In June 2016, the European Union promulgated Directive (EU) 2016/943 as the first European attempts for harmonizing and strengthening trade secret protection in Europe. Only one month earlier, the US had enacted the Defend Trade Secrets Act (Pub. L. 114-153, "DTSA") as the first ever US federal civil law protecting trade secrets. Both the EU Directive and the US DTSA had been discussed and prepared for many years, and METI had been mindful of these international developments when preparing the amendments to Japanese law. Enhancing trade secret protection was promoted by large parts of US, EU and Japanese industry, as companies continued to feel the need to protect innovation not merely through patents and other registered intellectual property rights, but also through other forms of protection such as secrecy. This development – sometimes referred to in Japan as an "Open-Close-Strategy" – will remain an important challenge for drivers of innovation; providing an appropriate legal framework will be more crucial than ever to maintain an environment that fosters progress in technology.

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4. The 2015 Amendment to the Temporary Agency Work Act: A Fundamental Revision of the Regulatory Scheme

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I Introduction

In Japan, "labor supply" is prohibited under the Employment Security Act (Art. 44 of the Act). Labor supply is defined under the act as "having workers work under the direction and orders of another person based upon a supply contract" (Art. 4, Para. 6 of the Act). However, in order to better promote the proper matching of job openings with job applications, the Temporary Agency Work Act (in its Japanese short title, *Rodohsa Haken Ho*), hereinafter the Act, was enacted in 1985. It legalized

temporary agency work (more often translated as "worker dispatching" in Japan, a rather literal translation of the original Japanese word *rodosha haken*), where a worker employed by a temporary work agency, while maintaining his/her employment relationship with the agency, can be hired out to a user company in order to perform his/her work at the company under its direction and orders without being employed by the company (see Art. 2, Item 1, of the Act), as an exception to the prohibition of labor supply. The Act provides the legal framework within which temporary agency work is conducted.

The 2015 amendment to the Act, originally triggered by the accompanying resolution of the Diet to the 2012 amendment of the Act that required consideration of further revision, is the fourth and the latest major revision of the Act, following major amendments to it in 1999, 2003, and 2012. It is a fundamental revision of the regulatory scheme of the Act in that it requires all the temporary work agencies to obtain government permission to operate, instead of allowing some of them to operate only by giving notification to the Government, and that it comprehensively revised the regulation concerning the maximum period for which an agency is allowed to have its employees engaged in working for a user company. The revision is also important in obliging temporary work agencies to provide their temporary agency workers with job training and career counseling and to take measures in order to stabilize the employment of temporary agency workers employed under a fixed-term employment contract. Thus, it requires agencies to take more responsibility as employers of temporary agency workers. Furthermore, it has increased the obligation of user companies to balance the working conditions of temporary agency workers with those of user companies' own employees.

This note briefly introduces these key elements of the 2015 amendment of the Act.

II Requirement of All Temporary Work Agencies to Obtain Government Permission to Operate

Before the 2015 amendment, temporary work agencies that hired out only those employed "on a regular basis" were allowed to operate their business only by giving notification to the Government (i.e., getting permission from the Government was not required), while those that

hired out not just those employed on a regular basis but also employees employed on a more temporary basis were required to get permission from the Government to operate. The reason for requiring only a notification from the former and, thus, allowing agencies to operate under less strict government regulation was that employment of their temporary agency workers "on a regular basis" was considered more stable. However, employment "on a regular basis" included not only employment for an indefinite term (by which employment is stable to a certain extent under the doctrine of the abuse of the right to dismiss, the principle protecting employees from arbitrary dismissal) but also fixed-term employment continuing or expected to continue for more than one year. Since fixed-term employees are less protected under Japanese law (employers face fewer restrictions in terminating the employment contract at the end of the term) and, in reality, more than 80% of those temporary agency workers employed "on a regular basis" had fixed-term employment contracts, their employment was not necessarily stable.

Taking into consideration this situation as well as the fact that temporary work agencies operating only by giving notification to the Government got more administrative disciplines than those operating with permission from the Government, the 2015 amendment resulted in all temporary work agencies being required to obtain governmental permission, so that they have to operate in a manner more appropriate for protecting temporary agency workers (Art. 5 of the Act).

III Full-fledged Revision of the Regulation Concerning the Maximum Period for Which an Agency Is Allowed to Have Its Employees Engaged in Work for a User Company

The second key element of the 2015 amendment is the comprehensive revision of the regulation on the maximum period for which an agency is allowed to have its employees engaged in work for a user company.

Before the amendment, the Act placed no limit on the maximum period with regard to the so-called "twenty-six types of work," work that requires expert knowledge, technical skill, or experience (such as translation), or that requiring employment management significantly different from that of typical regular employees, while limiting the maximum period to basically one year (extendable up to three years) with

regard to other types of work. The reason behind placing no limitation on the "twenty-six types of work" was that this category of work had been considered to be traditionally performed by workers other than so-called regular employees and, therefore, would not cost regular employees their stable, better-paid jobs. In contrast, the limitation on other types of work was intended to prevent regular employees from being replaced by temporary agency workers.

The 2015 amendment abolished this distinction in types of work in placing or not placing a limitation on the maximum period for hiring out because, on the one hand, a distinction between work that requires knowledge, technical skill, or experience and one that does not is difficult to make and the criteria for the distinction change over time (for example, operating computers had been categorized as work that required knowledge, technical skill, or experience under the original 1985 Act, but many considered it no longer a technical job at the time of the 2015 amendment).

Instead, firstly the amendment put temporary agency workers *employed under an employment contract for indefinite period* (and some other categories of temporary agency workers, such as those aged sixty years or over) beyond the regulation for limiting the maximum period for hiring out (Art. 40-2, Para. 1, Proviso of the Act) because it was considered that temporary agency workers employed under an employment contract for an indefinite period enjoy relatively stable employment under the doctrine of the abuse of the right to dismiss (see II above) and, therefore, would not severely undermine the employment security of the workforce in the labor market as a whole even if the number of these workers increased.

Secondly, the amendment introduced two kinds of limitation on the maximum period for hiring out *temporary agency workers employed under a fixed-term employment contract*. The first limitation is the three-year maximum period for which agencies are allowed to hire out their fixed-term employees and a user company is allowed to accept these employees *at each establishment* (e.g., a plant, an office) (Arts. 40-2 and 35-2 of the Act). The maximum period can be extended for up to three more years (and repetition of the extension is even possible) on condition that the user company hears an opinion of a representative of the employees it

employs at that establishment. The second limitation is the three-year maximum period for each temporary agency worker hired under a fixed-term employment contract to be hired out *to the same organizational unit of user company* (typically a department (*ka* in Japanese) – a unit typically smaller than a whole establishment but larger than a section (*kakari* in Japanese) and the smallest organizational unit of a company) (Arts. 40-3 and 35-3 of the Act). This means that the same temporary agency worker cannot be hired out to the same organizational unit for more than three years (no extension is allowed for this limitation). This limitation is intended to prevent temporary agency workers under a fixed-term employment contract being "trapped" in the same job for a long period of time as temporary agency workers and also to prevent the number of temporary agency workers under a fixed-term employment contract, whose employment is less secure, from increasing in the labor market as a whole.

IV Amendments Intended to Promote Better Treatment of Temporary Agency Workers

Other important revisions include (1) obliging temporary work agencies to take measures for the career development of temporary agency workers, (2) obliging temporary work agencies to take measures to stabilize the employment of temporary agency workers employed under fixed-term employment contracts, and (3) increasing user companies' responsibility to balance the working conditions of temporary agency workers with those of user companies' own employees.

With regard to (1), temporary work agencies are obliged to provide their temporary agency workers with step-by-step and systematic job training as well as, at the request of the workers, career counseling (Art. 30-2 of the Act). One of the reasons temporary agency workers face a difficulty in transitioning to direct employment (especially to regular employment) is their limited opportunities for career development, and the new regulation is intended to improve this situation.

As for (2), temporary work agencies are obliged to take one of the following measures with regard to a temporary agency worker who is employed under a fixed-term employment contract and expected to work for the same organizational unit of a user company for three years (i.e., for

the maximum period): (i) ask the user company to hire the worker as its own employee, (ii) introduce a new user company where the worker is expected to be engaged in a job appropriate to his/her ability or work experience, (iii) employ the worker as an employee of the agency (i.e., *not* as a temporary agency worker) under an indefinite employment contract, or (iv) implement other measures, such as providing job training with pay or hiring out for the purpose of an employment placement (Art. 30 of the Act). With regard to a temporary agency worker who is employed under a fixed-term employment contract and is expected to work for the same organizational unit of a user company for at least one year but less than three years, agencies are obliged to *endeavor* to take one of these measures. Agencies are also obliged to *endeavor* to take one of the measures (ii), (iii), or (iv) with regard to temporary agency workers and those registered at the agency who have worked for one year or more with the agency.

In terms of (3), a user company is obliged to pay due consideration to (i) provide, at the request of the temporary work agency, information on the wages of its own employees engaged in the same kind of job as that of temporary agency workers so that the agency can determine the wages of the temporary agency worker in a manner that is balanced with those of the user company's employees engaged in the same kind of job, (ii) provide, at the request of the temporary work agency, temporary agency workers with the same job trainings it provides to its own employees engaged in the same kind of job as that of the temporary agency workers, and (iii) allow temporary agency workers access to facilities, such as dining areas, restrooms, and locker rooms (Art 40, Para 5, 2 and 3).

V Conclusion

The 2015 amendment is a fundamental revision of the Act's regulatory scheme in requiring all of the agencies to get governmental permission to operate and in drastically changing the regulations on the maximum period for hiring out workers. The amendment is, as a whole, intended to provide a certain stability and protections to temporary agency workers. Whether the amended Act works as intended, we will have to wait and see.

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