

April 26, 2023

Worker Classification and Legal Protection of Gig Workers

1. Introduction

Recently, there has been an ongoing debate on the need to grant legal protection to gig workers similar to that afforded to employees. In light of this trend, we explain an order issued by the Tokyo Labor Relations Commission regarding a food delivery platform business, in which the Commission imparted a new decision on worker classification under the Labor Union Act. In addition, we explain the proposed Act on the Proper Conduct of Transactions with Specified Contractors (so-called “Proper Transactions Between Freelance and Business Operators Act”).

2. Background: Characteristics of Labor Unions in Japan

Japan’s Labor Union Act does not regulate the form of organization of labor unions. Unlike in other countries, there are only a few industrial unions, i.e., cross-sectional organization of workers belonging to the same industry, transcending the boundaries of companies and job categories. More than 90% of Japan’s private sector labor unions are enterprise unions which organize employees on a company-by-company basis, regardless of their job classification, and nearly 90% of labor union members belong to enterprise unions. The estimated organization rate in 2022 of all workers in Japan was 16.5%.

In the case we mention below, a labor union organized exclusively by delivery workers who use a platform to carry out food delivery operations demanded collective bargaining with the platform company. Because delivery workers are generally treated as independent contractors rather than employees, the fact that a group of delivery workers organized a labor union in and of itself indicates their strong desire to improve their working conditions and contract terms.

3. Recent Case on Food Delivery Service Business

(1) Outline of the Case

On December 24, 2022, the Tokyo Labor Relations Commission determined that the members of a labor union formed by delivery workers who use a platform to carry out food delivery operations were eligible for protection under the Labor Union Act, and ordered the company offering the platform to comply with the labor union's request to engage in collective bargaining in good faith. In response, the platform company appealed the Tokyo Labor Relations Commission's order and filed a petition for review by the Central Labor Relations Commission.

The platform company in this case operates a platform business in Japan that matches the orders received from customers with delivery workers who receive the ordered products from the stores and deliver them to the customers. The delivery workers do not have employment contracts with the platform company and are treated as independent contractors. As such, they are generally not considered to be employees protected under the Labor Standards Act which regulates wages, work hours and other labor conditions. In October 2021, the delivery workers formed a labor union and requested the platform company to engage in collective bargaining regarding such matters as compensation for accidents during deliveries and fee increases. However, the platform company refused the request on the grounds that the delivery workers were not protected under the Labor Union Act.

In the dispute, in addition to the issue of whether the delivery workers were "workers" as defined under the Labor Union Act, the parties also argued over whether the platform company was the employer under the Labor Union Act in relation to the union members because the actual operation and management of delivery workers was handled by an affiliate of the platform company and not the platform company itself.

(2) Framework for Determining Worker Classification

Under the Labor Union Act, a "worker" eligible for protection under the Act is defined as "any person, regardless of occupation, who lives on wages, salaries, or other equivalent income" (Article 3 of the Labor Union Act). This definition is interpreted to be broader

than the term "worker" in the Labor Standards Act which covers only those who are employed by an employment agreement. Independent contractors who are subject to a certain degree of control from the party engaging them may also be considered "workers" under the Labor Union Act. The Tokyo Labor Relations Commission ruled that the platform company is not only providing the delivery workers with the platform, but are also involved in various ways in the execution of delivery operations, including (i) incorporation into the platform company's business organization, (ii) the unilateral and routine determination of the content of the contracts with the delivery workers, and (iii) payment of remuneration as consideration for labor. While the Commission acknowledged that the delivery workers were not required to respond to work requests and were not subject to time or place constraints, the Commission found that the delivery workers were providing labor under broadly defined "direction and supervision" of the platform company and did not represent significant entrepreneurship. Taking all of these circumstances into consideration, the Commission concluded that the delivery workers fell under the definition of a "worker" under the Labor Union Act.

4. Act on Proper Transactions with Specified Contractors (Proper Transactions Between Freelance and Business Operators Act)

Another protection for gig workers was found in the cabinet decision of February 24, 2023 on a new bill to strengthen the protection of freelance workers called the Act on Proper Transactions with Specified Contractors (the Proper Transactions Between Freelance and Business Operators Act). Under current legislation, subcontractors are protected by the Act Against Delay in Payment of Subcontract Proceeds, etc. to Subcontractors ("Subcontract Act"), if the party engaging the contractor has a capital exceeding 10 million yen. However, the lack of regulation of small businesses with a capital of 10 million yen or less have been seen as problematic.

In order to ensure appropriate transactions between freelancers and businesses, the proposed new Act stipulates: (i) the prohibition of certain acts such as reduction of pre-determined fees, unfairly low pricing, and refusal to accept deliverables, (ii) an obligation to provide terms and conditions in writing, and (iii) an obligation to pay compensation within 60 days from the date of receipt of deliverables. In addition, as the proposed new Act aims to protect contractors who are individuals, it also requires the parties engaging the contractors to provide the following items to improve the working environment of the contractors: (i) accurate presentation of recruitment information, (ii) consideration for the

need to balance work with childcare and nursing care, (iii) establishment of a system to prevent harassment, and (iv) provision of 30 days' prior notice in case of termination during the contract term. In addition, under the proposed new Act, if a party is found to have committed a violation, administrative authorities may conduct an inspection and request information, issue guidance and advice, make recommendations, or issue an order if the ordering party does not comply with the recommendations. Imposing a fine up to 500,000 yen for a violation of an order or refusal to receive inspection is also under consideration. The proposed new Act is expected to be enacted in the current session of the Diet.

If the proposed new Act is enacted, companies that outsource work to freelancers should review their contracts and practices regarding the engagement of such workers to ensure compliance with new requirements.

TMI Associates

Cross-Border Labor and Employment Team

23rd Floor, Roppongi Hills Mori Tower
6-10-1 Roppongi, Minato-ku, Tokyo 106-6123, Japan
Tel +81(0)3-6438-5511 Fax +81(0)3-6438-5522
Email XBorLE@tmi.gr.jp
<http://www.tmi.gr.jp/english/>

This newsletter is provided as a general informational service to clients and friends of TMI Associates.
It does not constitute legal advice.