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Less Regulation is Essential to Labor Market in the Era of IT*

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I. Introduction

The emergence of "*i-mode*" has brought a dramatic change in the field of information technology. You do not need a computer to receive or send e-mails or use the internet. For "*Oyayubizoku,*" who can use his thumb nimbly not only to press phone numbers but also to type words on the mobile phone, a desk-top computer is a white elephant since it is not mobile. The "i-mode" has had a trouble of system down many times and have been unable to connect, but there were not many complaints heard about it. This was because many users had more than one mobile phone, and could avoid the risk of communication inaccessibility.

From single to multiple. Technology and skills have shorter life span nowadays, as the word of "dog-year" explains. This tells us how hard it is to rely on one skill. A decade ago, you could list your typing ability on your resume as a skill since it was quite creditable if you could type eighty words per minute. But it is not true any more. As much more people can now type as fast as a professional typist, typing ability is not to your credit as it used to be. Skills to be sought after are changing lickety-split in the era of IT.

According to a sketchy projection by the Japan Institute of Labor, the number of information processing technicians will mount up to 477,000 by the year of 2010. On the other hand, the U.S. publishes more detailed data on occupational changes. The Bureau of Labor Statistics shows dramatic increases in highly professional occupations such as computer engineers (214.9%) and system analysts (187.6%) in ten years from 1998, but relatively slight increase in less professional occupations including computer programmers (76.7%) and data entries (57.6%). *See Table 1.*

You see a big difference in the increase among the technical and professional

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Table 1. Employment of wage and salary workers in computer and data processing services by occupation, 1998 and projected change, 1998-2008

(Employment in thousands)

Occupation	1998 Employment		1998-2008 Percent change
	Number	Percent	
All occupations	1,599	100.0	117.1
Professional specialty	560	35.0	186.8
Systems analysts	141	8.8	187.6
Computer engineers	122	7.6	214.9
Computer support specialists	113	7.0	222.3
Writers and editors, including technical writers	21	1.3	97.0
Electrical and electronics engineers	21	1.3	124.6
Database administrators	20	1.2	238.8
Operations research analysts	15	1.0	55.6
Administrative support	291	18.2	62.7
Data entry keyers, except composing	41	2.6	57.6
Computer operators	37	2.3	-21.6
Secretaries	30	1.9	57.0
Office and administrative support supervisors and managers	28	1.8	91.5
General office clerks	25	1.6	98.8
Bookkeeping, accounting, and auditing clerks	22	1.4	60.4
Receptionists and information clerks	20	1.3	96.7
Executive, managerial, and administrative	286	17.9	94.5
General managers and top executives	73	4.6	91.2
Engineering, natural science, and computer and information systems managers	33	2.1	136.4
Financial managers	16	1.0	66.9
Accountants and auditors	16	1.0	85.1
Technicians and related support	280	17.5	79.1
Computer programmers	243	15.2	76.7
Engineering technicians	33	2.1	97.0
Marketing and sales	108	6.8	81.3
Precision production, craft, and repair	43	2.7	82.1
Data processing equipment repairers	23	1.5	77.3
Operators, fabricators, and laborers	25	1.6	93.5
All other occupations	6	0.4	78.0

Source: U.S. Department of Labor, Bureau of Labor Statistics, Career Guide to Industries 2000-2001 Edition.

levels, although all jobs are categorized into the IT related occupations. When considering this fact, we believe that Japan should show more detailed occupational data to the public.

Mobility and flexibility in employment are essential in order for workers to maximize their ability and chance to choose the right job, which will eventually promote the development of information technology.

II. To Realize the Compensation by the Results System

From the viewpoint of the promotion of information technology, milder regulation in the field of labor is fundamental. Especially deregulation is part and parcel of the compensation by the results system. Corporations need to obtain competent workers as many as possible to win the IT era. In the U.S., traditionally, stock option plans have been used as a way for companies to reward top management and "key" employees and link their interests with those of the company and other shareholders. More and more companies, however, now consider all of their employees as "key." As a result, there has been an increase in the popularity of broad-based stock option plans, particularly since the late 1980s[1]. Particularly in the high-tech sector, stock options are a common and valuable tool for encouraging workers to join upstart companies. The National Center for Employee Ownership (NCEO) estimates 7.5 million Americans work for companies that offer stock options[2].

In the U.S., the Department of Labor's February 12, 1999 Opinion Letter on the application of the Fair Labor Standards Act (FLSA) to employee stock option programs has generated considerable debate and concern among employer groups[3]. An unnamed employer who was contemplating a stock option program for non-exempt employees had consulted the Department of Labor (DOL), seeking guidance as to whether the value of exercised employee stock options had to be factored into the calculation of overtime rates for employees subject to the FLSA's

1) *See* NCEO, *Employee Stock Options Fact Sheet*, <http://www.nceo.org/library/optionfact.html>, (2000).

2) *Id.*

3) For more details, *see*, e.g., Statement of T. Michael Kerr, Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, the Subcommittee on Workforce Protections of the House Committee on Education and the Workforce (Mar 2,2000); Statement of Alexis Herman on Stock Options and FLSA, OHA Press Release (Mar.2,2000); Deanna Johnson Keim, *Don't Deny Stock Options to the Rank-and-File,* <http://www.appwp.org/newsroom pr13100.html>, (Jan 31,2000); *also,* Corey Rosen, *Employee Ownership Update* <http://www.nceo.org/columns/cr77.html>, (Jan 6,2000).

overtime requirements. In its Opinion Letter, the DOL stated that the proposed plan would not amount to a gift or special occasion bonus, a bona fide profit sharing plan, a discretionary bonus, or any other form of compensation excludable from the calculation of an employee's regular rate of pay. Thus, an employee's profits under the stock option plan must be allocated over the period of time in which it was earned in calculating the employee's regular rate of pay and determining the applicable overtime rate. For example, if an employee exercised her stock option three months into the proposed program, earning a profit of $1,750, the profit would be attributed to the previous thirteen work weeks.

A number of employer groups have criticized the February 12 Opinion Letter and have asked the DOL to retract it. In particular, employers are concerned with the administrative complexity of factoring the value of stock options into the overtime calculation and with the higher potential overtime costs. While refusing to issue a retraction, the DOL has stressed that the Opinion Letter responded to a specific request for assistance and was not intended to suggest that all stock option programs would be treated in the same manner.

In response to this outcry, Congress and the DOL worked together to draft legislation addressing the issue[4]. The Act excludes the value of any income or profit from a stock option, stock appreciation right or stock purchase plan from a non-exempt employee's regular rate of pay for purposes of calculating overtime compensation, under certain circumstances[5].

This new legislation ensures that employers retain flexibility in compensating their non-exempt employees and allows those employees to participate in equity ownership programs sponsored by their employers. The Act appears to cover most forms of stock option, stock appreciation right and stock purchase plan programs. Companies also are protected with respect to prior issuances of equity grants or rights. The Act becomes effective on August 16, 2000, 90 days after enactment[6].

The quick action by Congress is really astonishing. It was from the concern that the DOL's position would impede the expansion of stock option plans to regular employees, since it was likely that employers would eliminate stock options as a benefit for hourly workers.

Contrastively, in Japan, any stock option plans have not been construed as wages under the Labor Standards Act since 1997 because it is up to each employee

4) *See* U.S. Senate Republican Policy Committee, Legislative Notice (Apr 12, 2000).

5) The House passed S. 2323, The Worker Economic Opportunity Act by a vote of 421 to 0. The bill passed the Senate on April 12 by a vote of 95 to 0. S. 2323 amends § 207(e) of the FLSA.

6) Public Law No. 106-202 (May 18, 2000).

to exercise her own stock option. But this March the Ministry of Labor issued an official notice regarding annual salary systems that employers might not exclude bonuses from the calculation of overtime wages if the amount of such bonuses was determined in advance. Annual salary systems are an effective tool to establish the "compensation by the results system" and have often been utilized by many corporations to attract workers. The notice might hinder companies from introducing annual salary systems since the wage cost would run up. It seems that the Japanese Administration moves backwards against the current of the times.

The Regulatory Reform Committee of the Cabinet Headquarters pointed out that the notice of the Ministry of Labor would slacken companies' move to introduce annual salary systems when it published the issues for regulatory reform, but it was merely ignored. The present Diet seems spiritless if it does not show its mettle, even to amend the law to correct the Ministry's interpretation.

In the U.S., Section 13(a)(1) of the FLSA exempts executive, administrative, professional, and outside sales employees from the minimum wage and overtime requirements of the FLSA, provided they meet certain tests regarding job duties and responsibilities and are compensated "on a salary basis" at not less than stated amounts. Subject to certain exceptions set forth in the regulations, in order to be considered "salaried", employees must receive their full salary for any workweek in which they perform any work without regard to the number of days or hours worked. For certain computer-related occupations, such as a computer system analyst, programmer, software engineer, or similarly skilled worker in the computer software field, under the professional exemption, they need not be paid a salary if they are paid on an hourly basis at a rate not less than $27.63 per hour. Computer related occupations were included in the exemption during 1990 for the reason that those works are intellectual and varied in character, the accomplishment of which cannot be standardized as to time[7]. This measure was incorporated into the Fair Labor Standards Act in 1996[8]. It is now being deliberated by the Senate to revise an exemption from FLSA minimum wage and overtime compensation requirements for certain computer professionals to include computer network and database analysts, and computer systems, network, and database designers and developers (passed the House of Representatives)[9].

In Japan, the discretionary work hour system (*SAIRYO-RODO-SEI*), which may

7) 29 CFR Part 541 (Oct 14, 1992).

8) Public Law No: 104-188 (1996) or The Small Business Job Protection Act of 1996.

9) H.R.3846, H.R.3081 (106th Congress, 2000).

be compared to the American measures on FLSA exemption, has been applied to the occupations such as information processing system analysts and designers, but not programmers.

The discretionary work hour system is one of the average work hour systems (*MINASHI-RODO-SEI*), which oblige employers to pay overtime wages when his employees work on weekends or at nights. It will possibly obstruct the promotion of the "compensation by the results system." The Japanese systems are quite dissimilar to the FLSA exemption of the U.S., and Japan moves at a slower gait towards regulatory reform. It is required for Japan to go much faster and do more dynamic reforms to meet the IT era.

III. The Necessity to Expand Opportunities for Manpower Development

Furthermore, Japan needs another reform and flexibility in the temporary work system. Information technology will inevitably accelerate the tide of outsourcing. Corporations do not have sufficient time to train new people within their offices, or cannot secure their employees stable jobs since they are unable to see moves ahead.

In the U.S., stronger needs have recently been seen for temporary workers in the IT related professional jobs. The Bureau of Labor Statistics estimates 97.6% increase between 1998 and 2008 in the occupations such as computer engineers and scientists for personnel supply services, while estimating 10.2% decrease in general office clerks in contrast. *See Table 2.*

Comparing earnings of computer programmers, it is notable that median annual earnings in 1997 were US$53,700 for personnel supply services and 12.9% higher than the median annual earnings of all computer programmers which was US$47,550 in 1998[10]. Hourly wages for data entry keyers are only US$8.00 or so. Wages for entry level agency temporaries might be relatively low, but those for more professional levels are kept in higher standards.

Temporary work can be an effective method for agency temporaries to train themselves and improve their skills. Especially in the field of information technology where the situations are changing with dizzy rapidity, you would have to keep up with the speed and improve your ability not to be left behind or you might lose your job. But it does not necessarily mean temporary jobs are always temporary. In the U.S., they do not restrict the contract terms for temporary jobs, although most temporary positions are only for short terms, and the average tenure

10) BLS, Occupational Outlook Handbook 2000-2001 Edition, Computer Systems Analysts, Engineers, and Scientists (2000).

Table 2. Employment of wage and salary workers in personnel supply services by occupation, 1998 and projected change, 1998-2008

(Employment in thousands)

Occupation	1998 Employment		1998-2008 Percent change
	Number	Percent	
All occupations	3,230	100.0	43.1
Administrative support, including clerical	1,178	36.5	22.1
General office clerks	231	7.2	–10.2
Secretaries	181	5.6	20.3
Receptionists and information clerks	111	3.4	50.4
Data entry keyers	105	3.2	20.5
Word processors and typists	66	2.1	–5.9
Stock clerks and order fillers	56	1.7	50.6
Bookkeeping, accounting, and auditing clerks	49	1.5	22.6
File clerks	48	1.5	19.1
Office and administrative support supervisors and managers	34	1.1	46.4
Shipping, receiving, and traffic clerks	33	1.0	52.2
Operators, fabricators, and laborers	987	30.6	61.2
All other helpers, laborers, and material movers, hand	263	8.2	50.6
Hand workers, including assemblers and fabricators	230	7.1	51.1
Machine setters, setup operators, operators, and tenders	172	5.3	62.9
Hand packers and packagers	143	4.4	103.3
Freight, stock, and material movers, hand	98	3.0	58.7
Material moving equipment operators	39	1.2	50.6
Truck drivers	34	1.1	48.8
Precision production, craft, and repair	229	7.1	52.0
Inspectors, testers, and graders, precision	49	1.5	74.0
Mechanics, installers, and repairers	34	1.1	32.0
Blue-collar worker supervisors	31	1.0	50.6
Service	229	7.1	44.1
Personal care and home health aides	60	1.9	50.6
Janitors and housekeepers, including maids and housekeeping cleaners	47	1.4	35.5
Nursing aides, orderlies, and attendants	46	1.4	32.0
Food preparation and service occupations	40	1.2	62.7
Professional specialty	158	4.9	60.5
Registered nurses	53	1.6	35.5
Computer engineers and scientists	32	1.0	97.6

Executive, managerial, and administrative	155	4.8	36.5
Employment interviewers, private or public employment service	37	1.2	7.1
Technicians and related support	150	4.6	48.3
Engineering and science technicians and technologists	59	1.8	60.0
Marketing and sales	116	3.6	60.6
All other occupations	28	0.9	50.6

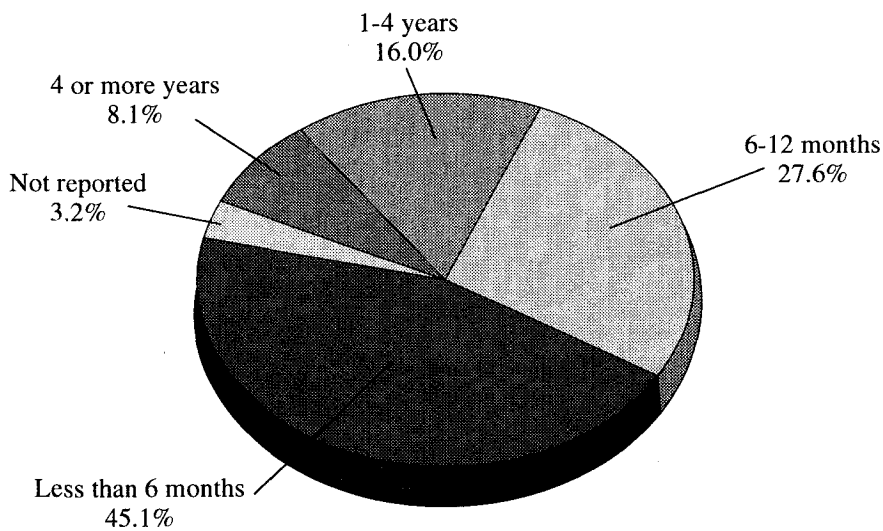
Source: U.S. Department of Labor, Bureau of Labor Statistics, Career Guide to Industries 2000-2001 Edition.

of assigned workers ranges from 3 to 5 months[11]. Lengths of temporary employment are mostly less than 6 months. *See Figure 1.*

On the other hand, some prefer longer assignments, for the purpose of their skill development. In most cases, longer you work for the same position, higher skills you are able to obtain.

Many agency temporaries choose to work as a temp because they are provided free training. According to the American Staffing Association, the staffing industry provides free training for millions of assigned employees to help meet today's

Figure 1: Length of Employment as a Temporary Help Worker



Source: Sharon R. Cohaney, *Workers in Alternative Employment Arrangements*, Monthly Labor Review, October 1996.

11) ASA, *Staffing FAQs*, <http://www.natss.org/staffseek/staffingfaqs.shtml>, (2000).

demand for skilled workers[12]. More specifically, 90% of staffing companies provide free training to their assigned employees, 4.8 million assigned employees received skills training worth $720 million in 1997, and 70% of temporary employees say they gained new skills through their assignments[13].

Japan changed its stance toward temporary work, and liberalized the staffing industry. Prior to the 1999 amendment, the Japanese government allowed only 26 jobs for temporary employment. Now the new Temporary Help Business Act removed these restrictions for all professions except port transportation, construction, security services, medical related professions, and professions related to manufacturing (for the present). It was expected that the deregulation would accelerate the temp market expansion, and create more jobs.

By contraries, there was no much job creation by the amendment according to the Temporary Work Services Association of Japan. This is because the new act restricts the contract term up to 1 year for the newly permitted jobs, thus companies may not receive service of temporary staffing at the same establishment after the 1st year. The average sales rate of the newly permitted jobs in each agency is only 2.15%.

If there is no chance to work, there is no skill development either. The restriction of the contract term seems inimical rather than meaningless to agency temporaries. The purpose of the restriction is to prevent agency temporaries from substituting for regular employees. But the Temporary Help Business Act was enacted for the benefit of agency temporaries. This bottom line should not be forgotten.

Some critics say that temporary jobs are second rated jobs. They pay poorly, offer few benefits, provide little security, and are inferior to "regular" jobs. Typically the critics fail to acknowledge that agency temporaries have different characteristics from workers holding regular jobs, which can lead to different motivations and expectations from their jobs. There is also little recognition that temporary help firms play an important role as labor market intermediaries, matching firms and employees. Nor is there any acknowledgement that both firms and temps benefit from these arrangements, firms gain flexibility and immediate access to specialized skills, while temps gain flexibility, experience, and often a stepping stone to "regular" employment when that is their goal[14].

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12) ASA, *Staffing Facts*, <http://www.natss.org/staffseek/staffingfacts.shtml>, (2000).

13) *Id.*

14) EPF, *Temps: Tempest in a Teapot*, 5 EMPLOYMENT POLICY FOUNDATION FACT & FALLACY No.2 , (Feb 1999).

Temporary jobs and temporary workers have great roles in labor market and should not be slighted. They deserve the same respect as regular jobs and regular workers.

Temporary work provides a bridge to permanent employment. People can try out a prospective employer and showcase their skills for a permanent job. The American Staffing Association says 74% of temporary employees say it's a way to get a permanent job, 72% of temporary employees go on to permanent jobs, and 40% of assigned employees are looking for their first permanent job or are re-entering the job market[15].

So-called temp-to-hire arrangements are very popular in the U.S. as an effectual instrument for best job matching. They offer valuable opportunities for both of workers and companies. On December 1, 2000, Japan made another advancement to improve the employment situation. The ban on charging temp-to-hire fees is now lifted. The justification for lifting the ban, is that more temp-to-hire arrangements will smooth the flow of labor between industries and improve the unemployment rate. As of October 2000, the unemployment rate has been holding steady at 4.7%.

Although the dual business of temporary help service and job placement had long been prohibited, similar activity had been seen. If an agency temporary was hired full time by a client after the temporary assignment, it was considered a job placement, not temp-to-hire. The ban had been in place because the Japanese government was afraid that if the two businesses were mixed, employer responsibilities would become ambiguous. And for agencies to start their temp-to-hire arrangements in Japan, they need to meet certain requirements that might cripple the potential of temp-to-hire for expanding employment opportunities. Workers are waiting for more chances to become available so that they can have better selection of jobs. Japan should realize this and deregulate further for the workers' sake.

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15) ASA *supra* note 12.