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Overview of the New Freelance Act and Some Remaining Issues for Freelancers

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I. Background of the New Freelance Act in Japan

For a long time, issues have surrounded freelancers or persons who do various kinds of work but are not covered by employment contracts. As self-employed workers, freelancers have been traditionally excluded from social protections, such as those afforded by labor laws and social security, and they are often taken advantage of given their vulnerable position.

Recently, however, work styles have been drastically diversifying, and in particular, new forms of work utilizing technology, such as platform work and gig work, are becoming common not only in Japan but also all over the world. In fact, the population of freelancers in Japan has been increasing, and as of 2022, the number of people whose main livelihood is freelancing is estimated to be around 2.09 million, accounting for 3.1% of the entire working population.[1] Hence, as a matter of course, there have been growing calls to protect freelancers.

The laws that protect freelancers include the "Act on Prohibition of Private Monopolization and Maintenance of Fair Trade"[2] and the "Act against Delay in Payment of Subcontract Proceeds, etc. to Subcontractors"[3] (the "**Subcontract Act**") to the extent they apply to transactions with freelancers. However, these laws do not provide freelancers sufficient protection.

To provide freelancers sufficient protection by creating an environment where they can work stably, the "Act on Improvement of Transactions between Freelancers and Undertakings,"[4] or the so-called "Freelance Act" (the "**Freelance Act**"), was enacted on April 28, 2023, and promulgated on May 12 of the said year. The Freelance Act will take effect on November 1, 2024.

On May 31, 2024, the Cabinet Order, Rules of the Japan Fair Trade Commission (the "**JFTC**"), Ordinance of the Ministry of Health, Labour and Welfare (the "**MHLW**"), and guidelines were then published by the JFTC and the MHLW.

1. Bureau of Statistics of the Ministry of Internal Affairs and Communications, "Survey on the Labor Market in 2022," available at (https://www.stat.go.jp/data/shugyou/2022/pdf/kgaiyou.pdf) (in Japanese).
2. *Shitekidokusen no kinshi oyobi kouseitorihiki no kakuho ni kansuru houritsu* [Act on Prohibition of Private Monopolization and Maintenance of Fair Trade] Law No. 54 of April 14, 1947, as last amended by Law No. 63 of June 16, 2023.
3. *Shitaukedaikin shiharai chien boushi hou* [Act against Delay in Payment of Subcontract Proceeds, etc. to Subcontractors] Law No. 120 of June 1, 1956, as last amended by Law No. 51 of June 10, 2009.
4. *Tokutei jutakusha ni kakaru torihiki no tekiseika ni kansuru houritsu* [Act on Improvement of Transactions between Freelancers and Undertakings] Law No. 25 of May 12, 2023.

II. Outline of the Freelance Act

As described below, the Freelance Act provides freelancers certain protections similar to those contained in the Subcontract Act and labor related laws, and enables authorities to address violations of the Freelance Act.

1. Covered transactions

The Freelance Act applies to any "business consignment" by a consignor to a "specified consignee" (hereinafter referred to as a "freelancer" for ease of understanding).

Article 2.1 of the Freelance Act defines a freelancer as follows:

Freelancer (Specified consignee)	(a) The counterparty in a business consignment, and
	(b)-(i) an individual with no employee;[5] or (b)-(ii) a company with no officer (other than a legal representative) and no employee.

A "business consignment" is defined as *"an entrepreneur's agreement that entrusts to another entrepreneur the manufacture (including processing) of goods or the creation of information-based products as a part of its business"* or *"an entrepreneur's agreement that entrusts to another entrepreneur the provision of a service as a part of its business (including having another entrepreneur provide a service for its own services)."*[6] The entrepreneur making the business consignment shall be referred to herein as the "consignor."

Unlike the Subcontract Act, however, the Freelance Act has no capital requirement for it to apply to the parties involved. In addition, the transactions subject to the Freelance Act (i.e., any business consignment) are broader than those subject to the Subcontract Act.[7]

Moreover, as one can expect from the definition of a freelancer provided earlier, it could prove to be extremely difficult to determine whether every counterparty to a business consignment is a freelancer under the Freelance Act because there seems to be no other way but to ask each counterparty about its number of employees. Such information is not registered in the commercial registration of a company.

Therefore, it may be more practical to assume and treat micro-enterprises, including individuals, as freelancers under the Freelance Act and comply with the requirements thereof, rather than check each and every counterparty to determine whether or not it is a freelancer.

2. Regulations similar to the Subcontract Act

(a) Obligations of a consignor

- Obligation to clearly state the terms of the business consignment[8] (Article 3.1 of the Freelance Act)

  When consigning a business to a freelancer, (i) the terms of the consignment, (ii) amount of the remuneration, (iii) payment date, etc., must be clearly indicated in writing or by electromagnetic means.

- Payment obligation (Articles 4.1 and 4.5 of the Freelance Act)

  The payment date must be fixed within sixty (60)

5. The guidelines published by the JFTC and the MHLW define an "employee" as (a) a worker with more than twenty (20) hours of normal working hours a week, and (b) a worker who is expected to be employed for more than thirty (30) consecutive days.
6. The Freelance Act, art. 2.3.
7. For example, an entrepreneur's use of outsourcing for its own services is not subject to the Subcontract Act.
8. This obligation applies even when the consignor does not have an employee (the Freelance Act, arts. 3 and 2.5). All other obligations, prohibited acts, etc., would only apply to such consignor if it has more than one (1) employee.

days[9] from the day the consignor receives the work from the freelancer or the day the freelancer provides the service. Payment must be made by such date.

(b) Prohibited acts

For any business consignment that lasts longer than the period specified in the Cabinet Order (i.e., one (1) month), the following acts are prohibited (Article 5 of the Freelance Act).

- Refusal to receive the work without any reason attributable to the freelancer;
- Reduction of remuneration without any reason attributable to the freelancer;
- Return of the goods without any reason attributable to the freelancer;
- Unjust setting of the remuneration at a level that is conspicuously lower than the price ordinarily paid for the same or similar type of work;
- Coercing the freelancer to purchase or use designated goods or services without any justifiable reason;
- Causing the freelancer to provide economic gain that unjustly injures its interests; and
- Causing the freelancer to change the content of the work or do a re-work without any reason attributable to the freelancer and which unjustly injures its interests.

3. Regulations similar to labor related laws

- Display accurate and up to date recruitment information in advertisements (Article 12 of the Freelance Act)[10]
- Give consideration for pregnancy, childbirth, childcare, or caregiving for any business consignment that lasts longer than the period specified in the Cabinet Order (i.e., six (6) months) (the "**Continuous Business Consignment**"), if requested, so that the freelancer can balance such circumstance and the work (Article 13 of the Freelance Act)
- Establish a consultation system and take measures to prevent harassment to ensure that the work environment is free from sexual harassment, maternity harassment, power harassment, etc. (Article 14 of the Freelance Act)
- Give prior thirty (30) days' notice of termination or non-renewal of a contract for a Continuous Business Consignment (Article 16 of the Freelance Act)

However, the prior notice requirement above would not apply if it has become difficult to give such notice due to a natural disaster or any other compelling reason, or in the cases specified by the Ordinance of the MHLW, such as where it is necessary to terminate an agreement with the freelancer immediately due to a reason attributable thereto. However, please note that the guidelines state that this should be limited to very serious and extreme cases from the viewpoint of protecting freelancers. Therefore, contracts with freelancers are recommended to be reviewed because immediate termination clauses may be considered to violate the Freelance Act.

4. Enforcement

Freelancers may request the relevant authorities[11] to take appropriate measures if there is any factual circumstance that is in violation of the provisions of

9. If the original consignor consigns the business to an entrepreneur (other than a freelancer) and then re-consigns the business to a freelancer, the date of payment of the remuneration for the re-consigned business must be fixed within thirty (30) days from the date of payment of the remuneration for the original consignment (the Freelance Act, art. 4.3).
10. This rule is almost the same as that provided in Article 5-4 of the Employment Security Act (*Shokugyo antei hou* [Employment Security Act] Act No. 141 of November 30, 1947, as last amended by Act No. 68 of June 17, 2022).
11. Such authorities include the JFTC, the MHLW, and the Small and Medium Business Administration.

the Freelance Act (Articles 6 and 17 thereof). Such authorities have the power to investigate, conduct on-site inspections, give guidance or recommendations, issue orders, etc. (Articles 7-9, 11, 18-20 of the Freelance Act). In case of any violation of any administrative order, a fine of up to 500,000 yen could be imposed and there is a dual penalty clause that punishes both the violating employee and the employer thereof (Articles 24 and 25 of the Freelance Act).

5. Summary of the Freelance Act

Below is a summary of the Freelance Act.

Entrepreneur (Consignor)	Obligations	Freelancer
●Consigning the business to the freelancer ●No employee	(a)	●Counterparty of the business consignment ●No employee
●Consigning the business to the freelancer ●Has more than one (1) employee	(a)(b)(d)(f)	
●Consigning the business to the freelancer ●Has more than one (1) employee ●The period of the business consignment is longer than one (1) month	(a)-(g)	

Obligations	Summary of the Obligations
(a) Obligation to clearly state the terms of the business consignment, etc.	When consigning a business to a freelancer, (i) the terms of the consignment, (ii) amount of the remuneration, (iii) payment date, etc., must be clearly indicated in writing or by electromagnetic means.
(b) Payment obligations	The payment date must be fixed within sixty (60) days from the day the consignor receives the work from the freelancer, or the day the freelancer performs the service, and the payment must be made by such date.
(c) Prohibited acts	See the list provided in Part 2(b) above.
(d) Obligation to display accurate and up to date information in recruitment advertisements	Information offered in recruitment advertisements must not be false or misleading and must be kept accurate and up to date.
(e) Obligation to give consideration for pregnancy, childbirth, childcare, or caregiving	Necessary consideration must be given to the freelancer in response to a request thereof so that the freelancer can balance pregnancy, childbirth, childcare, or caregiving and the work.
(f) Obligation to establish a consultation system for harassment	A system for consultation concerning harassment must be established for the freelancer and measures should be taken to prevent harassment.
(g) Obligation to give a prior notice of termination or non-renewal	Thirty (30) days' prior notice must be given to the freelancer when terminating or not renewing a contract for a Continuous Business Consignment.

6. Remaining Issues

The enactment of the Freelance Act is a major step towards protecting freelancers and should be praised as such, however, the following important issues remain unresolved.

(a) Disguised freelancers

There has been a growing social issue concerning companies bringing in freelancers to have them work like their employees, i.e., "workers" under the Labor Standards Act,[12] but without employee benefits. If someone is a "worker" under the Labor Standards Act, he or she is protected by various labor related laws, such as the Labor Standards Act, the Labor Contracts Act,[13] the Industrial Safety and Health Act,[14] and the Labor Union Act.[15] Workers are also afforded social security. Under the Freelance Act, if someone who has been treated as a freelancer is found to be a "worker," then the Freelance Act would not apply to such "worker" and, instead, such "worker" must be protected by the various labor related laws mentioned above.

The determination of whether or not a person is a "worker" under the Labor Standards Act is made by comprehensively considering various items,[16] however, the standard has been criticized for its uncertainness and difficulty in predicting whether or not one is a "worker." Thus, there is a need to make the criteria to determine the status of a "worker" clearer and establish a system in which the labor standard offices can appropriately respond to in order to protect "workers" who are not being treated as "workers."

(b) Social security for freelancers

Since freelancers are not considered "workers" under the Labor Standards Act, currently, it is almost impossible for them to have workers' accident compensation insurance, employment insurance, health insurance, or employees' pension insurance, except for a very few exceptions. Therefore, freelancers are not entitled to receive, among other things, workers' accident compensation, even if they get injured from a work-related accident, or unemployment benefits when they lose their jobs. To solve this issue, a study group of the Japanese government has suggested that the government consider providing social security to freelancers/gig workers who are not considered "workers" under the Labor Standards Act. Such discussion is expected to develop in depth to provide freelancers further protection.

12. *Roudou kijun hou* [Labor Standards Act] Law No. 49 of April 7, 1947, as last amended by Law No. 71 of December 12, 2018.
13. *Roudou keiyaku hou* [Labor Contracts Act] Act No. 128 of November 28, 2007, as last amended by Act No. 71 of December 28, 2018.
14. *Roudou anzen ensei hou* [Industrial Safety and Health Act] Act No. 57 of June 8, 1972, as last amended by Act No.68 of June 17, 2022.
15. *Roudou kumiai hou* [Labor Union Act] Act No. 174 of June 1,1949, as last amended by Act No. 53 of June 14, 2023.
16. The determination of the status of a "worker" under the Labor Standards Act is made by comprehensively considering the following items: (a) whether it is possible to reject a work request; (b) whether there are directions and orders regarding the content of the work and the manner in which the work should be done; (c) whether there is a degree of binding effect with respect to place and time; (d) whether someone else is allowed to step in as a substitute for the person who is to provide the services; (e) whether the remuneration bears the characteristics of consideration for the provision of labor; (f) whether there are characteristics showing that the person is a business operator; and (g) whether the person is providing the services exclusively to the employer.

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Overview of Responsive Actions to Defamatory Posts

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Companies have been increasingly facing reputational damage from defamatory posts on the Internet. In Japan, there are generally two possible actions that can be taken by such companies to respond to such defamatory posts. The first is to have the defamatory post removed by demanding that the administrators of the subject social networking services or websites (the "**content providers**") delete the defamatory posts. The second is to file a direct lawsuit against the individual responsible for such posts (the "**sender**") by first demanding that the content provider or the internet service provider ("**internet provider**") disclose the identification information of such sender. An overview of these responsive actions is provided below.

I. Demand for Deletion of the Defamatory Posts

A demand for the deletion of a defamatory post is based on a violation of the claimant's moral rights. There are no substantive rules governing this right to demand deletion.

Initially, a request for the deletion of a defamatory post is submitted to the content provider outside of a court proceeding, typically via an email or an online form. However, it is up to the content provider to voluntarily comply with such request.

On May 10, 2024, a law amending the Provider Liability Limitation Act was enacted. This amendment imposes obligations on large platform operators, such as responding to requests for deletion within a certain period and establishing and publishing deletion criteria. With this amendment, the name of the law will change from the Provider Liability Limitation Act to the Information Distribution Platform Act. This new law is scheduled to take effect within a year. Due to concerns about the potential chilling effect on freedom of expression, this new law does not require large platform operators to delete defamatory posts. Instead, it allows each operator to decide whether to comply with a request for deletion.

If the content provider refuses to delete the subject post, the claimant may choose to file a court action.

Typically, the claimant would file a petition for a provisional disposition order. If successfully obtained, the provisional disposition order would temporarily establish a situation similar to where the claimant had already won the lawsuit, even before the formal trial. During this proceeding, the court will make a decision within a shorter time frame compared to a full trial. In most cases, upon receiving a provisional disposition to delete a post, the content provider will agree to delete it and not contest the illegality of the post in the formal trial.

To grant an order for provisional disposition for the deletion of a defamatory post, the following two

factors would be considered by the court:[1]
(a) The right to be preserved; and
(b) Necessity of the preservation.

Regarding the right to be preserved, the claimant must make a prima facie showing of the harm of the post on the social reputation thereof and the absence of any factor that would negate the illegality of the post.

The illegality of the post would be negated if **all** of the following three requirements are satisfied: (i) the content of the post relates to the public interest; (ii) the post was made solely for the purpose of serving the public interest; and (iii) the facts disclosed in the post are true. Therefore, the claimant just needs to make a prima facie showing that at least one of the three requirements in items (i) to (iii) is not satisfied.

In the case of a defamation on the Internet, the requirements in items (i) and (ii) above can usually be met. Therefore, the requirement in item (iii) would often be the only issue in dispute. When considering whether or not the facts in the post are true, it is important to consider that, in general, there are two types of defamatory posts: posts that indicate facts and those that express an opinion. For example, the post, "The hospital made a prescribing error," is stating a fact, while the post that, "The quality of service is poor" or that "the food is tasteless," is expressing an opinion.

For a fact-based defamation, the claimant must allege and make a prima facie showing that the fact in the post is not materially true. In the case of an opinion-based defamation, the claimant must allege and make a prima facie showing that the underlying facts of the post are not materially true and that the post deviates from the scope of a fair opinion or commentary, such as it constituting a personal attack. Regarding the necessity of the preservation, the claimant needs to allege and make a prima facie showing that the preservation of the subject right is necessary to avoid any substantial loss or imminent danger to the claimant.

II. Demand for Disclosure of the Sender's Identification Information

To pursue a claim for damages directly against the sender, the claimant must obtain the sender's identification information, and the most effective way to demand the disclosure of such information is to make such demand upon both the content provider and the internet provider. The substantive legal basis therefor is outlined in the Provider Liability Limitation Act. [2]

Previously, to identify a sender on the website where the posts were made anonymously, the claimant must demand that the content provider disclose the IP address, time stamp, etc., of the post, then use such information to identify the internet provider used by the sender, and then demand that the internet provider disclose the sender's address, name, and other information. In the past, it was common to use the provisional disposition proceedings to make these two demands. However, the revised Provider Liability Limitation Act, which took effect on October 1, 2022, introduced a new procedure that allows both demands to be made in a single court proceeding.

Under this new procedure, upon petition by the claimant, the court may order the content provider to provide the claimant the name of the internet provider associated with the IP address, etc., (the

1. *Minji hozenho* [Civil Provisional Remedies Act] Act No. 91 of December 22, 1989, art. 13, para. 1, as last amended by Act No. 53 of June 14, 2023.
2. *Probaida sekinin seigenho* [Provider Liability Limitation Act] Act No. 137 of Nov. 30, 2021, art. 5, paras. 1 and 2, as last amended by Act No. 53 of June 14, 2023.

"**Information Provision Order**").[3] This would then enable the claimant to initiate proceedings against the internet provider without waiting for an order compelling the content provider to disclose the IP address, etc.

In addition, when the claimant files a petition demanding that the internet provider disclose the sender's identification information, the pending proceeding against the content provider will be combined with such proceeding against the internet provider.

Furthermore, concurrently with the petition for the court to compel the internet provider to disclose the sender's identification information, it is possible to petition the court to issue a prohibitory order against the internet provider to prevent it from deleting the IP address and other information of the sender prior to the court's determination of the order to disclose the sender's identification information.[4]

The order prohibiting the deletion of information is important because many internet providers delete their communication logs after a certain period. Such period varies among internet providers, but generally ranges from three to six months. Once these communication logs are deleted, it would become impossible to identify the sender, so it is necessary to request the internet provider to preserve them. While some internet providers will voluntarily comply with log preservation requests, others will not do so unless an order prohibiting the deletion of such logs is issued.

There are several requirements for the approval of a demand for the disclosure of a sender's identification information, but the issue most often in dispute is the requirement that the violation of the claimant's right be obvious.[5] As mentioned in Part II above, the claimant must allege and prove that the social reputation thereof has been harmed by the post and that there are no factors that would negate the illegality of the post.

III. Concluding Remarks

Responding to defamatory posts is a race against time, especially when demanding the disclosure of the sender's identification information. For companies that interact with consumers, it is important for them to understand these procedures in advance so that they can take swift action when the time comes to do so.

3. *Id.*, art. 15, para. 1.
4. *Id.*, art. 16, para. 1.
5. *Id.*, art. 5, para. 1, item 1.

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