



HUMAN RESOURCES AND ANTIMONOPOLY ACT

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Background

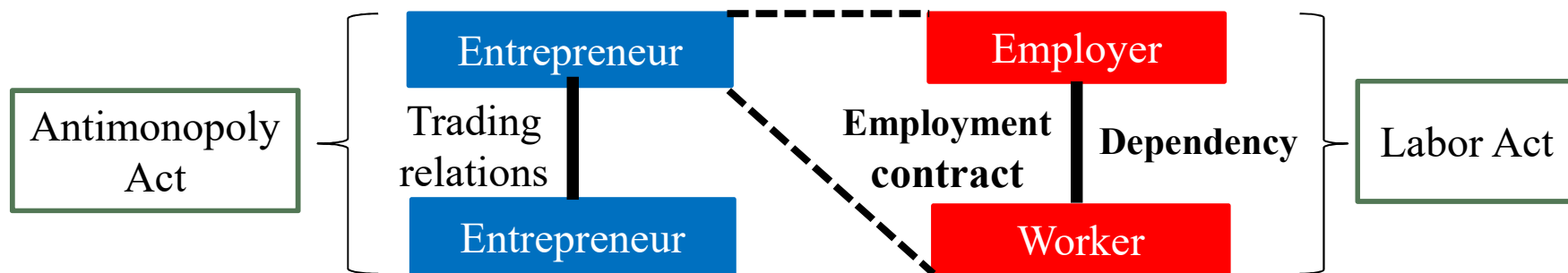
- Traditional model of working styles
 - Work at one company under an employment contract and lifetime employment system
 - Difficulty in obtaining information on the demand for Worker's skills
 - Emphasis on mass production and smooth execution of routine operations in catch-up economy
- Trend toward diversification of working styles
 - Demand of professional skills increase in global, digitized & matured economy
 - Growing demand for specialists, global & digital HR (IT/AI HR)
 - The demand enables the specialists to provide her/his skills to more than one company by becoming entrepreneurs instead of belonging to one company
 - Facilitating access to demand information on their skills, such as “cloud-sourcing”
 - Declining labor population
 - Necessity to maximize each individual's abilities triggers trends in employers' acceptance of employees' side jobs
- Increase in the number of “freelancers”
 - Market mechanism with proper resource allocation function yields proper placement of human resources through competition
 - A measure to labor population decrease by raising productivity
 - Requires protection of less-bargaining freelancers

Antimonopoly Act & Labor Trading 1/2

- Underlying concepts
 - Labor itself is one of “goods/services”
 - Employment contracts are also one of service-type contracts
 - Labor is one of "input" for manufacturing goods
 - Antimonopoly law will be applied to competition for acquiring labor.
 - In fact, Antimonopoly Act and Subcontract Act apply to manufacturing outsourcing contract between business operators
- Tadditional discussion
 - Antimonopoly Act does not apply to employment or labor contracts
 - Employment contracts should be governed by the Labor Laws
 - Dichotomy theory
 - The AMA applies to the trading between business operators
 - Labor laws apply to the trading of business operator (employer) and worker
 - Reasoning
 - i) laborer is not a “entrepreneur” (AMA applies to trading between entrepreneurs)
 - ii) Employment contracts are not “trading” under the AMA.

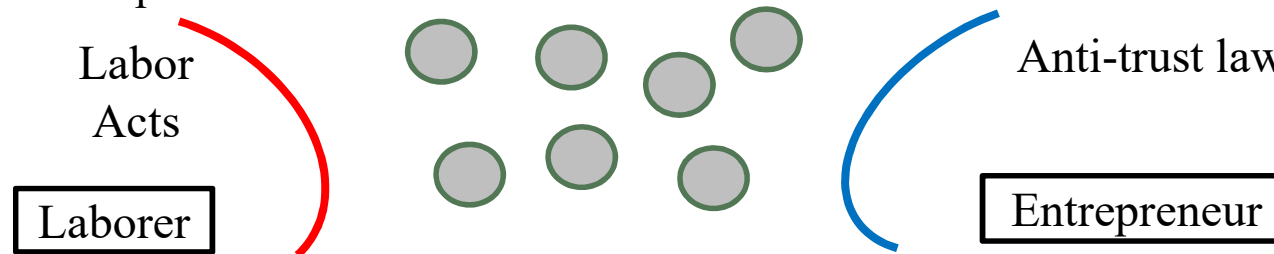
Antimonopoly Act & Labor Trading 2/2

- Reasons why the Antimonopoly Act was not applied to employment contracts (personal view)
 - 1) Risk of denouncing laborers' collective activities as a cartel
 - Would deny the constitutional right to organize labor and the labor union law
 - 2) The AMA coverage becomes too broad.
 - Labor issues can be properly treated under Labor Standards Act, Labor Union Law & Labor Relations Adjustment Act
 - 3) Difficult to say that "Employee" is "Entrepreneur" (Business operator).
 - While "Entrepreneur" implies independence & risk-bearing, "labor" implies dependency & subordination relationships."
 - 4) Difficult to grasp "Competition among Workers"



Antitrust law and labor Trading ③

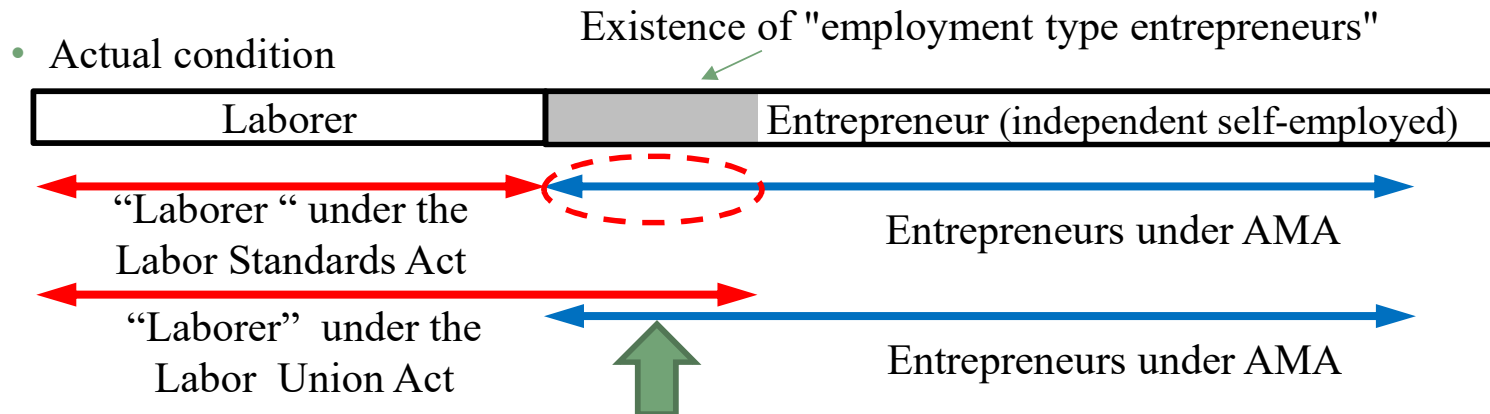
- Extension of the “Dichotomy Theory”
 - A tendency to refrain from applying AMA to entrepreneur with labor element
- "Valley" issue
 - Professional baseball players and/or entertainers
 - Insurance and cosmetics sales representatives, writers, training instructors, designers, and interpreters



- Though some can be remedied under the Subcontract Act, the coverage of the Act is limited.
- Increasing trend of the "Valley" issue
 - Increasing orders for in-house jobs through “cloud-sourcing” (internet)
 - E.g.. Uber driver's business (a trend toward increasing small entrepreneur through the “share-economy”)
 - E.g.. IT engineers, consultants and professional engineers

Approach from Labor Law

- Extension of the “Laborer” definition of Labor Union Act
 - The Supreme Court affirmed entrepreneur can be regarded as “laborer” under certain conditions
 - Assumption of dichotomy theory



E.g., Professional baseball player, Opera chorus member (New National Theater Case), Repairing housing equipment workers (INAX Case), Workers engaged in repairing audio equipment (Victor Case)

Approach from Antimonopoly Act 1/2

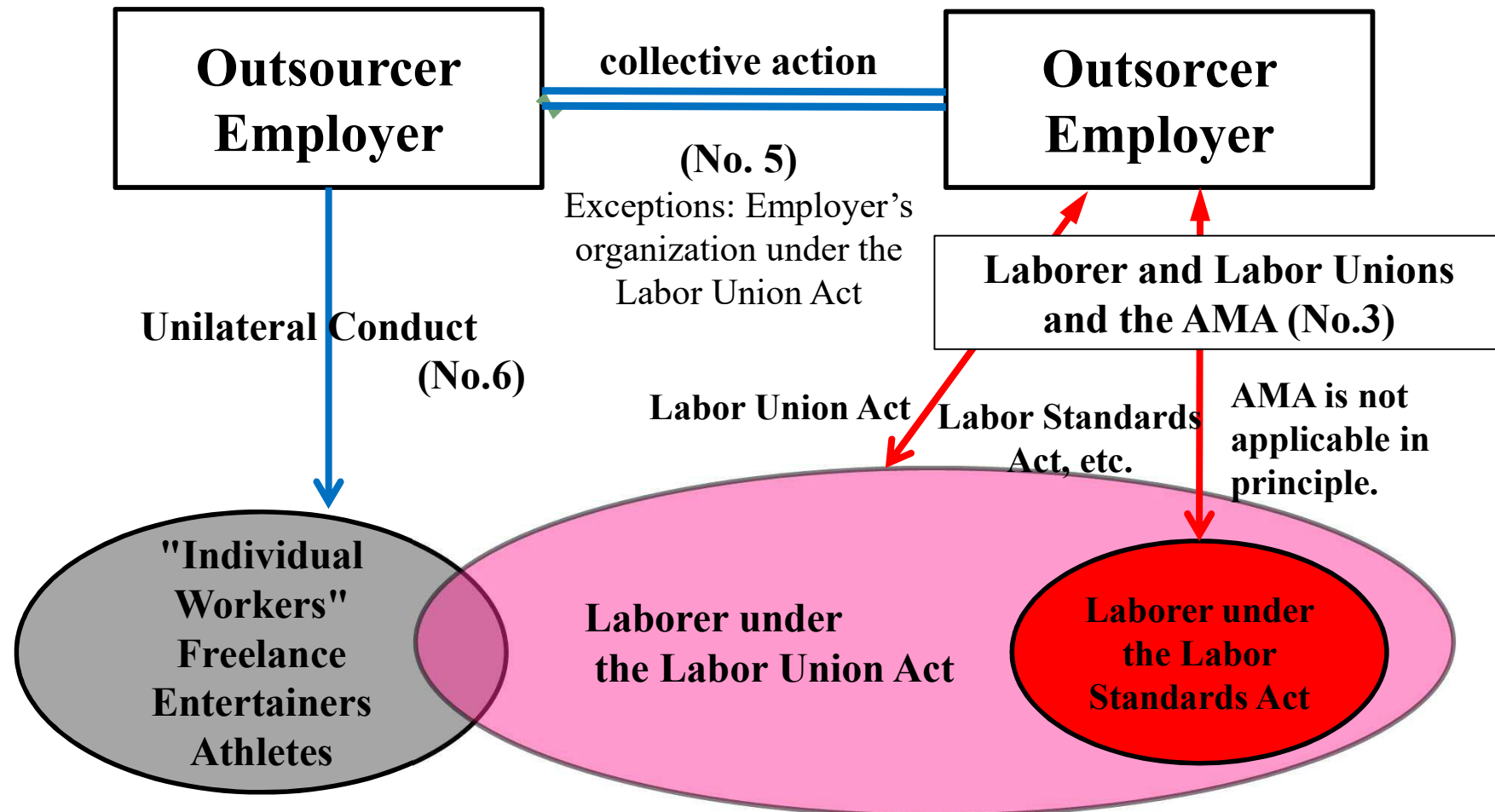
- Human Resources Report issued by CPRC
 - “Laborer under the Labor Standards Act” does not constitute an entrepreneur under the AMA, and conducts by such Laborer is not considered to be an issue under the AMA. In addition, in areas governed by labor legislations, whether the actors are employers, laborers or labor organizations, they do not, in principle, pose issue under the AMA.”
 - 1) Conducts of labor unions under the Labor Union Acts in collective labor relations between labor unions and employers
 - 2) Conducts of employers under the Labor Union Acts in relation to collective labor relations law against conducts of labor unions under Labor Union Act
 - 3) Conducts of employers against the Laborer governed by the Labour Standards Law and the Labour Contract Law etc in connection with laborer in individual labour relations
 - Provided, however, that in exceptional cases, such as those that deviate from the purpose of these systems, the AMAct may be applicable.

Approach from Antimonopoly Act 2/2

- “Entrepreneur”
 - "It is not appropriate to consider that a laborer never fall within the scope of an entrepreneur under the AMA, and in the future, it is necessary to examine whether the problematic conduct was acted by an entrepreneur under the AMA on case by case basis"
- "Trading"
 - “Similarly, with respect to ‘Trading’ under the AMA, when it is recognized that a conduct that falls under behavior prohibited under the AMA is being conducted, it is appropriate to examine whether the trading in which the behavior is conducted falls into ”Trading“ under the AMA on case by case basis"

	Collective labor relations	Individual labor relations
Traditional Worker		
Freelance		
Employer	Employer's Conduct under the Labor Union Act	

Chart of CPRC's Human Resources Report



Attorney Toshiaki Kobayashi, "The Report of the Investigative Committee on Human Resources and Competition Policies" and subsequent issues-between the Antimonopoly Act and the Labour Act
 Cited (partially changed) <https://www.kottolaw.com/column/001680.html> from "Shortcomers and Athletes."

Features of the Recent HR Sector

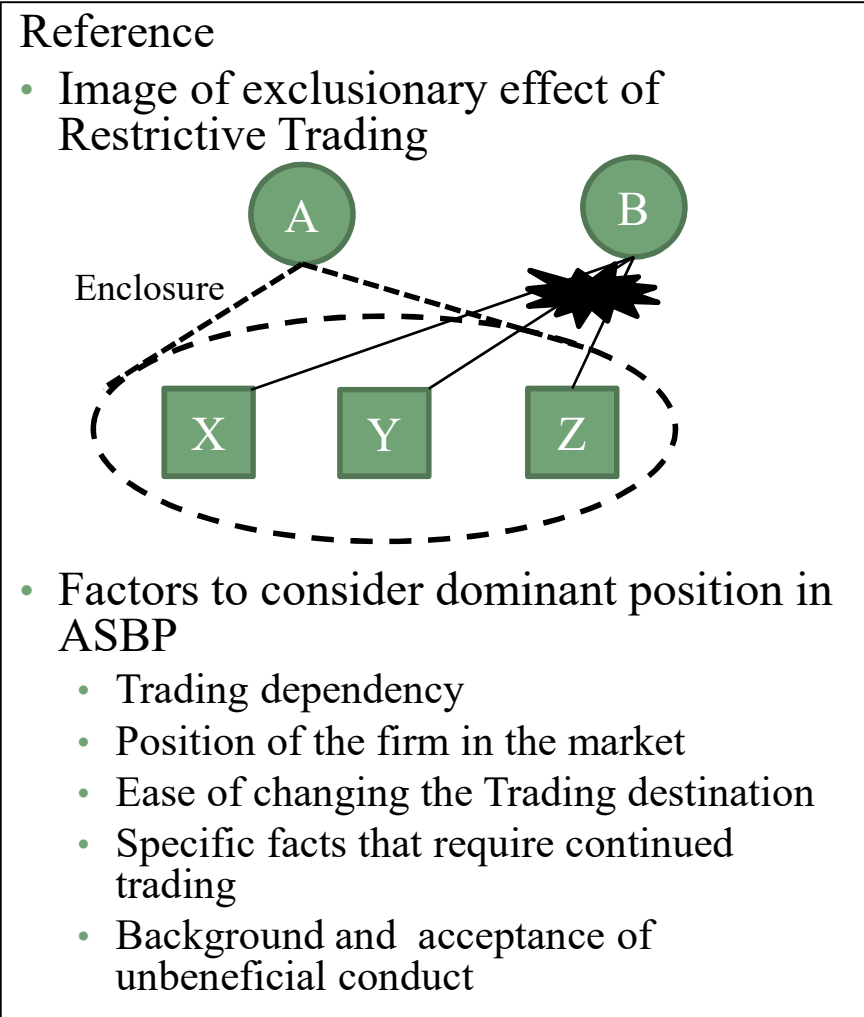
- Intensified competition for highly-skilled human resources
 - Insufficient supply of IT/AI/Digital/Global human resources
 - Fierce competition that transcends industry and borders
 - Emergence of independent freelancers and outsourcing from companies
 - high-cost simple operations & highly intelligent or creative professional operations that are difficult to be replaced by Artificial Intelligence or robot fits to outsourcing, which tends to generate independent business operators
- Possible concerns from competition policy perspective
 - Request of subcontractors to become fully dependent
 - Enclosure of independent business operator and freelancers
 - No-poach coordination among competitors
 - Restraint on compensation to independent business operator/freelancers
 - Exploitative actions
 - Price agreements between competitors to counter the price-hike of independent business operators or freelancers

Making freelancer/subcontractor full-time

- Measures to make freelancers etc. fully dependent - Enclosure Measures
 - Non-Competition Obligation (substantiation of confidentiality)
 - Exclusive obligation (recovery of cultivation expenses/intestment)
 - Restrictions on the use of the Deliverables (obligation not to publicize, restriction on the use of the Deliverables, obligation to grant exclusive licenses, low price transfer)
- Possible infringement as i) Trading on Restrictive Terms or ii) abuse of a dominant bargaining position (“ASBP”)
 - The measure may helps freelancers improve their skills.
 - Restrictive Trading applies when it is likely to exclude competitors
 - ASBP applies when causing unjust disadvantage to a trading partner.
- “Unjust disadvantage” is judged considering following factors
 - 1) Whether the contents & duration of the obligation is excessive in light of the purpose
 - 2) the extent of disadvantage to the freelancers including existence & level of compensatory
 - 3) whether sufficient prior consultation was conducted with the freelances as to the obligation
 - 4) Whether it is discriminatory comparing with the terms & conditions of other freelancers
 - 5) Circumstances of discrepancies with usual obligations of the same type of restriction

Exploitative behavior toward freelancers

- Type
 - Breach of contract
 - Late payment
 - Request for Reduction of Proceeds
 - Refusal to Accept
 - Request for trading at extremely low prices without adequate consultation
 - Unilateral handling of product rights
- Subcontract Act
 - Depending on the capital and the type of trading, the Subcontract Act may apply.
 - Where SMEs with capital less than the capital designated by law is the requestor or the trading is not covered by the Subcontract Act, freelancers need to rely on ASBP regulation



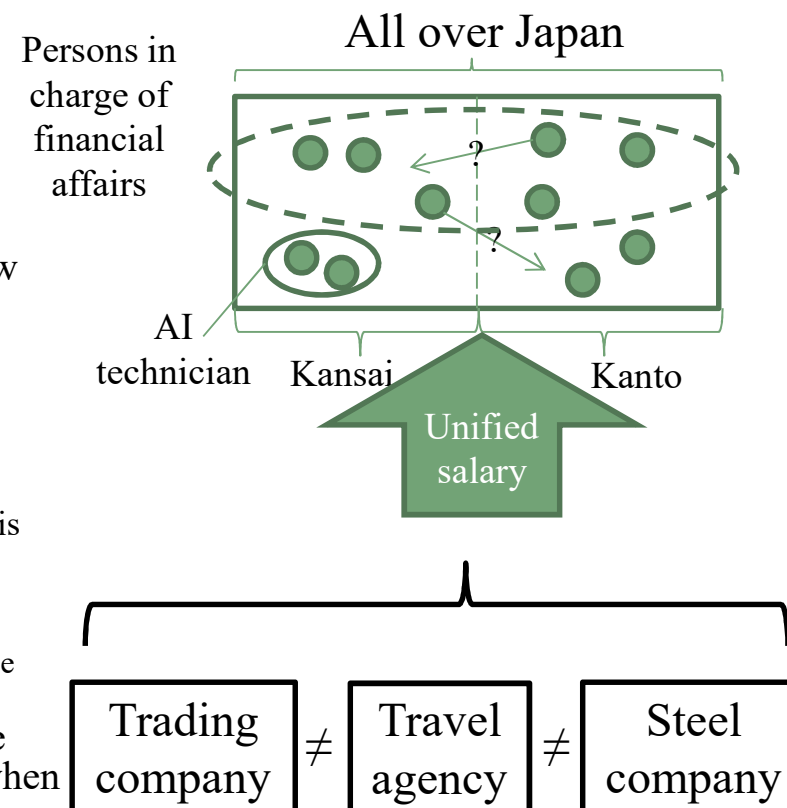
Collective conduct of freelancers

- Order Business through cloud-sourcing
 - “Gig Economy”: working style where worker accepts a single job via internet
 - Workers subcontract the work (gig) in line with their schedule, and intermediaries receive orders from consumers and re-consign and pay compensation to workers.
 - Hypothetical: Uber drivers collectively request for price increase
 - Analysis from Antimonopoly Act
 - In principle, if the drivers have not concluded employment contracts and are entrepreneurs, concerted conduct would fall under unreasonable restraint of trade, i.e., cartels.
 - Whether the conducts "substantially restrain the competition in a particular field of trade"?
 - How to define a particular field of trade in this case?
 - Is there competition “among drivers who works under Uber system”?
 - Is it not “Laborers” of the Labor Union Act?
 - Elements of Supreme Court Decisions which implies little competition among workers
 - Basic factors.: 1) incorporation of labor into business organizations, 2) unilateral and routine determination of contract contents, and 3) compensation in consideration for labor,
 - Supplementary factors: 4) relationship to response to the request for work, 5) supply of service under the guidance and supervision of outsourcer and restriction of certain time and place
 - Negative factor: 6) Existence of significant feature of entrepreneur

Collective act among employers for salary

Compensation (Salary) Agreement

- Illegality in principle
 - A particular field of trade defining factors
 - Scope of goods (services)
 - Labor requiring special expertise tends to narrow (AI personnel, etc.)
 - Labor that can be expanded through general-purpose labor and post-employment education tends to be wider
 - Geographic range
 - Due to the constraints of residential areas in Worker, it is not possible to provide labor services nationwide. Economic Burden and Family Burden Associated with Relocation
 - Even in cases where the labor procurement market cannot be defined nationwide
 - Even if the business of the employers (or orderers) are not competitive in supply side, they are competitors when they have same demand for human resources.
 - Demand for digital human resources exists in all industries
 - (Autonomous drive, factory automation, logistics efficiency, demand forecasting, image sensor acquisition information analysis...



Collective act among employers for salary

- Cases of U.S. DOJ detection (consent degree)
 - Arizona Hospital & Healthcare Association
 - Arizona hospitals agreed on salary for temporary nurses and daily nurses
 - Utah Society for Healthcare Human Resources Administration
 - Utah Hospital exchanged non-public information on salaries of registered nurses
 - Artificially lowered salaries for registered nurses in Salt Lake County and Utah
 - Council of Fashion Designers of America
 - Attempted to reduce fashion models' compensation
- National Port Strike Case
 - National Harbor and Port Transportation Alliance, an industry-wide labor union organized by port workers
 - The labor union requested employer's association, Japan Port Transportation Association, to raise minimum wages
 - Employers denied wage raises on the ground that the wage determination among employers is likely to infringe the AMA.
 - If it falls under or is equivalent to an employer's association under the Labor Union Act it is unlikely to violate the AMA.
 - Since there was a request from the laborers for joint negotiations with employers, and in light of the advantages of both labor and management due to the ripple effect of the wage across the industry, no trouble under the AMA including *Shunto*.

Collective act among Employers – No- Poach Agreement

- No-Poach Agreement
 - Comparative balancing of the purpose of recovering human resource development costs (securing incentives for development investment for develop employees' skill)
 - 1) Level of rearing costs to be recovered
 - 2) The content and degree of job change restrictions are balanced with the level,
 - 3) Whether there is less restrictive alternative methods to achieve the same purpose (i.e., securing incentive to foster workers) : e.g., job change system by paying training costs)
 - Peculiarities of sports
 - Whether restrictions on transfer during the season are considered by the need to maintain strategy during the season and the need to maintain entertainment through a force balance
- Cases of U.S. DOJ
 - i) eBay & Intuit case; ii) Lucasfilm & Pixar case; iii) Adobe, Apple, Google, Intel, Intuit & Pixa caser; Consent Judgment
 - Agreement (the "no poach agreement") to refrain from calling on incumbent employees for solicitation and to restrict them from hiring employees who are working for the other party
 - Antitrust Guidance for Human Resource Professionals (Oct. 2016)

Collective acts among Employers- Qualifications and Graduate Recruitment

- Qualifications and Standards Agreement among competitors
 - Purpose) Setting industry standards for maintaining & securing service quality
 - Voluntary standards set under the trade association guidelines
 - 1) Does it unjustly harm the interests of customers in the markets?
 - 2) Are there unreasonable discriminatory behavior among orderers (employers)?
 - 3) Is it within in the extent of reasonably necessary based on legitimate purposes such as social and public purposes
 - It is preferable that there is an opportunity to hear the opinions of the parties concerned (labor service providers, users, experts, etc.)
- Agreement on employment of university graduate
 - Employers' rules on the time of new graduate employment (timing of job session/visiting to the company)
 - Objectives: to prevent educational impediments from unlimited employment activities
 - Impairment of the recruitment competition through early adoption and liberalization
 - Whether there are measures and methods that are socially and publicly justifiable and no other less restrictive method to achieve the goal above.
 - How critical is recruitment timing for talent obtaining competition?

Human Resources and Competition Policies

- With respect to applicable labors of Labour Acts
 - Basically, labor Acts are applied, and appropriate and fair trading conditions are secured through the free recruitment competition between employers.
- Workers not covered by the Labor Acts (self-employed, freelancers)
 - Ensuring a fair contract negotiation environment and fair contract content under the AMA
 - The Labor Acts is an economic policy that aims to protect not only the Labors and to secure a sustainable workforce through this policy.
 - If there is increasing demand for a way of working as a personal entrepreneur (freelancer), social and economic policies need to make it possible to make sure that people can choose their ways of working in relief.
 - In a mature society, where the need for professional and individual labor is increasing, it is necessary to place the right people in the right jobs more than before in order to increase productivity.
 - In a society with a declining birthrate, an aging population, and a declining labor force, the loss of productivity due to mismatches in human resources is greater than used to be.
 - Market-economic or competition mechanisms with proper resource allocation and supply-demand adjustment functions play a major role in placing the right people in the right jobs