

# **The Notion of Employer in the Era of the Fissured Workplace**

## **Should Labour Law Responsibilities Exceed the Boundary of the Legal Entity?**

*Editors*

**Roger Blanpain & Frank Hendrickx**

*Guest Editors*

**Hiroya Nakakubo & Takashi Araki**

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**Aelim Yun**

**Qi Zhong**

**Mimi Zou**



**Wolters Kluwer**

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# Introduction

Hiroya Nakakubo\* & Takashi Araki\*\*

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## THE TOPIC AND ITS BACKGROUND

The Japan Institute for Labor Policy and Training (JILPT) hosted its 13th Comparative Labor Law Seminar (the Tokyo Seminar) on February 29 and March 1, 2016.<sup>1</sup> The seminar addressed the topic *Reconsidering the Notion of “Employer” in the Era of the Fissured Workplace: Should Labor Law Responsibilities Exceed the Boundary of the Legal Entity?* which was on consultation with Prof. Kazuo Sugeno, President of the JILPT. As the organizers of the seminar, it was our pleasure to invite distinguished scholars from Australia, China, France, Germany, Japan, the Republic of Korea, Spain, Taiwan, the United Kingdom and the United States (U.S.) to participate in the project. The following memo was sent to the participating scholars to elaborate on the topic:

“The fissured workplace” is the term used by David Weil in his recent book, “The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It” (Harvard University Press, 2014). Weil describes the phenomenon of “fissuring” as follows (pp. 8-9):

During much of the twentieth century, the critical employment relationship was between large businesses and workers. ... However, most no longer directly employ legions of workers to make products or deliver services. Employment has been actively shed by these market leaders and transferred to a complicated network of smaller business units. Lower-level businesses operate in more highly competitive markets than those of the firms that shifted employment to them.

---

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1. The JILPT Tokyo Seminar was originally organized by Professor Kazuo Sugeno (Professor Emeritus, the University of Tokyo, Honorary President of the International Society for Labour and Social Security Law, President of JILPT) and Professor Yasuo Suwa (Professor Emeritus, Hosei University, Chairman, Central Labor Relations Commission) in 1991. The papers submitted to the previous JILPT Tokyo Seminars were published in the Bulletin of Comparative Labour Relations No. 30 (1995), No. 34 (1999), No. 38 (2000), No. 47 (2003), No. 53 (2005), No. 61 (2007), No. 68 (2008), No. 76 (2010), No. 81 (2012), and No.88 (2014).

Consequently, [w]age setting and supervision shift from core businesses to a myriad of organizations, each operating under the rigorous standards of lead businesses but facing fierce competitive pressures. Although lead businesses set demanding goals and standards, and often detailed work practice requirements for subsidiary companies, the actual liability, oversight, and supervision of the workforce become the problem of one or more other organizations. And by replacing a direct employment relationship with a fissured workplace, employment itself becomes more precarious, with risk shifted onto smaller employers and individual workers, who are often cast in the role of independent businesses in their own right.

As the fissured workplace has deepened and spread across the economy, work that once provided middle-class wages and benefits has declined. Jobs that once resided inside lead businesses providing decent earnings and stability now reside with employers who set wages under far more competitive conditions. Where lead companies once shared gains with their internal workforce, fissuring leads to growing inequality in how the value created in the economy is distributed.

Traditionally, labor and employment law has imposed various obligations on “employers.” Legal responsibilities usually stop at the boundary of the legal entity, even though there are some exceptions reflecting the nature of the subject. However, Weil’s argument of the “fissured workplace” vividly shows that there has been a fundamental change in the structure of businesses. It is no longer sufficient to discuss the responsibility of the person directly hiring workers. Law should squarely grasp and tackle this new reality. But how far can the current labor law go in questioning the responsibility of persons who have no direct contractual relationship with the workers? Can we develop effective theories under the existing legal framework? Or do we need a new set of legislation? Do other measures such as soft law or reputation mechanisms in the market deal with the undesirable consequences of the fissurization more properly? Inspired by Weil’s excellent analysis, we would like to discuss these challenges facing our labor law today.

## SUGGESTED FOCUS AND OUTLINE

Fissurization may take various forms, such as multi-layered subcontracting, outsourcing, franchising, and supply-chains. These measures are aimed at, or result in, “externalization” of the employment relationship, which brings about many problematic phenomena.

From the legal point of view, it seems there are two types of employment externalization. First, by outsourcing, contracting out, or utilizing supply-chain mechanisms, the lead companies may be relieved of employment-related responsibilities in multi-layered contractual relationships even though they wield considerable influence on the fate of the actual workers. This is the issue of the notion of “employer,” or who should bear the legal responsibility as the employer. Second, in the process of fissurization, traditional workers or employees tend to be converted into, or sometimes misclassified as, self-employed or independent contractors. This is the issue of the notion of “employee.”

While the second issue is of course important, it has already been discussed rather extensively. We therefore decided to place the focus of the 13th Tokyo Seminar on the first issue.



After explaining the aforementioned focus of the discussion, we offered the following points to the participants as a general guideline for the country papers, with a note that they were free to depart from them given that the situation and legal responses might differ in their respective countries:

**1. Introduction**

- General observation about the topic before going into the analysis.

**2. Current situation of fissurization**

- How far has the overall phenomenon conceptualized as “fissurization of the workplace” developed in your country, and why (if not, why so)?
  - A. What are the individual phenomena composing such “fissurization of the workplace” (such as subcontracting, supply chain, franchising and others). Please describe them somewhat concretely. Are they new phenomena or rather conventional practices?
  - B. What are managerial motives and socioeconomic backgrounds which give rise to such “fissurization of the workplace” (such as cost-cutting and evasion of labor-law responsibilities under intensified global competition)?
  - C. Please give an overview of the labor law issues (both interpretative and legislative) contained in “fissurization of the workplace.”

**3. Current legislative and interpretative responses**

- Measures to protect workers by going beyond the boundary of the legal entity should be described both in individual employment relations and collective labor relations.

**3.1 Individual labor relations**

- Please describe the current legislation in your country, if any, to protect workers in a multi-layered contractual relationship or indirect employment relationship, for instance:
  - Site owner’s responsibilities concerning health and safety regulations in the construction site
  - User’s responsibilities in a temporary agency work relationship
  - Parent or holding company’s responsibilities to the daughter company’s workers concerning wages, work-related injuries, dismissal regulations, and other duties arising from employment.
  - Have these regulations existed for a long time, or were they newly adopted to deal with fissurization?
  - Please describe the interpretative responses to protect workers in a multi-layered contractual relationship or indirect employment relationship, such as expanding the notion of “employer” (single employer, joint employer, etc.), and piercing the corporate veil.
  - Have these theories existed for a long time, or were they newly adopted to deal with fissurization?

**3.2 Collective labor relations**

- Please describe the current legislative and interpretative responses to fissurization in collective labor relations, for instance:
  - Does a parent or holding company bear the duty to bargain with, consult with, or give information to, representatives of the workers (such as labor unions or works councils) of its daughter or subsidiary company?
  - Does your country have special regulations on behalf of those who are not directly employed by the company concerning matters such as works council elections or other procedures in workers’ involvement schemes?
  - Have social partners (labor unions and employers’ organizations) set up special mechanisms addressing fissurization?