost. On the other hand, (ii) includes cases in which the burden is judged excessive in light of overall circumstances, such as the company’s scale and the state of its finances.<sup>28</sup> Although both (i) and (ii) certainly have potential to constitute undue hardship, when judging this, care must be taken not to overlook the purpose of imposing an obligation for reasonable accommodation on employers.

The mechanism of the levy system is also expected to be used in connection with employers’ burdens.<sup>29</sup> Indeed, the Subcommittee’s Statement of Opinion suggests the possibility that the mechanism of levies will be applied as one aspect of adjusting financial burdens among employers, and that this could at the same time help to ease the financial burdens on

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<sup>26</sup> It should also be borne in mind, however, that some persons with disabilities would have difficulties in appropriately conveying their own need for reasonable accommodation to their employers. It has been pointed out that limiting the person making the request to “persons with disabilities,” as in the text of the Employment Promotion Act, is problematic. Hasegawa, *supra* note 13, at 37.

<sup>27</sup> Tominaga, *supra* note 15, at 32, 33.

<sup>28</sup> Tominaga, *supra* note 15, at 33, 34.

<sup>29</sup> In France, for example, the existence of public subsidies is taken into account when deciding whether a burden is excessive. There, levies are used as a fiscal resource for a very diverse array of subsidies provided to employers.

employers arising from reasonable accommodation. Revising the levy system in this direction must be a task for the future.

### C. Ensuring Effectiveness

The following points can be made with regard to means of ensuring the effectiveness of prohibiting discrimination and the obligation to provide reasonable accommodation.

Firstly, provisions prohibiting discrimination and obliging employers to provide reasonable accommodation in the amended Employment Promotion Act are administrative enforcement provisions, and are not considered to have effect in private law. The prohibition of discrimination and the obligation to provide reasonable accommodation are merely to be observed in an administrative context, and are not thought to trigger claim rights in civil law. On this point, the amended Employment Promotion Act could be said to have its limitations. However, general clauses of the Civil Code and the provisions of labor law can be used to contest disadvantageous treatment in a causative relationship with discrimination and the obligation to provide reasonable accommodation in court cases, as has been the case until now. Provisions on prohibiting discrimination and reasonable accommodation, as prescribed in the amended Employment Promotion Act, are thought likely to influence the interpretation of these general clauses of the Civil Code and provisions of labor law in future, and in fact, are expected to do so.<sup>30</sup>

On the other hand, while encouraging voluntary resolution of disputes, the amended Employment Promotion Act adopts the method of “ensuring effectiveness by administrative intervention.” This refers to advice, guidance or recommendations to employers from the Minister of Health, Labour and Welfare or from the Director of the Prefectural Labour Bureau, and conciliation by the Dispute Coordinating Committee following a request from both or either of the parties. This administration-led approach feels inadequate in terms of upholding the rights of individuals. Nevertheless, using this approach can probably be expected to raise the levels of prohibition of discrimination and provision of reasonable accommodation in society as a whole.<sup>31</sup> A characteristic of the amended Employment Promotion Act could be said to lie in the fact that it adopts this method.

Moreover, it has been pointed out that this method lacks an aspect of participation or involvement by representatives of persons with disabilities when resolving disputes. There have also been demands from persons with disabilities that opportunities for dialog be created, mediated by support workers or others with detailed knowledge of the field of disabled employment, positioned midway between voluntary resolution by the employers and assis-

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<sup>30</sup> Iwamura et al., *supra* note 8, at 25. However, on the obligation to provide reasonable accommodation itself, measures based on the obligation are diverse and cannot be uniformly specified. As such, it is construed that demands for specific measures to be implemented will not be possible. Tominaga, *supra* note 15, at 34.

<sup>31</sup> Ikehara, *supra* note 25, at 11.

tance in resolving disputes by the Director of the Prefectural Labour Bureau.<sup>32</sup> In relation to resolving disputes, the participation or involvement of representatives of persons with disabilities and experts in the field of disability will probably be an issue from now on.<sup>33</sup>

### 3. The Employment Quota System

Several issues can be raised concerning the employment quota system.

#### A. Relationship with the Principle of Prohibiting Discrimination

Firstly, introducing the principle of prohibiting discrimination throws up the theoretical problem of how to position it in relation to the employment quota system. On this point, the employment quota system is thought to be positioned as affirmative action toward persons with disabilities.<sup>34</sup> This means, in other words, that the employment quota system is not thought incompatible with the principle of prohibiting discrimination. The employment quota system has, so far, contributed to a “quantitative” improvement in employment of persons with disabilities, but not necessarily to a “qualitative” one. In future, both “quantitative” and “qualitative” improvements in their employment are expected to result from a combination of the employment quota system and the principle of prohibiting discrimination.

Incidentally, the system of special subsidiaries based on the employment quota system has also contributed to employment of persons with disabilities in large corporations.<sup>35</sup> Concerning these special subsidiaries, the Labour Policy Council’s Subcommittee on Employment of Persons with Disabilities has expressed the view that the system should be continued because “It has played a great role in promoting employment of persons with disabilities, and also contributes to continued employment of many persons with disabilities, taking their characteristics into consideration.”<sup>36</sup> At present, however, working conditions in

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<sup>32</sup> On this point, support from Public Employment Security Offices, Local Vocational Centers for Persons with Disabilities and others could possibly be used, as well as follow-ups by Employment and Life Support Centers for Persons with Disabilities, job transition support providers and special support schools. 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): 44.

<sup>33</sup> *Ibid.*, 46.

<sup>34</sup> See “Research Group Report on the Response to the Convention on the Rights of Persons with Disabilities in the Fields of Work and Employment (August 3, 2012)” 7. In the process of drafting the Convention, it is confirmed that employment quota systems were included in affirmative action. Ryosuke Matsui, “Rodo [Work],” in *Shogaisha no Kenri Joyaku to Nippon: Gaiyo to Tenbo* [The Convention on the Rights of Persons with Disabilities and Japan: Overview and prospects], ed. Nagase Osamu, Toshihiro Higashi, and Satoshi Kawashima (Tokyo: Seikatsu Shoin, 2008): 172.

<sup>35</sup> Special subsidiaries are subsidiaries established within the framework of the employment quota system. Workers employed by a special subsidiary are deemed to be employed by the parent company that established the subsidiary (Employment Promotion Act, Article 44).

<sup>36</sup> The Subcommittee’s Statement of Opinion, *supra* note 18, at 7. According to the “2013 Aggregated Results on the Status of Disabled Employment”, as of June 1, 2013, a total of 380 companies

special subsidiaries generally differ from those in the parent companies, while a transition from special subsidiaries to parent companies is not basically assumed.<sup>37</sup> Moreover, because special subsidiaries mainly recruit persons with disabilities and provide them with employment opportunities, some have expressed the view that they are also problematic in terms of inclusion of persons with disabilities. Introducing the principle of prohibiting discrimination is likely to trigger a demand for special subsidiaries that do not contradict the principle of prohibiting discrimination.

#### B. Problems with the Mandatory Employment of Persons with Mental Disabilities

As problems and issues accompanying the mandatory employment of persons with mental disabilities, one could firstly cite the fact that persons with mental disabilities eligible for mandatory employment are limited to those who have mental disability passbooks. To be sure, it cannot be denied that, since the obligation to employ persons with disabilities imposed on employers is linked to the obligation to pay levies, there will be a demand that the scope of persons with disabilities subject to mandatory employment should be made clear, fair and nationally uniform. It could also be said that confirming this scope using disability passbooks is reasonable as a basis for this. However, the proportion of persons with mental disabilities who have actually obtained mental disability passbooks is not very high. As a result, limiting eligibility to those with mental disability passbooks has caused the problem that persons who should normally be covered by the employment quota system are excluded from eligibility for the system. As also discussed under the scope of persons with disabilities, it would probably be effective to deal with this problem by introducing a means of defining the scope of persons with disabilities unique to the Employment Promotion Act.

Another problem or issue is that, by making persons with mental disabilities subject to mandatory employment, companies will start to “hunt out” such persons (including forced acquisition of mental disability passbooks). With a view to preventing this “hunting out,” the Ministry of Health, Labour and Welfare has already issued “Guidelines on Identifying and Confirming Persons with Disabilities with Consideration for Privacy.” Employers will probably be required to make rigorous efforts to respond in a form that complies with these Guidelines.<sup>38</sup>

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had obtained certification as special subsidiaries, and 20,478.5 persons with disabilities were employed by them. This corresponds to about 5% of all disabled persons working in companies subject to the employment quota system.

<sup>37</sup> Matsui, *supra* note 34, at 176, 177.

<sup>38</sup> For more details on the above issues, see Hiroyo Tokoro, “Seishin Shogaisha no Koyo Gimuka to Kongo no Kadai [Mandatory employment of persons with mental disabilities and future issues],” *Quarterly Labor Law* 243 (Winter 2013): 54–59.

## **V. Conclusion**

This paper has confirmed the content of the 2013 Amendment of the Act on Employment Promotion etc. of Persons with Disabilities and examined outstanding issues remaining after the amendment. When the amended Act comes into effect, Japan's employment policy on persons with disabilities will enter a new stage. Until now, Japan's policy for promoting their employment can be said to have made quantitative improvements based on the employment quota system. Now, with the new addition of the principle of prohibiting discrimination, improvements are also expected to be made in qualitative aspects. The amendment will also add persons with mental disabilities to mandatory employment under the employment quota system, further strengthening its significance. In future, the already established employment quota system and the newly introduced principle of prohibiting discrimination will mutually supplement each other while contributing to quantitative and qualitative improvements in employment of persons with disabilities.

However, employment policy on persons with disabilities will need to be continuously revised. This is because the problems and issues highlighted in this paper still remain unresolved. And while future issues have mainly been examined with focus on the content of the 2013 Amendment in this paper, there are still many other matters that will need to be examined. These remaining problems and issues will need to be carefully studied one by one and systems related to employment of persons with disabilities continuously improved in future.