THAT OBSCURE OBJECT OF DESIRE: THE DECLINE OF INFORMAL BARGAINING OVER EMPLOYEE LEAVES IN JAPAN

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I. INTRODUCTION

The traditional pattern of employment relations in Japan has been described by commentators as that of lifetime employment with workers' lives adjusted to the needs of their employers.[1] Accordingly, upon joining a company, an employee enters into a "social contract" with his employer by which he pledges his total devotion to that company in exchange for lifetime economic security for himself and his family.[2]

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1. *See* CHALMERS JOHNSON, MITI AND THE JAPANESE MIRACLE 11-12 (1982).

2. *See generally* Marcia J. Cavens, Comment, *Japanese Labor Relations and Legal Implications of Their Possible Use in the United States*, 5 NW. J. INT'L L. & BUS. 585 (1983). However, many scholars point out that only about one-third of the overall workforce is "core employees" protected by the life employment system. *See* KAREL VAN WOLFEREN, THE ENIGMA OF JAPANESE POWER 170 (1989).

Incidentally, such a system has been largely premised on male dominance; men typically need less time outside of the workplace as compared to women, who have additional responsibilities unrelated to the workplace, like child care.[3] Despite these cultural and socio-economic factors that primarily define the Japanese workplace, women have played, and are increasingly playing, substantial roles in many areas of the nation's workforce.[4]

To its credit, the institution of lifetime employment has encouraged a collective spirit among corporate employees, yet it has also discouraged long leaves of absence and leisure outside the firm.[5] Employees almost exclusively socialize with their fellow co-workers, thereby thwarting more individualistic lifestyles.[6] This system has also impeded the mobility of the workforce because it offers very few opportunities for career changes or post-graduate studies once an employee embarks on a career.[7] The employer's control is epitomized by its power to transfer people on short notice to various geographic locations. Due to the high priority given to the corporation's needs, the employee is often required to adjust his or her lifestyle accordingly. For instance, transferred employees often have to live without their families for a extended periods of time because of difficulties in relocating the children to new schools or kindergartens. In exchange, employers provide special benefits for such employees, including short-term leaves for family reunions or extra allowances to commute to work.[8]

In recent years, however, there has been much pressure to change this traditional pattern of lifetime employment. Due to economic restructuring in the 1980s and 1990s, Japan has shifted its business philosophy from that of an export-oriented nation to one more focused on domestic demand.[9] In light of substantial Japanese trade surpluses with the rest of the world, the Japanese government has repeatedly attempted to encourage domestic consumption due, in part, to foreign pressure.

The economic realities of the 1980s cast doubt on the country's perception of itself as the "nation of producers," as well as an exporting giant. This, in turn, prompted the transition towards the consumption-

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3. *See* VAN WOLFEREN, *supra* note 2, at 172-74.
4. *See id.* at 172-73.
5. *See* Cavens, *supra* note 2, at 594-99.
6. *See* VAN WOLFEREN, *supra* note 2, at 161-62.
7. *See id.*
8. *See id.* at 162.
9. *See generally* Harumi Yamamoto, *The Lifetime Employment System Unravels*, 40 JAPAN Q. 381 (1993).

centered model of economic development and required reconsideration and subtle readjustment of the methods of regulating employer-employee relations. Despite this self-evaluation, a surge of litigation in recent years has focused on different aspects of employee rights.

Court battles over the right to paid leave illustrate the increasing willingness of workers to resort to formal legal processes rather than to informal bargaining with their employers. Informal bargaining has been further weakened by the recent rights-defining legislation designed to reduce the overall working time in the nation. Due to the failure of earlier attempts to regulate the free time of employees through the familiar tools of administrative guidance, the introduction in 1993 of provisions that were more formalized and legalistic regarding work time reductions suggests that such informality may be largely ineffective in the new economic environment.

In addition to legal practices, both cultural traditions and economic exigencies greatly influence labor relations in Japan.[10] These social norms have long been the core standards used to control various economic and social changes. The heightened competition of the 1990s, the bursting of the "bubble economy," and the decreasing supply of labor in Japan have all added to the complexity of feasibly freeing up personal time for Japanese "salary men"[11] without undermining a system that prefers the informal adjustment of interests to formal adjudication grounded in rights-based theories.[12]

This Article shows that the new economic and social forces that challenge the power that employers have over the nation's workforce may also pose a threat to the traditional, informal regulation of working time. In this context, analyses of the history of litigation over paid leaves and the recent legislation aimed at reducing working time will illustrate how Japanese employees have tended to resort to the judicial process to settle conflicts with employers over the terms and conditions of their paid leave. Furthermore, the effectiveness of the recent measures aimed at balancing the time employees spend working as opposed to enjoying other private pursuits will be evaluated, with occasional comparisons to the regulation

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10. Many commentators identify a cultural phenomenon as partially responsible for the long working hours in Japan, namely, the underutilization of vacation time that has been made available to employees by the Labor Standards Act. *See, e.g.*, Hajime Wada, *Reconsidering Legal Doctrines Concerning Annual Leaves*, 167 KIKAN RODOHO [LABOR L.Q.] 20, 28 (1993) (in Japanese). *See also* Cavens, *supra* note 2, at 587-99.

11. *See* VAN WOLFEREN, *supra* note 2, at 159-63 (describing the nature of the term "salary men").

12. *See* Cavens, *supra* note 2, at 599-606.

of employee free time in the United States. This writing predicts that the emphasis on informality and private negotiation in regulating the work and leisure time of Japanese employees will give way to a more formalistic dispute resolution process, one which stresses defined legal entitlements of the parties. Unlike other employment disputes in post-war Japan, the current social conflict will become increasingly more difficult to resolve through informal means, epitomized by the recent paid leaves litigation. This difficulty is due, in large part, to the unique competitive pressures on employers, coupled with the increasing social demands on, and expectations of, employees. The interests of these parties may have become too polarized to be amenable to government-sponsored informal adjustment.

II. STATUTORY ENTITLEMENT TO PAID LEAVE

The duration of employee off-work time in Japan is generally regulated by several statutes that have recently been adopted and extensively amended. The Labor Standards Act (LSA or Act), one of the paramount post-World War II labor laws, guarantees an annual paid leave to all eligible employees.[13] Under the LSA, an employer must provide a paid annual leave to an employee who has been continuously employed by that employer for more than six months.[14] The Act has been amended

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13. *See* Labor Standards Act (Law No. 49 of 1947) [hereinafter LSA]. An English translation of the LSA (not done by the author) is available at <http://home.highway.or.jp/JAPANLAW/tul.txt> (visited Feb. 21, 1997).

14. Section 39 of the LSA grants to employees the right to an annual leave by providing, in pertinent part, the following:

> 1. The employer shall provide a paid leave for 10 working days, continuously or divided in several periods, to the employee who was continuously employed for 6 months from the date of hiring and who worked at least 80% of all working days during that employment period.
> 2. The employer shall each year provide a paid leave for the period specified in the preceding paragraph, with an additional leave day for each period of continuous employment exceeding 6 months, to the employee (but only if the employee worked at least 80% of all working days) who has been employed continuously for 1.5 years or more, *provided*, that there shall be no duty to provide a paid leave for the period exceeding the total 20 days of leave . . . .
> 3. [Omitted by the author.]
> 4. The employer shall provide a paid leave in accordance with the preceding three paragraphs within the period requested by the employee. However, a paid leave may be provided in a period other than that requested, if the provision of the leave in the desired period would interfere with the normal operation of the business.
> 5. For paid leaves exceeding 5 days, the employer may provide a paid leave in accordance with a written agreement with the labor union if such union

several times; the most recent amendment having substantially reduced the minimum length of employment requirement and eased other conditions which must be satisfied in order to be eligible for a paid leave.[15]

In addition, the LSA guarantees certain other benefits, such as maternity leave for female employees and off-work recuperation time for any employee injured in the course of employment.[16] Such leaves are provided to fulfill a specific statutory purpose and can be seen as necessary components of equitable labor law, rather than as a creation of new entitlements. The social significance of these special purpose leaves is also different from that of the paid leave legislation.[17] Therefore, the analysis of the special purpose legislation will not be addressed in this Article.

Legal issues concerning paid leaves have assumed great significance in recent years, largely because of an increased awareness in Japanese society of the overall "quality of life."[18] Although a typical

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> represents a majority of employees at a particular workplace, or, in the absence of such union, with a representative of the majority of employees. This written agreement determining the paid leave duration shall be based on provisions as specified in paragraphs 1 through 3 of this section, notwithstanding the provisions of the preceding paragraph.
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> 6. The employer shall pay to the employees the average wages, or normal wages in the case of an employee who has worked the prescribed number of hours, for the period of a paid leave as provided in paragraphs 1 through 3, [and] in accordance with work regulations and other relevant provisions. However, the employer shall be bound by a written agreement with the labor union if such union represents a majority of employees at a particular workplace, or, in the absence of such union, with a representative of the majority of employees, if the agreement provides for a payment equal to the standard daily allowance as prescribed by § 3 of the Health Insurance Act (Law No. 70 of 1922) . . . .

15. *See* Act Partially Amending the Labor Standards Act and the Act Concerning Interim Measures to Encourage the Reduction of Working Hours (Law No. 79 of 1993) [hereinafter Amendment Act]. The Amendment Act relaxed the requirement of continuous employment necessary to qualify for a paid leave from one year to six months. *See id.* § 1. The Amendment Act also provides that the entitlement to additional days off work starts accruing after 1.5 years of continuous employment (Section 39(2) of the pre-amendment Labor Standards Act mandated two years of employment).

16. *See* LSA § 68 (sickness leave upon a female employee's request), § 65 (childbirth leave), § 76 (recuperation leave upon injury).

17. Likewise, neither the recently adopted statute regulating employee leaves to care for a newborn child, nor the guidelines regulating employee leaves to care for the elderly promulgated by the Japanese Ministry of Labor, are addressed in this Article. *See* Act Concerning Child Care Leaves, Etc. (Law No. 76 of 1991).

18. *See generally* Haruo Shimada, *Structural Distortion of the Japanese Economy and SII: Labor's Perspective*, 29 JAPAN LAB. BULL. 4 (May 1990).

Japanese "salary man" has become much more affluent in the past decade, he still spends the vast majority of his lifetime with his firm, leaving relatively little time to enjoy life outside the workplace.[19] While reports of deaths due to overworking are no longer common, the demands for a more balanced lifestyle are likely to increase in Japan as the country becomes more and more exposed to the outside world.[20] In this context, Japanese society has recently focused on two major interrelated issues: the availability of paid leaves to "salary men" and the overall reduction of working time. This social awareness has been magnified by conflicting economic pressures which have forced companies to reduce costs and eliminate many employee benefits.[21]

A. Employee Protection Under the Labor Standards Act

The LSA establishes the fundamental terms and conditions of employment. This legislation seeks to enhance the bargaining power of employees vis-à-vis their employers by creating a series of "inalienable entitlements" to protect employees,[22] including the right to a paid leave.[23] The statute purports to encourage informal adjustment of interests between labor and management by placing employees on equal footing with their employers.

To be eligible for a paid leave of a specific duration, as guaranteed by section 39 of the LSA, the employee has to satisfy the conditions of the statute, such as working continuously for the same employer for at least six months.[24] The LSA applies to virtually all employees in Japan, excluding only family businesses,[25] certain categories of public employees,[26] and seamen.[27] In addition, the statute grants specified grace periods to certain enumerated enterprises.[28]

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19. *See* VAN WOLFEREN, *supra* note 2, at 161-62.

20. The pillars of Japanese labor relations, such as the seniority-based wage system and the discretionary relocation of employees, have increasingly come under legal attack. *See generally* Kazuo Sugeno, *Management Flexibility in an Era of Changes: The Court's Balancing of Employer and Employee Interests*, 30 JAPAN LAB. BULL. 5 (June 1991).

21. *See generally* Yamamoto, *supra* note 9.

22. *See* LSA §§ 1-12 (general provisions).

23. *See id.* §§ 39-41.

24. *See id.* § 39. The section provides that working time accrues from the date of hiring and that the employee must be present at work for at least eighty percent of the total working days. Fulfilling these requirements guarantees the employee ten paid leave days. *See infra* note 15.

25. *See* LSA § 8 and LSA Implementing Regulations (Ministry of Health and Public Welfare Order No. 23 of 1947) § 1.

26. *See* State Public Employees Act (Law No. 120 of 1947) § 106 and Miscellaneous Provisions § 16 (excluding the application of LSA to certain public employees).

The Act's provisions establish minimum requirements designed to protect employees,[29] allowing employers the freedom to provide their employees with time off in excess of the statutory protection as an additional benefit.[30] The general purpose of the Act is to rectify the imbalance of bargaining power between employers and employees.[31] The Act prescribes a number of remedies available to employees to enforce their rights.[32] Thus, violations of the LSA's mandates may subject the employer to a maximum criminal fine of $3,000 or imprisonment for up to six months.[33] Punitive damages are also available if the employer violates section 39(6) of the LSA which requires payment of normal wages to employees who take paid annual leaves.[34] Such punitive damages are levied at double the amount of the unpaid wages.[35] Although the amount of the monetary award may not be very high when one accounts for the lengthy, expensive litigation process, courts normally consider awarding attorney fees and other litigation costs to the prevailing party. Therefore, the LSA establishes certain employee entitlements that a court will enforce.[36] This statutory reallocation of

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27. *See* LSA § 116.

28. LSA (Miscellaneous Provisions) § 133 provides a grace period for employers with 300 or fewer permanent employees and sets forth a schedule delineating gradual increases of the minimum leave period from six working days in 1987 to ten working days effective April 1, 1994.

29. *See* LSA § 1.

30. Many private Japanese companies guarantee additional time off to their employees (in excess of the minimum mandated by the Act). Apparently, the terms of those leaves vary from company to company (e.g., they may be paid, unpaid or partly paid). Among those most common are the special summer leaves, reserved leaves, "refreshment leaves," and anniversary leaves. *See, e.g.*, Note, *Working Conditions and the Labor Market*, 29 JAPAN LAB. BULL. 2, 3 (July 1990). Thus, in practice, the terms of paid leaves can be augmented to a certain extent by informal arrangements between employers and employees.

31. *See* LSA § 2.

32. *See id.* §§ 117-21.

33. *See id.* § 119(1) (requiring criminal fines or imprisonment of an employer's officers for up to six months for violations of the Act).

34. *See id.* §§ 39(6), 114.

35. *See id.* § 114.

36. By way of comparison, the private ordering of leave benefits is more pronounced in the United States than in Japan. In the United States, the right to a paid leave has traditionally been regulated largely by common law, pursuant to an agreement between the employer and the employee. American employees generally have no vested right to continued employment in absence of an express or implied agreement. The employment-at-will doctrine, exemplified in a landmark decision of *Payne v. Western & Atlantic R.R.*, 81 Tenn. 507 (1884), allows the employer to discharge an employee at will "for good cause, for no cause or even for cause morally wrong, without being thereby guilty of a legal wrong." *Id.* at 519. Various court decisions hold that there is no common law right to a paid vacation in the absence of an agreement to that effect. *See* New Mexico State Labor & Indus. Comm'n v. Deming Nat'l Bank, 634 P.2d 695, 696 (N.M. 1981) ("[A]n employee has no right to a paid vacation in absence of an agreement, either express or implied." *See* Marine Inspection Service, Inc. v. Alexander, 553 S.W.2d 185, 188 (Tex. Civ. App.

legal entitlements in favor of employees is not meant, however, to be an invitation to sue the employer, but rather encouragement to negotiate on the basis of parity.[37]

To promote this informal negotiation of the terms of employment, the Labor Standards Act specifically provides for other methods of private ordering, such as work regulations.[38] Although drafted by the employer, work regulations are normally viewed as being jointly conceded by both parties, rather than unilaterally stipulated by the employer.

B. Work Regulations As a Bargaining Technique

Currently, almost all Japanese companies have their own management-established work regulations.[39] Among other conditions of employment, these work regulations commonly prescribe the terms of various types of leaves, including the accrual and duration of leaves, and methods of designating the timing of the leave.[40] The LSA serves to protect against employer overreaching by establishing mandatory minimum conditions of employment. Therefore, work regulations guaranteeing employee vacations and other benefits cannot fall below those statutorily-required levels.[41] In practical terms, the content of the particular employee's right to a paid leave is largely defined in the language of the employer's work regulations. These, of course, may be given higher procedural and substantive benefits to employees over and above the statutory minimum.[42] Thus, the actual scope of employee

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1977)). In addition to the common law, state statutes may regulate some particular issues surrounding vacation benefits. *See* CAL. LABOR CODE § 227.3 (West 1996). That provision, as interpreted by the California Supreme Court, requires that pro-rata vacation pay be paid to an employee who quits or is terminated before the paid leave eligibility date. *See* Suastez v. Plastic Dress-Up Co., 31 Cal. 759, 784 (1982).

37. *See* LSA § 2. This section provides that employers and employees shall determine the conditions of employment "on the basis of equality." Clearly, such informal bargaining is subject to the minimum conditions of employment prescribed by the Act. *See* LSA § 1; s*ee also infra* note 43.

38. *See* LSA §§ 89-93.

39. LSA § 89(1) provides that every employer covered by the Act having ten or more permanent employees must have work regulations and should notify the competent administrative agency once the regulations are promulgated. Thus, only very small companies are not required to adopt some sort of work regulations.

40. *See* LSA §§ 89-93.

41. *See id.* § 1.

42. In the United States, terms and conditions of employment, including paid leave policies, are often set forth in employee handbooks. Courts have ruled that statements in such handbooks, if sufficiently detailed and communicated to the employee, may constitute an enforceable contract. *See* Green v. American Cast Iron Pipe Co., 446 So. 2d 16, 20-21 (Ala. 1984); Knecht v. Board of Trustees for State Colleges, 591 So. 2d 690, 694-95 (La. 1991). Certain customary practices may also establish an implied agreement as to the terms of the leave. *See* Aasmundstad v. Dickinson

leave benefits are left in large part to the informal negotiations between the employer and employee.

The LSA requires that conditions concerning employee leaves be included in the work regulations.[43] The specific provisions of work regulations are enforceable against an employee in court if the employee has not specifically objected to them when entering into an employment contract.[44] These work regulations are thus given the effect of a "practical custom." In other words, an employee need not have conscious knowledge of, or even give affirmative approval to, the terms of the employment contract for the regulations to become effective and enforceable by the employer.[45] These efforts to stave off litigation in this area by using legal strategies, such as the practical custom doctrine and judicially created objection requirement have, however, impeded the success of the LSA in balancing the respective bargaining powers of employers and employees.[46]

Due to the practical failure of the statute,[47] the legislature acted to amend the LSA in 1987. The amendments introduced the system of "scheduled leaves." Under this system, an employer may agree to provide paid leaves to its employees pursuant to a written agreement with the labor union or other employee representative.[48] Clearly, the new provision anticipates that the parties will negotiate the timing of each scheduled leave, and thus, the employees' interests will be balanced with

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State College, 337 N.W.2d 792, 797 (N.D. 1983) (employer's practice of allowing employees to receive compensation for unused vacations at retirement precluded the employer from requiring that the employee use up his vacation in lieu of compensation).

43. *See* LSA § 89(1). Because the issue of working time is a mandatory item, the failure to include pertinent provisions will render the regulations ineffective. *See* Noboru Kataoka, 2 LABOR LAW at 511 (1975) (in Japanese).

44. Shuhoku Bus Case, 22 MINSHU 3459 (1968).

45. *See id.* at 3460.

46. Because work regulations are drafted by employers, the courts and legal scholars frequently voice concern that the employer may abuse its power and adopt regulations that are unfavorable to employees. Although the drafting of work regulations is, of course, subject to the general duty that both employers and employees "determine the conditions of employment on the basis of equality," the threat of such overreaching is possible. *See* LSA § 2(1). One other safeguard is the "practical custom" doctrine which allows the court to give less weight to certain work regulation provisions that might be unfair to the employee, as opposed to a contractual agreement that would have bound both parties by the language of the covenant.

47. The LSA previously introduced a so-called "free-style leave." This move constituted a drastic attempt to resolve by negotiation disputes concerning paid leaves since they were difficult to structure adequately in the statute. Free-style leaves never became popular, and the corresponding provision in the Labor Standards Act was deleted.

48. *See* LSA § 39(5).

the employer's need to ensure the smooth operation of its business by constantly maintaining an adequate workforce.

Although the rationale behind the new system attempted to weigh the business interest of employers against the employees' desire for uninterrupted vacations, the direct purpose of the provision was to informally encourage employees to fully utilize their paid leave time.[49] The amended statute thus sought to enhance the employees' bargaining power in order to induce the cooperation of employers in scheduling such leaves. However, in the current, polarized, rights-centered environment, the LSA's amended section 39(5) has also created a conflict pitting the employee's right to designate a particular time for a leave against the corresponding duty of the employer to provide it without compromising or interfering with the employer's business operations. Specifically, the amendment left unclear whether the employer could still exercise its right to redesignate scheduled leaves, especially when it had agreed at the beginning of the year to a master schedule of paid leaves.[50] Also, LSA section 89(1) requires that the methods of designating the timing of a paid leave by individual employees be specified in work regulations. This provision exposed the leave's schedule provisions to different legal interpretations. Consequently, employee suits with respect to this issue continued unabated, with new ad hoc entitlements being established by the Japanese courts.[51]

The strong Japanese preference for informal dispute resolution as well as the LSA's statutory vagueness regarding employee rights and paid leaves both added to the proliferation of rights-based adjudication. As the dissatisfied parties increasingly turned to courts for relief, a number of precedent-setting judicial opinions focused on legal entitlements with respect to paid leaves.[52] These decisions reflect the judges' general

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49. *See* Wada, *supra* note 10, at 27 (citing KIHATSU [ADMINISTRATIVE RULING] No. 1, January 1, 1988).

50. The issue was put to rest by the Mitsubishi Heavy Industries, Nagasaki Shipyard Case, 45 ROMINSHU 123 (Fukuoka High Ct. 1994), which held that scheduled leaves extending over five days should be negotiated jointly by the employer and the union pursuant to § 39(5). The decision held that neither the employee's right to designate, nor the employer's right to redesignate the timing of the leave, could be exercised once the scheduled leaves for a particular period were agreed upon.

51. To illustrate, the district court decision in the *Nagasaki Shipyard Case* held that the language of LSA § 39(5) excluded the application of § 89(1). Mitsubishi Heavy Industries, Nagasaki Shipyard Case, 1457 ROKEISOKU 3 (Nagasaki Dist. Ct. 1992), *aff'd on other grounds*, 45 ROMINSHU 123 (Fukuoka High Ct. 1994).

52. This Article does not attempt an extensive analysis of court decisions regarding employee leaves. Rather, several judicial opinions of precedent-setting value have been selected to illustrate the increasing delineation of legal entitlements between employers and employees.

confusion over the degree of control that management should retain in regulating workplace relations. Evidently, this increase in litigation reflected a breakdown in the informal negotiation process due to both the employers' concern over greater competition and the employees' higher expectations in their "quality of life."[53]

III. RIGHTS-BASED ADJUDICATION OF PAID LEAVE DISPUTES

Since the mid-1970s, the issues concerning employees' off-work time have been frequently litigated in Japan.[54] Particularly noteworthy is the fact that the Japanese Supreme Court has addressed the problem numerous times in the past two decades, primarily to identify the appropriate scope of the paid leave regulation. This conscious choice to adjudicate conflicts over paid leaves underscores the malfunctioning of the processes implemented to ensure the informal adjustment of interests between employers and employees. In the context of employment relations, the Japanese government has tried, with mixed success, to discourage rights-based litigation as a vehicle for social change. Accordingly, the government strongly advocates this negotiation process by offering "bureaucratic leadership through informal processes."[55] Two important factors contributing to the increase in formal adjudication lie in the increased economic competition facing Japanese corporations and the high expectations of employees in pursuing a better quality of life.

A. Jiji News Agency Case—On Again, Off Again

One recent decision pertaining to annual leaves under § 39 of the Labor Standards Act, the *Jiji News Agency Case*,[56] manifests the ambivalence in Japanese society regarding the judiciary's role as a driving force for social change. *Jiji News* is noteworthy because it is the first opinion in Japanese case law that addresses the issue of a long-term, annual paid leave request by a white-collar employee.[57] Acknowledging the importance of the dispute, the Japanese Supreme Court observed that its decision would undoubtedly have a profound impact on the workplace: "No doubt, judicial decisions in cases like the present one will shape the

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53. *See* Shimada, *supra* note 18, at 4.

54. *See generally* FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 16-27 (1987).

55. *See id.* at 21.

56. Jiji News Agency Case, 46 MINSHU 306 (Sup. Ct. 1992).

57. Previous Supreme Court decisions dealt almost exclusively with blue-collar workers. Also, the duration of the time off work was no longer than several days.

national policy in the field of labor relations. This means that the judiciary will be establishing the labor policies, and court verdicts will be leading the national labor policies in the future."[58]

The plaintiff in *Jiji News* was a journalist assigned to cover several administrative agencies. He had requested a consecutive twenty-four day summer leave.[59] Exercising its right to redesignate under section 39(4) of the LSA, the employer conceded twelve days of summer leave as requested, but refused to allow the employee to take the other twelve days at that time.[60] Objecting to this redesignation, the journalist took the full leave he had requested without the employer's consent. He was subsequently censured for insubordination, with his annual performance bonus reduced.[61]

The trial court rejected the employer's justification for redesignating the employee's vacation, even though the employer claimed it was due to a lack of personnel. The court found that the news agency routinely assigned one reporter to cover each administrative agency, and that there were also several freelance reporters who were expected to write articles on subjects that went beyond any particular agency's jurisdiction.[62] The appellate court subsequently affirmed the employee's right to take the leave. However, the Supreme Court overruled the decision, due to what it saw as the unattractive consequences of "more personnel, higher labor expenses and increased [overall] costs."[63]

This decision by the Japanese Supreme Court rests on faulty ground. The Court specifically noted in the opinion that it viewed paid annual leaves as a means of rejuvenating employees and promoting more efficient use of work time.[64] Under the Court's rationale of the paid leave system, a series of short leaves throughout the year (five to six days each) would suffice, and indeed, be more desirable than a lump-time vacation.

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58. *See Jiji News* (Sup. Ct.), 46 MINSHU at 306.

59. The employee desired a long-term continuous leave because he planned to do an intensive study of electrical energy generation problems occurring at nuclear power stations in Europe. Part of the employee's duties at the news agency included covering the regulatory agencies that oversee energy generation in Japan. *See id.* at 310. Apparently, the employee was willing to spend his own free time to enhance his expertise in that field. The employee's increased competence (largely at his own expense) undoubtedly would have benefited the news agency, as well as the employee himself.

60. *See id.*

61. *See id.*

62. *See* Jiji News Agency Case, 46 MINSHU 347, 363, 368 (Dist. Ct. 1988); *see also* discussion *supra* note 37.

63. *Jiji News* (Sup. Ct.), 46 MINSHU at 321.

64. *See id.* at 326.

However, this view of industrial relations is rather obsolete because it is based on the premise that an employee will stay at the same company for his entire working life. In the changing economic and industrial climate of Japan, this may not be the case. Incidentally, previous decisions by the Supreme Court have specifically rejected this narrow view of the paid leave system.[65]

Moreover, the *Jiji News* decision departs from earlier interpretations of LSA section 39(4). This section grants employers a limited right to redesignate the period of an annual leave if its timing "interfere[s] with the normal operation of the business."[66] Considerations regarding the possibility of a business disruption should include not only the length of the leave, but also the size of the business, its social importance, the availability of replacement workers, and other relevant circumstances.[67] The Court, however, in *Jiji News*, emphasized a single factor: the length of the paid leave. In effect, this creates a presumption that the longer the time off requested by an employee, the greater the employer's power to redesignate the timing of the leave. To this end, the opinion explained that:

> [W]hen the employee contemplates a long-term, continuous, annual paid leave, the probability of an interference with the normal operation of a business because of the increased difficulty for the employer to secure replacement workers becomes greater the longer the time of the employee's leave. Normally, it will be necessary to adjust it to the employer's plans, anticipated leaves by other employees, etc. Moreover, the employer cannot adequately predict at the time when the employee indicates the timing of his leave, the expected workload that may arise at the employee's workplace during his absence, availability of replacement personnel, the number of other employees who might take a leave simultaneously, and other workplace circumstances that affect the normal operation of the business. Because the employer must make a decision based on the probability of an adverse impact upon the business when the

65. *See, e.g.*, Kokutetsu Koriyama Kojo Case, 27 MINSHU 210, 218 (1973) ("[A]nnual paid leave system is premised on . . . providing employees the lifestyle that befits a human being.").

66. *See* LSA § 39(4).

67. *See* Toa Spinning Co. Case, 9 ROMINSHU 207 (Osaka Dist. Ct. 1958); *see also* Tsuyama Post Office Case, 31 ROMINSHU 1143 (Okayama Dist. Ct. 1980).

> employee takes a long-term continuous paid leave . . ., some degree of the employer's discretion concerning duration of the leave and the ability to change its timing by exercising the right to redesignate the leave period must be recognized.[68]

This language in *Jiji News* is a serious departure from the seminal precedent in the *Kokutetsu Koriyama Kojo Case*, which set forth the principle that an employer who is obligated to provide a paid leave normally may not interfere with the employee's right to such a leave.[69] The *Koriyama* court stated that the employer is basically obligated to not act in violation of the employee's right to a paid leave.[70] Moreover, the Supreme Court's forceful remark in *Koriyama* that "[t]he paid leave system has absolutely nothing to do with a system of reproduction of labor force that rewards employees only to have them work harder,"[71] is characteristic of the justices' interpretation of the right to time off and the purpose of the paid leave system in general. Unfortunately, the Supreme Court retreated from that position in *Jiji News*.

Finally, the rationale behind the Supreme Court's decision in *Jiji News* seems to be counterproductive to Japanese business and managerial practices. The country's managers have succeeded, in large part, because of their ability to train employees in several related specialties. This allows for substitution of workers in the event that a key employee becomes unavailable.[72] In the case at hand, it seems logical to expect

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68. *Jiji News* (Sup. Ct.), 46 MINSHU at 313-14. The appellate court upheld the claim for damages suffered by the employee because of the employer's unlawful exercise of its right to redesignate. *See* Jiji News Agency Case, 46 MINSHU 371 (Tokyo High Ct. 1988); *see also Jiji News* (Sup. Ct.) 46 MINSHU at 308. By evaluating the news division and all its employees, the High Court was able to ascertain whether or not this person's being absent could possibly interfere with the operation of the news agency. This court observed that finding a qualified replacement within such a large pool of reporters should not have been difficult. *See Jiji News* (Tokyo High Ct.) 46 MINSHU at 375. In rejecting this view, the Supreme Court defined the word "business" narrowly to encompass only employees in the immediate "workplace"—the current news subdivision. *Jiji News* (Sup. Ct.), 46 MINSHU at 312. The Supreme Court subsequently confirmed the employer's argument that locating such a qualified worker was objectively difficult in that limited "workplace." *See id.* at 308. The district court's factual findings, however, included evidence that employees in the news division could be easily substituted for each other because they routinely exchanged information. *See Jiji News* (Dist. Ct.), 46 MINSHU at 362. Furthermore, reporters assigned to a particular administrative agency frequently covered for their colleagues who were sick or away on business for extended periods. *See id.* Finally, the workload was lighter than normal due to a summer slowdown.

69. *See Koriyama*, 27 MINSHU at 218.

70. *See id.*

71. *See id.* at 219.

72. *See id.*

news reporters to be adequately trained to allow them to cover related fields and subject matter. In fact, such substitution routinely occurred in the news agency. The Supreme Court's conclusion is, however, based on its determination that the reduction of key personnel would eliminate the possibility of finding a replacement, in light of the highly-specialized nature of the work.[73]

B. Other Judicial Decisions Concerning Paid Leaves

Litigation over the right to a paid leave has developed into a substantial body of law, despite the fact that the majority of litigated cases involving employer-employee relations were economically infeasible due to the exorbitant cost of litigation and relatively small damages awards, and also due to social forces opposing litigation.[74] Yet, with the realization of the benefits of formal litigation by employees and their unions, adjudication has grown in popularity and has actually proven to increase the labor force's influence over business decisions in the workplace.

The noticeable increase in litigated disputes has correspondingly armed the parties with a higher level of sophistication in dealing with both substantive and procedural legal issues. For example, in the early 1970s, some employers argued that an employee's right to a paid leave was forfeited if that leave was sought for an unlawful purpose. The Japanese Supreme Court rejected that argument in the well-known *Koriyama* case, where an employee requested time off so that he could participate in a protest action organized by a labor union.[75] The Court reasoned that an employee can take a leave for any purpose, even an illegal one.[76] Moreover, that purpose would not concern the Labor Standards Act (although the employee may still be subject to sanctions, if any, under other laws).[77] The favorable ruling in *Koriyama* armed employees with a new legal doctrine, but also resulted in situations where employees manipulated the right to a paid leave to engage in activities that would otherwise give rise to censure or discharge.

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73. *See Jiji News* (Sup. Ct.), 46 MINSHU at 338.

74. *See generally* UPHAM, *supra* note 54, at 166-204 (analysis of Japanese legal informality and industrial policy and litigation).

75. *See Koriyama*, 27 MINSHU at 219.

76. *See id.* at 222.

77. *See id.*

One example of such "inappropriate" use of the paid leave system is the *Tokyo Savings Processing Center Case.*[78] Here, an employee attempted to excuse his reporting late to work (eight times in total) by subsequently requesting a paid leave, effective immediately. When the employer denied the request, the employee sued for the amount of his salary reduction, approximately twenty dollars, and punitive damages of eight hundred dollars.[79] The High Court found that only if the employer had based its decision on considerations irrelevant to the employee's leave request would that employer have abused its ability to redesignate under LSA section 39(4).[80] The Court also noted that this employee failed to follow the procedures for procuring such a leave request as established by the employer's work regulations.[81] The denial of relief, however, was based on the Court's determination that the individual had abused his right to a paid leave due to his "inequitable conduct," not because of his failure to comply with procedural requirements stipulated in the employer's work regulations.

The Japanese Supreme Court addressed this potential abuse of the paid leave system for "inappropriate" reasons by devising an exception to the principle that generally allows employees to use their paid leave time off work as they see fit. In the *Yubari Minami High School Case*, the Court held that an employer had complete and unfettered discretion over the timing of several employees' leaves when those employees sought to take simultaneous half-day paid leaves so that they could participate in their labor union's attempt to keep one-third of all employees off work.[82] The union arranged the work stoppage to pressure the employer into concessions.[83] The tactics, if successful, would have reduced the business to a skeletal operation without bringing it to a complete standstill.[84]

The Supreme Court in *Yubari* introduced a broad exception to the *Koriyama* principle that an employee may freely dispose of his or her off-work time. The *Yubari* decision made clear that an employee's taking of

78. 44 ROMINSHU 271 (Tokyo High Ct. 1993).
79. *See id.*
80. *See id.*
81. Under the Processing Center's work regulations, the employee is required to notify his supervisor no later than noon of the previous day when requesting a paid leave for the following day. *See id.*
82. Yubari Minami High School Case, 1220 HANJI 136, 137-38 (1986).
83. *See id.*
84. *See id.*

a paid leave specifically designed to hurt the employer is impermissible.[85] This broad and somewhat nebulous rationale appears to be well accepted by the courts, although *Koriyama* has never been formally overruled or modified. It seems apparent from the *Yubari* decision that the Court was unwilling to act as an arbiter in this increasingly sophisticated litigation saga.

This same *Yubari* Court refused, only a year later, to support an employer who attempted to prevent its employees from engaging in allegedly "anti-social" activities.[86] In the *Hirosaki Telegraph and Telephone Office Case*, a telecommunications company manager denied a paid leave to an employee who wanted to participate in a protest meeting unrelated to the business of the employer (a rally opposing the construction of the new Tokyo international airport).[87] The manager refused to change the work schedule to allow the employee to take a day off, although such a change could have been accomplished.[88]

The Supreme Court observed that this exercise of the employer's right to redesignate the timing of the paid leave was unreasonable in light of the business's objectively determined needs and work requirements.[89] The Court thus reconfirmed the *Koriyama* principle that the employee's off-work time is of no concern to the employer, even when the employee is engaged in so-called "anti-social" activities.

Hirosaki is difficult to reconcile with *Yubari* on strict doctrinal grounds, although the differing policy considerations are apparent in both opinions. The Supreme Court itself distinguished *Yubari* from *Hirosaki* by stressing that *Yubari* focused only on the employee's behavior, which it found to be immediately proximate to causing a possible disruption of the employer's business (a simultaneous leave taken by a number of employees which would effect a stand still).[90] One could, however, argue that the continuous protest actions opposing the construction of the Narita Airport in a Tokyo suburb could conceivably damage the fabric of Japanese society. Moreover, these protests were frequently associated

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85. The Supreme Court noted that high school teachers, being public employees, are prohibited from striking. *See id.* at 138. Although it seems an exaggeration to analogize these demands for simultaneous half-day paid leaves to a strike, the court's reasoning underscores its concern with the labor movement's potential use of this right as an anti-employer weapon. Less than a quarter of the entire school system' high school teachers requested such a leave. *See id.*

86. *See* Hirosaki Telegraph and Telephone Office Case, 41 MINSHU 1229, 1253 (1987).

87. *See id.* at 1229.

88. *See id.*

89. *See id.* at 1253.

90. *See id.*

with violence, which in turn generated heightened fear of terrorism and social upheaval. Incidentally, this argument did persuade the lower court to rule that the employer's attempt to dodge this foreseeable harm to its business, stemming from the possibility of social disruption and chaos from the protest, was not capricious or unreasonable.[91]

In the same vein as the district court in *Hirosaki*, the Supreme Court in the *Tokyo Broadcasting Control Facility Case* upheld the right of an employer to redesignate employee leaves when an emergency situation exists.[92] In *Tokyo Broadcasting*, a TV transmitting facility covering the entire Tokyo metropolitan area anticipated a series of large-scale subversive acts in conjunction with violent protests over the construction of the new Tokyo international airport.[93] When presented with an employee's request for a one-day paid leave, the employer exercised its right to redesignate, claiming that there were no other technicians available to take care of maintenance at the facility.[94] The Court held that the redesignation was reasonable under the circumstances, stressing the critical impact of such potential large-scale unrest, as well as the ensuing disruption of the employer's business.[95] In the opinion, however, the Court failed to even consider whether or not the employer could have substituted another worker in place of the requesting employee.

C. Statute of Limitations Litigation

The heightened level of conflict between employers and employees manifest in the paid leave litigation is underscored by a bitter fight over relatively technical issues of statutory construction, such as the duration of time when the employee may claim an unused paid leave. Although the LSA's general statute of limitations provision establishes a two year cut-off period, it is unclear from the language of section 39 whether or not the employee's right to an annual leave is canceled within the relevant year, or if it may be carried forward within the statute of

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91. *See* Hirosaki Telegraph and Telephone Office Case, 41 MINSHU 1229, 1255 (Aomori Dist. Ct. 1983). The trial court based its decision on the now familiar "abuse of the right" argument. The court noted that by insisting on this right to a paid leave, the employee who works for a company that is extremely public in nature (the national telegraph and telephone company, a state monopoly at the time) in effect breaches his relationship of trust with that employer. *See id.* at 1262. Thus, the trial court placed great emphasis on the plaintiff's status as a "public employee."

92. Tokyo Broadcasting Control Facility Case, 43 MINSHU 767 (1989).

93. *See id.*

94. *See id.*

95. *See id.*

limitations period.[96] This lack of clarity has generated a vigorous rights-based debate, with several scholars expressing a "logical view" that the LSA's statute of limitations provision in section 115 should be applied to the employee's right to a paid leave.[97]

Notwithstanding this view from academia, a district court in the *Japanese National Railroads, Hamamatsu Locomotive District Case* refused to apply the LSA's section 115 statute of limitations to an employee's claim for a past due leave.[98] The court observed, "[T]here is no room for applying the statute of limitations to a leave prescribed by the Labor Standards Act."[99] Under this decision, leave time must be used up within the year of its accrual or else it will be forfeited.[100] The court, however, upheld a provision of the collective bargaining agreement that allowed a carryover of unused leave time in excess of the statutory minimum.[101] It observed that such provisions should be enforceable as long as they do not fall below the Act's minimum protection.[102] Therefore, under this opinion, unused time carried over to following years should not be considered as statutory "annual paid leave," and the limitations period of section 115 should apply to the period in excess of the minimum leave time.[103]

The *Hamamatsu* court apparently believed that its ruling, which affirmed the inapplicability of the Act's statute of limitations provision, would encourage employees to actually use their leave time each year.[104] This line of reasoning may, however, be wishful thinking on the part of the judges. Evidence shows a wide-spread underutilization of paid leave time as mandated by the statute, not to mention use of any additional

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96. LSA § 115 provides the following: "[c]laims to wages, accident compensation and other [items] (excluding severance pay) pursuant to this Act, expire within two years, and claims to severance pay pursuant to the provisions of the Act expire within 5 years after accrual." Section 115 applies generally to every substantive "claim." Under the established doctrine, the entitlement to a paid leave is a substantive right and therefore should arguably fall within the § 115 limitations period.

97. *See, e.g.*, Noboru Kataoka, *supra* note 43, at 480.

98. Japanese Nat'l R.R., Hamamatsu Locomotive Dist. Case, 24 ROMINSHU 96 (Shizuoka Dist. Ct. 1973).

99. *Id.*

100. *See id.*

101. *See id.*

102. *See id.*

103. *See id.* Of course, the employee may always stop the running of the statute of limitations by making a demand for a paid leave. *See* Civil Code § 147 (Law No. 9 of 1898).

104. *Hamamatsu*, 24 ROMINSHU at 96.

leave days frequently provided by many large employers.[105] Contributing to the seriousness of this underutilization problem are both the imbalance of bargaining power between employers and employees, and the employer's right to unilaterally redesignate the timing of a leave.

At least one commentator has criticized the *Hamamatsu* ruling as an inappropriate refusal to apply the section 115 limitations period.[106] He argues that the decision reduced employees' control over their free time, increased their dependence on employers, and further lessened the mobility of the workforce by impeding career development and education opportunities.[107]

Notwithstanding these views, the Ministry of Labor has interpreted the statute to allow carryovers (and the payment of wages during the paid leave period) even after the two-year period.[108] The administrative ruling apparently reflected economic exigencies of the workplace, although it further complicated the law. It seems that the agency thus sought to reestablish its role as an informal arbiter in employment disputes over paid leave time.

D. Judicial Prohibition of Employer Retaliation

As litigation battles over paid leaves unfolded, the judiciary gradually took a more active role in shaping the legal agenda. A series of lawsuits within the overall framework of civil rights legislation were brought by employee-plaintiffs filing against employers who had retaliated against the employees because they exercised their rights to paid leave. Because "bureaucratic informalism" had failed to smother the growing social conflict, the courts generally adhered to their activist

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105. Japanese employees tend to underutilize the time off guaranteed to them by the existing laws. *See, e.g.*, The Ministry of Labor, *Comprehensive Survey of Compensation and Working Time Arrangements*, *in* 10 RODO JIHO [LABOR BULL.] 39 (1995) (in Japanese). According to the Survey, Japanese workers took only an average of 7.5 days off in 1986, although 14.9 days of annual leave were available on average. In 1993, the actual average time taken off was 9.1 days, while 16.3 days were typically available.

106. *See* Mitsuo Nagafuchi, *Carryover of Annual Paid Leaves and the Statute of Limitations*, 101 JURIST (Special Issue) 114, 115 (1989) (in Japanese) (referring to administrative practice as expressed in KIHATSU [ADMINISTRATIVE RULING] No. 501 (Dec. 1, 1947) as a precedent).

107. *See id.*

108. *See* Koichiro Yamaguchi, *Legal Issues Concerning Annual Paid Leaves*, 25 SOPHIA U. L.J. 31, 71 (1982) (in Japanese). Some companies apparently allow the unused leave time to accumulate over several years. Thereafter, it may be used as a lump-time "revitalization leave." *See* Kazuo Sugeno, *Flexibility in Working Time in Japan (II)*, 29 JAPAN LAB. BULL. 5, 7 (July 1990).

approach in banning various forms of discriminatory practices by employers.[109]

The current Labor Standards Act prohibits discrimination of employees who exercise their right to a paid leave.[110] Judicial decisions, most of which were handed down before the addition of the anti-discrimination clause to the statute in 1987, have outlawed various forms of discrimination or retaliation by employers based on the employee's taking a paid leave. In the well-known *Ose Industries Case*, a group of employees sued their employer because it refused to count the time of a paid leave as time worked, thus making employees who took such leaves ineligible for a performance bonus.[111] The district court struck down the relevant provision in the employer's work regulations that contained eligibility criteria for annual bonus payments.[112] In effect, this has created a substantive rule of law that limits an employer's discretion in rewarding its employees when the disbursement of such bonuses acts to discourage the employee's exercise of a statutory right.

The court in *Ose Industries* also mentions that the employer's practices violated the general principle of "public order and good morals" in the Japanese Civil Code.[113] The court stated that although the employer did not directly contravene any statutory provision of the Labor Standards Act, allowing such practices would emasculate the statutory purpose of protecting the entitlement to paid leaves.[114]

Other courts have also paid greater attention to the issue of employer retaliation.[115] Judicial decisions that prohibit discriminatory

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109. *See* UPHAM, *supra* note 54, at 20, 22 (illustrating the role taken by the judiciary in advancing civil rights of women in the context of equal employment opportunity litigation). The term "bureaucratic informalism" is borrowed from Upham.

110. LSA (Miscellaneous Provisions) § 134 provides as follows: "[t]he employer shall not treat employees who take a paid leave pursuant to § 39(1) through (3) disadvantageously by decreasing their salaries or otherwise." This section underscores the initial unwillingness of the Japanese legislators to allow a cause of action for employer's retaliatory behavior. Added to the Act in 1987, this provision essentially codified case law of the previous decade. Before the 1987 amendment, there was no statutory clause outlawing discriminatory practices regarding leave benefits. The enactment of the section as a "miscellaneous provision," which usually carries less weight than a provision in the main body of the statute, exhibits the Diet's apprehension of the potential "litigiousness" of employees.

111. Ose Industries Case, 820 HANJI 111 (Yokohama Dist. Ct. 1976).

112. *See id.*

113. *See* Civil Code § 90 (Law No. 9 of 1898); *see also* UPHAM, *supra* note 54, at 154 (discussing the courts' utilization of § 90 of the Civil Code in the context of equal employment opportunity litigation).

114. *See Ose Industries*, 820 HANJI at 112.

115. *See, e.g.*, Schering Japan Case, 34 ROMINSHU 679 (Osaka High Ct. 1983) (holding that an employer's inclusion of a paid leave as days not worked in the computation of total working time

acts against employees who take advantage of their paid leave underscore the activist role of the Japanese courts in enforcing the spirit, if not the letter, of the Labor Standards Act. Aware that the LSA has failed to ensure the informal adjustment of interests between the parties in this context, the judges, by implementing the general goals of the Act, have effectively created a private cause of action under the Act in the absence of any statutorily prescribed right to sue.

E. Doctrinal Nature of the Right to Paid Leave

Like the judiciary, legal scholarship has contributed significantly to the refinement of the rights-based litigation strategies used by Japanese employees. Most Japanese commentators analyze the disputes concerning paid leaves in terms of legal entitlements, thus raising the expectations of the parties and providing arguments for use in judicial opinions.[116]

In 1973, the Supreme Court in *Koriyama* noted that the employee's right to an annual paid leave rests on the provisions of the Japanese Constitution, specifically, article 13 which ensures every person's right to the pursuit of happiness, and article 27(2) which establishes a right to repose.[117] The Court concluded that the right to a paid leave, supported by the Constitution and codified in the Labor Standards Act, could not be arbitrarily restricted by legislation.[118] Traditionally, Japanese legal scholars have considered the right to a paid leave in terms of general principles of contract law. Here, the right to a paid leave, governed by the general provisions of the Civil Code regarding obligations, vests once the employee requests a leave under the procedural requirements specified in the employer's work regulations.[119]

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for the purpose of determining a pay raise was a violation of the Labor Standards Act); Senshu Shipping Agency Case, 617 ROHAN 57 (Chiba Dist. Ct. 1992) (prohibiting the firing of an employee on the grounds that he used his annual paid leave).

116. The degree of influence of such academic commentaries may be illustrated by the fact that the Supreme Court in *Jiji News* repeatedly relied on the opinion of an academic, Associate Professor Wada of Nagoya University, in its critique of the lower court's decision. Jiji News Agency Case, 46 MINSHU 306, 322 (1992).

117. *See* Kokutetsu Koriyama Kojo Case, 27 MINSHU 210, 219 (1973); KENPO [Constitution], art. 13 (providing that people's "right to life, liberty and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation . . ."); KENPO [Constitution] art. 27, para. 2 (stating that "[s]tandards for wages, hours, rest and other working conditions shall be fixed by law").

118. *Koriyama*, 27 MINSHU at 219. *See also Jiji News*, 46 MINSHU at 372.

119. Although regulation of employee off-work time in the United States is based predominantly on a contract between the employer and the employee, terms of an agreement may also be governed by statute or regulation, particularly if the employer is a state agency or a closely-

Once this right has vested, the employee's duty to work for the employer is terminated for the specific term of the leave.[120]

The statutory right to a paid leave is not absolute. The employer may exercise its right to redesignate the timing of the leave to prevent any disruption of its business that may be caused by the particular timing of the employee's vacation.[121] This substantial power of the employer to redesignate is viewed by Japanese legal scholars as a procedural defense in cases where the employee's substantive right to the paid leave is being litigated.[122]

The analysis of the paid leave legislation in terms of legal entitlements established a new trend in Japanese labor jurisprudence. It presented a doctrinal trap for many scholars because of the closely held principle of "no work, no pay" imbedded in the Japanese law.[123] Many Japanese commentators invoke the "excuse doctrine" to explain the conceptual conflict that results when the employee's duty to work is temporarily annulled, yet, at the same time, that person's salary is preserved. The "excuse doctrine" provides that a legal obligation is extinguished in certain circumstances pursuant to the Civil Code.[124] However, the excuse doctrine is normally only effective when the obligee (the employer) manifests its intent not to demand performance of the obligation. The statute conveniently resolves the legal dilemma by presuming that the employer agrees to the employee's temporary absence from work.[125] These various legal theories pertaining to paid leaves have clarified the entitlements of the parties, but have also contributed to the complexity of legal rules. Accordingly, this dynamic has worked to further entrench the disputants in their respective legal positions.

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regulated entity (such as a utility company). The multiplicity of applicable regulations may lead to inconsistent results in different jurisdictions. *Compare, e.g.*, May v. Board of Educ., 567 N.Y.S.2d 186, 187-88 (App. Div. 1991) (employee entitled to compensation for accrued, unused vacation time upon expiration of his employment contract), *with* Hess v. Board of Educ., 341 N.Y.S.2d 536, 537 (App. Div. 1973) (school board may pay compensation for accrued, unused vacation time only when authorized under general municipal law).

120. *See* Forestry Agency, Shiraishi Forestry Office Case, 27 MINSHU 191, 200 (1973); *see also* Susumu Noda, *Leaves, Time Off and Employment Contracts*, 167 KIKAN RODOHO [LABOR L.Q.] 6, 9 (1993) (in Japanese).

121. *See* LSA § 39(4).

122. *See* Yamaguchi, *supra* note 108, at 61.

123. *See* Kokutetsu Koriyama Kojo Case, 27 MINSHU 210, 221 (1973).

124. *See* Civil Code § 519 (obligor may be excused when obligee expresses its intent not to demand performance).

125. *See* Noda, *supra* note 120, at 11.

Another example of such a legal entitlement is the "abuse of the right" defense which is available to the employer to counter the demand for a paid leave. This is a broad equitable doctrine in Japanese law that prevents an employee from exercising his or her rights for a purpose immediately harmful to the employer (for example, to organize a strike or otherwise disrupt normal business operations through the utilization of the employee's paid leave).[126] The doctrine weighs the relative harms and benefits arising from the exercise of a particular right. By allowing this defense, courts essentially force the plaintiff to negotiate with the employer. The exercise of the plaintiff's right, in the words of the Japanese Supreme Court, should remain within "a scope judged reasonable in the light of the prevailing social conscience."[127] The availability of the defense to employers was confirmed by the Supreme Court in *Koriyama* where the court remarked that an employee who takes a paid leave to participate in a concerted work stoppage to disrupt his employer's business abuses that right to a paid leave.[128]

The paid leaves litigation presents a vivid example of how a series of discrete grievances brought by employee plaintiffs precipitated a broad drive for a social change. This social discontent has been demonstrated in the increased "litigiousness" of employees and the labor unions that back them. In response, Japanese policy makers have sought to regain the initiative by prohibiting the judicial system from becoming an institutional channel for the development of national employment policy.[129]

IV. THE WORKING TIME REDUCTION MOVEMENT

The answer to the problem of increasing hostility and conflict between corporate management and labor forces over employee leave benefits came by way of the government's proposal to gradually reduce the overall working time. This government action shifted the employees'

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126. *See* Michael K. Young, *Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan*, 84 COLUM. L. REV. 923, 970-71 (1984).

127. Young, *supra* note 126, at 970 (quoting Mitamura v. Suzuki, 26 MINSHU 1067, 1069 (S. Ct. Petty Bench 1972). *See generally* Kazuaki Sono & Yasuhiro Fujioka, *The Role of the Abuse of Right Doctrine in Japan*, 35 LA. L. REV. 1037 (1975).

128. *See Koriyama*, 27 MINSHU at 222.

129. *See* UPHAM, *supra* note 54, at 22, for a discussion of the role of legal informality in Japan as a vehicle for maintaining the bureaucratic control over the pace and direction of social change. The conclusions advanced by Professor Upham, however, assume that every Japanese institutional "player" (i.e., the courts, bureaucracy and the legislators) is monolithic and pursues the same agenda. This is not necessarily true and each institution may have internal divisions and varying agendas that would affect its "outbound" policy decisions.

focus away from the refinement of their legal rights. In this way, the bureaucracy looked to retaining control over the process of change by exercising informal "guidance" over the disputants.[130]

Economic concerns over a mounting foreign trade crisis and pressing foreign competition in the late 1980s prompted Japanese politicians and businessmen to consider restructuring the national economy in order to increase domestic demand and to ensure the continued economic well-being of the country. At the same time, this policy looked to decreasing huge surpluses in commodity trade that Japan had run with the United States and Europe. Shortly before the 1985 Tokyo summit of the seven industrial nations, the Japanese government announced several measures to convert the economy from its export-orientation to one predominantly geared toward domestic demand.[131] A drastic reduction of working hours was envisioned as one of the key elements of the new system. A specially-drafted governmental program set a goal of reducing per worker annual working hours from above 2,100 hours in 1985 to 1,800 hours by 1997.[132] At this time, the Labor Standards Act was also revised to provide for a reduction of the maximum legal working limit from forty-eight to forty hours per week.[133] The drafting process apparently involved numerous informal discussions with representatives of both management and labor to ensure that all interests were taken into account.

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130. Employee vacation time has increasingly been subject to statutory regulation in the United States, particularly due to the proliferation of federal legislation. This federal anti-discrimination legislation (e.g., Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1994)) mandates that benefits and vacation time be provided on a neutral basis, whereas "suspect classifications" such as race, sex, or religious beliefs cannot justify unfair treatment. Other federal laws, including the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 (1994), impose affirmative duties on employers. In recent years, vigorous debate arose over whether the broad language of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 (1994), applied to employee leaves. Several federal courts subsequently considered this question and answered it in the negative. *See* Massachusetts v. Morash, 490 U.S. 107, 114-15 (1989); California Hosp. Ass'n v. Henning, 770 F.2d 856, 860-61 (9th Cir. 1985), *cert. denied*, 477 U.S. 904 (1986) (California statute barring forfeiture of vacation time not preempted by ERISA).

131. This was not the first attempt at reducing the working time in Japan. The Ministry of Labor had unsuccessfully attempted to reduce employee working time in the past by administrative guidance. *See, e.g.*, KIHATSU [ADMINISTRATIVE RULINGS] No. 56 (May 2, 1978) and No. 355 (June 23, 1978).

132. *See* Kazuo Sugeno, *Japan: The State's Guiding Role in Socioeconomic Development*, 14 COMP. LAB. L. 302, 315 (1993).

133. *See* LSA § 32. The forty hour working week limit was implemented gradually starting April 1, 1988. *See* LSA Miscellaneous Provisions § 2 (Law No. 99 of 1987). *See also* Cabinet Order on Interim Measures Concerning Working Time, Etc. Pursuant to Labor Standards Act (Order No. 397 of 1987) § 32(1), § 1 (exempting certain industries from compliance with the revised § 32 provisions until 1991).

Notwithstanding its bureaucratic leadership, the initial enactment of the working time reduction legislation was only partially successful,[134] primarily due to the unwillingness of corporate managers to commit themselves to additional costs, in light of increased competitive pressures.

A. The "Old" Hours Act

To address the problems surrounding the issue of working time, the Japanese Parliament adopted the *Act Concerning Interim Measures to Encourage the Reduction of Working Hours* (Hours Act) in 1992.[135] Because of the desire to accommodate the interests of all parties involved, the Hours Act was largely drafted as a political declaration of principles rather than a viable legislative piece. The initial draft was substantially weakened by strong employer lobbying.[136] Moreover, politicians and bureaucrats initially viewed the problem of excessive working time in Japan as easily resolved through the familiar device of "administrative guidance," which had proved effective in other areas of economic regulation.[137] For these reasons, the Hours Act set forth the responsibilities of employers concerning the gradual reduction of working time in vague, broad terms. Moreover, the Hours Act contained no adequate enforcement mechanism.[138] The Hours Act also obligated the government to formulate measures that would facilitate the gradual reduction of working time.[139] The drafters apparently sought to grant to the Ministry of Labor flexibility that would allow it to ascertain the positions of the employers and the employees, and to determine the necessary measures to diffuse the conflict over work time. The

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134. The Japanese government's statistics show that the annual working time in Japan did drop somewhat in the late 1980s from 2,120 hours in fiscal 1987 (April 1, 1987, to March 31, 1988) to 1,903 hours in fiscal 1993. *See* Editorial, *Concerning the Program to Promote Leisure Time*, 10 RODO JIHO [LAB. BULL.] 38 (1995). According to the Japan Statistical Yearbook 1996, average weekly hours at 387 major Japanese companies with 1,000 or more employees decreased from more than 44 hours in 1990 to less than 42 hours in 1993. *See* STATISTICS BUREAU, 1996 JAPAN STATISTICAL YEARBOOK 124 (1995).

135. The Hours Act (Law No. 90 of 1992).

136. *See* Takehiro Fukuda, *Working Hours Come Down After Spring Labor Campaign*, NIKKEI WEEKLY, April 4, 1992, at 7.

137. *See, e.g.*, Young, *supra* note 126, at 923 (describing the Ministry of Industry and International Trade's (MITI's) administrative guidance practices).

138. For example, § 2(1) of the Hours Act provides that the employer should "take steps to gradually increase the number of days of the employee leaves and take other necessary measures." Paragraph 2 urges trade associations to provide "necessary advice, support and other assistance concerning working time reduction for employees of employers-members of such associations." In the past, trade associations have proved to be the effective means of making businesses familiar with the government's policies concerning particular economic problems.

139. *See* Hours Act § 4(1) (the Working Time Reduction Program).

bureaucracy would act as an arbiter, encouraging the parties to negotiate with each other.

The system of "administrative guidance," with its emphasis on modifying private behavior through informal, nonbinding measures to encourage (or coerce) "voluntary" compliance, appears to be tailored precisely for such an informal redistribution of private entitlements in the workplace, especially in light of its active encouragement of social harmony and employee morale.[140] As it turns out, however, employers were not prepared to shoulder the cost of the new regulation, due to increased competitive pressures on Japanese businesses and to decreased national labor supplies.[141]

Premised on the success of the administrative guidance regulatory model, the Hours Act authorized the Ministry of Labor to closely supervise businesses to ensure the implementation of the statute's goals. The Hours Act also empowered the Ministry to delegate its enforcement authority to trade associations.[142] To strengthen this mechanism of bureaucratic supervision, the Hours Act encouraged employers to set up "working time reduction committees" at individual enterprises or even at multiple workplaces within the same enterprise.[143]

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140. *See* Young, *supra* note 126, at 932, for a general assessment of the effectiveness of administrative guidance. *See generally* Yoriaki Narita, *The Functions, Merits And Demerits Of Administrative Guidance*, 741 JURIST 39 (1981) (in Japanese) (analysis of administrative guidance by a Japanese legal scholar).

141. Employee working time in the United States is regulated both at the federal and state levels. Federal labor laws apply to businesses involved in interstate commerce, and cover predominantly "blue collar" employees. *See, e.g.*, Fair Labor Standards Act, 29 U.S.C. § 207 (1994) (mandating increased pay for overtime work above 40 hours per week for executive employees); 49 U.S.C. § 42112(b) (1994) (federal regulation of working time for airline pilots). The federal agencies that are responsible for administering these various federal laws are required to promulgate regulations that interpret the statutes within their jurisdiction. In addition, states may impose different limitations on the duration of an employee's work time. *See, e.g.*, NY Lab. Law § 160 (McKinney 1996) (prescribing a basic legal eight hour daily limit). Other state laws may provide for a paid or unpaid leave related to a particular purpose. *See, e.g.*, California Fair Employment & Housing Act, Cal. Gov't Code § 12945(b)(2)(1996) (prohibiting discrimination in leave benefits on the basis of pregnancy). Although many court decisions address different aspects of those statutes, overworking by "white collar" employees has received little judicial attention so far. Even when claims related to "death from overworking" (known as *karoshi* in Japan) are raised, American courts appear unsympathetic to the plaintiff. *See* McKenzie v. Cleary, Gottlieb, Steen & Hamilton, 1994 WL 150139 (N.Y. Sup. Ct. 1994) (unpublished decision).

142. Section 5 of the Hours Act provides as follows: "[t]he Minister of Labor may make a necessary demand upon pertinent associations concerning the issues of working time reduction, when such demand is considered necessary for thorough and smooth implementation of the working time reduction program."

143. Section 6 of the Hours Act provides:

Presently, many large Japanese companies appear to have established such committees.[144] However, this creation of working time reduction committees does not necessarily prove that these individual employers agree with the virtue of reducing working time. Rather, there seems to be a desire to use the vaguely-drafted statute to increase the competitive advantage of Japanese businesses.[145] Specifically, under the Hours Act, a unanimous decision by such a committee may act as a substitute for the bilaterally negotiated terms of an employment contract previously required by the law.[146] The existence of a committee therefore gives the employer an opportunity to bypass the collective bargaining process in certain business situations. Thus, by establishing such nominal committees, employers can tacitly sabotage the goals of the Hours Act by discounting or ignoring the employee's economic interests.

Furthermore, the Hours Act imposed certain reporting requirements on employers,[147] yet the statute failed to effectively monitor the progress of implementing these legislative goals. Moreover, and the Hours Act was conceived as a provisional measure (as is evident from its

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> Consolidation of the Hours Reduction Implementation System. The employer shall endeavor to set up a system necessary to effectively implement the reduction of working time by establishing a committee [or committees] comprising the representatives of the employer and of the employees at the enterprise as a whole or at each workplace, for the purpose of considering measures to reduce working time and other issues related to working time reductions, and for expressing opinions to the employer.

144. Some large companies set up such committees prior to the enactment of the Hours Act in order to soothe potential problems in employer-employee relations. *See e.g.*, Note, 29 JAPAN LAB. BULL. 3 (Oct. 1990) (describing the functioning of a committee at Matsushita Electric Industrial Co., one of the prominent Japanese conglomerates).

145. For example, in *Declaratory Judgment Request Case*, 1492 HANJI 141 (Tokyo Dist. Ct. 1994), the employer and the union included in a collective bargaining agreement specific working time reduction targets to be attained each year. The clause apparently benefited the employer because it could pay less for less working hours.

146. *See* Hours Act § 7. For example, § 32-3 of the Labor Standards Act provides that the limitations on the number of working hours may be bypassed if there is a written agreement between the employer and the representatives of the employees. A unanimous decision by the working time reduction committee would satisfy the statutory requirement.

147. Section 7(2) establishes the employer's duty to report the establishment of a working time reduction committee to a local labor standards supervision office. Such offices have been required by the provisions of the Labor Standards Act and other workplace laws to monitor compliance by employers with various labor statutes, concerning, inter alia, minimum wages, terms and conditions of employment, occupational safety and employees' disability insurance. *See, e.g.*, LSA § 97; Minimum Wages Act (Law No. 137 of 1959) § 37; Occupational Safety and Health Act (Law No. 57 of 1969) § 88. In light of the already heavy burden of policing compliance with the labor laws placed on the supervision offices, their resources appear to be insufficient to effectively enforce such a vaguely drafted statute.

title) which was to expire within five years after its effective date.[148] Thus, although the passage of the statute did alleviate some political concerns and showed the Japanese government's "commitment" to restructuring the national economy as demanded by foreign critics, the Hours Act itself did not impact the workplace as was hoped.

The Hours Act was also ineffective at preventing or resolving workplace conflict, although it did allow the bureaucracy to shift the attention of the labor movement from litigating narrow statutory entitlements, such as the right to a paid leave, to the broader task of building a social consensus concerning the working time reduction program. Consequently, a new statute that more clearly defined the legal entitlements of the parties was passed to enable the government to control the pace of social change in the context of labor relations.

B. A New Approach under the New Act

Acknowledging the failure of the original 1992 statute, the government drastically revamped the Hours Act one year later, mandating detailed documentation of worker's rights and increased enforcement and penalties.[149] Interestingly, the new Hours Act still relies on administrative guidance mechanisms. The Act gives the Minister of Labor the authority to certify the Working Time Reduction Assistance Center (WTRAC) and its offices around the country. The WTRAC, a special purpose legal entity, has now replaced the overburdened labor standards supervision offices in an attempt to further advance the goals of the statute.[150] This innovative approach has allowed the Ministry of Labor to utilize existing nonprofit legal entities, saving it the burden and expense of setting up a network of offices especially for this task. To date, several offices have been certified by the Ministry.

With this delegation of enforcement authority to the WTRAC, the drafters of the new Hours Act envisioned a greater degree of flexibility in monitoring industrial relations, as compared to the former practices of

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148. *See* Hours Act (Miscellaneous Provisions) § 2 (the law was scheduled to expire on September 1, 1997).

149. Incidentally, the Child Care Leave Act was adopted in the same year, partially in response to public upheaval generated by the publication of statistics showing the record low birth rate in Japan. *See* Noda, *supra* note 120, at 16. These political and social events of the beginning of the decade underlie the increased awareness in Japanese society of the relevant "quality of life" issues. *See also* Sugeno, *supra* note 132, at 316.

150. *See* Hours Act § 14.

direct business supervision by the Ministry of Labor.[151] In addition to the delegated powers, the new organization will likely experience personnel exchanges both with the Ministry and with large corporations. These exchanges are a feature of the Japanese administrative machine which have, in the past, greatly contributed to the success of "private ordering" under the bureaucratic control.[152]

The Ministry of Labor did not, however, abandon its own enforcement powers as prescribed in the statute. In fact, the Ministry has been very active in promoting various informal measures that encourage businesses to comply with the statutory goal of curtailing working time.[153] Section 17 of the new statute specifically reserves to the Minister of Labor the right to delegate to the Center all or a portion of its powers under the Hours Act (including, broadly phrased "educational activities" and counseling of individual employers).

In addition to the primary responsibility of ensuring compliance with the statute, the delegated duties of the Center, as enumerated in the statute, include research and analysis of working time reduction, dissemination of pertinent information and research data (including seminars and study sessions), and distribution of "incentive money" allocated by the Ministry of Labor to trade associations and individual employers.[154] The Center is obligated to report its activities to the Ministry and to publish its annual financial statements. The Ministry, in turn, is expected to exercise, through the Center, its "administrative guidance" over private employers. Finally, the statute specifically provides that the Center's statutorily-prescribed activities may be fully or in part financed by the government.[155]

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151. *See* UPHAM, *supra* note 54, at 24, 166-204, for a description of informal guidance and delegation of authority by MITI in setting industrial policies in Japan.

152. *See* Yutaka Tsujinaka, *Rengo and Its Osmotic Networks*, *in* POLITICAL DYNAMICS IN CONTEMPORARY JAPAN 200, 204 (Gary D. Allinson & Yasunori Sone eds., 1993), for a description of personnel shifts among the government, business, semi-public and informal supervisory organizations.

153. For example, the Ministry of Labor has been sponsoring so-called "leisure month" events which include public lectures, seminars, and meetings with particular groups of employers and trade organizations aimed at educating business management about the virtues of working time reduction. *See* Symposium, *Envisaging Leisurely Life For Employees*, 11 RODO JIHO [LAB. BULL.] 5 (1993) (in Japanese). Such informal methods of persuasion by the Ministry officials, coupled with an implicit threat to use the Ministry's leverage, has apparently been very effective. *See* UPHAM, *supra* note 54, at 166-204 (discussing the use of such techniques by MITI).

154. *See* Hours Act §§ 14, 16-17.

155. *See id.* § 23.

An important feature of the new Hours Act is the inclusion of statutorily-prescribed penalties for violations of the statute. In addition to criminal fines that may be imposed on the Center or its field offices, the officers and other agents of the Center may be subject to criminal sanctions for violating the reporting requirements of the new Hours Act.[156] These enforcement provisions allow the courts to effectively promote the primary goal of the Hours Act, that of reducing working time in the country. By prescribing such penalties in the new Hours Act, the Japanese government has ironically embraced the formal rights-based enforcement which it so strongly desired to reject.

Overall, by combining the informal practice of administrative guidance with the creation of explicit legal entitlements enforceable by the courts, the amended Hours Act creates a new framework for ensuring compliance with the statutory goal of reducing working time in Japan. The failure of the former Hours Act, which was based primarily on the administrative guidance regulatory model, illustrates the ineffectiveness of informal bargaining between management and labor in an era of mounting competitive pressures and increased social awareness of the "leisurely lifestyle."

V. CONCLUSION

The recent attempts in Japan to reduce working time provide an interesting perspective on the role of the government in regulating "private" issues of employer-employee relations. As the evolution of the paid leave legislation shows, the Japanese government has fervently sought to regain the initiative in reshaping the nation's labor relations which was arguably lost to the judiciary. The open hostility between corporate management and labor, reflected in the recurring litigation over paid leaves, accentuates the national concern that this conflict may, in the future, grow too large to control. To prevent such an outcome, the Japanese government has attempted to drastically redefine the dispute, as well as the relative positions of the parties involved.

To obtain this goal, the government proposed a set of legislative measures which was consolidated in the 1992 Hours Act and designed to curtail the overall working time in Japan. The informal negotiation techniques encouraged by the original statute proved, however, to be largely ineffective in the highly competitive environment of the recent years.

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156. *See id.* §§ 23-25.

The rationale behind the 1993 amendments to the Hours Act was largely premised on theories of rights-based enforcement and the informal adjustment of interests. The new Act contains a much clearer allocation of legal entitlements between employers and employees, with more direct enforcement mechanisms. Thus, the legal developments in this area of Japanese employment relations appear to have gone full circle, from rights-based litigation over the paid leave issues to working time reduction premised on administrative guidance, and finally to the current Hours Reduction Act that unambiguously delineates the respective entitlements of the parties. It remains to be seen whether the new statutory structure will withstand the pressures of parties unwilling to compromise, in light of economic and social transformations of the past decade.