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The Applicability of Japanese Labor and Employment Laws to Americans Working in Japan

RYŪICHI YAMAKAWA*

This Article examines whether and under what circumstances Japanese labor and employment laws apply to Americans working in Japan. As for public or regulatory laws, the question turns on the coverage of each statute. Most Japanese labor and employment laws apply to foreigners in Japan except when they are on business trips. The applicability of private laws is determined according to the conflicts rules of each forum. These rules will often require the application of Japanese law.

I. INTRODUCTION

As the activities of multinational American enterprises increase, more and more American citizens employed by them go to work in foreign countries. Japan is one of the primary countries where these multinational American enterprises engage in their business.¹ In addition, because the current Japanese immigration law permits foreign nationals who have specialized knowledge, language skills, and “know-how” to stay and work in Japan,² an increasing number of

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¹. As of 1988, about 45% of foreign based enterprises in Japan are American corporations or their subsidiaries. Shōtarō Nakamura, Gaishikei Kigō no Rōshi Kankei Tō no Jittai [The Reality of Industrial Relations in Foreign Based Enterprises], 148 KIKAN Rōdō Hō 70, 72 (1988).

². Under Japanese immigration law, foreign nationals are permitted to stay and work in Japan when they fall under one of the provisions for status of residence in the
Japanese corporations are beginning to hire foreigners, including Americans. This trend has raised the issue of which laws shall apply to American citizens working in Japan with respect to labor and employment relations. American courts have held that public or regulatory labor and employment laws shall not apply to employment abroad unless there is a clear expression of congressional intent to apply them extraterritorially. Although in recent years the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act of 1990 were amended to extend their coverage beyond the United States territory, the extraterritorial application of these statutes is limited to United States citizens abroad employed by American employers or foreign corporations controlled by American employers. Moreover,

Annexed Table I and II of the Immigration Control and Refugee-Recognition Law. Of these provisions, those under which foreigners may engage in occupational activities include the following: Diplomat, Official, Professor, Artist, Religious Activities, Journalist, Investor/Business Manager, Legal Accounting Services, Medical Services, Researcher, Instructor, Specialist in Humanities/International Services, Intra-company Transfer/Entertainment, Skilled Labor, Cultural Activities, and Temporary Visitor. Foreign unskilled workers are not allowed to stay and work in Japan.

3. According to a recent survey conducted by the Ministry of Justice, the number of foreigners who arrived in 1989 to work in Japan exceeded 70,000. This is a 31.5% increase as compared to the figure in 1986. See IMMIGRATION BUREAU, MINISTRY OF JUSTICE STUDY, SINPAN GAIKOKUIN NO SHUSHOKU KOYU; Q & A [EMPLOYMENT OF FOREIGN NATIONALS; QUESTIONS AND ANSWERS] 60-61 (2d ed. 1990) [hereinafter IMMIGRATION BUREAU, MINISTRY OF JUSTICE STUDY]. In 1988, the Ministry of Justice conducted another survey regarding the employment of foreign citizens in Japan on 3,000 corporations doing business in Japan. This survey reveals that 1,110 of these corporations currently employ foreign nationals and that 48.6% of them employ citizens of the United States and Canada. MINISTRY OF JUSTICE, GAIKOKU JIN NO SHURO NI KANSURU ENQUETE CHOSA [THE SURVEY REGARDING EMPLOYMENT OF FOREIGN NATIONALS] 4 (Nov. 6, 1989).

4. In Japan, where the influence of jurisprudence in civil law countries has been strong, courts as well as scholars have long recognized the distinction between public and private law. Accordingly, the notion of international law is usually divided into two categories: international public law and international private law. The applicability of international public law involves the issue of jurisdiction in international law in common law countries. Issues in the area of international private law are mostly equivalent to those discussed in the United States in the context of conflict laws.


the extraterritorial applicability of these statutes does not preclude the applicability, if any, of labor and employment laws of foreign countries where American citizens work. Thus, whether or not Japanese labor and employment laws apply has become an important issue to Americans working in Japan. Furthermore, which law governs the employment contracts of Americans working in Japan is also important. Some aspects of Japanese employment law, such as case law restricting the right of employers to dismiss employees, are remarkably different from employment law in the United States.\(^7\)

In light of this background, this Article addresses the issue of the applicability of Japanese labor and employment laws, both public and private, to American citizens working in Japan. Part II focuses on the application of Japanese public labor and employment laws and demonstrates that these laws usually apply to foreign citizens who are employed by and work at enterprises in Japan, while those who are on business trips to Japan are not covered by these laws. Next, Part III explores the choice of law rules regarding private laws such as employment contract law in both the United States and Japanese forums. This exploration reveals the considerable likelihood that Japanese employment laws will govern the employment relations of American citizens in Japan regardless of the forums and the choice of law by contracting parties. This Article concludes that understanding the contents of Japanese labor and employment laws is a necessity.

II. APPLICABILITY OF JAPANESE PUBLIC LABOR AND EMPLOYMENT LAWS

Under the traditional territorial principle in international law,\(^8\) Japan may exercise its prescriptive jurisdiction to govern conduct of foreign nationals and corporations within its territory. But how and under what circumstance its labor and employment laws apply requires an analysis in view of the structure of each municipal law. The following analysis divides Japanese public labor and employment laws into four categories: (1) labor standards law, including equal employment opportunity law; (2) trade union law; (3) workers' compensation laws; and (4) other social security laws. The applicability of each law to Americans working in Japan is then examined.

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7. See infra note 111 and accompanying text.
A. Labor Standards Law

The Labor Standards Law of Japan\(^9\) is one of the primary statutes to protect individual workers. It provides for certain minimum working conditions in areas such as working hours and payment of wages with respect to workers in general. The law also provides some additional protection for female workers and minors in areas such as working hours. Furthermore, it enjoins discrimination against workers with respect to wages, working hours, or other working conditions by reason of their nationality,\(^10\) creed, or social status.\(^11\) Sex discrimination is prohibited under this law only with respect to wages.\(^12\) An employer who violates this law is subject not only to civil liabilities,\(^13\) but also criminal sanctions with respect to most of the regulatory provisions.\(^14\)

The Labor Standards Law applies to the "enterprises [jigyo] and places of business" listed in the items under Article 8,\(^15\) which include almost all kinds of industries. The law protects workers who

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10. Although the Labor Standards Law prohibits an employer from discriminating against its employees on the basis of nationality, it may be argued that the Friendship, Commerce and Navigation Treaty, Apr. 2, 1953, U.S.-Japan, 4 U.S.T. 2063, provides United States employers with a defense for their employment practices in favor of American citizens regarding certain types of employees. Article 7(1) of the Treaty provides, "Companies of either party shall be permitted to engage, within the territory of the other Party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists of their choice." (Emphasis added). Although no case on point has been reported in Japan, American courts and commentators have discussed the meaning of this provision with respect to Japanese corporations in the United States. See generally Gerald D. Silver, Friendship, Commerce and Navigation Treaties and the United States Discrimination Law: The Right of Branches of Foreign Companies to Hire Executives "of Their Choice", 57 FORDHAM L. REV. 765 (1989).
11. Article 3 provides, "An employer shall not engage in discriminatory treatment with respect to wages, working hours or other working conditions by reason of the nationality, creed or social status of any worker." LABOR LAWS OF JAPAN 1990, at 60.
12. Article 4 provides, "An employer shall not engage in discriminatory treatment of a woman as compared with a man with respect to wages by reason of a worker being a woman." Id. Discrimination against women in areas other than wages is treated under the Equal Employment Opportunity Law. See infra note 28 and accompanying text.
13. Article 13 of this Law provides, "A labor contract which provides for working conditions which do not meet the standards of this Law shall be invalid with respect to such portions. In such a case the portions which have become invalid shall be governed by the standards set forth in this Law." LABOR LAWS OF JAPAN 1990, at 63. Thus, according to the second sentence of this provision, a worker has a right to enforce the standards provided by the Labor Standards Law through a civil action against the employer who fails to abide by its provisions.
15. Article 8 provides, "This law applies to the enterprises and places of business listed in each of the items below; provided, however, that it does not apply to any enterprise or place of business employing only relatives living with the employer as family members nor to domestic employees:
   (1) enterprises engaged in the manufacture, rebuilding, processing, repairing, cleaning, sorting, packing, decoration, finishing, tailoring for sale, demolition or
are employed at such "enterprises." According to the long-standing administrative interpretation of the Ministry of Labor of Japan, the term "enterprise" means "a body of business operation which is carried out continuously as an interrelated organization at a specific place." Although the law contains no specific provision regarding geographical coverage, it is widely recognized that the law applies only territorially. Thus, to be covered by the Labor Standards Law, the "enterprise" must be located in Japanese territory. The Ministry

dismantling of goods; And in the alteration of materials (including industries which generate, transform and transmit electricity, gas and various forms of power, and waterworks); (2) enterprises engaged in mining, stone cutting and other extraction of soil, gravel or minerals; (3) enterprises engaged in civil engineering, construction, and other building, remodeling, maintenance, repair, renovation, demolition or dismantling of structures; and enterprises engaged in preparatory work for the above matters; (4) enterprises engaged in the transportation of passengers or freight by roads, railroads, streetcar lines, cable lines, vessels or airplanes; (5) enterprises handling freight at docks, on vessels, at jetties, at piers, at railway stations or at warehouses; (6) enterprises engaged in the cultivating of land or the cutting or reclamation of waste land, planting, cultivating, harvesting of crops or cutting of timber, and other agricultural and forestry enterprises; (7) enterprises engaged in the breeding of animals or the catching, gathering and breeding or cultivation of marine animals and seaweed, and other enterprises of livestock raising, sericulture and fisheries; (8) enterprises engaged in selling, distributing, storing, and lending of commodities, and hairdressing; (9) banking, insurance, agency, brokerage, bill collection, information and advertising enterprises; (10) motion picture production and projection, theatrical performance and other entertainment enterprises; (11) postal and telecommunications enterprises; (12) enterprises engaged in education, research and investigation; (13) enterprises engaged in the treatment or nursing of the ill or infirm and in other health and hygiene services; (14) hotel, restaurant, snack bar, service trade and recreation center enterprises; (15) enterprises engaged in incineration, sanitation and butchery; (16) governmental and public offices which do not come under any of the foregoing items; (17) other enterprises or places of business defined by ordinance.

Id. at 61-62.

16. Article 9 provides, "In this law, worker shall mean one who is employed at an enterprise or place of business . . . and receives wages therefrom, without regard to the kind of occupation." Id. at 62.


of Labor has taken the position that the Labor Standards Law shall apply to the "enterprises" under Article 8 regardless of the nationality of employers. Consequently, enterprises of foreign corporations and foreign governments are included, so long as they are located in Japan. Likewise, the law protects workers employed by these enterprises, whether the workers are Japanese or foreign nationals. This is because Japan has its own interest in regulating workplaces within its territory. Thus, United States citizens working in Japan are protected by the law, so long as they are employed at an "enterprise," regardless of whether the enterprise is a branch of a United States corporation, its Japanese subsidiary, or a purely domestic Japanese corporation. This protection is significant because Article 3 of the law prohibits discrimination on the basis of nationality.

Whether a person is "employed" has been determined by, *inter alia*, the existence of direction and control over the person by the employer. As a matter of course, a person is "employed" by an enterprise when both the person and the enterprise are parties to an employment contract. Furthermore, persons transferred by their employer to work at and under the control of another employer may be deemed "employed" by the latter employer and also be protected under the Labor Standards Law with respect to the subjects for which that employer has authority and responsibility. Thus, the Labor Standards Law applies to American citizens who work under the direction of employers in Japan, whether they were hired in or transferred to Japan.

However, the Labor Standards Law does not cover all United States citizens working in Japan. For example, many Americans who ordinarily work in the United States but visit Japan on business trips...
may be outside the coverage of the law. When their employers in the United States do not have any Japanese branches or offices, those employers do not constitute "enterprises" under Article 8 of the law because they do not have a "body of business operation" carried out continuously and in an organizational manner at specific places in Japan.\(^\text{24}\)

The activities of the business travelers in most cases also do not constitute an "enterprise" by themselves because their work in Japan usually does not operate "in an organizational manner." Even when business travelers work at places that constitute "enterprises" in Japan, such as their United States employers' Japanese branches or subsidiaries, they may still work under the direction of their supervisors in the United States, not under the direction of supervisors in Japanese workplaces. These employees are not under the control of enterprises in Japan. Thus, the employees are not considered to be "employed" at the enterprises. In such a case, they are outside the coverage of the law,\(^\text{26}\) although whether they are under the control of the enterprises in Japan depends on the facts of each case. "Expatriates," who are assigned for overseas work for relatively longer periods than business travelers and who often work under the control of local management,\(^\text{28}\) are much more likely to be covered by the Labor Standards Law in the same manner as local workers.

The Equal Employment Opportunity Law,\(^\text{27}\) which was enacted in 1985 in order to promote equality in employment for women,\(^\text{28}\) does

\(^{24}\) See supra note 17 and accompanying text.

\(^{25}\) These employees should be covered by United States labor and employment laws so long as the employees belong to their employment bases or work stations in the United States while working abroad, even if these laws do not have a provision for extraterritoriality. The rationale for this "work station" doctrine is that business travelers working under the direction and control of their employers in the United States belong to their United States work stations or extended United States workplaces and should not be treated differently in terms of the applicability of United States labor and employment laws. See Ryuichi Yamakawa, Territoriality and Extraterritoriality: the Coverage of Fair Employment Laws After EEOC v. ARAMCO, 17 N.C. J. INT'L. L. & COM. REG. 71 (1992).


\(^{28}\) This Law prohibits employers from discriminating against female employees on the basis of gender with respect to vocational training, fringe benefits, retirement systems, and dismissal. Id. arts. 9-11. Articles 7 and 8 of this Law require employers only to make good faith efforts to treat women equally with respect to recruitment, hiring, assignment, and promotion, though the Ministry of Labor has engaged in administrative
not have “enterprise” coverage like that of the Labor Standards Law. The Equal Employment Opportunity Law applies to “employers,” meaning legal entities whether incorporated or human, as a party to employment contract regardless of whether the entities are Japanese corporations. But this law is presumed to apply only within Japanese territory because of the absence of the provision for extraterritoriality. Likewise, the law does not distinguish Japanese employees from foreign employees, so long as they are working in Japan. Thus, the law protects foreign women who are employed by or who apply for employment with employers in Japan. However, an employment relationship, including employment relations between applicants for employment and potential employers, is necessary for the application of this law because it protects female “workers” from discrimination by “employers.” Thus, business travelers from foreign countries may not be “employed” for purposes of the law if they are not under the direction of employers in Japan and therefore are beyond the protection of the law. In sum, the coverage of this law appears to be substantially similar to that of the Labor Standards Law.

B. Trade Union Law

The Trade Union Law of Japan, modeled after the National Labor Relations Act (Wagner Act) of the United States, prohibits employers from engaging in the following unfair labor practices: (1) discharging or otherwise discriminating against workers for union membership or activities or for filing complaints or otherwise participating in administrative procedures before the Labor Relations Commissions; (2) refusing to bargain collectively with their employees’ representative without proper reasons; and (3) controlling, interfering with, or financially assisting the formation or management of labor organizations. Administrative remedies by the Labor Relations Commissions are available for these unfair labor practices in addition to judicial remedies such as damage awards or judgments.

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30. See supra note 22 and accompanying text.
32. Excluding the Central and Local Labor Relations Commissions for Seafarers, Japan has 42 Local Labor Relations Commissions for each prefecture as well as the Central Labor Relations Commissions, which review the decisions of Local Labor Relations Commissions. Id. art. 19, at 25, art. 19-12, at 29-30, & art. 25, at 33.
declaring the invalidity of the disparate treatment.\textsuperscript{33} Thus, the primary question is whether the law protects United States citizens working in Japan from these unfair labor practices.

Although the Trade Union Law contains no provision for its geographical coverage, it is presumed to apply only territorially. Yet, because this law does not distinguish foreign employers from Japanese, it applies to Japanese branches and subsidiaries of United States employers like other Japanese labor and employment laws. Moreover, foreign citizens in Japan are protected by the law so long as they have actual or potential employment relations with employers in Japan. However, there may be a case, as in the Labor Standards Law, where business travelers from foreign countries lacking a connection with such employment relations fall outside the protection of the law.\textsuperscript{34}

If employees of a United States corporation at a Japanese subsidiary assert that the parent corporation is liable for unfair labor practices committed by its subsidiary, an administrative procedure is held before the Labor Relations Commissions in Japan. The question to be resolved in this case is whether the United States parent corporation is an “employer” under Article 7 of the Trade Union Law so that the unfair labor practices committed by the subsidiary may be deemed to be the parent’s conduct. In the domestic context, the Commissions have held a parent corporation is the “employer” with respect to the subsidiary’s employees when it exercises actual and concrete control over the subsidiary which committed the unfair labor practices.\textsuperscript{35} Control between the parent and the subsidiary may be based on various factors, including ownership of the subsidiary’s stock by the parent, common directors, and subcontract relationship.\textsuperscript{36}

\textsuperscript{33} Unlike the National Labor Relations Board in the United States, the Labor Relations Commissions in Japan do not have exclusive jurisdiction over unfair labor practice cases. Thus, workers alleging that their employer committed an unfair labor practice may directly bring suit in a civil court, so long as the alleged unfair labor practice constitutes a cause of action under general civil law such as torts or breach of contract.

\textsuperscript{34} However, under the “work station” doctrine, business travelers who belong to their extended United States workplaces may be protected under the National Labor Relations Act from unfair labor practices committed by their employers in the United States. See supra note 25.

\textsuperscript{35} \textit{E.g., In re Tōkō, K.K.}, 65 Htō Rōdō Kō Jiken Meirei Shū 174, 179 (Kanagawa Labor Relations Comm’n Mar. 2, 1979).

\textsuperscript{36} According to one commentator, however, in order for the Commission to order the parent to reinstate the discharged employees of the subsidiary, the control must be so strong that the subsidiary may be deemed a branch of the parent, and therefore, the
To obtain judicial relief declaring the invalidity of the discharge or other disparate treatment, plaintiff employees must rely on the doctrine of piercing the corporate veil and prove the subsidiary was only a formality without substance of enterprise or set up by the parent corporation as a subterfuge to evade its own liability under labor and employment law. American parent corporations should recognize the potential liability attaching to the unfair labor practices of their subsidiaries in Japan.

C. Workers' Compensation Law

The Labor Standards Law of Japan imposes a duty on employers to compensate employees for injuries and illnesses suffered in the course of employment, regardless of the employer's negligence. More importantly, the government established and continues to administer a national workers' compensation insurance system under the Workmen's Accident Compensation Insurance Law. This system obliges employers to pay premiums and, as in the compensation scheme under the Labor Standards Law, employees may be entitled to insurance benefits for injuries and illnesses which arise in the course of employment.

Almost every undertaking in Japan which employs workers is subject to mandatory application of the Workmen's Accident Compensation Insurance Law. Under this law, the term "undertaking" mutual relationship of performance of service by the employees and payment of wages by the parent exists between them. Kazuo Sugeno, Japanese Labor Law 631 (Leo Kawowitz trans. 1992).

37. In addition to the substantive issue whether the parent corporation is the "employer" of its subsidiary's employees, there remains a procedural question whether Japanese courts may exercise jurisdiction over the parent in foreign countries. When the subsidiary is conducting business in Japan and it is deemed a branch of the parent under the theory of piercing the corporate veil, the jurisdiction of Japanese courts may be inferred from Article 9 of the Code of Civil Procedure, which provides that "a suit against a person maintaining an office or place of business may, in so far as it only concerns... the affairs of such office or place of business, be filed with the court of the place where the office or place of business is located." 2 EHS Law Bulletin Series No. 2300, Japan [hereinafter EHS]. Even where a subsidiary in Japan was dissolved, a recent lower court decision acknowledged its jurisdiction over the United States parent corporation for a damage suit in which certain employees of the subsidiary asserted the business of the subsidiary was closed because of antiunion animus. Takahashi v. Reader's Digest Ass'n Inc., 536 R-d6 Hanrei 7, 9 (Tokyo Dist. Ct. Mar. 27, 1989).


40. Rodōsha Saigai Hoshō Hoken Hō [Workmen's Accident Compensation Insurance Law], Law No. 50, 1947, art. 1 in Labor Laws of Japan 1990, at 412-13. Article 84, para. 1, of the Labor Standards Law provides that an employer shall be exempt from liability for compensation under the law when the employee is eligible for insurance benefits equivalent to such compensation. Id. at 80.

41. Article 3, para. 1 of the Rodosha Saiga Hoshō Hoken Ho provides, "In this law, undertakings which employ a worker or workers shall be covered undertakings."
means, like the term "enterprise" under the Labor Standards Law, "a body of business operation which is carried out continuously as an interrelated organization at a specific place."48 Because the coverage does not depend on the nationality of employers as undertakings nor that of employees, a foreign citizen employed by these undertakings in Japan shall be covered by this insurance system.44 However, as with the coverage of the Labor Standards Law and other statutes,45 business travelers from foreign countries will most likely be considered outside the coverage of this law because they are not "employed" by an undertaking in Japan.46

The Ministry of Labor has conditioned compensation for injuries and illnesses suffered by an employee while working outside Japanese territory, under the above-mentioned ordinary insurance scheme, on whether the claimant employee was on a business trip abroad or transferred to a foreign workplace. The Ministry of Labor issued an administrative interpretation as to the distinction between these two categories of employee status.47 An employee working abroad is on a business trip when he or she continues to belong to his or her ordinary workplace in Japan while abroad and works under the direction of the employer at the Japanese workplace. In this case, the employee may be entitled to compensation for injuries or illnesses in the course of employment, even if they occur abroad. In contrast, an employee who belongs to a foreign workplace and works under the direction of the employer at the foreign workplace shall be

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42. See supra note 17 and accompanying text.
43. Circular [Kihatsu] No. 36, Sept. 11, 1948, in Rōsai Hoken Hō Kaishaku Sōran [Comprehensive Handbook of Interpretations of the Workmen's Accident Compensation Insurance Law] 85 (Ministry of Labor ed. 1989) [hereinafter Rōsai Hoken Hō Kaishaku Sōran]. Even when a foreign worker who was injured in the course of employment in Japan returns to his or her home country to receive medical treatment, he or she may apply for insurance benefits under the Workmen's Accident Compensation Insurance Law. See Shigéo Sakamoto, Gaikokujin Rodōsha eno Shakai Hoken, Shakai Hoshō Hō no Tekiyo, [The Application of Workmen's Accident Compensation Insurance and Social Security Law to Foreign Workers], 40 Hōkei Kenkyū 1, 13 (1991).
45. See supra note 25 and accompanying text.
46. Business travelers from the United States are likely to be covered by the workers' compensation law of the states where they have their ordinary employment relations or work stations. See generally 4 Arthur Larson, The Law of Workmen's Compensation § 87 (1990).
deemed transferred abroad and outside the coverage of the ordinary insurance scheme.

The Workmen’s Accident Compensation Insurance Law was amended in 1977 to provide for a new special scheme of compensation insurance for employees transferred abroad. When an injured employee is a transeree to a foreign workplace at the time of injury but eligible for this new scheme, the compensable injuries and illnesses are essentially the same as those under the ordinary insurance scheme. Thus, injuries and illnesses arising in the course of employment are compensable, even though they occur outside Japanese territory. Under this scheme, foreign citizens who ordinarily work at enterprises in Japan may also be eligible for workers’ compensation insurance for overseas, without discrimination based on nationality.

D. Other Social Security Laws Related to Employment

In Japan, the Employment Insurance Law establishes a public unemployment insurance system to provide temporarily unemployed workers a measure of economic security by granting certain insurance benefits and facilitating the workers’ job-search activities. Like the Labor Standards Law and the Workers’ Compensation Insurance Law, this law does not generally distinguish Japanese citizens from foreigners in its applicability. Also, the law applies to “undertakings in which a worker or workers are employed,” regardless of the nationality of the undertakings. Thus, foreigners, such as American citizens working in Japan, are eligible for unemployment benefits when they meet certain conditions provided under the law. However, there are considerable exceptions to this general principle. First, as with the Labor Standards Law, foreigners on a business trip to Japan are not covered by this insurance system because they are supposed to go back to their own home countries where they ordinarily work. In addition, under current administrative practice, foreign nationals who are granted status of residence for employment

48. Workmen’s Accident Compensation Insurance Law, art. 27, item 7, LABOR LAWS OF JAPAN 1990, at 433. See also Circular [Kihatsu] No. 192, Mar. 30, 1977, in Rōsai Hōken Hō Kaishaku Sōran, supra note 43, at 804-05. For employees to be eligible for compensation under this scheme, their employers must file an application to certain administrative agencies and receive the consent of the government regarding their eligibility. Workmen’s Accident Compensation Insurance Law, art. 30, LABOR LAWS OF JAPAN 1990, at 436.


51. Id. arts. 13-21, at 491-98.

for a fixed period of time are also outside the coverage of the insurance system when they lose their jobs. This is because they are not supposed to remain and seek employment in Japan after they become unemployed. As a result the only foreign nationals who are actually eligible for the unemployment insurance benefit are those who have status of residence without restriction on activities in Japan, e.g., foreigners who are granted permanent residence or spouses of Japanese citizens.

The Welfare Pension Insurance Law establishes a government managed pension plan for employees in the private sector. The plan applies to foreigners as well as Japanese employees, except for business travelers from abroad and who do not belong to undertakings in Japan, regardless of whether the employees are authorized to stay and work in Japan. One problem under the current practice is that foreigners covered by this insurance system are required to contribute even if they are not likely to stay in Japan long enough to be eligible for old-age pension payment. However, these foreigners may be eligible for disability pension under the law.

Additionally, foreign workers (and their dependents) employed by most private enterprises in Japan are covered by the public health insurance system under the Health Insurance Law, so long as they are authorized to work in Japan under the Immigration Control Law. Thus, "illegal" or unauthorized foreign workers are outside the coverage of the insurance system.

As indicated above, the application of Japan's social security laws appears somewhat diverse or even inconsistent. These current practices may be subject to change in the future. Therefore, in each case, inquiry as to application is advised.

III. CONFLICT RULES AND JAPANESE LABOR AND EMPLOYMENT LAWS

A comprehensive examination of the application of Japanese labor and employment laws to Americans working in Japan requires a

54. These categories for status of residence are listed under Annexed Table II of the Immigration Control Act. See IMMIGRATION BUREAU, MINISTRY OF JUSTICE STUDY, supra note 3, at 18-21.
55. Law No. 115, May 1954.
conflict of laws analysis as to private laws,\textsuperscript{57} such as employment contract law, in addition to the above consideration of Japanese laws. This Article analyzes the conflict rules and their applications both in the United States and Japanese forums. Courts must rely on the conflicts rule of the forum to determine choice of laws,\textsuperscript{58} and choice of law rules may vary depending on whether the action takes place in the United States or in Japan.\textsuperscript{59} Also, the following discussion focuses on the choice of laws over disputes arising from employment contracts, such as discharge, which often occur in transnational settings.\textsuperscript{60}

A. American Conflict Rules and Japanese Law

Whether the parties to a transnational employment contract designated governing law will dictate which law applies to the contract. Modern American courts have given considerable weight to party autonomy in the choice of laws.\textsuperscript{61} Accordingly, this Article first analyzes the choice of law rules in employment contracts in the absence of parties’ choice and then addresses the effect of party autonomy and exceptions thereto.

1. Choice of Law in the Absence of Parties’ Designation

When parties to an employment contract have not designated which law shall govern their contract, the courts must choose the governing law in accordance with the conflict rules of the forum. The traditional American conflict rule based on the vested right doctrine directs courts to apply the law of the place where the contract was

\textsuperscript{57} For the notion of public and private laws, see \textit{supra} note 4. Because the law of employment contract belongs to private law, its international aspect requires analysis under the framework of international private law or choice of law rules.

\textsuperscript{58} Klaxon v. Stentor Elec. Mfg., 313 U.S. 487, 496 (1941). This is also taken for granted in Japan.

\textsuperscript{59} Although a United States citizen employed by a United States corporation is more likely to bring suit over their disputes in a United States court, a Japanese court can exercise jurisdiction with respect to disputes arising from employment in Japan when the employer’s office is in Japan and the dispute is related to the business of that office. See \textsc{Minsō}, Law No. 29 of 1890, art. 9.

\textsuperscript{60} Another issue that may arise in transnational employment relations is the choice of law rule in the area of workers’ compensation. In Japan, however, the workers’ compensation system is provided under the Labor Standards Law and the Workmen’s Accident Compensation Insurance Law, the applicability of which has already been discussed in Part II. See \textit{supra} notes 39-49 and accompanying text. Because this area of law belongs to public law under the Japanese legal system, it applies to foreigners working at enterprises in Japan regardless of choice of law rules in private law. Japanese courts have, however, recognized a contractual cause of action for compensation for work-related injuries. If asserted under the transnational setting, this cause of action is subject to choice of law rules. See \textit{infra} note 65.

\textsuperscript{61} See \textit{infra} note 80 and accompanying text.
concluded.\textsuperscript{62} However, current case law diverges under the influence of modern flexible approaches.\textsuperscript{63} For example, the “significant contact” approach\textsuperscript{64} states that the law of the place where the services or the major portion of services are to be rendered generally governs disputes over the validity of and the rights created by the contract.\textsuperscript{65} The rationale for this view is that it fits the expectations of the parties to these contracts, and the state where the service is to be rendered has a strong interest in applying its laws to issues arising from the contracts.\textsuperscript{66}

Relying on the “significant contact” approach of the \textit{Restatement (Second) of Conflicts of Laws}, a number of courts have applied the law of the place of performance to resolve employment disputes of the types described above.\textsuperscript{67} Nevertheless, some courts have maintained the traditional approach and applied the law of the place where the employment contract at issue was made.\textsuperscript{68} In some cases, however, the place of contract coincides with the place of performance.\textsuperscript{69} In other cases where the court held that the law of the place of contract governs,\textsuperscript{70} the employee traveled frequently for business purposes making it difficult to localize the place of performance.\textsuperscript{71}

\begin{itemize}
\item[62.] \textit{Restatement of Conflict of Laws} § 332 (1934).
\item[64.] \textit{Restatement (Second) of Conflict of Laws} § 196 (1971).
\item[65.] Examples of these contractual disputes include disputes regarding the employer’s liability for the dismissal of its employees and the validity of a covenant not to compete with the employer’s business. \textit{Id.} cmt. a. These causes of actions are also recognized in Japan. In addition, Japanese case law recognizes a cause of action for compensation of work-related injuries suffered by an employee as a result of the employer’s neglect of its contractual duty to care for the safety of its employees. \textit{E.g.}, Kawayoshi K.K. v. Wada, 38 Minshū 557, 562-63 (1983). Because this right to compensation stems from the employment contract, it is also governed by the choice of law rule applicable to contracts for the rendition of services.
\item[66.] \textit{Restatement (Second), supra} note 64, cmt. C.
\item[70.] \textit{E.g.}, Helder v. Corona Prods., 127 F.2d at 622; Koehler v. Cummings, 380 F. Supp. at 1303.
\item[71.] Some courts have held that the law of the employer’s principal place of business shall govern. \textit{E.g.}, Weiner v. Pictorial Paper Package Corp., 303 Mass. 123, 20
\end{itemize}
Thus, when the employee works exclusively or mainly in a state or
country other than the state where the contract was made, more
than likely the place of performance test will apply.\textsuperscript{72}

Under current case law, a United States court focusing on the
place of performance under the \textit{Restatement} will apply Japanese law
to an American citizen when: (1) he or she was employed and work-
ing exclusively or at least mainly in Japan, or (2) he or she was sent
from the United States and was working exclusively or mainly in
Japan. In contrast, when an American citizen works during a busi-
ness trip to Japan from his or her employment base in the United
States or transfers from the employment base to the employer's Ja-
panese branches or subsidiaries but is supposed to go back to the
United States or be transferred again to another country after a rel-
atively short period of time, Japanese law is not likely to apply.

In addition to contractual claims such as breach of contract, em-
ployment disputes may sometimes give rise to causes of action based
on tort law, such as a violation of public policy in a discharged em-
ployee's damage action.\textsuperscript{73} This is also the case when dismissal constitu-
tes the intentional infliction of emotional distress. Although courts
adopting the traditional vested right doctrine relied on the place of
injury test for tort actions, this approach has been discredited by a
number of courts which favor the modern approach.\textsuperscript{74} Because of the
flexibility of the modern approach, however, it is difficult to genera-
lize the tendency of current case law regarding tort claims in em-
ployment law. Courts have chosen the laws of various places: place
of wrongful conduct,\textsuperscript{76} place of performance,\textsuperscript{76} place of employee's

\textsuperscript{72} N.E.2d 458 (1939); Glaz v. Ralston Purina Co., 24 Mass. App. Ct. 386, 389 n.2, 509

\textsuperscript{73} See Bachmann v. Blaw-Knox Co., 198 F. Supp. at 620-21 (applying Venezuela
law to an employee who worked exclusively in Venezuela); McKinney v. National Dairy
Council, 491 F. Supp. at 1117-18 (applying Massachusetts law to an employee who was
hired in New York, but later transferred to Illinois, and then to Massachusetts). But see
breach of contract claim and Venezuela statutory law to a severance pay claim where an
employee negotiated the employment contract in New York but worked exclusively in
Venezuela).

\textsuperscript{74} See David M. Kroeger, \textit{Welcome to the Big World: The Emerging Tort of the
Public Policy Exception to Employment at Will and Its Chaotic Encounter with Con-
employer's right to discharge by unjustly discharging an employee constitutes a breach of
contract. See \textit{infra} note 111. But a discharge may also constitute a tort when it is carried
out so as to inflict emotional distress upon the discharged employee.

\textsuperscript{75} See generally SCOLE & HAY, supra note 63, at 571-78.

\textsuperscript{76} See generally Kroeger, supra note 73, at 819-22.

\textsuperscript{77} E.g., Hager v. National Union Elec. Co., 854 F.2d 259, 261-62 (7th Cir. 1988)
(remanding the case to the district court to apply the \textit{lex loci delicti} rule as enunciated
by the Indiana Supreme Court).

\textsuperscript{78} E.g., Thomason v. Mitsubishi Elec. Sales Am., 701 F. Supp. 1563, 1567 (N.D.
domicile,\textsuperscript{78} and place giving rise to the public policy at issue.\textsuperscript{79} Even though predicting which test will prevail in the future is difficult, it appears certain some courts will choose Japanese law by relying on these tests. For example, when an American citizen executes an employment contract with an American corporation at its Japanese branch and works in Japan but is discharged while working at that branch, Japanese employment law most likely will be held to govern.

2. **Party Autonomy in the Choice of Law and Its Exception**

   \textit{a. Party Autonomy}

   Although early decisions of American courts showed reluctance to allow contracting parties to designate the law governing their contracts, modern courts essentially have permitted party autonomy in this respect on the condition that a substantial relationship exists between the state chosen and the parties or their transactions.\textsuperscript{80} This is true of the employment contract: some courts have rejected the argument that the employment contract is a type of adhesion contract in which party autonomy should not be permitted.\textsuperscript{81} The governing law chosen by the parties to an employment contract is often that of the place of contract, the place of performance of service, or the place of the employer's principal office of business.\textsuperscript{82} In these cases, courts have found that the chosen state has a "substantial relationship" with the parties and upheld the choice of law by the contracting parties.\textsuperscript{83}

   \textit{b. Public Policy Exception}

   Party autonomy in the choice of law, however, is subject to exception for public policy reasons. According to section 187(2) of the Restatement (Second) of Conflict of Laws, the law of the state chosen by the parties shall not be applied when the application of the

\textsuperscript{79} E.g., Oakes v. Oxygen Therapy Serv., 363 S.E.2d 130, 132 (W. Va. 1987) (applying Maryland law to an employee who was discharged in West Virginia because he allegedly had filed a workers' compensation claim in Maryland where he worked, stating that the public policy to be vindicated in this case is that of Maryland).
\textsuperscript{80} See generally Restatement (Second) of Conflict of Laws § 187(2)(a).
\textsuperscript{81} E.g., Burbank v. Ford Motor Co., 703 F.2d 865, 867 (5th Cir. 1983).
\textsuperscript{82} E.g., Transcontinental & W. Air, Inc. v. Koppal, 345 U.S. 653, 656 (1953).
\textsuperscript{83} Id.
law would violate "a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which . . . would be the state of the applicable law in the absence of an effective choice of law by the parties." 84 This public policy is not limited to that of the forum, although there have been only a small number of cases in which courts have invoked the public policy of third states or countries. 85

The questions which arise under the approach of the Restatement (Second) of the Conflict of Laws are, then, (1) whether Japanese labor law would apply to the dispute if it were not for the parties' choice of law, (2) whether the Japanese law shall constitute a "fundamental public policy" under the Restatement, and (3) whether Japan has a "materially greater interest than the chosen state" in resolving the dispute. According to the place of performance test, under the "significant contact" approach of the Restatement, 86 Japanese labor and employment laws shall apply under certain circumstances. The answers to the second and third questions, however, are not clear at present: there appears to be no American cases on point.

Cases related to interstate employment disputes may be instructive, however, as to what policy American courts will regard as an exception to party autonomy in the choice of law in employment contract, even though most of these cases focus on the public policy of the forum state. For example, state laws restricting the validity of a covenant not to compete with a former employer's business have often been held to constitute a fundamental public policy that party autonomy cannot override. 87 Japanese courts, like some United States courts, 88 have scrutinized the validity of these covenants, considering factors such as the period of restriction on competition or geographical scope of restriction. 89 Thus, if Japanese law would apply in the absence of the parties' choice of law, and the state law chosen by the parties is less restrictive than Japanese law as to the validity of such a covenant, an American court is likely to hold that the choice of law violates Japanese public policy. 90

84. Restatement (Second) of Conflict of Laws § 187(2).
85. One example of these is Barnes Group, Inc. v. C & C Prods., Inc., 716 F.2d 1023 (4th Cir. 1983). In this diversity case, the Fourth Circuit Court of Appeals, which applied South Carolina choice of law rules, held that applying Ohio law according to the governing law clause and enforcing a covenant not to compete would violate the public policy of Alabama, where the employee whose contract was at issue worked and resided. See supra notes 64-66.
86. See supra notes 64-66.
87. E.g., Barnes Group, Inc. v. C & C Prods., 716 F.2d at 1032. See also Scoles & Hay, supra note 63, at 668.
90. In Japan, case law has established that an employer may not discharge its employee without just cause. Kochi Koso K.K. v. Shiota, 268 RODO HANREI 17, 18 (Sup.
Furthermore, most mandatory provisions of Japanese public labor and employment statutes, such as the Labor Standards Law, will constitute public policies that exclude the parties' choice of law, so long as they apply to American employees working in Japan. These mandatory provisions, some of which have criminal sanctions against violation, reflect clear and strong policies of Japan to regulate labor and employment relations within its territory, and, accordingly, Japan has a materially greater interest in this regulation than the employee's home country.

B. Japanese Conflict Rules and Japanese Law

In Japan, a statute called the "Hōrei" provides the choice of law rules for Japanese courts. The Hōrei, like modern American conflict rules, recognizes the autonomy of contract parties in the choice of law subject to public policy exception. Yet, in the absence of parties' designation, the Hōrei adopts the place of contract test for contract based claims. Thus, the Japanese choice of law rule is more traditional than modern American approaches, although courts have sometimes chosen the law of the place with the closest connection to the disputes by finding the parties' implied choice of law.

See infra note 11. But it is not clear at present whether American courts would recognize this Japanese law as a fundamental public policy under American conflicts rule. American courts have only recently begun to restrict the employment-at-will doctrine, which has enabled employers to discharge employees without just cause. As a result, there does not appear to be a case in this area which held that applying the law of the chosen state would violate the public policy of another state.

91. See supra part II of this Article.
93. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187, cmt. g (1969) ("A fundamental policy may be embodied in a statute which makes one or more kinds of contract illegal or which is designed to protect a person against the oppressive use of superior bargaining power."). Most mandatory provisions under Japanese labor and employment statutes may well be regarded as protections of workers against "the oppressive use of superior bargaining power" by the employers.
94. Law Concerning the Application of Laws in General (Law No. 10, 1898), 1 Einbun Horei Sha (EHS) No. 1001.
95. See infra notes 107-34 and accompanying text.
96. Instead of adopting interest analysis, the Hōrei follows the traditional approach in that courts first determine the character or nature of the issue and then search for the connecting factors according to the characterization.
1. Choice of Law in the Absence of Parties' Designation: Place of Contract Test

Under the Hōrei, when it is uncertain which law the parties intended to have govern, the law of the place where the contract was made shall govern disputes concerning the information and effect of the contract.\(^\text{97}\) Thus, when an American citizen who concluded an employment contract in the United States and now works in Japan files a suit in a Japanese court against the employer with respect to claims arising from the employment contract, the court shall apply the law of the state where the contract was made, unless the court finds the parties intended to choose the law of another state or country.\(^\text{98}\)

Japanese courts in employment law cases have sometimes managed to find parties' implied intent, dispensing with the place of contract test. For example, a court in a recent decision found that the parties to an employment contract intended Japanese law to govern their employment contract where the employer, a British corporation, discharged its British employee in accordance with the procedure of the Japanese Labor Standards Law.\(^\text{99}\) Although the contract was made in the United Kingdom, the place of performance was Japan, and the contract was executed while the employee visited the United States merely on a business trip. One of the considerations underlying this decision must have been that the place of contract test under the Hōrei could result in the choice of law of the country which does not necessarily have significant contact with the employment contract.\(^\text{100}\) Thus, there is a substantial likelihood that courts will find Japan has the most significant contact with the dispute at issue and apply Japanese employment law, even if the parties did not express Japanese law as the choice of law.\(^\text{101}\)

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97. Article 7 of the Hōrei provides:
(1) As regards the formation and effect of a juristic act, the question as to the law of which country is to govern shall be determined by the intention of the parties.
(2) In case the intention of the parties is uncertain, the law of the place where the act is done shall govern.
1 EHS No. 1001.

98. Loustalot v. Admiral Sales Co., 92 HANTA 83, 88 (Tokyo Dist. Ct. 1959). This may also be the case with the cause of action for compensation for work-related injuries based on the employer's neglect of its contractual duty to care for the safety of its employees. See supra note 65.


100. SHŌICHI KIDANA, HIROSHI MATSUOKA & SATOSHI WATANABE, KOKUSAI SHIHŌ GAirON [AN INTRODUCTION TO INTERNATIONAL PRIVATE LAW] 123 (2d ed. 1991).

101. Even when a court applies a foreign law as the law of the place of contract to a case involving employment in Japan, the court shall, as in the case where party autonomy applies, consider Japanese labor and employment laws which constitute public policy under Article 33 of Hōrei. See infra notes 107-34 and accompanying text.
2. Party Autonomy and Exceptions Thereeto

a. Party Autonomy

In Japan, Article 7, paragraph 1 of the Hōrei permits party autonomy in the choice of law as to the formation and effect of contract. Some scholars have argued that this provision should not apply to employment contracts because employees are generally unable to negotiate a favorable governing clause with their employers on an equal basis. Thus, the scholars suggest that the law of the principal place of the employer's business or the place of performance should govern irrespective of the parties' choice. Japanese courts, however, have upheld the validity of a governing law clause in employment contracts. The majority of scholars have supported this case law.

b. Limitations on Party Autonomy

Although party autonomy in the choice of law may apply to employment contracts, certain restrictions are necessary to protect employees' interests. As stressed by the view denying party autonomy in employment contract, employees generally do not have sufficient bargaining power to negotiate with their employers as to the governing law clause. Moreover, the government has a compelling interest in protecting employee welfare by intruding upon party autonomy and regulating employment relations. Thus, Japanese courts and scholars have presented the following views to limit party autonomy in employment contracts.

i. Theories for Limitation

Public Policy Doctrine

The most traditional theory is the public policy doctrine, embodied by Article 33 of the Hōrei. This theory provides that "[t]he law of a
foreign country shall not govern if the application of its provision is contrary to public order and good morals." Thus, party autonomy shall be precluded only when the result of the application of the designated foreign law at issue would harm the social order of Japan.

The public policy doctrine was applied in Singer Sewing Machine v. Volonakis. In this case, the plaintiff, a United States citizen, was hired in the United States by a United States corporation and worked at its Japanese branch. After the employee was notified of his dismissal due to the elimination of his job, he brought suit in a Japanese court, alleging that the dismissal was impermissible in light of the abuse of right doctrine under Japanese civil law. The court, while finding that the parties intended New York law to govern their employment contract, acknowledged that the party autonomy should be subject to public policies of Japan under the Hōrei. However, the court went on to hold that the application of New York law in that case did not violate any public policies of Japan. According to the court, the plaintiff, who had been the general manager of the United States employer's Japanese branch with a considerable salary, was entirely different from ordinary Japanese workers who, once discharged, would find it difficult to get a new job under at least substantially similar terms of employment due to the Japanese lifetime employment practice. Therefore, the court concluded that the failure to apply the abuse of right doctrine under Japanese civil law, which presupposes a typical employment practice in Japan, did not disturb the public order of Japan.

Although prohibiting unjust dismissal of employees is one of the most fundamental features of Japanese employment law, this case indicates that the public policy doctrine will not necessarily guarantee its application to all foreigners working in Japan. Where, as in Volonakis, the working conditions and job description of a foreign employee are substantially different from those of ordinary Japanese employees, the courts may hold that the application of foreign law as chosen by the parties does not disturb the public order of Japan.

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108. 1 EHS No. 1001.
111. Japanese case law is well settled that a dismissal of an employee without just cause is impermissible as an abuse of the employer's right to dismissal. E.g., Kōchi Hōō K.K. v. Shiota, 268 RÖDÔ HANREI 17, 18 (Sup. Ct. 1977). The background of this case law is the Japanese lifetime employment system under which it is usually very hard for an employee, once discharged, to find a new job equivalent to the former one.
112. Volonakis, 568 HANJI at 174-75.
113. Id. at 175.
114. Id.
115. Id.
116. On the other hand, if the plaintiff had been in a position much more similar
Thus, *Volonakis* indicates the scope of the public policy doctrine is not very wide.

**Territorial Application of Public Laws**

The theory of “territorial application of public laws” restricts party autonomy by public laws under which the legislative body intends to intervene and regulate certain private areas such as employment relations within the territory of that country.\(^{117}\) Thus, unlike the public policy doctrine, this theory does not require the court to determine whether the application of the foreign law chosen by the parties would run counter to Japanese public policies: if there is a public law which applies to conduct occurring in the territory of Japan, the court must apply the law irrespective of the choice of law by the parties.\(^{118}\)

The Tokyo District Court relied on this theory in *George v. International Air Service Co.*\(^{119}\) The dispute concerned the dismissal of an American citizen employed by a California corporation. The employee was dispatched to Japan from the United States office and worked as a pilot of a Japanese domestic airline. After being dismissed, apparently as a result of his union activity in Japan, he brought an action in a Japanese court for back pay, alleging the dismissal was an unfair labor practice and void in law. The court, despite finding that the parties chose California law to govern their employment contract, stated that Japanese labor laws should apply as to the effect and validity of the dismissal in the present case.\(^{120}\) According to the court, the party autonomy provided under the *Horei* should be restricted by the “Japanese labor law which constitutes territorial public policy.”\(^{121}\) Thus, the court applied the Trade Union Law of Japan and concluded that the dismissal was impermissible.

Although the decision in *George* referred to “public policy,” the

to that of ordinary Japanese employees, the public policy doctrine might have intervened despite the parties' choice of New York law.

\(^{117}\) *Yutaka Orimo, Kokusai Shihō Kakuron [International Private Law]* 125 (2d ed. 1972).

\(^{118}\) One of the problems with this theory is deciding how courts should determine whether a specific law belongs to “public laws.” Although traditional Japanese jurisprudence has taken for granted the distinction between public laws and private laws, *see supra* note 4, the distinction is not always easy. This Article does not explore this issue.

\(^{119}\) 16 Rūminshū 308, 314 (Tokyo Dist. Ct. 1965).

\(^{120}\) *Id.* at 313-15.

\(^{121}\) *Id.* at 314.
court apparently did not rely on the public policy exception under Article 33 of the Hōrei because it did not follow the process required under that provision: analyzing the result of applying the chosen foreign law in light of the public policies of Japan. Thus, the term “public policy” in George may have referred to the public law, which should apply territorially regardless of the parties’ choice of law.

**Special Connection of Mandatory Law**

Under the “special connection of mandatory law” theory (Sonderanknüpfungstheorie), originating from German conflicts theory, courts may apply the laws of a third country other than those of the forum, such as the place of performance, if the third country has a substantial connection to the contract relationship at issue. In contrast, under the theory of territorial application of public law, courts may apply only the public laws of the forum when the forum is also the place of the performance. Thus, the “special connection of mandatory law” theory has a similar function to section 187 of the *Restatement (Second) of Conflict of Laws*, which enables American courts to invoke the public policies of a third country other than the chosen state or forum state under certain circumstances. Some scholars argue that there is little statutory ground for this theory in Japan, pointing out that the Hōrei does not refer to the public policy of third countries, unlike the *Restatement*. To date, no reported decision has expressly adopted this theory.

**ii. Discussion**

When the place of forum coincides with the place of performance of service, such as when American citizens working in Japan bring suit in Japanese courts, the theory of special connection of mandatory law leads to the same result as the theory of territorial

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123. Id. One commentator argues that this decision relied on the “special connection of mandatory law” theory described below. Takao Sawaki, *Rod Keiyaku ni Okeru Tōjisha Jichino Gensoku to Kyō Hōki no Renketsu Mondai [Party Autonomy in Employment Contract and the Issue of Connection of Mandatory Law]*, 9 RIKKYŌ 145, 163-64 (1967).

124. Kuwata, supra note 122, at 77. See also Matsuoka, supra note 109, at 577.

125. While the public policy doctrine requires Japanese courts to analyze the result of the application of chosen laws in light of Japanese public policies, the other two theories enable courts to apply Japanese laws directly. See supra note 122 and accompanying text.

application of public laws. This result occurs because territorial Japanese law has the most substantial connection to such cases. The public policy doctrine, however, appears to be more oriented to party-autonomy than these two theories. In addition to the different approach in applying public policy, the public policy doctrine differs from the other two theories in that it will not always preclude party autonomy when a Japanese mandatory or public law applies to the employment contract at issue. This doctrine will intrude upon party autonomy only when the fundamental public policies or social order of Japan would be disturbed by the application of chosen foreign law in a given case.

The distinction between public and private law is not clear, however, even as to the theory of the territorial application of public laws. This is especially true in the area of employment law, where case law and a number of statutes have come to intervene with otherwise private contract relations. Moreover, it is not entirely clear whether all the “public laws” of Japan would preclude party autonomy under the theory of the territorial application of public laws. Therefore, the distinction between this theory and the public policy doctrine may be more theoretical than practical. What is important is which law constitutes the “fundamental public policy” or public law that applies regardless of the parties’ choice of law.

The regulatory labor and employment statutes of Japan will in most cases constitute “fundamental public policy” because Japan has established systems to protect workers by enacting these statutes and setting up agencies to enforce them. Thus, as the George decision indicates, the protection of workers against retaliation for union activities under the Trade Union Law is extended to foreign citizens working in Japan, even when they did not choose Japanese law to govern their employment contracts.

In contrast to these regulatory statutes, it is not certain whether all the case law in the area of employment contract constitutes “fundamental public policy.” For example, the Volonakis court refused to find that the protection from unjust dismissal under the abuse of right doctrine was a fundamental policy in that case. Because the

127. See supra note 122 and accompanying text.
128. See supra notes 108-16 and accompanying text.
129. See supra part II of this Article for discussion of applicability.
130. See supra notes 119-21 and accompanying text.
131. See supra notes 110-15 and accompanying text. In the Federal Republic of Germany and Italy, the provisions of the protective legislation regarding dismissal were held not to be the public policies that preclude party autonomy, while courts in Belgium
Japanese case law regarding unjust dismissal is based on the lifetime employment practice, the application to foreign citizens outside this practice will not be warranted. This is not to say that all the case law regarding employment law is entirely subject to party autonomy in the choice of law. Some case law, like the restriction on the validity of the covenant not to compete, would apply regardless of the parties' choice of law. Courts are supposed to examine differences in employment practice when determining if the application of the chosen law would violate the public policies of Japan.

IV. Conclusion

Legislative intervention often protects the interests of workers in the areas of labor and employment relations. Because each nation has an interest in regulating the workplaces in its domain, its public labor and employment laws will usually apply to foreign citizens employed and working within its territory. Moreover, this governmental interest in regulating its workplaces leads to an emphasis on the law of the place of performance in the context of choice of law rules, although Japanese courts and some United States courts follow the traditional place of contract test. This is also true when parties to an employment contract choose the law of a place other than the place of performance.

When a Japanese labor and employment law constitutes a fundamental public policy or mandatory public law of Japan, the law will intervene despite party autonomy. Although it is not entirely clear what law constitutes a fundamental policy or mandatory public law, most Japanese statutes regulating labor and employment relationships and some case law, such as that regarding the validity of a non-competition agreement, are likely to override party autonomy. Thus, when American citizens work in Japan, they and their employers, whether American or Japanese, must realize that efforts to preclude the application of Japanese law might fail and that it is and France indicated a contrary view. Felice Morgenstein, International Conflicts of Labor Law 37, 45 (1984).


133. See Morgenstein, supra note 131, at 45.

134. It is not certain at present whether party autonomy is precluded in the cause of action for compensation of work-related injury as a result of the employer's neglect of the duty to care for the safety of employees. See supra note 65. Although this cause of action is contractual and based on case law, its function is similar to that of statutory workers' compensation law, which is most likely to override party autonomy. See supra note 60. Therefore, this case law arguably constitutes a fundamental public policy of Japan which may not be bypassed by party autonomy. There does not appear to be a case on this issue.
necessary to understand the contents of the applicable Japanese labor and employment laws.\textsuperscript{135}