Regulation and Response : Industrial Safety and Health Law in Japan (I)

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NOTES

Regulation and Response : Industrial Safety and Health Law in Japan (I)

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I. INTRODUCTION

The Japanese regulatory structure governing occupational safety and health is an underdeveloped area of English-languange research of Japanese law. But a study of such a regulatory regime is relevant to more than just the handful of lawyers and academics who stake an interest in understanding the Japanese legal system. It is, for example, of crucial importance for foreign firms operating in Japan to understand not only how the regime operates but what kind of environment it operates within. Failure to abide, not just by the minimum standards established by law, but by commonly-accepted expectations of corporate management in Japan, will quickly alienate labor and lead to recruiting difficulties. It is thus within the interest of foreign firms operating in Japan to understand what is expected of them by government and labor alike and to be

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aware of what corporate practice is in this regard.

But a study of occupational safety and health regulation and corporate Japan's response to it is valuable in a larger context also. Safety and health issues at the workplace are laden with opportunities for both cooperation and conflict. The situation involve not only the regulated entity (management) and the regulator (government), but also labor. Better understanding the situation will aid in understanding these relational dynamics in Japan. Further, by comparing the regulatory regime with that of the United States, a study of safety and health regulation and response can also reveal cultural differences and similarities, which further our understanding of both our own culture and that of Japan. Taking it a step further, comparative social regulation studies also contextualize one's own system and aid in an accurate assessment of the strengths and weaknesses of it. By including information concerning corporate response to a regulatory regime, groundwork is provided to assess the attendant costs and benefits of a particular legal system and style. An analysis of the governing law, regulatory environment, business response, and safety and health records in Japan and the United Sates will assist in answering questions regarding the costs and benefits associated with the respective legal styles.

This study is the first step in a larger project comparing the experiences of a Japanese firm with parallel operations in the United States and Japan concerning workplace safety and health management in response to the respective legal systems. It begins with a historical outline of safety and health regulation in Japan, providing a context whereby to understand later developments. It then outlines generally the modern legal and regulatory framework governing safety and health issues. In the next section, it analyzes in greater detail the cornerstone legislation, the Industrial Safety and Health Act. Then, a description of the regulatory structure and environment follows, giving one greater understanding of administrative control in Japan and providing an important context for detailed analysis of corporate compliance and avoidance patterns. Then, in order to assess the efficacy of the regulatory regime, injury and illness data from Japan will be compared with similar data from the United States. Finally, the safety and health experiences of a Japanese firm in Japan will be analyzed in order to understand the other side of the legal equation : implementation. The company's internal structure for protecting the safety and health of its workers

will be described, its goals and activities will be explained, and its safety and health records will be analyzed.

II. HISTORICAL DEVELOPMENT OF SAFETY AND HEALTH LAWS

Any attempt to understand the current regulatory structure and environment governing occupational safety and health in Japan must necessarily start at the beginning, at the moment the structure was first created and the environment first defined. For to do otherwise is to strip the current system from its historical context, creating a false dichotomy between past and present. Time is a continuum, not an instant. By briefly outlining Japan's initial regulatory responses to safety and health problems, I hope to demonstrate both the continuity and change of the modern Japanese legal and regulatory environment.

Following the Meiji Restoration in 1868, the new leaders found that during Japan's long seclusion from the rest of world, a vast change had taken place. Not only had the Industrial Revolution occurred, but the Western countries were also in the midst of an orgy of colonization. To avoid the latter, the Meiji leaders realized they needed the former. They coined the slogan *fukoku kyōhei* (wealthy country, strong army) to "unite the aspirations and endeavors of the people under the new regime."[1] This slogan helps illustrate the key difference between the Industrial Revolutions that occurred in England and Japan. In England, the developments and changes in industry were both spontaneous and individualistic. In Japan, on the other hand, industrialization was a government policy aimed at national advancement.

The changes in Japanese industry that occurred at this time can be divided into four distinct stages.[2] The first stage was actually before the Meiji Restoration, when feudal lords (*daimyō*) and the shogunate (*shōgun*) began to adopt new methods of manufacturing from the West. The second stage, commencing with the Restoration and lasting for about fourteen years, was characterized by state initiation and state management of industry. The third stage, lasting for about thirteen years, witnessed the government beginning to privatize the economy, turning over many of their then-modern factories to individuals (but

[1] IWAO F. AYUSAWA, A HISTORY OF LABOR IN MODERN JAPAN 24 (1966).
[2] *Id.*, at 39-40.

retaining supervision and control), but continuing to give protection and subsidies. The final stage, though not the end of industrial expansion, lasted until 1904 and was marked by rapid industrial expansion.

Modern development soon began to profoundly alter traditional social and economic organization. Industrialization demanded larger economic organizations and economies of scale than existed in Shogunate Japan.[3] The greater demand for workers in concentrated locations created an irresistible pull on the peasants to move from the poverty of rural life to the cities and their new factories. Workers, cut off from the social rhythms of an agrarian life, were exposed to long hours, harsh working conditions, and little protection.[4] This rapidly changing industrial situation soon exposed the new Japanese Civil Code[5] as being insufficient to address the problems related to the changing working conditions attendant with industrialization.[6]

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[3] This term can be used to collectively describe the Kamakura period (1192-1333), Muromachi period (1338-1573) and Edo period (1603-1867). It was during this last period, commonly referred to as the Tokugawa period, that commerce in Japan, blessed by over two hundred and fifty years of peace and isolation, began to really develop. A few of the more well-known companies in Japan can trace their roots to this period. For example, Mitsui and Sumitomo both date back in some form or another to the early Tokugawa period (Mitsui as a sake brewer in Ise and Sumitomo as a drug and iron-goods merchant in Kyoto). JOHN WHITNEY HALL, JAPAN : FROM PREHISTORY TO MODERN TIMES 209 (Charles E. Tuttle Books 1971) (1968).

[4] Fujimoto describes the situation during these years :

> Many employers dealt with workers just as slaves, some employers such as mine owners and contractors or sub-contractors in construction outrageously oppressed workers' discontent by violence. The majority of employers were entirely indifferent to the safety of workers at the work places. As a matter of course, bad labour [*sic*] conditions as such, deprivation of human rights from workers and employers' indifference to safety resulted in high rates of accidents in those days.

Takeshi Fujimoto, *A Short History of Occupational Accidents in Japanese Industries, in* 67 REPORT OF THE INSTITUTE FOR THE SCIENCE OF LABOUR 3 (1967).

For a general description of effects of rapid modernization during the Meiji period, see HUGH PATRICK, ED., JAPANESE INDUSTRIALIZATION AND ITS SOCIAL CONSEQUENCES (1976).

[5] *Minpō* [Civil Code], Law No. 89 of 1897 (effective July 16, 1899), *amended by* Law No. 36 of 1902, Law No. 69 of 1926, Law Nos. 61 and 222 of 1947, Law No. 260 of 1948, Law No. 115 of 1949, Law Nos. 5 and 62 of 1958, Law Nos. 40 and 69 of 1962, Law No. 126 of 1963, Law No. 100 of 1964, Law No. 93 and 111 of 1966, Law No. 99 of 1971, Law Nos. 5 and 68 of 1979, Law No. 91 of 1989, Law No. 65 of 1990, and Law No. 79 of 1991.

[6] For example, the principle of liberty of contract ignored the real difference in the bargaining positions of the employer and employee, resulting in long hours, dangerous and unhealthy working environments, and low wages. Moreover, the strict requirement of negligence for liability precluding many injured workers from obtaining compensation for their injuries.

Ayusawa suggests that these shortcomings are due in part to the fact that when Japan "modernized" their law following the Meiji Restoration of 1868, they ignored native quasi-legal traditions such as *giri* and instead imported new Western concepts. AYUSAWA, *supra* note 1, at 201. *Giri* is the moral duty to fulfill obligations and repay favors received. Presumably, Ayusawa envisaged an employer's duty of care based on the *giri* an employer owes her employees. His point would seem to be partly mooted by the recognition in Japan, as early as 1875, of custom as a valid source of law. *See e.g.*, YOSHIYUKI NODA, INTRO-

The early legislative responses to such inadequacies were by no means singularly committed to improving occupational safety and health, nor to improving labor conditions generally. The first[7] such response is hidden away in fourteen short articles in the Mining Regulations of 1890[8] (the main purpose of which was to reaffirm the state's ownership of all mines[9]), five concerning "mines police" and nine concerning protection of workers, referred to collectively as *kōfu hogo kitei*, or Miner Protection Rules. These embryonic safety and health provisions were limited to miners and were even too "primitive"[10] to offer much real protection to them. However, their importance as being the first official response to the health and safety problems attendant with industrialization cannot be forgotten.[11] Still, the need for greater protection was recognized by some and they urged revision.[12] This pressure finally bore fruit when the Mining Act was promulgated in 1905,[13] requiring employers to draw up employment-related work rules, subject to approval by the government. It also declared that employers were liable to compensate work-related injuries "unless it was due to serious fault of his own."[14]

The next step was taken on March 28, 1911, with the passage of the Factory

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DUCTION TO JAPANESE LAW 218 (Anthony H. Angelo trans., 1976). Was it customary in pre-Meiji Japan for employers to provide for their injured workers, as Ayusawa suggests ?

[7] It should be noted that the description that follows is limited to workers in private enterprises. Early Meiji employees of state-run facilities were apparently given better safety and health protection than private employees under a distinct legal system. Government workers were covered by a workers' compensation system as early as 1875. *See e.g.*, John W. Bennett and Solomon B. Levine, *Industrialization and Social Deprivation : Welfare, Environment, and the Postindustrial Society in Japan, in PATRICK, supra* note 4, at 439-92.

Ayusawa points out that although the Factory Act was applicable to government-owned factories, the powers of the factory inspectors did not extend there ; enforcement was left to whatever administrative authority was overseeing the factories. AYUSAWA, *supra* note 1, at 184.

[8] *Kōgyō Jōrei* [Mining Regulations] of 1890. *See also*, AYUSAWA, *supra* note 1, at 106.

[9] These regulations were supplemental to the Japanese Mining Act of 1873. The year before, in 1872, the Meiji oligarchy had issued the so-called Instructions on Mining (*Kōzan Kokoroe*), establishing the principle that individuals could only license mining rights from the state.

[10] AYUSAWA, *supra* note 1, at 106. For example, although Article 72 obligated the employer to pay for medical treatment and cure in the event of an accident, it placed the burden of proof on the injured worker to prove that he was not at fault. The employer was then also able to adjust his compensation in proportion to the worker's degree of contribution. This regulation "was so loose that the employee could be left without any relief in certain cases." *Id.*, at 202.

[11] Modern Japanese case books on labor law are usually silent regarding these Miner Protection Rules and almost always refer to the Mining Act of 1905 as the first general safety and health legislation in Japan.

[12] AYUSAWA, *supra* note 1, at 106.

[13] *Kōgyō Hō* [Mining Act], Law No. __ of 1905 (effective date, amendments, repeal omitted).

[14] *Id.*, art. 80. This wording was meant to tighten the workers' compensation system established by the Mining Regulations of 1890 where, according to Article 72, an employer was obliged to pay for treatment and cure of a worker injured through no fault of his own.

Act on March 28, 1911,[15] after thirty years of effort.[16] The law only applied to factories ordinarily employing more than fifteen workers or designated as being either dangerous[17] or unsanitary,[18] a scope so narrow as to exclude a large percentage of workers and factories.[19] In addition, it's provisions regarding maximum working hours,[20] nightwork,[21] and fixed holidays[22] only applied to women and children under the age of 15.[23] Moreover, the provisions regarding nightwork and holidays were subject to grace periods in enforcement, ranging from 15 to 22 years[24] and the act itself was not even implemented until 1916.[25] The combined effect of all of this was to, as Ayusawa puts it, "effectively deprive adult male workers of any protection."[26] Fujimoto is more critical, claiming that the Factory Act merely "approved officially the cruel exploitation of workers by Japanese employers."[27]

The Factory Act did, however, establish a government agency to inspect

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[15] *Kōjō Hō* (Factory Act), Law No. 416 of 1911, Meiji 44 (*kami*) Hōrei Zensho 57 (effective date, amendments, repeal omitted).

[16] In 1881, the Department of Agriculture and Commerce (*Nōshōmu-Shō*) was established and was given the responsibility for worker protection. By 1887, it had completed a forty-six article draft "Factory Operatives' Regulations" but it met with strong resistance and was discarded. A new draft of the Factory Act was completed in 1898 by the Department's newly created Industries Bureau but went nowhere. It was not until Eiichi Shibusawa, Japan's most revered industrialist, became involved that the initiative met with any success in 1911. For a fuller acount, *see* AYUSAWA, *supra* note 1, at 106-109.

[17] Dangerous (*kiken*) was defined as "cleaning, oiling, examining, or repairing of machinery during its operation, or of the dangerous parts of the power transmission apparatus ; fixing or removing belts or ropes on machinery during its operation, or of power transmission apparatus ; other dangerous work." Factory Act, *supra* note 15, art. 9.

[18] Unsanitary (*eisei-jō yūgai naru*) was defined as "work using poison, drastic drugs, or other injurious materials ; work using explosives, ignitable, or inflammable materials ; work at a place where dust particles are thrown out and scattered about or where noxious gases are emitted ; work at other dangerous or unsanitary places." *Id.*, art. 10.

[19] AYUSAWA, *supra* note 1, at 110.

[20] Limited to twelve hours per day. Factory Act, *supra* note 15, art. 3.

[21] Defined as between 10 p.m. and 4 a.m. *Id.*, art. 4. The issue of nightwork was the most controversial provision of the draft bill, causing "interminable uproar and turmoil" in the Diet. The opponents to the bill argued that "the idea of prohibiting nightwork for women and young persons in factories was 'premature' for Japan. Japan's industrial growth was so dependent on the day- and night-work of those workers that the country could not afford to prohibit it —even ten years after promulgation of the law." AYUSAWA, *supra* note 1, at 108. It was not until this grace period was extended to fifteen years did the bill pass the Diet. Even so, the prohibition was subject to exceptions. *See id.*, art. 5.

[22] Two days of rest per month, unless they were working in a factory employing double shifts (whereby the same provision required the employer to rotate employees between the day and night shift every ten days or less), then four days a month. *Id.*, art. 7.

[23] Under 16 with regard to fixed holidays.

[24] Enforcement of the prohibition on nightwork was to not begin until 15 years had passed ; enforcement of mandatory rest periods was not to begin until 1929 in the case of factories and not until 1933 in the case of mines.

[25] [Factory Law Enforcement Regulations of 1916]

[26] AYUSAWA, *supra* note 1, at 110.

[27] Fujimoto, *supra* note 4, at 67.

safety and health conditions at factories covered by the Act, authorizing inspectors to issue orders.[28] However, it is reported that the adequacy of this forerunner to the Labor Standards Bureau "left much to be desired. For one thing, there were never enough inspectors to go around."[29] More could be learned about this first inspection system, like how strict its enforcement was ; how autonomous were its inspectors and how much power did they wield ; what was the enforcement style of the inspectors ? How long did the system last ? These questions will have to await another day to be answered but would be of great assistance in understanding the current regulatory structure and environment.

The Factory Act of 1911 also created a rudimentary workers' compensation system, very similar to that of the Mining Act. And, like the Mining Act, the effectiveness of this system was compromised by the perpetuation of the same contributory negligence escape clause—"unless it was due to a serious fault of his own."[30] Neither the Mine Act nor the Factory Act "referred to the need to provide compensation or reparations to injured workers but rather called for assistance,"[31] thus fostering the quasi-Confucian tenet of ethical paternalism that characterized much of Meiji-period industrial relations.

The Mining Act and the Factory Act remained the two most important laws governing occupational safety and health prior to World War II, but they were subject to repeated revisions. Ayusawa suggests that these revisions were in response to the International Labor Organization's Washington Conference of 1919 and related conventions.[32] These conventions—covering a range of issues including working hours, age of employment, nightwork, weekly rest days, daily rest periods, and protection of women and children—established separate and distinct standards for Japan by means of Article 405 (3) of the Peace Treaty (allowing separate standards for developing countries).[33] Nevertheless, they

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[28] KAZUO SUGENO, JAPANESE LABOR LAW 6-7 (Leo Kanowitz, trans., 1992) (1991) ; AYUSAWA, *supra* note 1, at 111.

[29] AYUSAWA, *supra* note 1, at 110.

[30] JAPAN INTERNATIONAL COOPERATION AGENCY, OUTLINE OF WORKMEN'S ACCIDENT INSURANCE SCHEME IN JAPAN (1985).

[31] RICHARD E. WOKUTCH, WORKER PROTECTION, JAPANESE STYLE : OCCUPATIONAL SAFETY AND HEALTH IN THE AUTO INDUSTRY 56 (1992).

[32] AYUSAWA, *supra* note 1, at 112-129.

[33] Article 405 (3) provides :

> In framing any recommendation or draft convention of general application, the Conference shall have due regard to those countries in which climatic conditions, the imperfect development of industrial organization, or other special circumstances make the industrial conditions substantially different and shall suggest the modifications, if any, which it considers may be required to meet the case of such countries.

still required Japan to alter its legislation and the 1920s witnessed a number of revisions to the Mining Act and the Factory Act.[34]

No discussion of labor issues in pre-war Japan would be complete without mentioning the Cooperation and Harmony Society (*kyōchō kai*), a semi-bureaucratic agency established in 1919. This group was aware both of the terrible labor conditions in Japan and the social conflict and labor unrest then occurring in the industrialized countries of Europe and America. They were keenly committed to preventing the latter by addressing the former. They were pragmatic. They endeavored to convince the capitalists that in was in their interest to improve working conditions. "In short, reforms were necessary, at least in part, to create a more malleable, accepting populace."[35] Their approach was to find and define a new industrial ideology as an alternative to the capitalist-labor conflict, based on "harmony and moral community." As is common in Japan, they sought transvaluation through education. One outgrowth of this effort was the institution in 1928 of the first national safety and health week. Their work "was an act of myth-making, creating normative ideals and forging a civil religion for the new modern industrial society."[36] The Cooperation and Harmony Society and its ideology became important elements in the political process of reform, especially during the 1920s, encouraging the conservative decision-making elites to accept a modicum of reform in order to strip labor unions of their agenda.

In addition to the revised Mining and Factory Acts, prewar health insurance legislation formed an important part of the overall safety and health regulatory structure. The Health Insurance Law was passed on April 22, 1922,[37] and

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[34] For example, *Kōjō Hō Kaisei* [Revised Factory Act], Law No. 33 of 1923, Taisho 12 Hōrei Zensho 39 (effective date, amendments, repeal omitted) (increasing the scope to include factories with ten or more employees) ; *Kōjō Rōdō-sha Saitei Nenrei Hō* [Industrial Workers' Minimum Age Act], Law No. 34 of 1923, Taisho 12 Hōrei Zensho 43 (effective date, amendments, repeal omitted) (raising the "in principle" minimum age from 12 to 14) ; the [Revised Factory Act of 1926] (prohibiting day and night shifts in textile mills and providing for maternity leave with reduced pay) ; and the [Revised Regulations for the Aid of Mining Workers of 1928] (limiting the working hours of an adult male doing underground work to ten hours per day and prohibiting women from working between 10 p.m. and 5 a.m. The later provision was subject to so many exceptions that it was meaningless).

[35] W. DEAN KINZLEY, INDUSTRIAL HARMONY IN MODERN JAPAN : THE INVENTION OF A TRADITION at xiv (1991).

[36] *Id.*, at xvi.

[37] [Health Insurance Law of 1922]. It was not until 1926, with the passage of the [Revised Health Insurance Act] and the [Health Insurance Special Account Act], that the insurance program became partially effective on July 1, 1926 and wholly effective on January 1, 1927. AYUZAWA, *supra* note 1, at 210.

covered all workers and miners covered under the Factory and Mining Acts as amended.[38] Either the government[39] or an enterprise health insurance society acted as the insurance carriers.[40] Medical coverage would start on the day of injury or illness and continue for no more than 180 days in a year. In addition to medical coverage, cash payments equivalent to 60 percent of the worker's daily wages would be paid, payments to begin on the day of occurrence in the case of work-related injuries and illnesses and on the fourth day if non-work related.[41] This insurance program relieved the employer of the responsibility to pay compensation as provided for in the amended Mining and Factory Acts during the course of insurance payments. After the expiration of the 180 days, if the injury or illness was work related, then the employer had to pay an "absence allowance" of 40 percent of wages. This obligation lasted until either the worker recovered or three years had passed, whichever came first.[42] In the cases of permanent incapacity, a lump sum varying (depending on the seriousness of the injury or illness) from 40 to 540 days' pay was required. Death, however, only demanded 360 days' wages.[43] This insurance program was jointly financed by government, employers, and employees. The government's contribution was intended to only cover the administrative costs and only came to about 10 percent. The remaining costs were evenly shared by employers and employees. The rate of employee contribution was calculated based on the employee's regular wages, divided into 16 categories by law.[44]

Similar insurance coverage was extended in 1931 to previously uncovered industries (construction, transportation, and cargo-handling) in 1931 with passage of the Worker's Accident Relief Act[45] and the Worker's Accident Relief-Liability Insurance Act.[46] Other insurance-related legislation continued, perhaps surprisingly, to be developed during the war years : the National Health

[38] Foreign workers and temporary workers were excluded. AYUSAWA, *supra* note 1, at 211.
[39] Supervisory jurisdiction laid with the Insurance Division of the Social Affairs Bureau.
[40] Where more than 500 workers were employed, the establishment of a society was mandatory ; where there were more than 300 but fewer than 500, establishment was voluntary with the consent of a majority of the workers. Several smaller enterprises could combine to get over the 300 mark and thus qualify provided they had majority consent and governmental approval. AYUSAWA, *supra* note 1, at 211.
[41] AYUSAWA, *supra* note 1, at 212.
[42] *Id.*
[43] *Id.*
[44] *Id.*
[45] [Workers' Accident Relief Act]
[46] [Workers' Accident Relief-Liability Insurance Act]

Insurance Act[47] of 1938 ; the Sailors' Insurance Act[48] of 1939 ; and the Workers' Pension Insurance Act[49] of 1940.

This brief sketch of prewar occupational safety and health legislation outlines some of the most salient aspects of the regulatory structure and environment. For example, we see that the regulatory response to growing workplaces injuries and illnesses was two-pronged : prevention and compensation. To prevent industrial accidents from occurring, minimum standards were set and a system of inspections was established. Here as elsewhere, safety and health issues are never dealt with separately from other labor issues ; thus, inspections were not focused on safety and health alone, but on a wide range of labor issues. However, standards were lax and inspections were rare. Compensation was also nominally provided for but in reality the system, handicapped by restrictive interpretations of contributory negligence, did not really afford workers much protection. One author has summarized the prewar situation in Japan as follows : "[o]ccupational hazards were late in developing, late in being recognized, and late in being confronted by government and industry."[50]

Not only the legal structure, but also the legal environment manifested certain characteristics that reappear in the postwar regime. A distinguishing characteristic of prewar Japanese safety and health law is the relative absence of union influence in the decision-making process. Unions in prewar Japan were both harassed and co-opted until their potential for developing into a large popular movement was destroyed. The responses to industrial safety and health hazards were orchestrated by decision-making elites in order to avoid the larger potential problems of mass uprisings and challenges to their authority. Further impetus was given by concerns for their public relations with the international community, but the pattern was definitely from top to bottom.

One manifestation of this can be discovered in the rhetoric of the day. Discussions of health and safety were usually discussed within the context of benefits to be gained by employers and to the national economy. The *kyōchō kai*, acting as proxy concerning workplace safety and health issues for a dis-

[47] *Kokumin Kenkō Hoken Hō* [National Health Insurance Act], Law No. __ of 1938 (effective date, amendments, repeal omitted).
[48] *Sen'in Hoken Hō* [Sailors' Insurance Act], Law No. __ of 1939 (effective date, amendments, repeal omitted).
[49] *Rōdō-sha Nenkin Hoken Hō* [Workers' Pension Insurance Act], Law No. __ of 1940 (effective data, amendments, repeal omitted).
[50] WOKUTCH, *supra* note 31, at 31.

placed and ineffectual labor movement, a movement that they themselves helped displace, emphasized utilitarian gains to be achieved by the capitalist and phrased their initiatives in the context of increasing national wealth. They were selling the idea of enlightened self-interest.[51] That their sales pitches were made in this manner reflects in large part the participants in the process.

Finally, and perhaps most importantly, the preferred method for increasing safety and health standards in Japan during this time was through increased education. Education transfers values and helps create a new epistemic framework regarding the workplace. Prewar safety and health improvement initiatives sought to modify the behavior of workers and managers through education, not through strengthening the legal remedies of individual workers.

Japan's prewar experience with safety and health regulation provided the basic framework and much experience and knowledge from which to construct the new postwar regulatory regime. Legislators were able to selectively draw on their past and they transferred many of the prewar legal approaches and many of the prewar values and customs to the modern regime.

III. MODERN LEGAL AND REGULATORY FRAMEWORK GOVERNING SAFETY AND HEALTH ISSUES

When the war was over, Japan found its entire economic and social system laying in shambles and as a nation, was "totally exhausted both physically and morally."[52] Over 3.1 million Japanese had died since the outbreak of the war in China and over 30 percent of their homes were lost to either the numerous incendiary raids on their cities or the only two atomic bombs ever used on humans. The war set Japanese industrialization back decades—back to one quarter of its previous level—and inflation reduced the *yen* to one hundredth of its prewar value. In addition, food, housing, and energy shortages plagued the early postwar years, as did high unemployment which was exacerbated by the repatriation of hundreds of thousands of soldiers and over six million civilians who had settled in the colonial trophies of Japanese expansionism of the previous eighty years. Japanese society faced its greatest hardship and despair

[51] This term is attributable to Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, NEW YORK TIMES MAGAZINE, Sept. 13, 1970, at 33, 122-126.
[52] HALL, *supra* note 3, at 349.

during these early postwar years.

Into this scene strode the occupation authorities of the Allied Powers. Along with demilitarization, abolition of state Shinto, dissolution of the *zaibatsu* (financial cliques), land and education reform, labor rights were a fundamental concern of the Occupation because of their belief that authoritative and exploitive labor relations in prewar Japan aided the *zaibatsu*-driven war machine. This concern expressed itself in an early liberal[53] and positive stance towards labor by the Occupation, illustrated most clearly by the 1947 Constitution.[54] The Occupation authorities were not alone in their concern. The government of Japan was dedicated to remedying the grave economic and social postwar situation, becoming obsessed with economic and employment security. Thus, the government's strong policy objective of stabilizing the economic chaos of the early postwar years and the Occupation's labor-strengthening policies coincided to create a very labor-friendly environment and a legislatively active period.

A. Framework of Postwar Labor Law—Industrial Relations and Economic Security

Reflecting these twin engines of labor reform, the labor-related legislation of this period can be thought of as falling into one of two general headings : 1) laws establishing the legal framework for democratic labor relations and 2) laws establishing systems for ensuring economic security.[55] Legislation that constructed the postwar framework for labor relations include the Trade Union Act of 1945,[56] the Labor Relations Adjustment Act of 1946,[57] the Labor Standards Act

[53] It was not long before this liberal attitude changed ; by 1948, the nature of the Occupation changed. As the United States grew increasingly concerned with communism, cold war tensions entered East Asia and decision-makers in Washington determined it to be in their strategic interests to replace demilitarization and reform by rehabilitation and reconstruction.

[54] *Nihon Kenpō* [The Constitution of Japan], promulgated November 3, 1946 (effective on May 3, 1947) [hereinafter *Kenpō*].

[55] Kazuo Sugeno, *Japan : The State's Guiding Role in Socioeconomic Development*, 14 COMP. LAB. L.J. 302, 303-306 (1993) [hereinafter, Sugeno, *State's Guiding Role*].

[56] *Rōdō Kumiai-Hō* [Trade Union Act], Law No. __ of 1945, Showa 20 Hōrei Zensho __ (effective date, amendments omitted ; repealed 1949) (prohibiting employer retaliation and providing indemnity from criminal and civil liability for proper union activities, giving collective agreements binding effect, and establishing the Labor Commissions).

[57] *Rōdō Kankei Chōsei Hō* [Labor Relations Adjustment Act], Law No. 25 of 1946 (effective October 13, 1946), *amended by* Law No. 175 of 1949, Law No. 288 of 1952, Law No. 161 of 1962, Law No. 85 of 1980, Law Nos. 25 and 87 of 1984, and Law No. 82 of 1988 (officially translated in MINISTRY OF LABOUR, JAPAN, LABOUR LAWS OF JAPAN 44-55 (1995)) (providing for the use of conciliation (*assen*), mediation (*chōtei*), and arbitration (*chūsai*) by the Labor Commissions).

of 1947,[58] and the revised Trade Union Law of 1949.[59] These three statutes, the Trade Union Act, the Labor Relations Adjustment Act and the Labor Standards Act, are referred to as the three fundamental labor statutes.[60]

To this first group should be added the postwar Japanese Constitution. Unlike the United States Constitution, the Japanese Constitution explicitly provides for certain labor rights. Article 25 guarantees a person's right to livelihood and obligates the government to promote and extend social welfare and public health.[61] Article 27 and Article 28 build upon this principle and establish the right and obligation to work[62] and the right of workers to organize

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[58] *Rōdō Kijun Hō* [Labor Standards Act], Law No. 49 of 1947 (effective in part September 1, 1947 and in whole November 1, 1947), *amended by* Law No. 97 of 1947, Law No. 70 and 166 of 1949, Law No. 290 of 1950, Law No. 287 of 1952, Law No. 171 of 1954, Law No. 126 of 1956, Law No. 133 of 1958, Law No. 137 of 1959, Law No. 161 of 1962, Law No. 130 of 1965, Law No. 108 of 1967, Law No. 99 of 1968, Law No. 64 of 1969, Law No. 57 of 1972, Law No. 34 of 1976, Law No. 78 of 1983, Law No. 87 of 1984, Law Nos. 45, 56, and 89 of 1985, Law No. 99 of 1987, Law No. 76 of 1991, Law No. 90 of 1992, Law No. 79 of 1993, and Law 107 of 1995 (officially translated in MINISTRY OF LABOUR, JAPAN, LABOUR LAWS OF JAPAN 71-110 (1995)). The Labor Standards Act will be discussed in greater detail *infra* at 82-97.

[59] *Rōdō Kumiai Hō* [Trade Union Act], Law No. 194 of 1949 (effective June 10, 1949), *amended by* Law Nos. 79, 84, and 139 of 1950, Law No. 203 of 1951, Law No. 288 of 1952, Law No. 212 of 1954, Law No. 137 of 1959, Law Nos. 140 and 161 of 1962, Law No. 64 of 1966, Law Nos. 67 and 130 of 1971, Law No. 39 of 1978, Law No. 85 of 1980, Law No. 78 of 1983, Law No. 25 of 1984, Law No. 82 of 1988, and Law No. 89 of 1993 (officially translated in MINISTRY OF LABOUR, JAPAN, LABOUR LAWS OF JAPAN 25-43 (1995)) (creating a duty for employers to bargain with unions ; refusal to do so is deemed an unfair labor practice and the Labor Relations Commission can issue an order to bargain in good faith).

[60] Sugeno, *State's Guiding Role*, *supra* note 55, at 304.

[61] Article 25 provides :

(1) All people shall have the right to maintain the minimum standards of wholesome and cultured living.

(2) In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health.

Kenpō, *supra* note 54, art. 25.

Exactly what kind of obligation this provision imposes has been a subject of some debate. The Japanese Supreme Court (*Saikō Saibansho*) has consistently held that Article 25 does not give rise to any mandatory obligations, merely a political obligation. Only an abuse of legislative discretion will merit judicial review. Judgment of May 24, 1967 (Asahi v. Minister of Health and Welfare (Asahi Case)), Supreme Court, 21 MINSHŪ 1043 (Grand Bench) ("the determination of what 'minimum standards of wholesome and cultured living' actually means in within the discretion of the Minister of Health and Welfare. His decision does not produce an issue as to the legality of the standards . . . . Only in cases where such a decision is made in excess of or by abuse of the discretionary power . . . would such a decsion be subject to judicial review") (translated in HIDEO TANAKA, ED., THE JAPANESE LEGAL SYSTEM : INTRODUCTORY CASES AND MATERIALS 793-803 (1976)). *See also*, Judgment of July 7, 1982 (Horiki Case), Supreme Court, 36 MINSHŪ 1235 (Grand Bench). According to Sugeno, however, a majority of academics and some lower courts believe that Article 25 is not merely a discretionary political obligation but a legal obligation and thus, judicial review is appropriate. SUGENO, *supra* note 28, at 15.

[62] *Kenpō*, *supra* note 54, art. 27 (1) ("[a]ll people shall have the right and the obligation to work"). On the whole, Japanese courts have treated this provision as "merely precatory in nature." Daniel H. Foote, *Judicial Creation of Norms in Japanese Labor Law : Activism in the Service of--Stability ?* 43 U.C.L.A. L. REV. 635, 645 (1996). Foote notes that many

and to bargain collectively.[63] In addition, and most important for the purposes of this study, Article 27, Paragraph 2 also establishes the policy of establishing labor standards.[64] Thus, the postwar Japanese Constitution clearly recognizes that there are limits to the "freedom of contract" principle and that the State not only has the right, but also the obligation to legislatively intervene in the labor contract with respect to working conditions.

A second group of legislation can be understood to reflect the Japanese government's strong policy goal of obtaining economic and employment security.[65] This legislation attempted to achieve stabilization in a number of different areas. At a fundamental level, in order to meet minimum needs, the legislature passed the National Assistance Act of 1946.[66] In the area of labor standards, legislation included the Labor Standards Act of 1947[67] (also included in the first group because of its broad scope) and the Workers' Accident Compensation Insurance Act of 1947.[68] In response to unemployment concerns, the government passed the Employment Stabilization Act of 1947[69] and the

academics disagree with this conclusion, arguing that this provision entails more than mere political rhetoric. Id. citing Akira Osuka, *Welfare Rights, in* JAPANESE CONSTITUTIONAL LAW 269, 282 (Percey R. Luney, Jr. & Kazuyuki Takahashi eds., 1993) (arguing that Article 27 (1) obliges the government to provide the unemployed with a choice of occupations meeting their qualifications). For a brief discussion of the legal ramifications of this provision, *see also* SUGENO, *supra* note 28, at 15-16.

[63] *Kenpō, supra* note 54, art. 28 ("[t]he right of workers to organize and to bargain and act collectively is guaranteed). Sugeno also provides an excellent introduction to the basic purposes and legal effects of this provision. SUGENO, *supra* note 28, at 17-28.

[64] *Kenpō, supra* note 54, art. 27 (2) ("[s]tandards for wages, hours, rest and other working conditions shall be fixed by law").

[65] Daniel H. Foote, *supra* note 62, at 686 ("in the economic chaos of the early postwar years, one of the government's strong policy goals was achieving employment stability").

[66] [National Assistance Act] of 1946.

[67] Labor Standards Act, *supra* note 58.

[68] *Rōdō-sha Saigai Hoshō Hoken Hō* [Workers' Accident Compensation Insurance Act], Law No. 50 of 1947 (effective September 1, 1947), *amended by* Law No. 71 of 1948, Law Nos. 82 and 166 of 1949, Law Nos. 125 and 290 of 1950, Law Nos. 46 and 78 of 1951, Law No. 287 of 1952, Law Nos. 39 and 131 of 1955, Law No. 126 of 1956, Law No. 126 of 1957, Law No. 148 of 1959, Law No. 29 of 1960, Law Nos. 67, 140, 152, and 161 of 1962, Law Nos. 112, 118, and 152 of 1964, Law Nos. 105 and 130 of 1965, Law No. 95 of 1967, Law Nos. 83, 85, and 86 of 1969, Law Nos. 13 and 88 of 1970, Law No. 13 of 1971, Law Nos. 85 and 93 of 1973, Law No. 115 of 1974, Law No. 32 of 1976, Law No. 54 of 1978, Law No. 104 of 1980, Law No. 66 of 1982, Law No. 83 of 1983, Law No. 87 of 1984, Law Nos. 34, 48, and 105-108 of 1985, Law Nos. 59 and 93 of 1986, Law No. 40 of 1990, Law Nos. 56 and 95 of 1994, and Law No. 35 of 1995 (officially translated in MINISTRY OF LABOUR, JAPAN, LABOUR LAWS OF JAPAN 550-600 (1995)) (hereinafter WACIA) (providing compensation to injured workers of covered enterprises). Note, this act is often translated as Workmen's Accident Compensation Insurance Act.

[69] *Shokugyō Antei Hō* [Employment Stabilization Act], Law No. 141 of 1947 (effective December 1, 1947), *amended by* Law Nos. 72, 130, and 222 of 1948, Law Nos. 88 and 166 of 1949, Law No. 120 of 1950, Law Nos. 278 and 284 of 1952, Law No. 133 of 1958, Law No. 18 of 1960, Law No. 145 of 1961, Law No. 140 of 1962, Law No. 121 of 1963, Law No. 132 of 1966, Law No. 64 of 1969, Law No. 68 of 1971, Law No. 117 of 1974, Law No. 85 of 1980, Law No. 78 of 1983,

Employment Insurance Act of 1947.[70] The legislature then moved to establish a framework for social security by passing the Children's Welfare Act of 1947,[71] the Disabled Persons' Welfare Act of 1949,[72] and the new National Assistance Act of 1950.[73]

As Japan's economy has grown, so has its labor standards and social security systems. Labor standards have been improved by such laws as the Minimum Wage Act of 1959[74] and the Industrial Safety and Health Act of 1972,[75] this study's most central piece of legislation. Social security has been advanced by the National Health Insurance Act of 1958[76] and the National Pension Act of

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Law No. 25 of 1984, Law Nos. 45 and 89 of 1985, Law No. 43 of 1986, Law Nos. 23 and 41 of 1987, Law No. 40 of 1988, Law No. 79 of 1989, Law No. 57 of 1991, Law Nos. 63, 67, and 86 of 1992, and Law No. 89 of 1993 (officially translated in MINISTRY OF LABOUR, JAPAN, LABOUR LAWS OF JAPAN 318-341 (1995)) (establishing public employment services for day laborers and creating jobs through construction projects ; establishing systems for job referrals). Note, this act is often translated as Employment Security Act.

[70] *Koyō Hoken Hō* [Employment Insurance Act], Law No. __ of 1947, *replaced by Koyō Hoken Hō* [Employment Insurance Act], Law No. 116 of 1974, *amended by* Law No. 33 of 1976, Law No. 43 of 1977, Law No. 40 of 1978, Law No. 40 of 1979, Law No. 27 of 1981, Law Nos. 54 and 87 of 1984, Law No. 56 of 1985, Law No. 93 of 1986, Law No. 23 of 1987, Law No. 26 of 1988, Law No. 36 of 1989, Law No. 56 of 1991, Law Nos. 8, 23, and 67 of 1992, Law No. 57 of 1994, and Law No. 27 of 1995 (officially translated in MINISTRY OF LABOUR, JAPAN, LABOUR LAWS OF JAPAN 634-699 (1995)) (providing unemployment benefits through public employment service offices). Note, this act is often translated as the Unemployment Insurance Act.

[71] *Jidō Fukushi Hō* [Children's Welfare Act], Law No. 164 of 1947 (effective January 1, 1948), *amended by* Law Nos. 198 and 290 of 1948, Law No. 211 of 1949, Law No. 213 of 1950, Law No. 202 of 1951, Law Nos. 219, 222, and 305 of 1952, Law Nos. 10 and 213 of 1953, Law Nos. 26 and 136 of 1954, Law No. 148 of 1956, Law No. 78 of 1957, Law No. 120 of 1958, Law Nos. 2, 53, and 148 of 1959, Law No. 37 of 1960, Law No. 154 of 1961, Law No. 161 of 1962, Law No. 169 of 1964, Law No. 141 of 1965, Law Nos. 111, 113, and 139 of 1967, Law No. 51 of 1969, Law No. 67 of 1973, Law No. 88 of 1974, Law Nos. 54 and 55 of 1978, Law No. 87 of 1981, Law No. 66 of 1982, Law No. 78 of 1983, Law Nos. 63 and 76 of 1984, Law Nos. 37 and 90 of 1985, Law Nos. 46, 52, and 109 of 1986, Law No. 98 of 1987, Law No. 22 of 1989, Law No. 58 of 1990, Law No. 89 of 1993, and Law Nos. 49, 56, and 84 of 1994.

[72] *Shintai Shōgai-sha Fukushi Hō* [Disabled Persons' Welfare Act], Law No. 283 of 1949 (effective April 1, 1950), *amended by* Law No. 169 of 1951, Law No. 222 of 1952, Law No. 213 of 1953, Law No. 28 of 1954, Law Nos. 148 and 179 of 1956, Law Nos. 29, 120, and 133 of 1958, Law No. 161 of 1962, Law Nos. 133 and 168 of 1963, Law No. 169 of 1964, Law No. 141 of 1965, Law No. 113 of 1967, Law No. 80 of 1968, Law No. 64 of 1969, Law No. 112 of 1972, Law No. 67 of 1973, Law No. 88 of 1974, Law No. 55 of 1978, Law No. 70 of 1979, Law No. 78 of 1983, Law Nos. 63 and 71 of 1984, Law No. 37 of 1985, Law Nos. 46 and 109 of 1986, Law No. 22 of 1987, Law No. 58 of 1988, Law No. 67 of 1992, Law No. 89 of 1993, and Law Nos. 49, 56, and 84 of 1994.

[73] [National Assistance Act of 1950]

[74] *Saitei Chingin Hō* [Minimum Wage Act], Law No. 137 of 1959 (effective July 10, 1959), *amended by* Law No. 90 of 1968, Law No. 64 of 1969, Law No. 60 of 1970, Law No. 85 of 1980, Law No. 78 of 1983, Law No. 25 of 1984, Law No. 56 of 1985, Law No. 67 of 1992 (establishing minimum wages on a regional scale) (officially translated in MINISTRY OF LABOUR, JAPAN, LABOUR LAWS OF JAPAN 137-148 (1995)).

[75] This act will be discussed in greater detail later. *See infra*, text accompanying notes 135-261.

[76] *Kokumin Kenkō Hoken Hō* [National Health Insurance Act], Law No. 192 of 1958 (effective January 1, 1959), *amended by* Law Nos. 148 and 149 of 1959, Law Nos. 136 and 143 of 1961, Law Nos. 57, 140, 152, and 161 of 1962, Law Nos. 62 and 99 of 1963, Law No. 152 of 1964, Law

1959.[77] Moreover, welfare has been extended to a broader scope of people by the Mentally Retarded Persons' Welfare Act of 1960,[78] the Elderly Welfare Act of 1963,[79] and the Mother and Child's Welfare Act of 1974.[80]

B. Framework of Occupational Safety and Health Regulation : Prevention and Compensation

The legal regime in Japan for protecting the safety and health of its workers finds its source in the Constitution. In particular, Article 27, Paragraph 2 is considered the source for all safety- and health-related legislation in Japan. But underneath this constitutional umbrella, safety and health regulation can be divided into two main categories : hazard prevention and accident compensation.[81]

1. Hazard Prevention

Foremost among the laws aimed at preventing hazards are the Industrial Safety and Health Act and the Labor Standards Act. The Industrial Safety and Health Act (*rōdō anzen eisei hō* ; hereinafter ISHA) will be discussed in greater

No. 130 of 1965, Law No. 79 of 1966, Law Nos. 81 and 121 of 1967, Law No. 111 of 1970, Law Nos. 85 and 89 of 1973, Law Nos. 32 and 62 of 1976, Law No. 86 of 1977, Law No. 108 of 1980, Law No. 80 of 1982, Law No. 82 of 1983, Law No. 77 of 1984, Law Nos. 34 and 105 of 1985, Law Nos. 106 and 109 of 1986, Law No. 78 of 1988, Law No. 31 of 1990, Law No. 89 of 1991, and Law No. 7 of 1992 (extending health insurance coverage to all citizens).

[77] *Kokumin Nenkin Hō* [National Pension Act], Law No. 141 of 1959 (effective November 1, 1959), *amended by* Law No. 148 of 1959, Law No. 135 of 1960, Law Nos. 145, 166, 167, 180, and 182 of 1961, Law No. 44, 67, 92, 115, 123, 140, 152, 153, and 161 of 1962, Law No. 150 of 1963, Law Nos. 87, 110, and 152 of 1964, Law Nos. 36, 93, and 130 of 1965, Law Nos. 67, 92, and 111 of 1966, Law Nos. 81, 83, 96, 121, and 136 of 1967, Law Nos. 48 and 96 of 1968, Law Nos. 68 and 91 of 1969, Law Nos. 13, 99, and 114 of 1970, Law No. 13 of 1971, Law No. 97 of 1972, Law No. 92 of 1973, Law No. 63 of 1974, Law No. 38 of 1975, Law Nos. 61 and 62 of 1976, Law No. 48 of 1977, Law No. 46 of 1978, Law No. 36 of 1979, Law Nos. 23 and 82 of 1980, Law Nos. 50 and 86 of 1981, Law Nos. 66 and 79 of 1982, Law Nos. 78 and 82 of 1983, Law No. 84 of 1984, Law Nos. 34, 68, 105, 106, 107, and 108 of 1985, Law Nos. 21 and 93 of 1986, Law No. 59 of 1987, Law Nos. 86 and 96 of 1989, Law No. 89 of 1993, and Law No. 95 of 1994.

[78] *Seishin Hakujaku-sha Fukushi Hō* [Mentally Retarded Persons' Welfare Act], Law No. 37 of 1960 (effective April 1, 1960), *amended by* Law No. 161 of 1962, Law No. 169 of 1964, Law No. 139 of 1967, Law No. 51 of 1969, Law No. 44 of 1970, Law No. 67 of 1973, Law No. 37 of 1985, Law Nos. 46 and 109 of 1986, Law No. 22 of 1989, Law No. 58 of 1990, Law No. 89 of 1993, and Law No. 49 of 1994.

[79] *Rōjin Fukushi Hō* [Elderly Welfare Act], Law No. 133 of 1963 (effective August 1, 1963), *amended by* Law No. 86 of 1966, Law No. 96 of 1972, Law No. 67 of 1973, Law No. 80 of 1982, Law Nos. 37 and 90 of 1985, Law Nos. 46, 106, and 109 of 1986, Law No. 22 of 1989, Law No. 58 of 1990, Law No. 89 of 1991, Law No. 89 of 1993, and Law Nos. 49 and 56 of 1994.

[80] [Mother and Child Welfare Act of 1974]

[81] *See, e.g., ANZEN EISEI IINKAI, NIHON EREBĒTA KYŌKAI* [SAFETY AND HEALTH COMMITTEE, JAPAN ELEVATOR ASSOCIATION], *RŌMU ANZEN EISEI KANRI MA'NYUARU* [LABOR SAFETY AND HEALTH MANAGEMENT MANUAL] 1 (1992) [hereinafter JAPAN ELEVATOR ASSOCIATION].

detail below but a few words should be said about the Labor Standards Act (*rōdō kijun hō* ; hereinafter LSA) here. The act is very broad and very inclusive, and includes provisions dealing with general matters,[82] labor contracts,[83] payment of wages,[84] minimum wages,[85] working hours,[86] rest periods,[87] rest days,[88] annual leave,[89] minors,[90] women,[91] training of skilled laborers,[92] accident compensation,[93] rules of employment,[94] dormitories for workers,[95] inspection bodies,[96] as well as safety and health.[97] The chapter on safety and health (Chapter Five) provided the general framework for safety and health regulation until ISHA was passed in 1972.

Article 211 of the Criminal Code can also be included in this first group of laws aimed at hazard prevention. Criminal liability (a prison sentence not to exceed 5 years or a fine not to exceed ¥200,000) can be imposed where an accident is caused by an employer's intentional or negligent acts.[98]

2. *Accident Compensation*

The second category of safety and health laws relate to compensating an injured worker. Of course, any form of accident compensation will have the dual effect of compensating the injured as well as serving as an incentive to prevent hazards from occurring in the first place. Payments for work-related injuries existed long before, but the LSA stipulated for the first time that such payments were designated as "compensation" rather than "assistance."[99] No

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[82] Labor Standards Act, *supra* note 58, arts. 1 to 12.
[83] *Id.*, arts. 13 to 23.
[84] *Id.*, arts. 24 to 27.
[85] *Id.*, art. 28 (arts. 29 to 31 have been superseded by the Minimum Wages Act, *supra* note 74).
[86] Labor Standards Act, supra note 58, arts. 32 to 33.
[87] *Id.*, art. 34.
[88] *Id.*, arts. 35 to 37.
[89] *Id.*, art. 39.
[90] *Id.*, arts. 56 to 64.
[91] *Id.*, arts. 64-2 to 68.
[92] *Id.*, arts. 69 to 74.
[93] *Id.*, arts. 75 to 88.
[94] *Id.*, arts. 89 to 93.
[95] *Id.*, arts. 94 to 96-3.
[96] *Id.*, arts. 97 to 105.
[97] *Id.*, arts. 42 (arts. 43 to 55 have been superseded by the Industrial Safety and Health Act, *infra* note 135).
[98] *Keihō* [Criminal Code], Law No. 45 of 1908 (effective October 1, 1909), *amended by* Law No. 77 of 1921, Law No. 61 of 1941, Law No. 124 of 1947, Law No. 195 of 1953, Law No. 57 of 1954, Law No. 107 of 1958, Law No. 83 of 1960, Law No. 124 of 1964, Law No. 61 of 1968, Law No. 30 of 1980, Law No. 52 of 1987, Law No. 31 of 1991, and Law No. 91 of 1995, art. 211.
[99] *See supra*, text accompanying notes 30-31.

longer was it the benevolence of the employer that provided redress for incapacity and illness suffered during the course of work, it was the employer's duty to provide payments and the right of workers to receive them.

Workers' compensation in Japan is characterized by usage of a standardized compensation system, providing uniform benefits for each type of injury, rather than payments based on the individual needs of the worker, an approach common to a variety of compensation systems in Japan.[100]

The LSA details an employer's obligations in the event of occupational accidents. It provides that in the event a worker suffers an injury, illness, or death in the course of employment, the employer is required to furnish or bear the expense of necessary medical treatment[101] and pay the worker 60 percent of her average wages for time lost due to such treatment.[102] If the worker fails to recover after three years, the employer may discontinue the medical treatment upon payment of discontinuance compensation equivalent to 1,200 days of annual wage.[103] If a worker is permanently disabled, the employer must pay disability compensation, determined by multiplying the worker's average wage by the number of days (ranging from 50 to 1,340 days) assigned to each of the fourteen grades of disabilities classified in Annex No. 1.[104] In case of a work fatality, the employer must pay 1,000 days wages as survivor's compensation to the worker's

[100] Not only workers' compensation but other compensation schemes in Japan use standardized compensation. *See, e.g.*, R.B. Leflar, *Personal Injury Compensation Systems in Japan : Values Advanced and Values Undermined*, 15 U. HAW. L. REV. 742 (1993). Standardized compensation can in fact be considered one of the most salient characteristics of the Japanese legal system. One standardized compensation system that has received a lot of high-quality attention is the traffic accident compensation system. *See, e.g.*, J. Mark Ramseyer and Minoru Nakazato, *The Rational Litigant : Settlement Amounts and Verdict Rates in Japan*, 18 J. LEG. STUD. 263 (1989) and Daniel H. Foote, *Resolution of Traffic Accident Disputes and Judicial Activism in Japan*, 25 LAW IN JAPAN 19 (1995). The argument is made, in fact, that standardized compensation is at the heart of the nonconfrontational system that is said to characterize the Japanese legal system "because of its simplicity and accessibility to the wider public, [it] reduces the legal knowledge required to resolve compensation disputes." Takao Tanase, *The Management of Disputes : Automobile Accident Compensation in Japan*, 24 L. & SOC'Y REV. 651, 667 (1990).

It is also apparently the case that the compensation standards developed for traffic accident cases were used without alteration in workers' compensation cases. Beginning in 1978, Section 27 of the Tokyo District Court, which until then had only handled traffic accident cases, began handling workers' compensation cases also and the judges admitted that they were simply applying the same compensation standards they had laboriously developed for automobile accident cases to workers' compensation cases. 765 JURISUTO at 106, *cited in* Foote, at n.58.

[101] Labor Standards Act, *supra* note 58, art. 75.

[102] *Id.*, art. 76.

[103] *Id.*, art. 81.

[104] *Id.*, art. 77 and Table No. 1.

survivors,[105] and 60 days wages as funeral expenses to the person handling the funeral.[106]

In conjunction with the LSA, the Workers' Accident Compensation Insurance Act (*rōdō-sha saigai hoshō hoken hō* ; hereinafter WACIA) was also passed in 1947,[107] establishing an insurance fund to which employers make mandatory contributions and from which employee compensation due under the LSA is paid. Thus, if an employer participates in the insurance scheme, payments made by it will exempt the employer from paying the compensation required by the LSA.[108] Although the LSA is still considered the basic law on workers' compensation, it has in fact come to play a very limited role due to the practical role played by the WACIA.

The workers' compensation system established by the WACIA is administered by the Labor Standards Bureau but financed by employer contributions.[109] For the purposes of the WACIA, there are three categories of employers : covered, non-covered,[110] and provisionally covered enterprises.[111] Participation in the insurance scheme is mandatory for covered enterprises and voluntary for provisionally covered enterprises.

Like the United States' workers' compensation system,[112] employer contribution rates are based on the degree of risk of a particular industry. An enterprise's contribution is calculated by multiplying the total amount of wages

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[105] *Id.*, art. 79.
[106] *Id.*, art. 80.
[107] WACIA, *supra* note 68.
[108] *Id.*, art. 84.
[109] The government also contributes money but is intended to merely cover the administrative costs attendant with the program. *Id.*, art. 26.
[110] Specifically, undertakings not covered by the WACIA include those that are managed directly by the state, public offices not covered by the LSA, and persons insured under the Mariners' Insurance Act. WACIA, *supra* note 68, art. 3.
[111] Provisionally covered enterprises include individually-operated undertakings in agriculture and forestry, animal husbandry, and marine products that employ fewer than five people, *Id.*, Supplementary Provision, Law No. 83 of 1969, and owners of small-sized enterprises (financial, insurance, real estate, retail and service enterprises normally employing no more than fifty persons, wholesale enterprises normally employing no more than one hundred persons, and others normally employing no more than three hundred persons), sole dealers in automobile transport, self-employed persons without employees, domestic workers, and workers dispatched overseas. *Id.*, art. 27.
[112] For a detailed treatment of the workers' compensation system in the United States, see WEX S. MALONE, MARCUS L. PLANT, AND JOSEPH W. LITTLE, WORKERS' COMPENSATION AND EMPLOYMENT RIGHTS (1980). For a briefer description in a comparative context, *see* Nathan Son, *Comparative Analysis of Workmen's Compensation Law* 1 COMP. LAB. L. 71 (1980) and George F. Rohrlich, *Work Injury Compensation in International Perspective* 1 COMP. LAB. L. 89 (1980).

by the Workers' Accident Insurance rate,[113] a rate determined by the Ministry of Labor based on the incidence rates of workplace injuries and illnesses in a particular industry for the previous three years.[114] Current insurance rates range from a low of 0.5 percent for the commerce industry to a high of 14.5 percent for hydroelectric and tunnel construction projects.[115] Also like the United States, a firm's contribution rates can be modified by its own individual safety and health records. This merit system is limited to undertakings with thirty or more employees[116] and can in no case reduce the rate more than 40 percent.

According to reports,[117] the administration of the compensation system, which occurs primarily at the local Labor Standards Inspection Office, is subject to relatively little conflict. There are, however, three recurring patterns of controversy that do occur. The first, inevitable in a standardized compensation system, is over a worker's designated degree of disability since the amount of compensation is tied directly to it. Conflict also arises over claims for injuries and illnesses that are not designated as injuries or illness "resulting from employment." Finally, there is often a dispute over whether an injured worker is an employer or self-employed, a situation that often arises in the sub-contractor context. In cases of dispute, a worker may appeal, first to the prefectural Labor Standards Bureau and then to the national Labor Standards Bureau (where the Labor Insurance Appeals Committee decides the case). From there, appeal is made to the judiciary. Wokutch reports that during one year in which over 257,000 workers' compensation claims were settled, only 1,474 appeals (0.57 percent) were made to the prefectural level, and only 329 cases (0.13 percent) went as far as the Labor Insurance Appeals Committee. Statistics on the number of appeals to the courts were unavailable.

Another recourse for an injured worker is provided for by the Civil Code. Unlike many countries, including most of the states in the United States,[118] in

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[113] WACIA, *supra* note 68, art. 11.
[114] *Id.*, art. 12 (2).
[115] SUGENO, *supra* note 28, at 333, n.16.
[116] It is presumably a typo where Sugeno states that the merit system is applicable to undertakings *under* a certain size. *See id.*, at 323.
[117] WOKUTCH, *supra* note 31, at 69-70.
[118] *See e.g.*, Shaw v. Salt River Valley Water Users' Ass'n, 69 Ariz. 309, 213 P. 2d 378 (Arizona 1950) ; Smith v. Baker, 157 Okl. 155, 11 P. 2d 132 (Oklahoma 1932) ; Morgan v. Ray L. Smith & Son, Inc., 79 F. Supp. 971 (D.C. Kan.) (Kansas 1948) ; Scott v. Powell Coal Co., 402 Pa. 73, 166 A. 2d 31 (Pennsylvania 1960) ; Barnhart v. American Concrete Steel Co., 227 N.Y. 531, 125

addition to collecting workers' compensation under the WACIA, an injured or ill worker may also sue their employer in a court of law. The reason for this secondary course of compensation lies in the fact that the WACIA was never intended to compensate for all of the damages workers are entitled to claim under Japanese civil law. For example, the WACIA does not make any provision for the awarding of consolation money (*isharyō*),[119] which is one of the most important discretionary tools Japanese judges have at their disposal.[120] The awarding of consolation money is the main avenue judges have in inserting equity into their legal decisions, and in the accident compensation context, can adjust total recovery to more accurately reflect individual loss.[121] In addition, the difference between the actual amount of lost wages and the amount of the disability compensation benefit, can be recovered. Of course, any such civil law recovery is offset by the amount of compensation received under the WACIA.

Traditionally, there were three civil law remedies available to an injured worker. First, general tort law provides remedies for intentional and negligent acts.[122] Second, it is possible to hold an employer liable as an owner or occupier

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N.E. 675 (New York 1920) ; Mitchell v. J.A. Tobin Construction Co., 236 Mo. App. 910, 159 S. W. 2d 709 (Missouri 1942) ; Hyett v. Northwestern Hospital for Women and Children, 147 Minn. 413, 180 N.W. 552 (Minnesota 1920) ; Stimson v. Michigan Bell Telephone Co., 77 Mich. App. 361, 258 N.W. 2d 227 (Michigan 1977). *But cf.* Boyer v. Crescent Paper Co., 143 La. 368, 78 South. 596 (Louisiana).

The Second Restatement summarizes as follows :

"Recovery for tort or wrongful death will not be permitted in any state if the defendant is declared immune from such liability by the workmen's [*sic*] compensation statute of a state under which the defendant is required to provide insurance against the particular risk and under which (a) the plaintiff has obtained an award for the injury, or (b) the plaintiff could obtain an award for the injury, if this is the state (1) where the injury occurred, or (2) where employment is principally located, or (3) where the employer supervised the employee" activities from a place of business in the state, or (4) whose local law governs the contract of employment under the rules of §§ 187-188 and 196."

RESTATEMENT (SECOND) OF CONFLICTS § 184.

As an interesting (perhaps) expression of culture, despite the exclusive nature of workers' compensation upheld by these cases, disfigurement is compensable either by statute or case law in 41 states. MALONE ET AL., supra note 112, at 425.

[119] Civil Code, *supra* note 5.

[120] For example, even though punitive damages are considered to be against the public policy of Japan and thus Japanese courts will not recognize or enforce a foreign judgment to the extent that it includes punitive damages, Civil Code, *supra* note 5, art. 200 ; *see also*, Judgment of June 28, 1993 (Northcon I v. Mansei Kogyō *et al.*), Tokyo High Court, 1471 HANREI JIHŌ 89 (1989), 823 HANREI TAIMUZU 126 (1993) (translated in 37 JAPANESE ANNUAL OF INT'L LAW 155 (1994), it has been suggested that some judges are willing to recognize and enforce small punitive damages by characterizing the punitive damages as a form of consolation money. Toshiyuki Kono, lecture delivered at University of Kyushu, Faculty of Law (June 26, 1996).

[121] Sugeno offers the example of the tip of a concert pianist's index finger being severed in an accident. SUGENO, *supra* note 28, at 344, n.3.

[122] Civil Code, *supra* note 5, arts. 709 and 715.

for defects in the construction or maintenance of a structure on land.[123] Finally, nonperformance of a contractual obligation also will provide remedies where such a contractual relationship does exist.[124] However, the difficulty of proving causality and actual loss, as well as offsetting an award for comparative negligence, has made court actions more difficult than merely receiving compensation under the WACIA.

Prior to 1972, most of the damage claims made in the occupational safety and health context were brought under either the first or second causes of action. When ISHA was passed, courts quickly determined that the employers had a duty under a labor contract to ensure safety (based on the employer's duty under ISHA[125]) and thus made the third cause of action substantially more accessible.[126] By 1975, the concept of an employer's duty to ensure safety had broadened into a more general "duty to care for safety" (*anzen hairyō gimu*).[127] Although the case was limited on its facts to the government's duty to care for safety owed to public servants, dicta paved the way for broader application where "on the basis of certain legal relations, the aforesaid duty to care for safety when the parties have entered into relations involving special social contacts will also be generally recognized as devolving on one or both parties toward the other based on the good-faith principle."[128]

Another decision of the Supreme Court defined the duty to care for safety as "the duty to consider the protection of the worker's life and body from hazards in the worker's use of a work site, equipment or implements, etc. for that worker's providing labor or in the course of that worker's providing labor under the employer's direction."[129] The burden of proving a violation of the above

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[123] *Id.*, art. 717. For example, where a crane operator has been seriously injured by a crane that collapsed because it had been improperly affixed to its concrete base, the operator's claim for damages was recognized. Judgment of June 30, 1973 (*Tsuneishi Zōsen*), Tokyo High Court, 298 HANREI TAIMUZU 234 (1973), *cited in* SUGENO, *supra* note 28, at 344, n.7.

[124] Civil Code, *supra* note 5, art. 415.

[125] ISHA, *infra* note 135, art. 3 (1) ("shall ensure the safety and health").

[126] Judgment of November 24, 1972 (*Moji Kōun*), Fukuoka District Court, 696 HANREI JIHOO 235 (1972).

[127] Judgment of February 25, 1975, (*Jieitai Sharyō Seibi Kojō Jiken* [Self-Defense Forces Vehicle Equipment Factory case]), Supreme Court, 29-2 MINSHŪ 143 (1975), 222 RŌDŌ HANREI 13 (1975) (3d Petty Bench). This case has received considerable attention in the past twenty years. At least four books have been written about it as well as numerous articles. For the most succinct treatment, see Masaru Mizuno, *Anzen Hairyō Gimu : Rikujō Jieitai Hachinohe Sharyō Seibi Kōjō Jiken* [The Duty to Care for Safety : The Ground Self-Defense Forces Hachinohe Vehicle Equipment Factory Case], 2 BESSATSU JU-RISUTO 122 (1995).

[128] Judgment of February 25, 1975, *supra* note 127.

[129] Judgment of April 10, 1984, (Kawayoshi Case), Supreme Court, 429 RŌDŌ HANREI 12

duty is on the plaintiff.[130] To succeed, a plaintiff must allege what specific duty the employer should have taken to comply with its duty to care for safety (*i.e.*, duty to install certain types of safety equipment) and then must show that the employer did not perform that duty. A defense can be raised if the employer shows that the measures taken were in accordance with the duty owed, as well as if the employer can show that there were other reasons for the accident (*e.g.*, employee negligence and natural disasters).

Given the plaintiff's burden of proof, this cause of action, being based in contract (non-performance of an obligation) does not appear to be substantially more effective than one arising in tort (violation of one's general duty of care articulated in Civil Code §709). However, procedurally, there remain some important differences. As to prescription periods (*shōmetsu jikō*), a claim arising in tort is subject to a three-year prescription period,[131] whereas a claim arising in contract has a ten-year period.[132] Also, the starting point for calculating delay damages (*chien songai kin*) is different : in tort cases, delay damages accrue from the day after the accident ; in contract cases, they only accrue from the day after the claim is filed.[133] Finally, consolation money (*isharyō*) is only available in tort cases and not in cases arising contract.[134]

Taken together, the LSA, ISHA, WACIA, as well as the civil and criminal codes form a detailed, complex, and as we shall see, effective framework governing occupational health and safety in Japan. As we have seen, this legal framework is intended, first, to prevent injuries and illnesses from occurring by establishing minimum standards, and second, to compensate the victim-worker when mishap does occur. Figure 1 provides a simple illustration of this division of laws from the perspective of the regulated entity.

Finally, in order to understand the legal framework governing occupational safety and health, one needs to be aware of the different levels of laws and regulation in Japan. There are at least six levels of legal provisions that govern

(1984) (3d Petty Bench).

[130] Judgment of February 16, 1981, (*Kōkū Jieitai Ashiya Bunkentai* [Air Self-Defense Force Ashiya Detachment case]), Supreme Court, 35 MINSHŪ 56 (1984) (3d Petty Bench).

[131] Civil Code, *supra* note 5, art. 724.

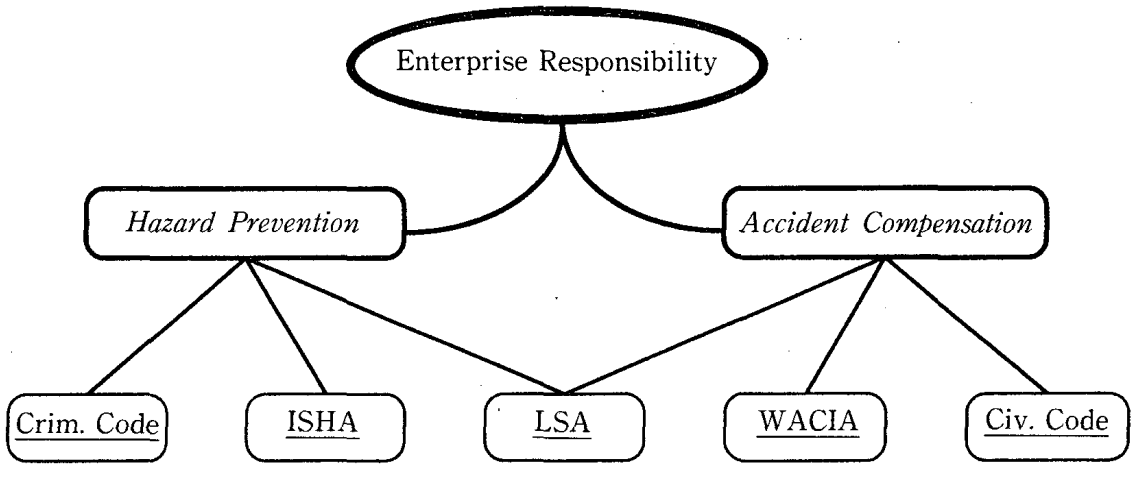
[132] *Id.*, art. 167.

[133] Judgment of December 18, 1980, (*Ōishi Tosō and Kashima Kensetsu* case), Supreme Court, 34 MINSHŪ 888 (1980) (1st Petty Bench). *See also*, Hiroko Hayashi, *Shagai Rōdō-sha ni taisuru Anzen Hairyo Gimu* [The Duty to Care for Safety Owed to Outside Workers], 2 BESSATSU JURISUTO 124 (1995).

[134] *Id.*

safety and health : laws (*hōritsu*), cabinet orders (*seirei*), ministerial orders (*shōrei*), regulations (*kisoku*), notices (*kokuji*), and circulars (*tsūtatsu*).

Figure 1 : Legal Framework of Safety and Health Regulation



IV. THE INDUSTRIAL SAFETY AND HEALTH ACT OF 1972

A. Background

The central link in Japan's injury and illness prevention strategy is the Industrial Safety and Health Act of 1972,[135] which creates a broad, overarching system to govern occupational safety and health. Prior to ISHA, regulations relating to occupational safety and health existed under the LSA's framework but they were not sufficient to meet the challenges and dangers posed by "new manufacturing processes, new technologies, use of new materials, as well as new forms of enterprises such as the leased and joint-venture factories."[136] To consider the safety and health problems posed by industrial developments, a committee was convened in the late 1960s by the Ministry of Labor.[137] The committee noted four inadequacies with the then-current legal regime :

[135] *Rōdō Anzen Eisei Hō* [Industrial Health and Safety Act], Law No. 57 of 1972 (effective October 1, 1972), *amended by* Law No. 28. of 1975, Law No. 76 of 1977, Law No. 78 of 1980, Law No. 57 of 1983, Law No. 56 of 1985, Law No. 37 of 1988, Law No. 55 of 1992, Law Nos. 89 and 92 of 1993, and Law No. 97 of 1994 (officially translated in MINISTRY OF LABOUR, JAPAN, LABOUR LAWS OF JAPAN 161-224 (1995)).

[136] JAPAN ELEVATOR ASSOCIATION, *supra* note 81, at 2.

[137] Sugeno comments that the original purpose of the committee was simply to "drastically amplify the simple provisions of the Labor Standards Act. Instead, however, the Industrial Safety and Health [Act] was enacted." SUGENO, *supra* note 28, at 284.

1) there were inadequate guidelines for preventing industrial accidents, which had been exacerbated by rapid industrial development ;
2) mechanisms were needed for providing advice and counsel on safety and health beyond minimum standards of performance ;
3) there were too few safety and health specialists ; and
4) there were inadequate provisions for coping with the increase in accidents in small and medium-sized companies and in subcontractors. [138]

B. Purpose

In order to remedy these shortcomings, the Ministry of Labor recommended, and the Diet passed ISHA. As codified in the law, Article 1 articulates the overall purpose of the law. It states :

> The purpose of this law is to secure, in conjunction with the Labor Standards [Act], the safety and health of workers in workplaces, as well as to facilitate the establishment of comfortable working environments, by promoting comprehensive and systematic countermeasures concerning the prevention of industrial accidents, such as taking measures for the establishment of standards for prevention of accidents and health impairment, the clarification of responsibility and the promotion of voluntary activities, with a view to preventing industrial accidents.[139]

Although the overall purposes are largely the same, comparing this statement of purpose with that of the U.S. Occupational Safety and Health Act (hereinafter, OSHA) reveals some interesting differences. The purpose of the U.S. law is stated as follows :

> To assure safe and healthful working conditions for working men and women ; by authorizing enforcement of the standards developed under the Act ; by assisting and encouraging the States in their efforts to assure safe and healthful working conditions ; by providing for research, information, education, and training in the field of occupational safety and health ; and for other purposes.[140]

There are thus three elements of ISHA not found in its U.S. counterpart. First, although both laws declare their goal to be assuring safe and healthful working environments, ISHA further declares the goal of securing a comfortable working environment. However, a further reading of ISHA makes clear that

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[138] WOKUTCH, *supra* note 31, at 61-62, *citing* MINORU YOSHIMOTO, DETAILS OF THE LABOR SAFETY AND HEALTH LAW (1981).
[139] ISHA, *supra* note 135, art. 1.
[140] Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 29 U.S.C. §§ 651-678 (1994).

this is really only a means to achieve the ultimate goal of insuring the safety and health of workers.[141] Second, the Japanese law includes "the clarification of responsibility" as a purpose of the law. Responsibility for injuries and illnesses was unclear under the LSA's safety and health framework, and it was not uncommon for lower-level managers to be held responsible while upper-level managers escaped blame.[142] ISHA sought to change that.[143] Finally, another important difference between the statements of purpose is the explicit reference to voluntary activities. As Wokutch correctly notes,[144] and as my own research supports, safety and health voluntarism is both more encouraged and more commonly practiced in Japan than in the United States.

There are also two elements in OSHA's statement of purpose not found in ISHA's. First, there is no need to refer to "assisting and encouraging the States" in Japan because it is a unitary state. Although divided into 47 prefectures,[145] there is very little autonomy (the prefectural Labor Standards Bureau is merely a branch of the national Labor Standards Bureau) and there is nothing equivalent to the state-plan OSHAs found in the United States. Second, the purpose of OSHA also provides for research, information, education, and training in the field of occupational safety and health. Though not stated in the statement of purpose, these goals are included elsewhere as within the purview of the Labor Standards Bureau.

C. General Provisions

Besides stating its purpose and defining terms,[146] Chapter One also declares generally the responsibilities (*sekimu*) of employers, manufacturers, importers, contractors, and workers. An employer is required not only to comply with the minimum standards established in the Act, but also to actively seek to improve

[141] ISHA, *supra* note 135, art. 3 (1).
[142] YOSHIMOTO, *supra* note 138.
[143] Old habits die hard. A former in-house legal council of Denki K.K. related a story about how aghast an outside attorney, retained to handle the legal proceedings arising from a fatal accident, was when the in-house council presented him with Denki K.K.'s only goal in the forthcoming litigation : pin the liability on the lowest-level manager possible.
Although this approach to damage control is not unique to Japan, what is more unique is the attitude displayed by those who are chosen to take the fall.
[144] WOKUTCH, *supra* note 31, at 63.
[145] Actually, Japan is divided into 43 *ken* (prefectures), 2 *fu* (Osaka and Kyoto), 1 *dō* (Hokkaido), and 1 *to* (Tokyo), collectively referred to as *to-dō-fu-ken*.
[146] The Act defines the following terms : 1) industrial accident (*rōdō saigai*) ; 2) worker (*rōdō-sha*) ; 3) employer (*jigyō-sha*) ; 4) chemical substance (*kagaku busshitsu*) ; and 5) working environment measurement (*sagyō kankyō sokutei*). ISHA, *supra* note 135, art. 2.

working conditions.[147] As discussed above, this declaration of employers' responsibility greatly affected tort actions against the employer by broadening the traditional scope of duty.[148]

In addition, a designer, manufacturer, or importer of machines or raw materials is also required to prevent accidents caused by the use of these items.[149] Prime contractors are also placed under an obligation to exercise care so as to not impose conditions regarding operating methods, deadlines, etc. that might impede safety and health conditions.[150] Workers, on the other hand, are required to observe safety and health regulations as well as to cooperate with employers and others regarding accident prevention.[151]

D. Industrial Accident Prevention Program

In order to focus attention and effort on the most pressing health and safety concerns, ISHA requires the Minister of Labor to prepare an Industrial Accident Prevention Program (*rōdō saigai bōshi keikaku*) which establishes measures to be taken for preventing industrial accidents. Before preparing such a program, the Minister of Labor must first obtain the opinion of the Central Labor Standards Investigative Council (*chūō rōdō kijun shingi kai*).[152] The Minister is to then publish the program without delay[153] and if deemed necessary, make recommendations or requests to employers, organizations of employers, and other interested persons.[154]

In practice, the Ministry of Labor prepares and publishes an Industrial Accident Prevention Program every five years.[155] The current five-year program commenced in 1993. For the most part, these programs speak in generalized terms, calling for the "promotion" of preventative measures for various risks. But interestingly, the program also establishes numerical targets. The previous five-year program's goal was to reduce the total number of industrial injuries by about 30 percent.[156]

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[147] *Id.*, art. 3.
[148] *See supra* text accompanying notes 120-132.
[149] ISHA, *supra* note 135, art. 3.
[150] *Id.*
[151] *Id.*, art. 4.
[152] *Id.*, art. 6.
[153] *Id.*, art. 8.
[154] *Id.*, art. 9.
[155] JAPAN INSTITUTE OF LABOUR, INDUSTRIAL SAFETY AND HEALTH 17 (Japanese Industrial Relations Series No. 9, 1988) [hereinafter JAPAN INSTITUTE OF LABOUR].

E. Safety and Health Management System

The establishment of a system to oversee safety and health concerns in the workplace is one of ISHA's most important aspects. Depending on the size and type of enterprise, an employer is required to appoint a variety of different people responsible for safety and health and to provide them with education and training.[157] A short description of each position follows.

1. *General Safety and Health Supervisor*

ISHA requires employers to appoint a general safety and health supervisor (*sōkatsu anzen eisei kanri-sha*) for each workplace of the size defined by Cabinet Order.[158] The person appointed must be one who exercises overall control over the execution of the undertaking (*e.g.*, in the manufacturing industry, the factory manager).[159] Cabinet Orders establish three categories of enterprises and sets the threshold level for each category. Thus, a general safety and health supervisor is required for 1) construction enterprises normally employing one hundred or more persons, 2) manufacturing, communications, electrical, and gas enterprises normally employing three hundred or more persons, and 3) other enterprises normally employing one thousand or more persons.[160] The general safety and health supervisor exercises overall control of matters pertaining to accident prevention, safety and health education, medical examinations, accident investigations, etc., as well as supervising the safety supervisor and health supervisor.[161] Failure to appoint a general safety and health supervisor is subject to, pursuant to Article 120, a fine not exceeding ¥500,000 (hereinafter, "Article 120 sanctions").[162]

2. *Safety Supervisor and Health Supervisor*

ISHA also requires an employer to appoint a safety supervisor (*anzen*

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[156] *Id.* This is contextually interesting in light of my discussions with Denki K.K. officials regarding safety goals and the reliance on the "zero accident" goal. *See supra* text accompanying note 352.
[157] ISHA, *supra* note 135, art. 19-2. The employer is also required to provide to such personnel the opportunity to receive such education and training. *Id.*
[158] *Id.*, art. 10 (1).
[159] *Id.*, art. 10 (2).
[160] [Industrial Safety and Health Cabinet Order] 2 [hereinafter ISH Cabinet Order].
[161] ISHA, *supra* note 135, art. 10 (1).
[162] *Id.*, art. 120 (1).
[163] *Id.*, art. 11.

kanri-sha) depending on the size and type of business.[163] Cabinet Order sets this threshold for the first two categories of enterprises (manufacturing, communications, electrical, and gas enterprises, and construction enterprises) at fifty or more normally-employed persons. The Order is silent with regard to industries in the third category.[164] The safety supervisor is in charge of technical matters related to safety and is required by ministerial ordinance to have either an educational background or experience in related scientific fields.[165]

Regardless of the type of business, any enterprise normally employing fifty or more persons is required to appoint a health supervisor (*eisei kanri-sha*).[166] Such supervisors are to take charge of the technical matters related to health. Health supervisors are required either to have received a license from the Chief of the Prefectural Labor Standards Bureau,[167] or to be a doctor or the equivalent.[168] Failure to appoint either a safety supervisor or a health supervisor when required is subject to Article 120 sanctions.[169]

3. *Health and Safety Promoter or Health Promoter*

Article 12-2 of ISHA mandates that enterprises too small to require safety and health supervisors (*i.e.*, under fifty employees), but normally employing ten or more persons,[170] are required to appoint either a safety and health promoter (*anzen eisei suishin-sha*) if a category one enterprise, or a safety promoter (*anzen suishin-sha*) if in any other industry.[171] Interestingly, the Act's penal provisions are silent with regard to this requirement. Research could be conducted into whether or not this provision experiences significant variance in compliance rates when compared to levels of compliance with other penalty-sanctioned provisions. An absence of significant variance would say a great deal about the efficacy of the penal sanctions in ISHA and about regulatory enforcement methods in Japan generally. Unfortunately, such research will have to await another day.

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[164] ISH Cabinet Order, *supra* note 160, art. 4.
[165] [Industrial Safety and Health Act Ordinance], arts. 5 and 10 [hereinafter ISHA Ordinance].
[166] ISHA, *supra* note 135, art. 12 ; ISH Cabinet Order, *supra* note 160, art. 5.
[167] ISHA, *supra* note 135, art. 12.
[168] ISHA Ordinance, *supra* note 165, arts. 5 and 10.
[169] ISHA, *supra* note 135, art. 120 (1).
[170] ISHA Ordinance, *supra* note 165, arts. 12-2 and 12-3.
[171] ISH Cabinet Ordinance, *supra* note 160.

4. Industrial Physician and Operations Chief

ISHA also commands the employer to appoint an industrial physician (*sangyō-i*) to perform health maintenance for workers[172] whenever the enterprise employs fifty or more persons.[173] Violation of this provision is subject Article 120 sanctions.[174] The Act also requires the appointment of an operations chief (*sagyō shunin-sha*) to supervise workers engaged in certain dangerous work (*e. g.*, operations within high pressure chambers).[175] The operations chief must either have received a license from the Chief of the Prefectural Labor Standards Bureau, have completed a skill training course conducted by the Chief of the Prefectural Labor Standards Bureau, or be designated by the Chief of the Prefectural Labor Standards Bureau.[176] Failure to appoint an operations chief is a violation subject to imprisonment not exceeding six months or a fine not exceeding ¥500,000 (hereinafter, "Article 119 sanctions).[177]

5. Safety Committees and Health Committees

At workplaces of a certain size,[178] employers are required to establish a safety committee (*anzen iinkai*) to investigate, consider, and advise the employer regarding safety-related matters.[179] One half of the committee members are designated by the union[180] and the other half by management from among the safety supervisors or other persons who possess safety-related experience.[181] In addition, the chair of the safety committee (*anzen iinkai no gichō*) is to be occupied by the general safety and health supervisor or, if none, a safety supervisor.[182]

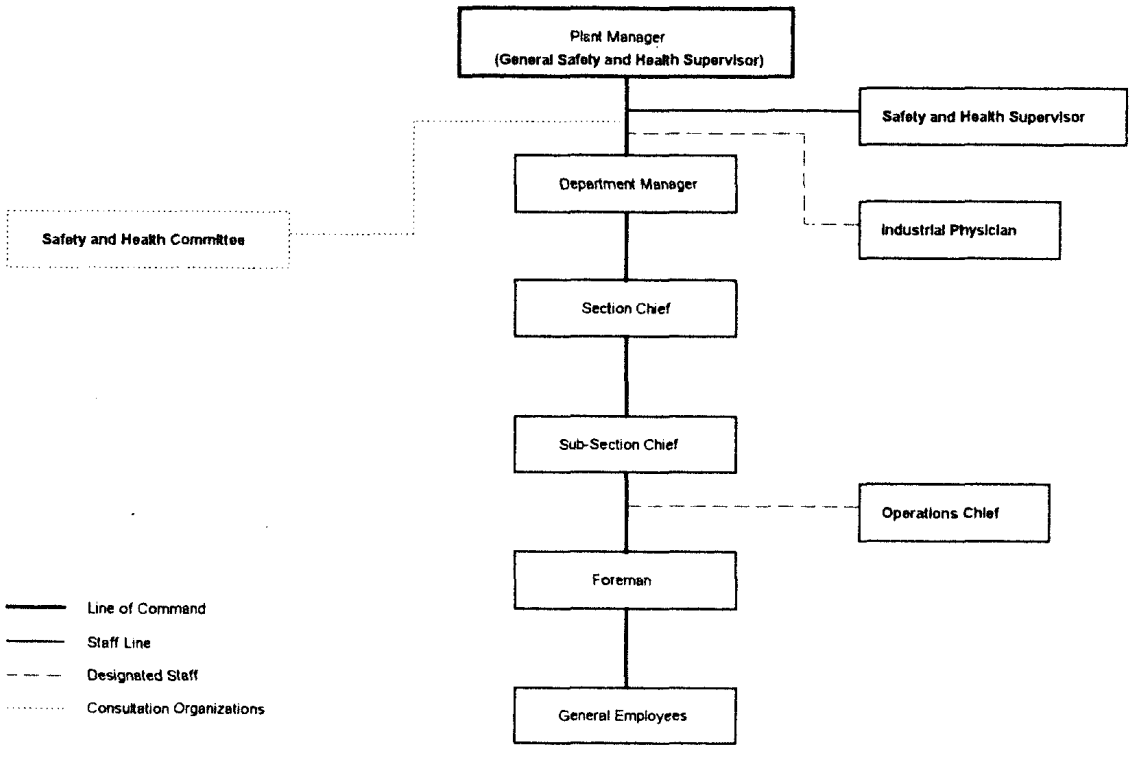
Similarly, at workplaces of a certain size and type,[183] a health committee (*eisei iinkai*) must also be established.[184] Its responsibilities pertain to health rather than safety-related matters, and management may also appoint members

[172] ISHA, *supra* note 135, art. 13.
[173] ISH Cabinet Ordinance, *supra* note 160, arts. 12-2 and 12-3.
[174] ISHA, *supra* note 135, art. 120 (1).
[175] *Id.*, art. 14.
[176] *Id.*
[177] *Id.*, art. 119 (1).
[178] ISHA Ordinance, *supra* note 165, arts. 8 and 9.
[179] ISHA, *supra* note 135, art. 17 (1).
[180] *Id.*, art. 17 (4). Where there is no trade union, then by the representative of a majority of the workers. *Id.*
[181] *Id.*, art. 17 (2).
[182] *Id.*, art. 17 (3).
[183] ISHA Ordinance, *supra* note 165, arts. 8 and 9.
[184] ISHA, *supra* note 135, art. 18 (1).

from amongst industrial doctors,[185] but otherwise has the same organization and structure as the safety committee. Where an employer is required to establish both a safety committee and a health committee, ISHA allows the establishment of a single safety and health committee (*anzen eisei iinkai*) in lieu of those respective committees.[186] Failure to establish either committee subjects the employer to Article 120 sanctions.[187]

Each company's organization for safety and health management may differ, reflecting the particular conditions of the company, but a typical organization is shown in Figure 2 :

Figure 2 : Typical Organization Chart for Safety and Health Management



Source : JAPAN INSTITUTE OF LABOUR, INDUSTRIAL SAFETY AND HEALTH 27 (Japanese Industrial Relations Series, No. 9, 1988).

F. Measures for Preventing Hazards and Health Impairment of Workers

ISHA also has detailed provisions regarding the control of dangerous and harmful substances. It requires the employer to take measures to prevent the

[185] *Id.*, art. 18 (2).
[186] *Id.*, art. 19.
[187] *Id.*, art. 120 (1).

following safety hazards (*kiken*) : 1) those due to machines or other equipment, substances that are explosive, combustible, or inflammable, and electricity or other energy ;[188] 2) those arising from excavation, quarrying, loading, unloading, and logging ;[189] and 3) those in connection with places where there is a danger that workers may fall or where sand or earth may slide.[190]

The employer is also required to take the necessary steps to prevent the following health impairments (*kenkō shōgai*) : 1) those due to raw materials, gases, vapors, dusts, insufficient oxygen, and pathogens ; 2) those due to radiation, high and low temperatures, ultrasonic waves, noise, vibrations, and abnormal atmospheric pressure ; 3) those due to monitoring gauges, and precision work ; and 4) those due to exhaust gases, liquid, or solid wastes.[191] In addition, the employer must take the necessary measures for ventilation, lighting, heating (but not cooling), dehumidification, rest, evacuation (including keeping the passageways, floors, and stairs clear), and cleanliness for "maintaining the health, morals, and lives of workers."[192] The law also requires an employer to take measures to prevent accidents that are caused by volitional acts of their employees.[193] Failure to take any of these measures subjects the employer to Article 119 sanctions.[194]

An employer is also required to immediately stop operations and have the workers evacuate the workplace were there exists "an urgent danger of the occurrence of an industrial accident."[195] Failure to do so subjects the employer to Article 119 sanctions.[196] A related question, and perhaps more pertinent, is whether employees have the right to refuse unsafe work. ISHA obliges an employee to observe the injury and illness prevention measures implemented by the employer[197] (subject to Article 120 sanctions[198]) but is silent in regard to the right to refuse dangerous work.

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[188] *Id.*, art. 20.
[189] *Id.*, art. 21 (1).
[190] *Id.*, art. 21 (2).
[191] *Id.*, art. 22.
[192] *Id.*, art. 23 (*"rōdō-sha no kenkō, fūki oyobi seimei no hoji"*).
[193] *Id.*, art. 24.
[194] *Id.*, art. 119 (1).
[195] *Id.*, art. 25 (*"rōdō saigai hassei no kyūhaku shita kiken"*).
[196] *Id.*, art. 119 (1).
[197] *Id.*, art. 26.
[198] *Id.*, art. 120 (1). This raises another interesting contrast with the United States. Although OSHA also imposes a legal duty on employees to comply with the terms of the act, there are no sanctions for employee noncompliance. *See* BACOW, BARGAINING FOR JOB SAFETY AND HEALTH, 12-14 (1980).

Japanese scholars have concluded that there are at least two situations where an employee may be justified in rejecting hazardous work. First, if a serious risk of injury has been created by the employer's failure to implement the safety and health measures required by ISHA, then the employee would be justified in refusing the work order on the theory that because of the violation of ISHA, *ergo* the work order is without binding effect.[199] Second, regardless of whether there has been a violation of ISHA, if "the inherent limits on the duty to work" did not envision doing work that posed a serious risk to life or health, then the employee may be justified in refusing such work.[200]

This situation should be compared with the United States where the Secretary of Labor has promulgated regulations which specifically provides that an employee has the right to refuse work where "a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels."[201]

In addition to employer responsibilities, ISHA also imposes various duties on prime contractors,[202] sub-contractors,[203] "machine lessors,"[204] "building lessors,"[205] and cargo forwarders.[206] For example, prime contractors are obliged to give necessary guidance to their sub-contractors so that they do not violate the law.[207] These various duties are subject to either Article 119 or Article 120 sanctions.[208]

To facilitate the effective and appropriate implementation of the measures mentioned above, the Minister of Labor publishes technical guidelines (*gijutsu-jō no shishin*) for each industry and operations therein, thereby educating regulat-

[199] SUGENO, *supra* note 28, at 289, n.‡.
[200] This grounds for refusing hazardous work appears to have the support of at least one court. *See* Judgment of December 24, 1968 (Chiyoda Maru case), Supreme Court, 22 MINSHŪ 3050 (3d Petty Bench), *cited in* SUGENO, *supra* note 28, at 289, n.‡.
[201] 29 C.F.R. § 1977. 12 (b) (2) (1979). *See also*, Whirlpool Corp. v. Marshall, 445 U.S. 1, 100 S. Ct. 883, 63 L. Ed. 2d 154 (1980) (upholding the validity of the regulation).
[202] ISHA, *supra* note 135, arts. 29 to 31.
[203] *Id.*, art. 32.
[204] *Id.*, art. 33.
[205] *Id.*, art. 34.
[206] *Id.*, art. 35.
[207] *Id.*, art. 29.
[208] Depending on the specific obligation, prime contractors are subject to either Article 119 or Article 120 sanctions for non-compliance. Sub-contractors, on the other hand, are only subject to the lighter Article 120 sanctions. "Machine lessors," "building lessors," and cargo forwarders are all subject to Article 119 sanctions. *Id.*, arts. 119 (1) and 120 (1).

ed enterprises on the measures which they are required to take to comply with the law.[209]

G. Regulations Concerning Hazardous Machinery and Harmful Substances

The manufacture of certain machines ("specified machines") which are deemed to be particularly dangerous (*e.g.*, boilers, cranes, elevators, etc.) require the advance permission of the Chief of the prefectural Labor Standards Bureau, which in turn requires an inspection.[210] Failure to comply with this provision is subject to the law's second-most severe penal sanction : incarceration for up to a year or a fine not exceeding ¥1,000,000 (hereinafter, "Article 117 sanctions").[211] In addition, a manufacturer, importer, or installer of such machinery must also have those machines inspected and receive a certificate of approval upon inspection,[212] subject to Article 119 sanctions. These certificates are only valid for a limited period of time, after which, inspection is required for renewal.[213] These specified machines can not be used nor sold or leased unless properly certified.[214] Interestingly, forbidden use entails a more severe punishment (Article 119 sanctions) than does forbidden sale or lease (Article 120 sanctions),[215] presumably because a new purchaser is also under a duty to certify such machinery.

In addition to the specified machines, other dangerous machines (designated by cabinet order) require certain standards and safety devices[216] which must pass either an individual[217] or a model examination.[218] Failure to comply with these advance examination requirements are also subject to Article 117 sanctions.[219] The certificates issued upon completing these examinations are also for limited period only, requiring another examination for renewal.[220] In addition, employers must make regular, periodic inspections on specified machines.[221] Failure to conduct regular inspection is subject to Article 120

[209] *Id.*, art. 28.
[210] *Id.*, art. 37.
[211] *Id.*, art. 117.
[212] *Id.*, arts. 38 and 39.
[213] *Id.*, art. 41.
[214] *Id.*, art. 40.
[215] *Id.*, arts. 119 (1) and 120 (1), respectively.
[216] *Id.*, art. 42.
[217] *Id.*, art. 44.
[218] *Id.*, art. 44-2.
[219] *Id.*, art. 117.
[220] *Id.*, art. 44-3.
[221] *Id.*, art. 45.

sanctions.[222]

ISHA also absolutely prohibits the manufacture of certain dangerous substances (such as yellow phosphorus matches and benzidine)[223] and requires advance permission for others (such as dichlorbenzidine).[224] Violation of the manufacturing ban is subject to the law's most severe punishment : 3 years or 3 million yen.[225] (The ban on manufacturing of such substances is, in fact, the only requirement of ISHA subject to this Article 116 sanction.) Additionally, movement of substances the manufacture of which is banned, entails certain labeling and packaging requirements.[226] Failure to meet these advance-permission requirements is subject to Article 117 sanctions.[227]

H. Measures for Employing Workers

The employer is required to educate new employees (as well as employees who have been reassigned) on safety and health,[228] subject to Article 120 sanctions.[229] In addition, education must be provided for those who directly guide or supervise workers in their duties (*e.g.*, a forewoman) in certain industries,[230] though not subject to any sanction for non-compliance. Additional training and education is required for workers assigned to hazardous or harmful work,[231] subject to Article 119 sanction.[232] Workers who are assigned to operate certain machinery (*e.g.*, a crane) are required to have the necessary operating license and employers are required to not assign a worker unless the worker does have the license, [233] also subject to Article 120 sanctions.[234] ISHA also requires employers to "endeavor to achieve appropriate job placement in correspondence with [the] physical and mental condition" of middle- and old-aged workers,[235] though not subject to any sanctions.

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[222] *Id.*, art. 120 (1) and 120 (3).
[223] *Id.*, art. 55.
[224] *Id.*, art. 56.
[225] *Id.*, art. 116.
[226] *Id.*, art. 57.
[227] *Id.*, art. 117.
[228] *Id.*, art. 59.
[229] *Id.*, art. 120 (1).
[230] *Id.*, art. 60.
[231] *Id.*, arts. 59 (3) and 60-2.
[232] *Id.*, art. 119 (1) and (4).
[233] *Id.*, art. 61.
[234] *Id.*, art. 119 (1). Article 120 sanctions are applied where a "person other than those persons entitled to engage in the duties in question . . . perform said duties." *Id.*, arts. 61 (2) and 120 (1).
[235] *Id.*, art. 62. In spite of this specific attention, data for the years following the passage of

I. Measures for Maintaining and Promoting Industrial Health

Chapter Seven of ISHA requires an employer to conduct working environment measurements in certain workplaces (*e.g.*, where dangerous work is performed),[236] to limit working hours for certain dangerous work (*e.g.*, underwater work),[237] and to prohibit workers with communicable diseases from working,[238] all subject to Article 119 sanctions for non-compliance.[239] Employers are also obligated to provide continuous health education,[240] to provide athletic facilities for their employees,[241] and to endeavor to create and maintain the workplace in a comfortable environment for the purposes of improving the health of its employees.[242] None of these obligations, however, are subject to any penal provision.

In addition, employers are required to provide the following types of medical examinations : regular medical examinations at the time of hiring and annually thereafter[243] (subject to Article 120 sanctions[244]), and special medical examinations given twice yearly to workers assigned potential dangerous duties[245] (not subject to any sanctions). Moreover, the Chief of the prefectural Labor Standards Bureau has the power and authority to order an employer to conduct special medical examinations when deemed necessary[246] and the employers are obligated, subject to Article 120 sanctions, to do so. To further ensure implementation of these medical-examination requirements, the law imposes a hortatory (*i.e.*, not subject to any sanctions) duty on workers to submit to such examinations.[247]

ISHA in 1972 demonstrate that the percentage of occupational casualties suffered by older workers continued to increase. In 1975, 29 percent of all occupational injuries and illnesses were suffered by workers fifty years or older. That percentage grew to 31.9 percent in 1979, 35.3 percent in 1983, and reached 38.6 percent in 1987. Meanwhile, however, incident rates among the middle-aged (forty to forty-nine) decreased from 27.2 percent in 1975 to 25.4 percent in 1987. JAPAN INSTITUTE OF LABOUR, *supra* note 155, at 11.

[236] ISHA, *supra* note 135, art. 65.
[237] *Id.*, art. 65-4.
[238] *Id.*, art. 68.
[239] *Id.*, art. 119 (1).
[240] *Id.*, art. 69.
[241] *Id.*, art. 70.
[242] *Id.*, arts. 71-2 to 71-4.
[243] *Id.*, art. 66 (1).
[244] *Id.*, art. 120 (1).
[245] *Id.*, art. 66 (2) ; ISHA Ordinance, *supra* note 165, arts. 43-48.
[246] ISHA, *supra* note 135, art. 66 (4).
[247] *Id.*, art. 66 (5).

J. Safety and Health Improvement Plans

The Chief of the prefectural Labor Standards Office, when deemed that a workplace is particularly dangerous or unhealthy, may order the employer to formulate and implement a safety and health improvement plan (*anzen eisei kaizen keikaku*)[248] after consultation with its employees.[249] The Chief may also "encourage" (*kanshō*) the employer to obtain the advice of an industrial-health or industrial-safety consultant in drawing up such plans.[250] There are no sanctions, however, for failure to comply.

K. Enforcement Mechanisms

As with any regulatory system, enforcement mechanisms define the character of the regulation. ISHA's enforcement mechanisms fall into three categories : licenses, inspections, and penal sanctions. First, ISHA requires health supervisors and operations chiefs, as well as operators of cranes, etc., to receive a license from the Ministry of Labor.[251] By controlling competency requirements, regulators attempt to raise safety and health standards in the workplace and direct attention and resources to safety and health problems. The law forces employers to invest in areas where the employer may not otherwise choose to invest.

The second mechanism for enforcing the standards established by ISHA is the inspection system. Inspections are required for the use of certain machines and general inspections, as will be discussed below,[252] are conducted both randomly and upon worker request. By inserting this step in the manufacturing process, Japanese employers are forced to consider safety and health standards when making capital investments and on a day-to-day basis, thus encouraging compliance.

The third method by which ISHA is enforced is by the imposition of penal sanctions on violators. ISHA provides a separate chapter on penalties, signifi-

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[248] *Id.*, art. 78 (1).
[249] *Id.*, art. 78 (2). Where a trade union exists, the employer must obtain the views of the trade union ; where one does not exist, then the views of a majority of workers must be sought.
[250] *Id.*, art. 80. Industrial-safety and industrial-health consultants are licensed by the Ministry of Labor after successful completion of an examination administered by the Ministry of Labor. *Id.*, arts. 81 to 84. Said consultants are under a duty of confidentiality regarding information learned during the course of her duties. *Id.*, art. 86. Violation of this provision is subject to Article 117 sanctions. *Id.*, art. 117.
[251] *Id.*, art. 72.
[252] *See infra*, text accompanying notes 285 to 296.

cant in the Japanese context, for Japanese regulations do not also include penal sanctions for non-compliance. There are basically four levels of sanctions in ISHA and have all been mentioned prior, in their context, but I will repeat them here, hopefully clarifying the situation. The most severe penalty provided for by ISHA is in Article 116 : "penal servitude not exceeding three years or . . . a fine not exceeding 3,000,000 yen."[253] This sanction is only applied in one situation, illegal manufacture of certain dangerous substances. The next most severe sanction, and one only applied in six situations, is Article 117 sanctions : "penal servitude not exceeding one year or . . . a fine not exceeding 1,000,000 yen."[254] The third and fourth level of sanctions are applied for numerous violations of the law. Article 119 sanctions is the next most serious penalty : "penal servitude not exceeding six months or . . . a fine not exceeding 500,000 yen."[255] The fourth level, Article 120 sanctions, only entail "a fine not exceeding 500,000 yen."[256] It must be remembered that these penalties are only assessed, after the offender has been convicted in a court of law. Japanese regulators do not have the authority to issue penalties themselves (in contrast to OSHA inspectors who do) but can only recommend to the Public Prosecutor's Office that the violator be prosecuted. More on this will be said in the next section.

L. Comparisons and Conclusions

As this brief outline intended to reveal, there are a number of differences between ISHA and OSHA, both in specific provisions and in philosophical approach. Briefly summarizing these differences here should aid in understanding the larger picture of both the structure and environment of Japanese regulation of workplace safety and health.

In general, the most fundamental difference between ISHA and OSHA lies in their respective regulatory approaches. OSHA is legal- and engineering-oriented : it emphasizes the legal mechanisms of compliance and dispute resolution, and it also focuses on engineering changes that must be affected in the workplace in order to achieve compliance. ISHA, on the other hand, is behavior-oriented : it specifies proper industrial structures and attempts to

[253] *Id.*, art. 116.
[254] *Id.*, art. 117.
[255] *Id.*, art. 119.
[256] *Id.*, art. 120.

modify the behavior of the regulated entities and their workers.

Specifically, ISHA requires the establishment of a safety and/or health committee, jointly staffed by management and labor. This committee provides a valuable forum for communication between labor and management, giving workers a structure within which concerns about safety and health can be raised that avoids the direct confrontation of complaining to the employer or of filing a request for inspection with the Labor Standards Bureau.[257] There is no corresponding structure under OSHA and all recent reform bills providing for mandatory safety committees have been defeated.[258] Interestingly, the reforms' proposals were very similar to ISHA's provisions. For example, the bills would have required employers to provide safety and health training and develop a safety and health program.[259] With regard to the latter, it was argued that "employers too often confine their safety and health activities to compliance with specific OSHA standards rather than taking a more assertive approach, systematically reviewing work operations, identifying risks, and establishing controls to avoid workplace accidents and work-related illnesses."[260]

Another difference between the two acts is that, although both place workers under an obligation to observe employer-imposed safety and health rules, only ISHA imposes sanctions (Article 120 sanctions) on employees who do not. There is a strong feeling among Japanese managers that the workers are just as much responsible for overall occupational safety and health as are managers. Workers do not seem to differ greatly in their views either. This may be due to the fact that the line between labor and management is much less distinct in Japan than in the United States. It is much more common in Japan for workers to eventually be promoted to the level of management[261] during the

[257] The safety and health committee is supplemented in many workplaces by a joint labor-management council, a voluntary standing body established for the purpose of discussing a variety of workplace issues, including safety and health. It is estimated that 58 percent of all workplaces in Japan have established joint-consultation committees (the figure rises to 77 percent in unionized enterprises). Takashi Araki, *The Japanese Model of Employee Representational Participation*, 15 COMP. LAB. L.J. 143, 145 (1994), *citing RŌDŌ DAIJIN KANBŌ SEISAKU CHŌSABU* [LABOR MINISTER'S SECRETARIAT, POLICY RESEARCH DIVISION], *NIHON NO RŌSHI COMYUNIKEISHON NO GENJŌ* [PRESENT SITUATION OF COMMUNICATION BETWEEN LABOR AND MANAGEMENT IN JAPAN] (1990).

[258] S. 575, 103d Cong., 1st Sess. (1993) ; H.R. 1280, 103d Cong., 1st Sess. (1993) ; S. 1622, 102d Cong., 2d Sess. (1991) ; H.R. 3160, 102d Cong., 1st Sess. (1991).

[259] Brett R. Gordon, *Employee Involvement in the Enforcement of the Occupational Safety and Health Laws of Canada and the United States*, 15 COMP. LAB. L.J. 527, 554-55 (1994).

[260] S. Conf. Rep. No. 453, 102d Cong., 2d Sess. 11 (1992).

[261] Clark points out how there is no word in Japanese that corresponds precisely with the

course of their employment than in the United States.

As discussed above, another difference between the two regimes relates to the right to refuse dangerous work. In the United States, regulation has explicitly provided an employer to refuse hazardous work. In Japan, no such explicit provision exist. But the impact of this difference is lessened by the academic and court response to the issue.

Two additional differences will be mentioned here, although the subject matter is a topic that I discuss in the next section. First, the process of issuing and appealing penalties in Japan is more involved than in the United States. In Japan, fines (*bakkin*), and in some cases imprisonment (*kinkokei*), are only assessed after a judicial conviction, and appeal is handled by the regular judicial system ; in the United States, OSHA inspectors have the right to immediately issue fines and appeal is first handled by the Occupational Safety and Health Review Commission. Second, the powers of the respective inspectors differ in various ways. Japanese inspectors may issue immediate work shutdown orders in the face of imminent danger and do not need to obtain a search warrant prior to conducting an inspection, but they do not have the authority to issue fines. OSHA inspectors need to secure a court order for shutdowns and need a search warrant to enter a workplace, but they have the right to immediately issue fines.

When ISHA is placed in its historical context, we can recognize certain regulatory incarnations of the prewar regime governing occupational safety and health, as well as evolution. An inspection body with a broad mandate over labor issues finds its origins in prewar Japan, but the powers and authorities have been greatly increased. We can also recognize the continuing importance of value transformation through education as a means of governing (and improving) safety and health in Japan. But unlike the prewar Japanese laws, ISHA accords unions a more prominent role in safety and health management. Especially noticeable are the safety and health committees that are nearly half chaired by union members. What is clear is that postwar Japanese legislators and regulators have been able to selectively draw on their past experiences.

English "manager." Various terms are used, including *keiei-sha, kanri shoku-sha, tantō-sha, jooshi*, as well as the English word "manager" itself. But none of them, even the English derivative, "expresses the idea of a category of rulers as opposed to a category of those who are ruled." RODNEY CLARK, THE JAPANESE COMPANY 109, n.1 (Charles E. Tuttle Books 1991 (1979).

V. MODERN REGULATORY ORGANIZATION AND FUNCTION : THE LABOR STANDARDS BUREAU

A. Organization of the Regulatory Function

The Ministry of Labor (*rōdō shō*) has jurisdiction over safety and health regulation in Japan. Within the Ministry of Labor, there are five bureaus : the Labor Relations Bureau, the Human Resources Development Bureau, the Women's Bureau, the Employment Security Bureau, and the Labor Standards Bureau. Among these, the Labor Standards Bureau (*rōdō kijun kyoku*)[262] (hereinafter LSB) is the agency primarily responsible for workplace safety and health.

One of the most striking differences between the United States' and Japan's organization of the safety and health regulatory function concerns the scope of responsibility. OSHA was created by the Occupational Safety and Health Act[263] and its jurisdiction is limited to occupational safety and health matters. The Labor Standards Bureau, on the other hand, was created by the Labor Standards Act[264] and has responsibility for all of the act's variegated labor matters.[265] Thus, the Labor Standards Bureau does not focus exclusively on safety and health issues like OSHA does.[266]

Internally, the LSB is organized into five principal divisions and two departments : the General Affairs Division, the Inspection Division, the Labor Accident Management Division, the Compensation Division, the Executive Office for Workers' Accident Compensation Insurance, the Industrial Safety and Health Department, and the Wages and Welfare Department. Within the LSB, the Industrial Safety and Health Department has primary responsibility for occupational safety and health issues but the Executive Office for Workers' Compensation Insurance and the Wages and Welfare Department also have safety- and

[262] The terminology employed by the Labor Ministry is often slightly different from that used in the Labor Standards Law. For example, under the Labor Standards Law, the Labor Standards Bureau is called the Labor Standards Management Bureau (*Rōdō Kijun Shukan Kyoku*). *See, e.g.*, LSA, *supra* note 58, arts. 97 (1).

[263] Occupational Safety and Health Act, *supra* note 140.

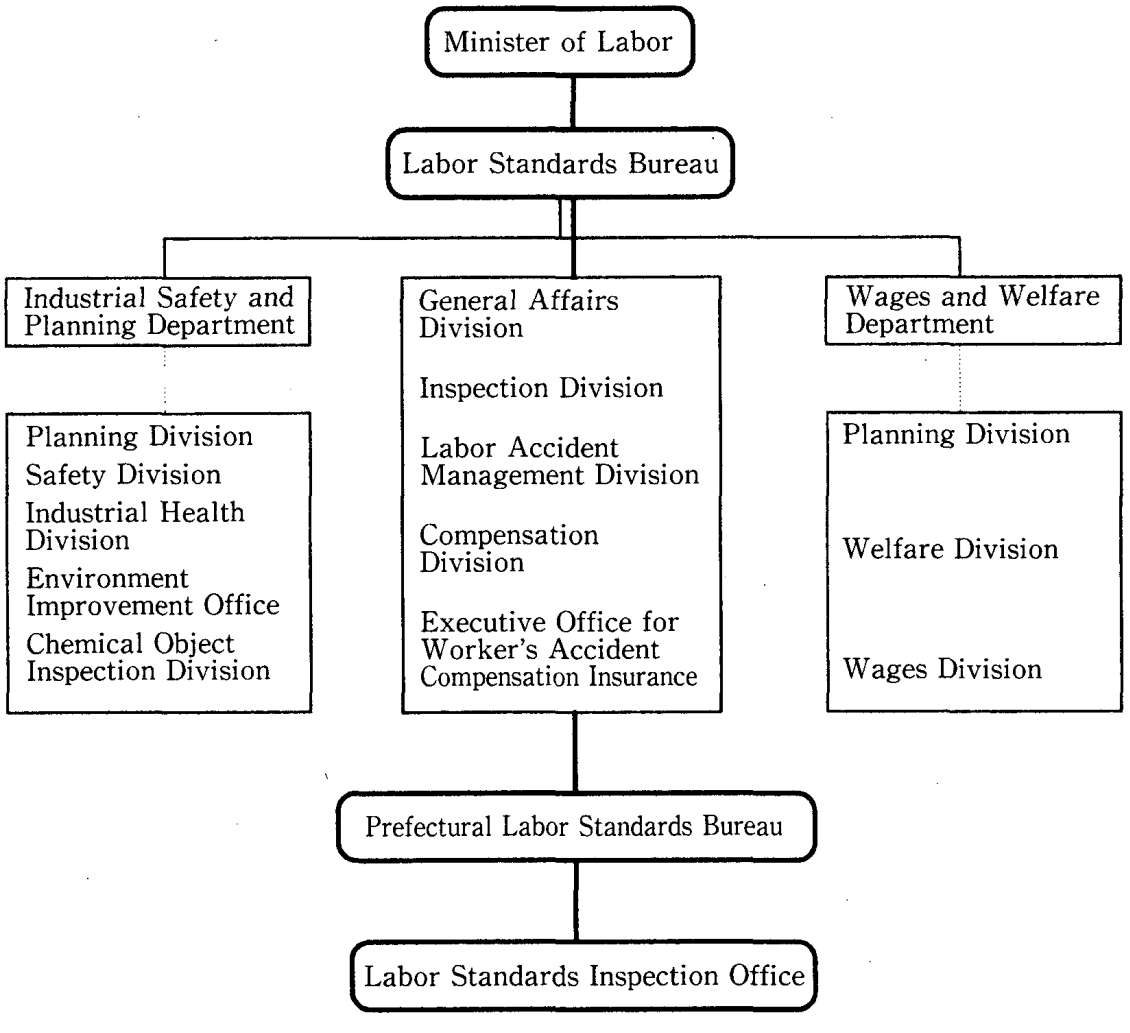
[264] LSA, *supra* note 58, art. 97 (1).

[265] Such matters include labor contracts, minimum wages, working hours, rest periods, rest days, annual leave, minors, women, training of skilled laborers, accident compensation, employment rules, and dormitories for workers.

[266] One result of this is that it becomes very difficult to compare the LSB activities with those of OSHA. *See infra*, text accompanying notes 324-331.

health-related responsibilities.

Figure 3 : Organization of the Labor Standards Bureau



Source : RICHARD E. WOKUTCH, WORKER PROTECTION, JAPANESE STYLE 60 (1992).

The Labor Standards Act calls for the establishment of, under the direct supervision of the Ministry of Labor, a Labor Standard Bureau (*(to-dō-fu-ken) rōdō kijun kyoku*) in each prefecture,[267] and, within the jurisdictional area of each prefecture, local Labor Standards Inspection Offices (*rōdō kijun kantoku sho*).[268] Currently, there are 47 Prefectural Labor Standards Bureaus and 343[269]

[267] *"To-dō-fu-ken"* refer to the formal administrative divisions of Japan. *See infra*, note 145.
[268] LSA, *supra* note 58, art. 97 (2).
[269] This number was provided by the Chief of a Prefectural Labor Standards Bureau. Interview with Kazu Tazaki, Chief Inspector, Fukuoka Labor Standards Bureau, in Fukuoka, Japan (July 2, 1996) [hereinafter, Tazaki Interview]. Apparently, the number of local Labor Standards Inspection Offices is declining. Wokutch, seemingly based on 1982 data, states that

local Labor Standards Inspection Offices. These offices conduct the field inspections for the Labor Standards Bureau and are all under the direct supervision of the Ministry of Labor. Thus, the line of authority[270] runs from the Labor Minister (*rōdō daijin*) to the Director-General of the Labor Standards Bureau (*rōdō kijun kyoku-chō*) to the chief of the Prefectural Labor Standards Bureau (*to-dō-fu-ken rōdō kijun kyoku-chō*) to the chief of the Labor Standards Inspection Office (*rōdō kijun kantoku sho-chō*).[271] In addition, the Labor Standards Act provides for the establishment of Regional Labor Bureaus (*chihō rōdō kyoku*) with direct supervision over a number of Prefectural Labor Standards Bureaus if the Ministry of Labor deems necessary,[272] but to date, the Ministry of Labor has yet to establish such an office. The organization of the safety and health regulatory functions described above is illustrated in Figure 3.

B. Regulatory Personnel

Within the Labor Standards Office (national, prefectural, and local) there are four main categories of personnel : 1) administrators (*jimu-kan*), 2) engineers (*gi-kan*), 3) inspectors (*kantoku-kan*), and 4) expert officers (*senmon-kan*). Inspectors are further divided into two groups, engineering group (*gi-kei*) and "letters" group (*bun-kei*).[273] Expert officers are either expert officers in industrial safety (*sangyō anzen senmon kan*) or expert officers in industrial health (*sangyō eisei senmon kan*) and are located in the Ministry of Labor, prefectural Labor Standards Bureaus, and Labor Standards Inspection Offices.[274] Like the general inspectors, these expert officers also conduct inspections but at a more sophisticated level.[275] They enjoy the same grant of authority as do inspectors

there are 348 such offices. *See* Wokutch, *supra* note 31, at 59. However, the Japan Institute of Labor, in a 1988 publication, gives the number 346. JAPAN INSTITUTE OF LABOUR, *supra* note 155, at 22.

[270] LSA, *supra* note 58, art. 100.

[271] The Chief of the Labor Standards Inspection Office must be qualified as an inspector. Interview with Takashi Kikuchi, Dean of the Faculty of Law, Kyushu Univerity, in Fukuoka, Japan (June 14, 1996).

[272] LSA, *supra* note 58, art. 97 (2).

[273] I am painfully aware of the inadequacy of this translation. Try as I might, I just could not do better. "*Bun*" means "letters" and refers to those whose training is in letters as opposed to science. Law graduates, for example, would be placed in the "letters" group whereas engineering graduates would be placed in the engineering group.

[274] ISHA, supra note 135, art. 93.

[275] Expert officers in industrial safety are responsible for investigating the causes of labor accidents that occur within their jurisdiction, for handling the licensing procedures required by Article 37 (the manufacture of specified machines that are deemed dangerous must be approved by the Chief of a prefectural Labor Standards Office), for overseeing a safety and

(*i.e.*, right to enter the workplace, question concerned individuals, etc.), except that no provision is made regarding medical examinations.[276] In addition, there are a number of ranks (*kyū*) within the qualification of expert officer.

Among the four categories, the expert officers are highest in status.[277] Depending on one's score on the National Public Service Exam, a new bureaucrat enters the Labor Standards Bureau as either an administrator, engineer, or inspector, but not as an expert officer. Both engineers and inspectors can eventually become expert officers but administrators cannot, reflecting the lower scores required to become an administrator. It normally takes about twenty years for an engineer or an inspector to become an expert officer and when an official is so promoted she then receives special training and education at the national Labor Standards Bureau. Though promoted to expert officer, an official retains her former qualifications as either an inspector or engineer.

It is easier (*i.e.*, fewer years of experience are required) to be promoted to expert officer in a local office than in a prefectural office. But there is a clear hierarchy among the levels of the Labor Standards Office. Thus, for example, a local expert officer receives lower wages than a prefectural expert officer does. Moreover, if a local expert officer is transferred to a prefectural office, though she retains her qualifications as an expert officer, that term is not used at the prefectural office for a number of years (*i.e.*, not until that person has acquired the same number of years of experience, etc. as prefectural-level expert officers). During this time, they are usually referred to as "chief clerk" (*kakari-chō*), an inauspicious term referring to the line of management, not to qualifications. This practice can be thought of as the counterpart to the

health improvement plan, for giving accident prevention guidance and assistance to enterprises, and, in general, for business needing safety-related expert knowledge. *Id.*, art. 93 (2).

The responsibilities of expert officers in industrial health are nearly identical ; merely insert the word "health" for "safety," as Article 93 (3) actually instructs you to do. They are also responsible for giving the "permission" mentioned in Article 56 (1) (the manufacture of items which are "feared to cause heavy health impediments to workers" must be approved in advance), the "advice" mentioned in Article 57-2 (4) (the Minister of Labor may seek the advice of health expert officers when deciding whether or not to permit the manufacture or import of "new" chemicals), and the "instruction" under Article 57-3 (1) (Minister of Labor may instruct enterprises wanting to manufacturer, import, or use "new" chemicals to conduct certain tests), as well as for "special technical matters" mentioned in Article 65 (requiring enterprises to conduct work environment tests). *Id.*, art. 93 (3).

[276] *Id.*, art. 94.

[277] This statement is clearly at odds with Wokutch's implication that expert officers are lower in status than inspectors. WOKUTCH, supra note 31, at 82 (". . . typically act in a support capacity to inspectors.").

private-sector practice of seniority-based advancement[278] and the ghost-management structures that it can create.[279]

At one prefectural Labor Standards Bureau that I studied, the safety and health regulatory function was divided into three sections : Health (*eisei-ka*), Safety (*anzen-ka*), and Inspections (*kantoku-ka*). All three sections combined, there were five industrial safety expert officers, three industrial health expert officers, and nine inspectors. Within the Health Section, for example, there were seven officials : the Section Head (*ka-chō*), the Assistant Section Head (*fuku ka-chō*), four expert officers and one engineer. (The Assistant Section Head was also qualified as an expert officer but had been transferred from a local office and had not yet acquired enough experience to be on equal footing with prefectural-level expert officers.)

As national public servants (*kōmuin*), Labor Standards bureaucrats are subject to transfer throughout Japan (*zenkoku idō*). In the typical case, an inspector will be assigned to two prefectural bureaus within seven years (described by the phrase "two bureaus, seven years" (*ni kyoku, shichi nen*)). Within each prefectural bureau, an inspector will probably be assigned to two local inspection offices. After these seven years, an inspector has the privilege of deciding where he or she wants to settle down. Settling down offers a welcomed escape from the rigors of periodic transfers. To settle down, an inspector notifies the national bureau of their desire to settle down and their desired location (*kibō-chi*). If there is room at that office, they will be assigned to that office. If there is no room, they will be put on a wait list and temporarily assigned to another location. According to one inspector I interviewed, Tokyo, Osaka, and Fukuoka are the most heavily sought-after locations.[280] The same right to settle down is not enjoyed by engineers and administrators. Expert officers, on the other hand, are usually not national because by the time a bureaucrat makes the grade of expert officer, he or she has usually already

[278] For a short description of seniority-based advancement in Japanese enterprises, *see* Ken'ichi Imai and Ryutaro Komiya, *Nihon Kigyō no Tokuchō* [*Characteristics of the Japanese Enterprise*], *in* KEN'ICHI IMAI AND RYUTARO KOMIYA, EDS., *NIHON NO KIGYŌ* [THE JAPANESE ENTERPRISE] 4-7 (1989) translated by Daniel H. Foote *in* YUKIO YANAGIDA, DANIEL H. FOOTE, EDWARD STOKES JOHNSON, JR., J. MARK RAMSEYER, AND HUGH T. SCOGIN, JR., LAW AND INVESTMENT IN JAPAN : CASES AND MATERIALS, 100-103 (1994).

[279] *See* CLARK, *supra* note 261, at 104-113.

[280] Tazaki interview, *supra* note 269.

settled down.

There are also other special positions filled by non-bureaucrats that should be mentioned. Some of these positions are full-time but most are part-time and they are usually filled by university professors and doctors. At the time of writing, there were three such positions : 1) Labor Health Guidance Doctor (*rōdō eisei shidō i*), 2) Regional Pneumoconiosis Inspection Doctor (*chihō jinpai shinsa i*), and 3) Dust Policy Guidance Committee Member (*funjin taisaku shidō iin*). In the prefectural Labor Standards Office that I studied, there were two people assigned to each position, all university professors, and all, except one, worked on a part-time basis.

C. Staffing

As mentioned above, the Labor Standards Bureau, being born of the broad Labor Standards Act, has a wide scope of duties, not merely limited to safety and health concerns. OSHA, on the other hand, is focused only on occupational safety and health concerns. This difference in scope makes comparing staffing levels difficult. Further confounding comparisons is the fact that there are both national and state occupational safety and health programs in the United States whereas Japan has a unitary system. Thus, comparisons of staffing levels becomes not only difficult but risky.[281] But, as Wokutch correctly asserts, "it is instructive to consider staffing levels and the numbers of inspections conducted for what they tell us about *changes* in occupational safety and health activities in Japan and the United States over time."[282] Table 1 contains the staffing levels for both OSHA and the LSB from 1974 to 1987.

Even a brief analysis of the data given reveals a stark contrast between the staffing patterns in the United States and Japan. In the United States, the total number of OSHA inspectors peaked in 1979 with 1,828. State occupational safety and health programs, in the aggregate, peaked in 1980 with 1,175 inspectors. After that, both programs witnessed a drop in staffing levels. The drop in staffing reflects the changing political environment of the day, following President Reagan's campaign denouncing "excessive government regulation."

[281] For example, the fact that Japan has more Labor Standards inspectors than the United States has OSHA inspectors would be misinterpreted if one did not take into account the wider scope of LSB inspectors' duties.

[282] WOKUTCH, *supra* note 31, at 82 (emphasis in the original).

This decline in staffing illustrates the fact that in the United States, political authorities can affect agencies' enforcement style in a number of ways.[283]

Table 1 : Staffing Levels

Fiscal Year[a]	United States			Japan		
	OSHA Inspectors	State Inspectors	Total	LSB Inspectors	Expert Officers	Total
1974	850	-	-	3,010	384	3,394
1975	1,350	-	-	3,040	442	3,482
1976	1,500	-	-	3,070	501	3,571
1977	1,600	1,139	2,739	3,100	554	3,654
1978	1,650	1,116	2,766	3,130	605	3,735
1979	1,828	1,132	2,960	3,160	625	3,785
1980	1,771	1,175	2,946	3,178	639	3,817
1981	1,686	1,110	2,796	3,184	651	3,835
1982	1,200	1,105	2,305	3,202	664	3,866
1983	1,125	1,081	2,206	3,210	673	3,883
1984	1,125	1,036	2,161	3,216	676	3,892
1985	1,200	-	-	3,222	680	3,902
1986	1,125	-	-	3,230	682	3,912
1987	1,125	-	-	3,237	685	3,922

[a]Fiscal year in Japan begins in April of the year noted and ends the following March.

In Japan, instead of contracting staffing resources, the Labor Standards Bureau has enjoyed a steady increase in the number of inspectors. These two patterns are illustrated in Figure 4.

What Figure 4 also illustrates is that Japan simply has many more inspectors than the United States does, even though the U.S. economy is almost a third larger than that of Japan.[284] This, of course, is related to the broader scope of the Labor Standards Bureau's duties than that of OSHA.

[283] These ways include the following : "by appointing, or influencing the appointment of, higher agency officials ; by expanding or contracting agency resources through the budget process ; by legislative oversight hearings ; and sometimes by telling agency officials how they would like particular regulatory matters of urgent political concern to be handled." Robert A. Kagan, *Regulatory Enforcement, in* DAVID H. ROSENBLOOM AND RICHARD D. SCHWARTZ, EDS., HANDBOOK OF REGULATION AND ADMINISTRATIVE LAW 401 (1994).

[284] As of 1993, the United States' nominal GNP (gross national product) was $6.3 trillion and Japan's was $4.2 trillion. As a percentage of the world economy, Japan's economy accounted for 17.5 percent and the United State's economy for 26.1 percent. ASAHI SHIMBUN, JAPAN ALMANAC 1996, 72 (1995) (hereinafter JAPAN ALMANAC 1996).

Figure 4 : Staffing Levels

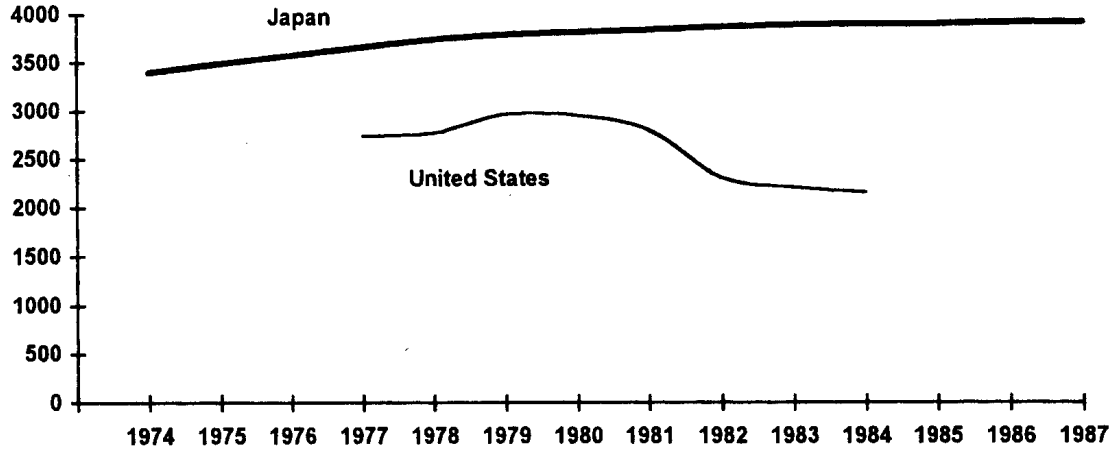


Table 2 : Staffing Variance Rates

Fiscal Year[a]	United States		Japan
	Total Inspectors (national and state)	OSHA Inspectors	Total (Inspectors and Expert Officers)
1974	-	-	2.7%
1975	-	59.0%	2.6
1976	-	11.0	2.5
1977	-	6.7	2.5
1978	1.0%	3.0	2.2
1979	7.0	10.8	1.2
1980	-0.5	-3.2	0.8
1981	-5.1	-4.8	0.4
1982	-17.6	-28.8	0.8
1983	-4.3	-6.2	0.4
1984	-2.0	0	0.2
1985	-	-6.7	0.3
1986	-	-6.7	0.3
1987	-	0	0.3
1988	-	10.7	-
1989	-	2.6	-

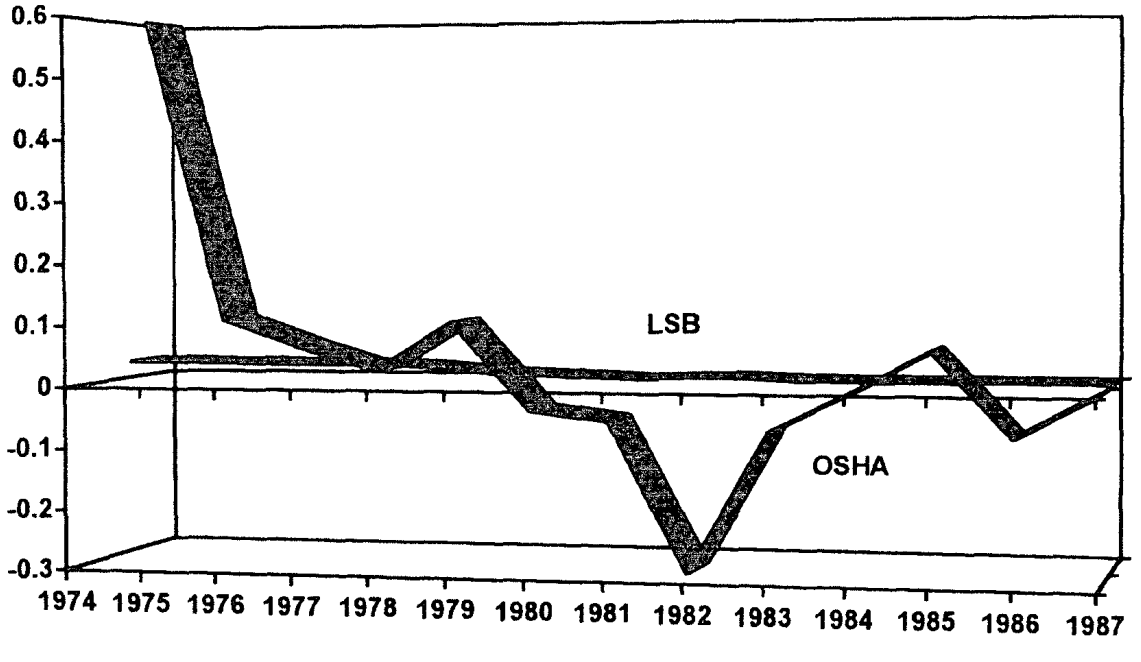
[a]Fiscal year in Japan begins in April of the year noted and ends the following March.

An even more stark contrast between the number of inspectors in the Labor Standards Bureau and OSHA can be drawn if we look at variance rates. When the data in Table 1 is analyzed in terms of variance (percent change from

previous year), the stability of Labor Standards Bureau staffing and the vicissitudes of national and state-plan OSHA staffing becomes even more clear. This data is contained in Table 2. In Japan, the variance rate never exceeded the 2.7 percent in 1974 and its lowest variance rate was 0.2 percent in 1984. In the United States, in contrast, the variance rate for total inspectors (state and federal) was as high as 7 percent in 1979 and as low as -17.6 percent in 1982. The variance rates are even more pronounced when one only looks at national OSHA inspector staffing levels. At the national level, variance rates were as high as 59 percent in 1975 and as low as -28.8 percent in 1982 !

When viewed in graphic form (see Figure 5), these variance rates say a great deal about the respective regulatory systems in the United States and Japan. Japan's variance curve is nearly horizontal, reflecting steady and non-political funding. The U.S. curve, however, is a veritable roller coaster ride. These wide swings in staffing levels are a good illustration of the United States' regulatory political atmosphere, whereby funding and support vary with the political currents.

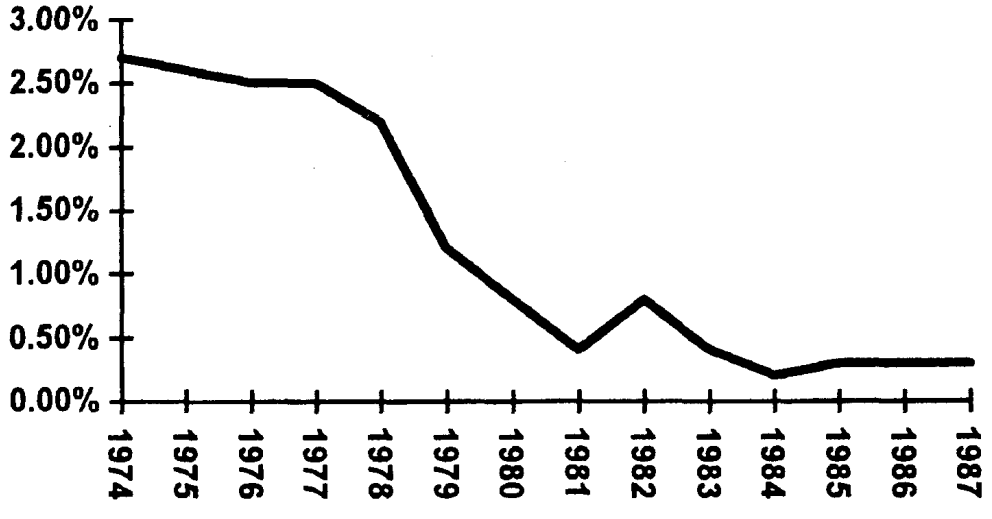
Figure 5 : Staffing Level Variance



When isolated from the distorting effects attendant when comparing to the United States, an interesting trend emerges from the variance rate data of the

Labor Standards Bureau. (See Figure 6.) Though staffing levels have consistently increased each year, the number of new inspectors, as a percentage of total inspectors, has tapered off considerably. During the 1970s, the total number of inspectors and expert officers grew at an average rate of 2.3 percent, but the 1980s saw a substantial drop in percentage points, only averaging around 0.4 percent for the years 1980 to 1987.

Figure 6 : Variance Rates for LSB Inspectors



From the above data, one conclusion is very clear : personnel resources are much more predictable in Japan than in the United States. "This predictability undoubtedly facilitates planning and makes it possible for Labor Standards Bureau policies to be more consistent than at OSHA."[285] It is arguable that greater stability in staffing levels, reflecting steady funding and political commitment, not only aids in regulatory planning, but also demonstrates the political commitment to occupational safety and health to industry, thus reinforcing the normative ideals of safety and health in the workplace and strengthening the deterrent effect of the legislation.

D. Power and Authority of the Regulatory Personnel

In order to enforce the requirements outlined in ISHA, Labor Standards Bureau inspectors are given a number of powers. These include the authority

[285] WOKUTCH, *supra* note 31, at 84.

to conduct inspections, issue orders, exercise the duties of judicial police officers, and send the papers to the Prosecutor's Office necessary to initiate criminal actions against violators.

1. Inspections

The rights of a Labor Standards Bureau inspector when conducting an inspection of a workplace are set out in ISHA Article 91.[286] When deemed necessary to enforce the law, an LSB inspector has the authority to enter the workplace, question concerned individuals, examine books, documents, and other items, conduct working-environment measurements, and, to the extent necessary for inspection, confiscate (*shūkyo*) products, raw materials, and tools or machines (*kigu*).[287] In addition, an inspector who is also qualified as a doctor, has the right to conduct medical examinations on workers she suspects of suffering from certain diseases.[288]

The exercise of these powers raises an interesting comparison with the United States. The U.S. Supreme Court has held, in *Marshall v. Barlow's Inc.*,[289] that an employer has the right to refuse entry to an OSHA inspector if she does not have a search warrant. The Court thus made no distinction between OSHA inspections and criminal investigations. Japan, on the other hand, makes such a distinction.[290] Though a search warrant issued by a judicial officer is required for criminal searches,[291] LSB inspectors are not required to obtain such a warrant prior to entry, but are only required to produce an official identification showing their status as a Labor Standards Inspector.[292]

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[286] ISHA, *supra* note 135, art. 91.
[287] *Id.*, art. 91 (1).
[288] *Id.*, art. 91 (2). Article 68 requires employers to prohibit workers suffering from certain sicknesses from working.
[289] Marshall v. Barlow's Inc., 436 U.S. 307, 98 S. Ct. 1816, 56 L. Ed. 2d 305 (1978).
[290] ISHA makes this distinction explicit :
> The authority to carry out field inspections under the provisions of paragraph 1 shall not be construed as one recognized for criminal investigation.

ISHA, supra note 135, art. 91 (4).
[291] Like the United States, this protection from warrantless searches is a constitutional provision. Article 35 of the Japanese Constitution states :
> (1) The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for adequate cause and particularly describing the place to be searched and things to be seized, or except as provided by Article 33.
> (2) Each search or seizure shall be made upon separate warrant issued by a competent judicial officer.

Kenpō, supra note 54, art. 35.
[292] ISHA, *supra* note 135, art. 91(3). Whether this justifies Wokutch's sweeping assertion that

The question of whether or not employers are notified in advance of an inspection in Japan has been mistreated in the literature. It has been reported that employers "are typically notified in advance of inspections whereas advance notification is specifically prohibited by the OSH Act."[293] It is true that the Occupational Safety and Health Act prohibits advance notification but the characterization of the practice in Japan is wrong. The key to understanding is to recognize that there are two kinds of inspections under the ISHA : required inspections (those required in to obtain approval of new machinery, etc.) and general inspections (both random and upon worker request).[294] ISHA requires that when an employer intends to construct, install or move buildings, machinery, or to alter the main building structure, she must obtain permission from the prefectural Labor Standards Bureau prior to using specified machines and such permission is only issued after an inspection of the specified machinery.[295] In these situations, the employer notifies the LSB inspector when the machine, etc. is ready for inspection and they then schedule an inspection.

General enforcement inspections, however, are not preceded by notifying the employer. A prefectural LSB Chief Inspector I interviewed was very adamant that they do not give notice to employers in advance of enforcement inspections and seemed perturbed by the insinuation.[296] The only occasion he could think of where they would give advance notice in the course of a general inspection is when they intend to inspect a really small enterprise since the risk of absence is greater. In such cases, for example, they will call the employer in the morning to confirm that she will be present in the afternoon, thus giving a few hours advance notice in these limited situations.

Comparisons of the numbers of inspections in Japan and the United States provide some interesting insights into the extent and coverage of regulatory activities. Once again, however, such cross-national comparisons must be qualified by the fact that Japanese inspections cover numerous work issues, not merely safety and health. Looking at Japan and Table 3 first, it can be seen

this difference "reflects the lower priority placed on individual rights and freedoms and the higher priority placed on conformity in Japan as compared to the United States" remains extremely dubious. *See* WOKUTCH, *supra* note 31, at 66.

[293] WOKUTCH, *supra* note 31, at 66.

[294] *See supra* text accompanying note 252.

[295] ISHA, *supra* note 135, arts. 37-39.

[296] Tazaki interview, *supra* note 269.

that inspectors and expert officers in industrial safety and health combined averaged over 55 inspections each, though this average has declined over the years, from 77.8 in 1972 to 51.0 in 1987.

Table 3 : LSB Inspection Activities

Fiscal Year[a]	Number of Inspections	Number of Inspectors[b]	Inspections per Inspector
1972	250,538	3,219	77.8
1973	236,538	3,304	71.6
1974	219,122	3,394	64.6
1975	206,059	3,482	59.2
1976	173,744	3,571	48.7
1977	173,314	3,654	47.4
1978	176,359	3,735	47.2
1979	203,459	3,785	53.8
1980	204,910	3,817	53.7
1981	209,822	3,835	54.7
1982	208,108	3,866	53.8
1983	207,979	3,883	53.6
1984	210,607	3,892	54.1
1985	206,215	3,902	52.8
1986	202,767	3,912	51.8
1987	200,005	3,922	51.0
Average	205,588.4	3,698.3	55.6

[a]Fiscal year in Japan begins in April of the year noted and ends the following March.
[b]Includes both inspectors and expert officers.

Now compare the inspection activities of federal and state programs in the United States for the same years. This information is contained in Table 4. OSHA inspections ranged from a high of 91.4 inspections per inspector in 1974 to a low of 31.5 inspections in 1979. On average, each OSHA inspector accounted for 52.3 inspections per year. The data for state-program occupational safety and health inspections is much more limited, but for the years where data is available, state inspectors averaged 97.5 inspections per year. Given the broader coverage of inspections in Japan, the fact that each LSB inspector conducted more inspections than their OSHA counterparts (state inspectors

excluded) would seem to suggest that Japanese inspectors are more efficient, at least if measured in terms of number of inspections alone.[297]

Table 4 : OSHA and State Program Inspection Activities

	OSHA			State Program		
Fiscal Year	Number of Inspections[a]	Number of Inspectors	Inspections per Inspector	Number of Inspections	Number of Inspectors	Inspections per Inspector
1973	48,370	-	-	-	-	-
1974	77,686	850	91.4	278,484	-	-
1975	81,728	1,350	60.5	176,898	-	-
1976	91,516	1,500	61.0	-	-	-
1977	77,556	1,600	37.0	-	1,139	-
1978	57,169	1,650	34.7	-	1,116	-
1979	57,603	1,828	31.5	107,636	1,132	95.1
1980	63,935	1,771	36.1	110,281	1,175	93.9
1981	56,563	1,686	33.6	108,376	1,110	97.6
1982	61,686	1,200	51.4	105,357	1,105	95.4
1983	67,727	1,125	60.2	104,627	1,081	96.8
1984	71,652	1,125	63.7	110,135	1,036	106.3
1985	71,719	1,200	59.8	114,215	-	-
1986	64,335	1,125	57.2	115,317	-	-
1987	60,117	1,125	53.4	109,906	-	-
Average	66,184	1,367	52.3	131,021	1,112	97.5

[a]Starting in 1981, inspection numbers include records inspections.

Another point can be made about that fact that even when one adds together the total number of OSHA inspections and sate-program inspections, the combined average is still only 197,817, around 4 percent lower than the average number of LSB inspections during the same period (205,588). It is all the more surprising that the mean number of inspections is significantly higher in Japan when one recalls the more inclusive nature of inspections in Japan and the larger U.S. economy.

[297] Wokutch argues that the greater variance in the number of inspections per inspector in the United States compared to Japan can be attributed to the political influences on OSHA inspection policies. *See* RICHARD E. WOKUTCH, COOPERATION AND CONFLICT IN OCCUPATIONAL SAFETY AND HEALTH : A MULTINATION STUDY OF THE AUTOMOTIVE INDUSTRY (1990).

2. Issue Orders

An inspector also has the authority to issue two kinds of orders to the employer. The first, an "order to stop use" (*shiyō teishi meirei*),[298] is issued when there exists a violation of the type of measures for preventing injuries and illnesses outlined in ISHA, Articles 20–34. The second order at the inspector's disposal is an "order to stop work" (*sagyō teishi meirei*).[299] This order may be issued in situations other than that subject to an order to stop use and where there "exists an imminent danger of the occurrence of an industrial accident and urgent necessity."[300] This ability to issue immediate work shutdown orders differs greatly with the United States where OSHA inspectors must obtain a court order before shutting down a workplace.

In interviews with LSB inspectors, reference was made to a third type of order, an "order to change" (*henkō meirei*). This order was described to me as being sanction-free (*i.e.*, no penalty for non-compliance) and was thus described as not being overly powerful. Still, they maintained, it does have a normative effect and is often used.[301] The fact that orders which entail no legal sanction for non-compliance still have behavior-modifying effects on regulated entities underscores the generally cooperative relationship between regulators and regulated in Japan.

The "order to stop use" and the "order to stop work" are both effective tools at the inspector's disposal to encourage compliance. The inspectors I interviewed were quick to point out how effective an order to stop use of a machine could be, given that loss of even a single machine can affect the entire factory's operations, thus creating an incentive for the employer to remedy the situation as soon as possible.[302] Once remedied, the issuing inspector's permission is needed before resuming usage of the machine.

3. Exercise the Duties of Judicial Police Officers

In addition to issuing orders, a violation of safety and health laws will trigger Article 92's provision that inspectors shall exercise "the duties of judicial police officers" (*shihō keisatsu-in*) as provided for under Japanese criminal

[298] ISHA, supra note 135, art 98.
[299] *Id.*, art. 99.
[300] *Id.*
[301] Tazaki interview, *supra* note 269.
[302] *Id.*

procedure law.[303] Although this has been interpreted to mean that "[i] nspectors can arrest individuals on the spot for violations of occupational safety and health requirements,"[304] this is untrue. Where the situation calls for an arrest,[305] an inspector must first go to a judge to obtain a warrant. As a judicial police officer, the inspector can apply directly for the warrant and, if issued, arrest the offender. This power to arrest with a warrant, however, is only rarely exercised, as can be inferred by the fact that when an inspector does obtain a warrant, he must first go to the Public Prosecutor's Office (*kensatsu chō*) to borrow a pair of handcuffs since none are kept at the inspection offices. The extremely limited scope of this power is further illustrated by the fact that a chief of inspections (*shunin kansatsu*) at a Prefectural Labor Standards Bureau admitted that in over twenty-nine years as an inspector, he has never arrested anyone.[306]

Given its extremely rare application, it is not surprising to hear that LSB inspectors feel that this power to arrest does not operate as a significant deterrent. It was suggested that most people are not even aware that inspectors have such an authority, and this conclusion has been supported by my own observations.[307] One situation where this power to arrest was cited as having had a positive deterrent effect is where an employer refuses to appear at the labor office following an order to appear (*shuttō meirei*) from the inspector. On the second call, an inspector will often explicitly invoke the threat of arrest and compliance is then nearly always assured.[308]

4. *Send the Papers*

Unlike the United States, where an OSHA inspector can impose a penalty on

[303] *Keiji Soshō Hō* [Code of Criminal Procedure], Law No. 131 of 1948, *amended by* Law No. 268 of 1952, Law No. 163 of 1954, Law Nos. 140 and 161 of 1962, Law No. 89 of 1993, and Law No. 91 of 1995.

[304] WOKUTCH, *supra* note 31, at 66.

[305] The most common examples of such situations are where an employer refuses to allow an inspector to inspect documents or where, after issuing an order to suspend use, an employer continues to use the machinery in question without having made the improvements or receiving the approval from the Inspector. Tazaki interview, *supra* note 269.

[306] *Id.*

[307] This conclusion is not limited to the general lay person. Even the former General Manager of the Legal Department of Denki K.K. admitted that he was unaware of such powers. Interview with former General Manager of the Legal Department, Denki K.K., in Fukuoka, Japan (July 3, 1996). Moreover, in a book on safety and health prepared by a manufacturers' association in Japan, the power to arrest was not included in a list of Inspector's powers. JAPAN ELEVATOR SOCIETY, *supra* note 81, at 10.

[308] Tazaki Interview, *supra* note 269.

finding a violation, LSB inspectors are not similarly authorized. If a violation is found, the inspector does not impose a penalty but rather "sends the papers" (*sōken*) to the Public Prosecutor's Office, thus recommending the case for action. It remains the prosecutor's prerogative as to whether to proceed with the case to trial.[309] If the prosecutor does elect to pursue the case then, as documented elsewhere,[310] conviction is virtually certain, but it is only upon conviction that a penalty is assessed against the employer.

In interviews, it was reported that the Labor Standards Bureau only "sends the papers" to the Prosecutor's Office in the most serious of cases.[311] Specifically, two situations were proffered where sending the papers is nearly certain. The first is where serious violations have been detected during an inspection and an order had been issued but the situation remained uncorrected by the time of a follow-up inspection. The second is where an industrial accident has occurred because of a serious violation of health and safety laws.

5. *Regulatory Discretion*

The question of when an inspector sends the papers to the Prosecutor's Office touches upon the larger question of regulatory discretion. How much discretion does the LSB inspector have in deciding what action to take ? In the United States, where authority is mistrusted and bureaucratic discretion is tantamount to tyranny, legislators have tried to prescribe with detail the desired behavior in closely specified, complex, and public regulations. What is the situation like in Japan ? When does an inspector issue an order to stop use ? How much discretion does an inspector have in determining whether to send the papers ? These questions of regulatory discretion are of central importance to understanding how the control and supervision of occupational safety and health in Japan actual operates and are important in comprehending the larger regulatory environment in Japan.

In interviews, it was revealed that, in addition to legislation, cabinet orders,

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[309] For more on a prosecutor's discretion, *see* Marcia Goodman, *The Exercise and Control of Prosecutional Discretion in Japan*, 5 U.C.L.A. PAC. BASIN L.J. 16-53 (1986).

[310] *See e.g.*, WALTER L. AMES, POLICE AND COMMUNITY IN JAPAN (1981) ; DAVID H. BAILEY, FORCES OF ORDER : POLICING MODERN JAPAN (2d ed. 1991) ; JOHN O. HALEY, AUTHORITY WITHOUT POWER : LAW AND THE JAPANESE PARADOX (1991) ; and SETSUO MIYAZAWA, POLICING IN JAPAN : A STUDY ON MAKING CRIME (Frank G. Bennet, Jr. trans., 1992).

[311] Tazaki interview, *supra* note 269.

ministerial order, regulations, notices, and circulars, all of which are public, LSB inspectors are guided by provisions contained in the "Equipment Standards" (*sōchi kijun*). These rules, contained in a bound book roughly two hundred pages long, are not public but are issued in every prefectural Labor Standards Bureau. It is these standards that guide an inspector in the decision of whether to issue an order (and if so, what kind), send the papers, or take no action. The informant clearly stated that they were intended to prevent discretionary abuse.[312] Surprisingly, since enterprises are held to these standards, the LSB makes no effort to educate firms as to these internal rules. In fact, an aura of secrecy pervades these standards. I was told that when a copy of the "Equipment Standards" is issued to an inspector, the inspector is required to put his or her seal (*inkan*) on the front cover to control circulation. Distribution is tightly controlled. In fact, during our interview, the inspector was careful to always keep his copy close to him, even though the other books we were using were placed freely on the coffee table for my perusal.

In my opinion, the fact that detailed regulations intended to control discretionary abuse exist but are not made available to the public at large nor to the regulated entities, confirms the description of the Japanese legal system as being characterized by bureaucratic legalism. In other words, policymaking and dispute resolution in Japan can be described as having a high degree of legal formality and as being hierarchical in its decisionmaking. In contrast, the U.S. legal and regulatory style can be described by the term adversarial legalism, denoting a high degree of legal formality but a party-influenced decisionmaking structure.

E. Violations and Penalties

A great deal can be learned by comparing the United States and Japan in terms of violations and penalties. One thing that becomes clear is that although there does not appear to be a great variance in the rate of violation citations per inspections, there is a distinct difference in the rate of imposing penalties. Put simply, in Japan, fewer violations result in penalties.

There are numerous complications in attempting to compare enforcement activity data in the United States and Japan. As mentioned above, LSB inspec-

[312] *Id.*

tions cover a much broader range of workplace issues than do OSHA inspections. Thus, violations unrelated to safety and health are also included in the data. Moreover, since the process of assessing penalties is different in both countries, unqualified comparisons become impossible. It must be remembered that OSHA inspectors have the authority to issue penalties themselves whereas LSB inspectors can only send the papers and penalties are not assessed unless the employer is convicted. With these limitations in mind, let us now look at the data.

Table 5 : OSHA Violations and Penalties

Year	Number of Violations	Average Dollar Penalties per Violation	Percentage of Citations Contested	Percentage of Inspections with Cited Violations	Percentage of Inspections Resulting in Penalties
1972	-	-	-	60%	46%
1973	144,527	$25.95	5.2%	67	51
1974	292,044	22.08	4.9	74	54
1975	316,386	22.26	6.0	79	57
1976	382,073	26.88	8.1	77	50
1977	178,118	46.05	12.5	70	30
1978	134,406	94.76	18.2	67	37
1979	127,466	108.74	21.7	65	38
1980	132,807	113.72	20.9	64	36
1981	110,489	64.26	10.8	60	29
1982	97,906	44.18	4.7	51	21
1983	108,862	44.25	3.2	52	23
1984	111,590	54.35	3.0	-	-
1985	120,024	64.53	2.8	-	-
1986	128,940	88.22	3.6	-	-
1987	136,751	177.60	4.6	-	-
Average	167,980	$67.71	9.2%	65.5%	39.3%

Source : RICHARD E. WOKUTCH, WORKER PROTECTION, JAPANESE STYLE 89 (1992).

Table 5 provides the data concerning the enforcement activities of OSHA. As is readily observable, there is considerable variation in all categories of data. This is another manifestation of the shifting political atmosphere surrounding OSHA regulation in the United States. Especially obvious is the period between

1976 and 1984. In the late 1970s, President Carter responded to strong criticism of OSHA's legalistic enforcement style and urged OSHA officials to reduce the number of citations issued for "nonserious" violations,[313] and the number of violations declined significantly. Then with President Reagan's continued attacks on excessive fines and overregulation, OSHA began to impose lower fines and the resulting percentage of citations contested declined correspondingly.[314] These downward trends are readily observable in graphic form and are presented in Figure 7.

Figure 7 : Trends in OSHA Enforcement Activities

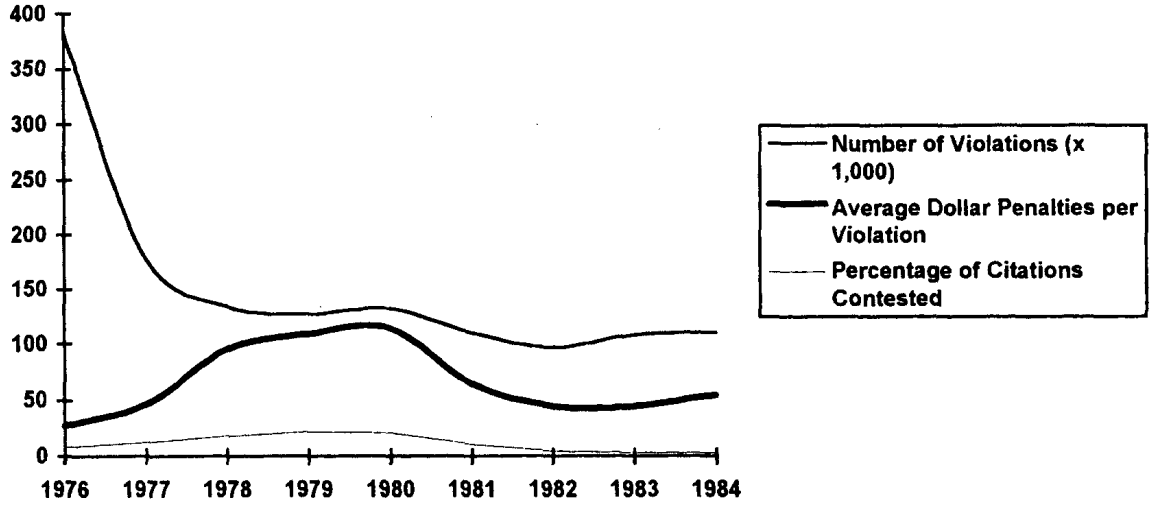

Table 6 contains the data for the Labor Standards Bureau. Unlike the data for the United States, LSB records list the number of workplaces with violations, not the gross number of violations, so caution must be exercised in comparing these figures. However, comparisons can be made between the percentage of OSHA inspection resulting in cited violations and the percentage of LSB inspections with violations. When that is done, it can be seen that overall, patterns of issuing citations/violations are basically the same in the United States and Japan (65.5 percent and 61.1 percent, respectively) though in the United States the rates vary greater over time.

[313] John T. Scholz, *Managing Regulatory Enforcement in the United States*, paper presented at the Symposium on the Organization of Administration of Major Regulating Functions in Government Agencies, American University, Washington, D.C., May 16, 1991, p.13, *quoted in* Kagan, supra note 283, at 402.
[314] Kagan, *supra* note 283, at 402.

Table 6 : LSB Violations and Penalties

Year	Number of Workplaces with Violations	Percentage of Inspections with Violations	Number of Cases of Sending the Papers	Cases of Sending the Papers as a Percentage of Inspections
1972	-	-	1,393	0.56%
1973	148,537	62.8%	1,575	0.67
1974	138,282	63.1	1,395	0.64
1975	130,043	63.1	1,363	0.66
1976	108,413	62.4	1,773	1.02
1977	105,842	61.1	1,864	1.08
1978	104,976	59.5	1,667	0.95
1979	122,216	60.1	1,545	0.76
1980	124,871	60.9	1,531	0.75
1981	123,423	58.8	1,426	0.68
1982	125,781	60.4	1,443	0.69
1983	124,729	60.0	1,413	0.68
Average	123,374	61.1%	1,532	0.76%

Where the data does indicate a significant difference, however, is in the imposition of penalties. As mentioned above, LSB inspectors have no authority to issue penalties, unlike OSHA inspectors. In Japan, penalties are only imposed after a conviction in a court of law. The data reflects this difference ; penalties are issued far more often in the United States, averaging nearly 40 percent for the years given, than in Japan, where fewer than 1 percent of the inspections result in sending the papers. Moreover, not all cases sent to the prosecutor result in penalties since a prosecutor still has to determine whether or not to prosecute and a judge must still decide whether a penalty should be imposed. But even if we assume, *arguendo*, that all of the cases sent to the prosecutor resulted in a conviction and the imposition of penalties, the disparity ratio would still exceed 51 : 1.

But before making too much of this disparity ratio, one should recall how LSB inspectors utilize "orders" and the effect this must have on compliance. As noted above, LSB inspectors can issue either a stop use order or a stop work order, and can do so without a court order (as is required in the United States).

As LSB inspectors well know, these stop orders can have a substantial impact on an enterprise's business and are regarded as an effective way to ensure compliance. In fact, from the enterprise's perspective, given compliance, opportunity, and other costs associated with it, a stop order results, in a very real way, in the imposition of an indirect fine. These indirect fines have a much quicker impact on businesses than do OSHA-imposed fines because business start "paying" the fines immediately and continue paying until the violation is remedied. If these "penalties" are included in the calculation, the disparity ratio discussed above will certainly not be as great as it is now. After all, one of the two situations where LSB inspectors send the papers is after discovering a continuing violation subsequent to a stop order. Unfortunately, there is no ascertainable data either on the number of such orders or the actual pecuniary cost to the enterprise, but it is clear that the percentage of inspections that result in sending the papers is not an accurate assessment of behavior-modifying penalties experienced by Japanese enterprises.

F. Priority Setting

Even though Japan enjoys a much higher inspector/enterprise ratio than does the United States, it too has far too few officials to inspect every business each year. For example, a former Chief of a Labor Standards Inspection Office recalled how he had 3600 enterprises under his jurisdiction but only 3 inspectors.[315] Given such short supply, decisions must be made as to which establishments to inspect and what issues to focus on. This decision-making process was described to me in the following manner. The national Labor Standards Bureau establishes basic policies for the bureau on an annual basis but leaves the details to the prefectural Labor Standard Bureaus. At the prefectural level, it is the local Labor Standards Inspection Offices that determines, on a monthly basis, how many companies within each industry that they will visit that month. These plans are submitted for approval to the Inspection Section of the prefectural Labor Standard Inspection Bureau who oversee and supervise inspection priorities. If the Inspection Section Chief sees fit, he or she will recommend changes to the plan.

Due to regional differences in industry, there are regional differences in

[315] Tazaki interview, *supra* note 269.

inspection priorities but number-one priority is given to worker requests for inspections (*shinkoku*). Requests from workers are not uncommon. One prefecture is reported to have received 806 requests in a recent year,[316] but numbers for the entire country were unavailable. After worker requests, priority is then given to industries with high injury rates. Consideration is also given to enterprises that have not been inspected in a long time. Finally, there are some specific rules that affect priority planning ; for example, chemical companies must be visited each year.

With respect to the requests received from workers, the broad range of issues monitored by the Labor Standards Bureau must be kept in mind. When asked what percentage of the request received pertained to safety and health issues, the Chief Clerk of the Inspection Section responded "none, for the most part . . . well, maybe 1 percent." The Safety Section Chief then jumped in the conversation and estimated it to be from 5 to 10 percent.[317] Although I was unable to obtain hard numbers, the study of the prefecture mentioned above revealed that of the 806 requests for inspections, only 35 (under 4 percent) pertained to safety and health issues.[318]

Another question that I can only ask but was unable to obtain the data to answer is, Where do these requests come from? Wokutch opined that requests for inspections are likely to come from workers in larger companies "since workers in smaller establishments tend to refrain from complaining for fear of identification and retaliation."[319] However, the LSB inspectors I spoke with all replied that most requests come from small- and medium-sized enterprises ("SME") (less than three hundred employees). This is not surprising given that more than 99 percent of all businesses in Japan are estimated to be SMEs.[320]

G. Inspector : Educator or Enforcer ?

It is often said that the role of LSB inspectors is as much to educate employers and workers about health and safety matters as it is to enforce legal mandates. Regulators in Japan are thought of as providing administrative guidance rather than threatening punitive sanctions for violations.[321] Presum-

[316] WOKUTCH, *supra* note 31, at 68.
[317] Tazaki interview, *supra* note 269.
[318] WOKUTCH, *supra* note 31, at 68.
[319] *Id.*
[320] JAPAN ALMANAC 1996, *supra* note 284.
[321] WOKUTCH, *supra* note 31, at 66.

ably this view offers an explanation for the practice of issuing stop orders rather than sending the papers upon initial detection of a violation. However, when I mentioned this to a former Chief Inspector, he firmly replied that he viewed himself as an enforcer, not an educator.[322] The Safety Section Chief happened to overhear our conversation and proffered two ways in which LSB inspectors do educate. First, in the course of an inspection, an inspector will often make "suggestions" rather than issuing an order, thus providing the employer with "loaded" education (the implication being that failure to implement the "suggestions" will result in an order upon reinspection). The same "education" occurs when a violation is detected and an order is issued, for the inspector will usually delineate how to remedy the problem. The second way in which LSB inspectors educate the regulated is more straight forward. Prefectural Labor Standards Bureau personnel organize and conduct periodic meetings with the various enterprises under their jurisdiction to "educate" them about any new regulations and to inform them of recent accidents within their industry and explain their causes. Since it is usually prefectural-level inspectors who conduct the latter, a division of duties can be found within prefectural and local inspectors, with the latter being less concerned about educating as they are enforcing.[323]

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[322] Tazaki interview, *supra* note 269.
[323] Interview with Takashi Kikuchi, Dean of the Faculty of Law, Kyushu University, in Fukuoka, Japan (April 12, 1996).