Overview of "Guidelines Concerning Matters to Be Taken into Account by Companies, etc. in Assignment of Business and Mergers"

Guidelines Concerning Assignment of Business, etc. set down matters that companies, etc. should take into consideration in assignment of business and mergers for the sake of worker protection!

− Applicable since September 1, 2016 −

Both assignment of business and mergers (hereinafter referred to as, "assignment of business, etc. ") are considered as types of organizational change. The former is, in nature, a form of specified succession, in which succeeding to labor contracts requires the consent of individual workers subject to succession. On the other hand, mergers are, in nature, a form of comprehensive succession, in which labor contracts of workers subject to succession are maintained as are and succeeded to by the surviving company.

On these grounds, no particular "legislative measure" has been taken for the worker protection in relation to assignment of business, etc. However, such organizational changes quite often lead to a significant impact on the employment or working conditions of workers. In particular, although some labor-management consultations are normally held in assignment of business cases, a certain number of cases develop into disputes in relation to the succession or non-succession to labor contracts.

For this reason, we have recently formulated the "Guidelines Concerning Matters to Be Taken into Account by Companies, etc. in Assignment of Business and Mergers" (hereinafter referred to as, "Guidelines Concerning Assignment of Business, etc."), which, in assignment of business cases, seek to assure companies, etc. of the substantiality of workers' consent required for labor contract succession and to enhance the mutual understanding between all workers and their employer, thereby contributing to the smooth implementation of assignment of business, etc. and worker protection.

We ask all relevant parties to take note of matters set forth below in order to promote labor-management consultation and understanding, and to ensure the worker protection and smooth organization restructuring on the basis of the sufficient understanding and cooperation between labor and management.

- You can check documents relating to the Guidelines Concerning Assignment of Business, etc. on the Ministry of Health, Labour and Welfare website (http://www.mhlw.go.jp/).

- If you have any question, please contact the Law and Regulation Unit 1, Labour Relations Law Division, Labour Standards Bureau of the Ministry of Health, Labour and Welfare, or the Employment and Environment Equality Division (Office) of the nearest Prefectural Labour Bureau.

Ministry of Health, Labour and Welfare /
Prefectural Labour Bureau

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Section 1　Purpose

Guidelines Concerning Assignment of Business, etc. stipulate matters that companies, etc.* (meaning companies and other business operators which use workers; the same applies hereinafter) should take account of, when they embark on assignment of business or the mergers prescribed in the provisions of Chapters II and V, Part V of the Companies Act (meaning absorption-type mergers or consolidation-type mergers; the same applies hereinafter). These Guidelines seek to assure companies, etc. of the substantiality of workers' consent required for labor contracts to be succeeded to by another company in the case of assignment of business, and to enhance the mutual understanding between all workers and their employers, thereby contributing to smooth implementation of assignment of business, etc. and the worker protection.

Among such matters to consider, those on assignment of business apply only to assignment of business for which assignment of business contract is executed on or after September 1, 2016.

** These include not only companies but also general incorporated associations and general incorporated foundations etc.*

Section 2　Matters to Consider in Assignment of Business

As matters that companies, etc. should take account of when embarking on assignment of business, this Section stipulates matters concerning procedures, etc. to be implemented with workers, and matters concerning procedures, etc. to be implemented with the labor union, etc. (meaning a labor union which is composed of the majority of workers in cases where such a union exists; if such a union does not exist, the person representing the majority of workers; the same applies hereinafter). The flow of assignment of business procedures is outlined below. Please go through the flow first before checking the details of each procedure.

☑ Flow and Overview of Procedures for the Worker Protection

Procedure Flow

Prior consultation with labor unions, etc.

Among procedures involving labor unions, etc., consultations should be commenced before the start of consultations with workers subject to succession at the latest, and should be held arbitrarily thereafter as required.

Prior consultation with workers subject to succession

When holding prior consultations with workers whose labor contracts are scheduled to be succeeded to by another company (hereinafter referred to as, "worker subject to succession"), plenty of time should be left to ensure sufficient consultations to obtain the consent of workers subject to succession on the basis of their true intentions.

Consent of workers subject to succession to their labor contracts being succeeded to another

In the case where a labor contract executed between the assignor company, etc. (*) and a worker is to be succeeded to by the assignee company, etc. (*), it is necessary to obtain the consent of the worker subject to succession, pursuant to the provisions of the Civil Code.　(*) See next page

Entry into force of assignment of business and the succession to labor contracts

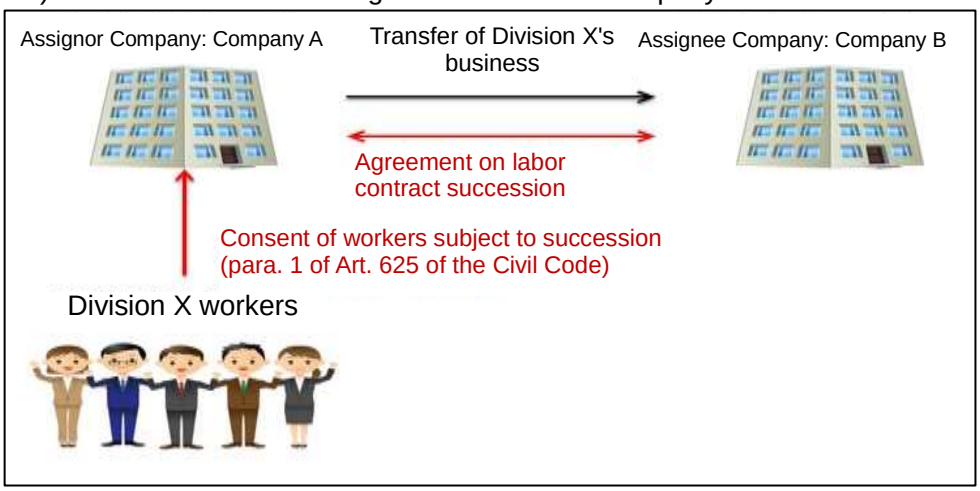
1. Matters Concerning Procedures, etc. to be Implemented with Workers

(1) Fundamental principle concerning the succession to labor contracts

In the case where a company, etc. that is to transfer its business (hereinafter referred to as, " assignor company, etc.") to another company, etc. (hereinafter referred to as, " assignee company, etc.") is to assign the assignee company, etc. labor contracts executed between the assignor company, etc. and workers subject to succession, it is necessary for the assignor company, etc. to obtain consent of the workers subject to succession pursuant to the provision of paragraph 1 of Article 625 of the Civil Code.

(Reference) Article 625 (Restrictions on Assignment of Employer's Rights)
(1) An employer may not assign his/her rights to a third party unless the employer obtains employee consent.

(Situation) The structure for obtaining consent where a company is to transfer its business



(2) Matters to consider when obtaining consent of workers subject to succession

(i) Prior consultations, etc. with workers subject to succession

In obtaining consent of workers subject to succession, the assignor company should provide such workers with sufficient explanations on the following matters, and hold consultations with them to obtain consent based on their true intentions.

- ☑ The overall situation relating to the assignment of business concerned (including matters concerning the prospect of the assignor company, etc. and the assignee company, etc. performance of obligations)
- ☑ The overview of the assignee company, etc. for which workers subject to succession will work, and working conditions (including the operations they are scheduled to engage in, workplace, and other employment details)

The above details are just examples. The assignor company, etc. is expected to explain other matters to workers subject to succession where explanations on such matters are required.

In the case where the assignor company, etc. has the assignee company, etc. succeed to the labor contract of a worker subject to succession after having made some change in the working conditions set forth in the contract, please bear in mind that it is necessary to obtain the consent of that worker to such change.

(ii) Consultation agent selection

It is important to note that where individual workers select their labor union as an agent for all or part of consultations concerned pursuant to the provisions of the Civil Code, it is necessary for the assignor company, etc. to consult with the labor union in good faith.

(iii) Relationship with the right to collective bargaining under the Labor Union Act

The working conditions, etc. of workers involved in assignment of business are subject matters of the right to collective bargaining prescribed in Article 6 of the Labor Union Act. For this reason, it is important to note that the assignor company, etc. may not refuse a lawful request for collective bargaining made by a labor union pertaining to the relevant assignment of business on the ground that a prior consultation with workers subject to succession has already taken place.

In addition, please also note that if a request for collective bargaining is made pertaining to such subject matters, the assignor company, etc. is required to negotiate with the relevant labor union in good faith.

(iv) Time of consultation commencement

When holding prior consultations with workers subject to succession, the assignor company, etc. should leave plenty of time to ensure sufficient consultation to obtain the consent of such workers on the basis of their true intentions.

(v) Matters to consider with regard to the provision of information to workers

It is important to note that if the assignor company, etc. has obtained the consent of workers subject to succession with regard to the assignee company, etc. succession to their labor contracts by intentionally providing false information to such workers, the workers may rescind their manifestation of intention pursuant to the provision of paragraph 1 of Article 96 of the Civil Code.

(Reference) Article 96 (Fraud or Duress)

(1) Manifestation of intention which is induced by fraud or duress may be rescinded.

(3) Matters to consider in the case of dismissal

When transferring a business, please bear in mind that if dismissal lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, such dismissal will be treated as invalid pursuant to the provision of Article 16 of the Labor Contracts Act; for example where a worker subject to succession is dismissed only on the basis that the worker does not consent to his/her labor contract being succeeded to by the assignee company, etc.

Further, the legal principle of precedent concerning dismissal for the reason of reorganization applies to cases of dismissal based on assignment of business. For this reason, it is important to note that if dismissal lacks objectively reasonable grounds (e.g. where the dismissal of a worker subject to succession is only based on a transfer of the business the worker has engaged in) and is not considered to be appropriate in general societal terms, such dismissal will be treated as invalid pursuant to the provision of Article 16 of the Labor Contracts Act.

In this type of case, it is necessary for the assignor company, etc. to take measures sufficient to maintain the employment relationship with the relevant worker subject to succession, such as reassigning the worker to a business division other than the division subject to the assignment of business.

(Reference) Article 16 (Invalidation of Dismissal) of the Labor Contracts Act

If dismissal lacks objectively reasonable grounds and is not considered to be appropriate in general societal terms, it is treated as an abuse of rights and is deemed invalid.

"Four requirements (four elements) of dismissal for the reason of reorganization"
(established by successive court precedents)

(i) Personnel reorganization is required for a business management reason (necessity of personnel cutbacks)

(ii) Sufficient efforts have been made to avoid the dismissal concerned (efforts to avoid dismissal)

(iii) The selection of persons to be dismissed is reasonable (reasonableness of personnel selection for dismissal)

(iv) Sufficient explanations and consultations have been given to the relevant workers and/or labor union (appropriateness of procedures)

(4) Other matters to consider

In the selection of workers subject to succession, it is necessary for the assignor company, etc.

and assignee company, etc. not to commit any unfair labor practices such as treating a labor union member in a disadvantageous manner, or any other illegal act.

[Court Precedents for Reference]

- *Case of Aoyama Kai (Judgment of the Tokyo High Court dated February 27, 2002), in which the assignee company was found to have committed unfair labor practices by refusing to employ a labor union member (see page 6)*
  Case of Azuma Jidosha Kotsu for re-examination of unfair labor practice (Order of the Central Labor Relations Commission dated September 16, 2009) (see page 6)

Further, in relation to the presence or absence of succession to labor contracts and changing of working conditions in assignment of business, it is important to note that, in court precedents, a relief has been granted according to the individual cases; for example, the handover of workers who had once been excluded from succession was allowed by finding an implied agreement on succession to their labor contracts, or by employing the doctrine of so-called piercing the corporate veil, or the doctrine of so-called contravention of public policy and morality.

[Court Precedents for Reference]

- *Ramen A Case (Judgment of the Sendai High Court dated July 25, 2008), in which the court found substantial similarities between the assignor company and assignee company, and consequently an implied agreement on the latter's succession to the labor contract concerned following its de facto comprehensive succession to the former's "eigyo (business)" (with the enactment of the Companies Act, the terminology has been reorganized, changing "eigyo" to "jigyo")(see page 7)*
- *Case of Nihon Gengo Kenkyujyo et al. (Judgment of the Tokyo District Court dated December 10, 2009), in which the succession to an employment relationship was found to have taken place in accordance with the doctrine of so-called piercing the corporate veil (see page 7)*
- *Case of Daiichi Koutsu Sangyo et al. (Sano Daiichi Koutsu) (Judgment of the Osaka High Court dated October 26, 2007), in which the court found the parent company to be responsible for the employment relationship concerned in accordance with the doctrine of piercing the corporate veil (see page 8)*
- *Case of Shoei Driving School (Ofuna Jidosha Kougyo) (Judgment of the Tokyo High Court dated May 31, 2005), in which the special provision concerning non-succession agreed to individually exclude employees was found to be void due to violation of Article 90 (Doctrine of Contravention of Public Policy and Morality) of the Civil Code, and found only the agreement on succession to be effective (see page 8)*

2. Matters Concerning Procedures, etc. to be Implemented with the Labor Union, etc.

(1) Matters to consider with regard to consultations, etc. with labor unions, etc.

(i) Prior consultations with labor unions, etc.

In assignment of business, the assignor company, etc. should endeavor to obtain, through consultations with labor unions, etc. and/or other equivalent means, the understanding and cooperation of its employees with regard to the transfer.

"Other equivalent means" include consultations, irrespective of the names thereof, which are held on occasions where it is possible to secure faithful consultations on equal footing between labor and management in order to obtain the understanding and cooperation of workers.

(ii) Subject matter of consultations

The assignor company, etc. should endeavor to obtain the understanding and cooperation of its employees with regard to such matters as the following.

- ☑ Background of and reasons for the assignment of business
- ☑ Matters concerning the prospect of the assignor company, etc. and the assignee company, etc. performance of obligations
- ☑ Scope of workers subject to succession
- ☑ Matters on succession to collective agreements

The above details are just examples. The assignor company, etc. is expected to explain other

matters to its workers subject to succession where explanations on such matters are required.

(iii) Relationship with the right to collective bargaining under the Labor Union Act

With regard to the subject matters of the collective bargaining prescribed in Article 6 of the Labor Union Act in association with assignment of business, which include the working conditions, etc. of workers, it is important to note that the assignor company, etc. cannot refuse a lawful request for collective bargaining from a labor union in relation to such assignment of business on the grounds that the above procedures have already been implemented.

In addition, please also note that if a request for collective bargaining is made pertaining to such subject matters, the assignor company, etc. is required to negotiate with the relevant labor union in good faith.

(iv) Time of commencement, etc.

Procedures to be implemented with the labor union, etc. should commence before the start of consultation with workers subject to succession, and should be arbitrarily implemented thereafter as required.

(2) Matters to consider with regard to collective bargaining

In determining which party is the employer that should deal with collective bargaining, it is important to note, "Although a precedent of the Supreme Court held, 'Generally, the employer is the person employing the worker concerned on the basis of his/her labor contract,' there are accumulated precedents holding that a business operator other than the person employing the worker concerned potentially falls within the category of employer 'if, and to the extent that, the business operator is in the position in which it is able to realistically and specifically control and decide the basic working conditions, etc. of the worker concerned to an extent equivalent, albeit partially, to the person employing the worker concerned.' "

In addition, where "it is realistically and specifically possible that the assignee company, etc. will continue employing labor union members" of the assignor company, etc. "in the near future" after the time of a request for collective bargaining, it is important to take into account of past orders that treated the assignee company, etc. as the employer under the Labor Union Act even before the assignment of business concerned.

Although the use of these methods for determining the employer ultimately depends on each case, please use the following court precedents as a reference.

[Court Precedents for Reference]

- *Case of Asahi Broadcasting Corporation (Judgment of the Third Petty Bench of the Supreme Court dated February 28, 1995), in which a business operator other than the party employing subcontract workers was found to be the employer under the Labor Union Act (see page 9)*

- *Case of Morioka Kanzansou Byouin for re-examination of unfair labor practice (Order of the Central Labor Relations Commission dated February 20, 2008), in which the assignee company was found to be the employer under the Labor Union Act even before the assignment of business concerned (see page 9)*

Section 3 Matters to Consider in Mergers

The nature of the succession to rights and obligations in a merger is so-called comprehensive succession, in which the surviving company after the merger or the new company incorporated by the merger comprehensively takes over labor contracts executed between the company disappearing due to the merger and its workers. For this reason, it is necessary to note that the working conditions stipulated in such labor contracts will be maintained as are.

Major Court Precedents and Orders

▶ Cases in which the assignee company, etc. refusal to employ labor union members was found to be unfair labor practice

◇ Case of Aoyama Kai (Judgment of the Tokyo High Court dated February 27, 2002)

[Overview of Case]

- Hospital x run by Medical Corporation X was closed, and subsequently Medical Corporation Y took over the facilities and operations of Hospital x, and opened Hospital y. In so doing, two labor union members, A1 and A2 (assistant nurse and practical nurse), who had been working for Hospital x, were not hired by Hospital y.

  The competent District Labour Relations Commission found that this refusal to employ A1 and A2 was an unfair labor practice under the Labor Union Act, and issued an order for relief that required Y to employ the two union members. Later, the Central Labour Relations Commission dismissed an application for re-examination. Consequently, Y filed an action for rescission of the order of dismissal.
- The court of first instance (the Tokyo District Court) dismissed the action, finding no illegality in the order of the Central Labour Relations Commission and thus no ground for Y's claim. Objecting to this judgment, Y appealed to the court of second instance.

[Outline of Judgment]

- The transfer concerned in this case was understood to be arranged for the business of hospital management, and Y was understood to have taken over X's business through receiving the transfer of X's properties that were to function as an organized and integral part of the business. On this basis, the transfer was analogous to assignment of business under the Commercial Code.
- In the case of assignment of business, whether the transferee succeeds to the employment relationship between the transferor and its employees may be, in principle, determined by agreement between the parties to the relationship at their discretion. However, despite the principle of the freedom of contract, some contractual details are naturally inadmissible in light of the legal order of this country.
- Looking at the employment status at Hospital y, excluding A1 and A2, all staff members of Hospital x who were willing to be employed by Hospital y, particularly the staff of the nursing department accounting for a large proportion of the personnel at Hospital x, received an interview for employment. Among such staff members, all of those who made a request for employment and agreed on their working conditions such as wages were accepted. On this basis, the actual employment that took place was not fresh hiring, but rather the equivalent to succession to the employment relationship.
- Under the contract between X and Y, it was agreed to be Y's sole prerogative to decide whether to succeed to X's position in relation to its employment contracts with its staff members and whether to employ such staff members. Notwithstanding this, it is inferred from the actual situation of Y's employment that the aforesaid agreement primarily aimed to exclude the labor union as well as A1 and A2 as the result of a dislike toward them. Accordingly, it is proper to construe the agreement based on such purpose as a means to circumvent the application of the provisions of the Labor Union Act. For this reason, the refusal to employ A1 and A2 was equal to their dismissal led by Y's longstanding dislike of labor union activities, amounting to a case of disadvantageous treatment and thus unfair labor practice.

◇ Case of Azuma Jidosha Kotsu for re-examination of unfair labor practice(Order of the Central Labor Relations Commission dated September 16, 2009)

[Overview of Case]

- After the dissolution of Company X, its union members were dismissed. Further, succeeding to part of Company X's business, Company Y employed Company X's employees with the only exception of its union members. On the basis of an allegation that Company Y's refusal to employ union members amounted to unfair labor practice, an action was brought for relief.
- Finding that Company X's dissolution and dismissal of the union members amounted to a false dissolution and thus unfair labor practice, the court of first instance granted an order for relief, which required Company Y, which had succeeded to Company X's liability, to treat the union members as if their dismissal had not occurred. Objecting to this order, Y filed an application for re-examination.

[Outline of Order]

- Both Company X and Company Y were operated substantially as one management body under the strong control and influence of President A (the representative director of both the companies) long before the dissolution of Company X. (Omitted) The fact that Company X dismissed all of its employees and that Company Y employed all of these employees with the only exception of union members can only be explained that the two companies as one management body excluded the labor union and its members by exploiting the plan to have Company Y effectively succeed to part of Company X's business and to consolidate the business operations of both the companies into Company Y in actuality, on the basis of President A's dislike of the labor union.

  Therefore, the dismissal and refusal to employ in the present case by means of the two companies' dissolution and partial business succession amounted to unfair labor practice.

▶ Case in which the court found substantial similarities between the assignor company and assignee company and consequently an implied agreement on succession to the labor contract concerned following a de facto comprehensive succession to business

◇ Ramen A Case (Judgment of the Sendai High Court dated July 25, 2008)

[Overview of Case]

- Company X (Representative Director Y), which had been running a ramen restaurant, was dissolved by a resolution of a general meeting of its members. Thereafter, Y personally ran the ramen restaurant using the same trade name, "Ramen A." Later, Employee A, who had been employed by Company X and Y, and who was about to retire, brought the case to trial, claiming the payment of overtime allowances, etc. arising on the basis of the employment contract between Employee A and Company X.
- The court of first instance (the Sendai District Court) allowed Employee A's claim, finding that Y received the assignment of the ramen restaurant business, "Ramen A," including Company X's employment relationship with its employees, despite the lack of an explicit assignment of business contract. Not willing to accept this ruling, Y appealed to the court of second instance.

[Outline of Judgment]

- The court found substantial similarities between Company X and Y, which should mean that Y, with such substantial similarities, effectively and comprehensively succeeded to Company X's business.
- Through the period from before to after the dissolution of Company X, the working conditions of its employees, including Employee A, did not changed in any form. In light of the fact that Employee A had not received a dismissal notice from Company X or any payment in lieu of dismissal notice, and that no new employment contract was formed between Employee A and Y, Company X and Y were found to have impliedly agreed that Y was to take over the labor contracts executed between Company X and its employees following the aforesaid de facto comprehensive succession to the business. Moreover, since Employee A did not raise any specific objection, Employee A was found to have given implied consented to Y's succession to Employee A's labor contract from Company X.

▶ Case in which the succession to an employment relationship was found to have taken place in accordance with the doctrine of piercing the corporate veil

◇ Case of Nihon Gengo Kenkyujyo et al. (Judgment of the Tokyo District Court dated December 10, 2009)

[Overview of Case]

- Because Company X, by which Worker A had once been employed, went bankrupt, it became impossible to confirm Worker A's status in relation to the employment contract between Company X and Worker A, and to obtain the final and binding judgment against Company X on the payment of unpaid wages, etc. Worker A claimed that Company X had abused its legal personality by effectively bankrupting itself for the purpose of escaping from its obligations such as unpaid wages to A and other creditors, and by assigning a large part of its business, etc. to Company Y1 and Company Y2 whose

management statuses were very much identical to that of Company X. Accordingly, on the basis of the doctrine of piercing the corporate veil, Worker A brought a case against Company Y1, seeking the confirmation of Worker A's status as having rights under Worker A's employment contract.

[Outline of Judgment]

- Originally, Company Y1 and Company Y2 were business divisions of Company X (Omitted). B (Company X's representative director) should be considered to have been in the position in which B was able to control Company X, Company Y1 and Company Y2 as B pleased.

  Further, (omitted) Company X (omitted) transferred all its business rights to Company Y1 and Company Y2, and consequently went bankrupt without paying a large amount of accumulated wages and obligations. Company Y1 and Company Y2 continued substantially the same businesses as those that Company X had previously engaged in. In light of these facts, it is proper to conclude that Company X had Company Y1 and Company Y2 succeed to all of its business rights, and willingly bankrupted itself for the purpose of escaping from a large amount of financial obligations such as unpaid wages, which Company X owed to Worker A and other creditors. Therefore, Company X's bankruptcy and handover of its business rights to Company Y1 and Company Y2 should be treated as an abuse of the company system, aiming to deviate from its obligations to Worker A and other creditors.

  On this basis, in accordance with the doctrine of piercing the corporate veil, Company Y1 was not allowed to assert, against Worker A, that it had a different legal personality from that of Company X, since such assertion was contrary to good faith principles. Consequently, Company Y1 was held responsible, together with Company X, to Worker A for complying with the order issued as part of the judgment in the previous action.

▶ **Case in which the court found that the parent company was responsible for employment relationship in accordance with the doctrine of piercing the corporate veil**

◇ Case of Daiichi Koutsu Sangyo et al. (Sano Daiichi Koutsu) (Judgment of the Osaka High Court dated October 26, 2007)

[Overview of Case]

- Company X, which had been running a taxi business, was dissolved through a resolution at a shareholders' meeting. Worker A and others, who were employees of Company X, brought an action claiming the following in relation to the dissolution of Company X and the dismissal of Worker A and others, who were labor union members, on the basis of the dissolution:
  (i) Asserting that the dissolution and dismissal arranged by Company Z, which was the parent company of Company X (holding all the shares of Company X and Company Y), was an unfair labor practice aiming to wipe out the labor union, and claiming, against Company Z, the confirmation of Worker A's and other's status as having rights under their labor contracts on the basis of the doctrine of piercing the corporate veil; and
  (ii) Asserting that Company Y, which had been running a taxi business in the same business area as that of Company X, succeeded to Company X's business under the instruction of Company Z, and claiming, against Company Y, the confirmation of Worker A's status and those of others as having rights under their labor contracts on the basis of the doctrine of piercing the corporate veil.
- The court of first instance (the Sakai Branch of the Osaka District Court) found that the dissolution was false since Company Z had dissolved Company X by illegally abusing the legal personality of the latter for the purpose of driving out the labor union, and since Company Y continued the same business as that of Company X. On this basis, the court found that Company Y could be held responsible under the employment contracts since it continued the same business as that of Company X and its legal personality had not become a dead letter, whereas it was not possible to hold Company Z responsible under the employment contracts. Worker A and others, as well as Company Z and Company Y, objected to this ruling, and both sides appealed to the court of second instance.

[Outline of Judgment]

- In this case, although the legal personality of Company X did not completely become a dead letter, the resolution for dissolution of Company X, a subsidiary company, was found to be adopted in the situation where it was under the substantial and actual control of Company Z, the parent company, and for the illegal and unjust purpose of eliminating the labor union. In addition, it was sufficient to hold that the dissolution of Company X was not true, but false. Accordingly, since the degree of abuse of the legal personality by Company Z, the parent company, was remarkable and clear, Worker A and others, who were union members, were entitled to hold Company Z continuously and comprehensively responsible under their employment contracts, even after the dissolution of Company X.

▶ Case in which the special provision concerning non-succession agreed to individually exclude employees was found to be void in violation of Article 90 of the Civil Code, and only the agreement on succession was found to be valid

◇ Case of Shoei Driving School (Ofuna Jidosha Kougyo) (Judgment of the Tokyo High Court dated May 31, 2005)

[Overview of Case]

- Company X executed a contract with Company Y, under which the whole business of Company X was to be transferred to Company Y. On the same day, the assignment of business was approved by Company X's shareholder meeting, and a resolution for dissolution of Company X was adopted. Article 4 of the contract provided that despite the fact that Company Y was not to succeed to the employment of Company X's employees, Company Y was to newly employ those employees of Company X who wished to be re-employed by Company Y and about whom Company X notified Company Y.

  Further, Company X and Company Y had agreed on the following matters by the time of execution of the assignment of business contract: (i) the position of Company X with regard to the labor contracts with its employees was to be transferred to Company Y; (ii) the companies were to individually exclude, from the aforesaid transfer, those of Company X's employees who objected to their working conditions such as wages being revised and lowered to a level substantially below that offered by Company X; and (iii) as the mean to achieve this objective, all the employees of Company X were to be required to submit a notice of resignation, Company Y was to re-employ those employees who submitted such notice, and Company X was to dismiss, on the grounds of company dissolution, those who did not submit such notice.

  Employee A and others who had not submitted a notice of resignation were dismissed by Company X on the ground of dissolution, and were not re-employed by Company Y. On this basis, Employee A and others brought an action, claiming the confirmation of their status of having rights under their labor contracts with Company Y.
- The court of first instance (the Yokohama District Court) found that (ii) and (iii) of the aforesaid agreement were void in violation of Article 90 of the Civil Code, and that only (i) was valid, thus finding Company Y's succession to the employment. Not willing to accept this ruling, Company Y appealed to the court of second instance.

[Outline of Judgment]

- The reason for the dismissal was stated to be the company dissolution. In fact, however, it aimed to individually eliminate employees who objected to the fact that the level of their working conditions such as wages was to be revised and consequently the level in Company Y was to be substantially below that offered by Company X. Since the dismissal lacked any objectively reasonable grounding and might not be accepted in the light of common sense, it was void as a case of abuse of the right to dismiss.
- (ii) and (iii) of the aforesaid agreement were void, in violation of Article 90 of the Civil Code. Article 4 of the assignment of business contract concerned, which coincided with the objective of the above agreement was also void, in violation of Article 90 of the Civil Code.

  Therefore, in relation to the above agreement, only the part that set down the principle that Company X's position with regard to its labor contracts with its employees (omitted) was to be transferred to Company Y was to remain valid.

- In accordance with the part that set down the principle of the above agreement, and with regard to the relationship between Company Y and Employee A and others whose dismissals were found to be void and thus had retrospectively been employees of Company X at the time of the dissolution, Company Y was treated as having retrospectively succeeded to the position of being a party to the labor contracts concerned from the day on which the assignment of business contract came into force.

▸ **Precedent concerning which party is the employer that should deal with collective bargaining**

◇ Case of Asahi Broadcasting Corporation (Judgment of the Third Petty Bench of the Supreme Court dated February 28, 1995)

[Overview of Case]

- In this case, an application was filed against a company engaging in a television broadcasting business (appellee) on the basis that this company refused to participate in a collective bargaining session called for by the labor union with regard to matters associated with the contractors' workers for the reason that the company did not consider itself as their employer, and on the basis that a recommendation for withdrawal from the labor union made to union members by the management of the company amounted to unfair labor practice. After an application for re-examination was filed by the company in response to a partial relief order issued as a result of the first examination, the Central Labor Relations Commission partially modified the same order and ordered the company to participate in a collective bargaining session with regard to working conditions. Objecting to this order, the company brought an action to the Tokyo District Court. Since this action was dismissed, the Company further appealed to the court of second instance. The Tokyo High Court delivered a judgment rescinding the judgment in the prior instance and the order of the Central Labor Relations Commission. In response to this judgment, the Central Labor Relations Commission filed a final appeal to the Supreme Court.

[Outline of Judgment]

- As independent enterprising bodies separate from the appellee, the three contractor companies concerned in this case dispatched their employees to the appellee and had them engage in operations in accordance with the service contracts between the appellee and the three contractor companies with regard to television program production operations. From the beginning, the appellee did not fall under the category of employer in relation to its relationship with the contractor companies' employees. However, the appellee generally managed the operations that the employees dispatched by the three contractor companies engaged in, and thus was in the position in which the appellee was able to control and decide the basic working conditions of the dispatched employees to an equivalent extent, albeit partially, to the three contractor companies that were their actual employers. Only to this extent, it is proper to find that the appellee fell under the category of "employer" under Article 7 of the Labor Union Act, and that it should not be able to refuse, without just cause, to participate in a collective bargaining session as long as such collective bargaining was associated with the working time allocation, form of labor provision, work environment, etc. that the appellee was able to decide by itself. Therefore, the refusal to participate in the relevant collective bargaining on the basis that the appellee was not the employer lacked just cause, amounting to unfair labor practice under item (ii) of Article 7 of the Labor Union Act.

▸ **Case of an order in which the transferee was found to be the employer**

◇ Case of Morioka Kanzansou Byouin seeking re-examination of unfair labor practice (Order of the Central Labor Relations Commission dated February 20, 2008)

[Overview of Case]

- Following the death of X, the founder of the private hospital concerned in this case (the former hospital), Y (worked for the former hospital as a part-time doctor) obtained the assets of the former hospital from the heir of the founder through an auction arranged by a court of law, took over the hospital management, and opened a new hospital under the same name as that of the former hospital. An application for relief

was made against Y on the basis that Y committed unfair labor practice when refusing to participate in a collective bargaining session which was associated with hiring issues and was requested by the labor union organized by the employees of the former hospital, on the grounds that Y was not in an employment relationship with the labor union members.

- In the first examination, the refusal to participate in the collective bargaining was found to be unfair labor practice since it lacked any legitimacy. Y filed an application for re-examination, objecting to the finding.

[Outline of Order]

- At the time of the request for collective bargaining (note: collective bargaining before the establishment of the new hospital, pertaining to the working conditions of employees of the new hospital), Y was scheduled to be the employer of employees of the new hospital under labor contracts 15 days after the request was made, and thus there was a high probability that employees of the former hospital including union members were to be continuously employed by the new hospital. On this basis, it was realistically and specifically possible that Y was going to continuously employ union members in the near future, and thus it was possible to regard Y as the employer under the labor contracts concerned at the time of the request for collective bargaining.

  Therefore, Y fell within the category of "employer" under item (ii) of Article 7 of the Labor Union Act, meaning Y was the person responsible for accepting the request concerned.

- Although the establishment of the new hospital by Y appeared as a new establishment, the nature of it could be considered as the succession to the business of the former hospital. Further, in the process of handover of the business concerned from the former hospital to the new hospital, the series of activities from deciding employment policies to specific hiring decisions, which Y took the initiative in implementing, was to select whom Y was going to continuously employ as employees of the new hospital and whom Y was to dismiss by using the establishment of the new hospital as an opportunity to do so. With the application of item (ii) of Article 7 of the Labor Union Act, it is not proper to consider the refusal to employ in this case to be equivalent to the refusal to hire new employees following the establishment of the new hospital; substantially, it should be seen as equivalent to dismissal by Y.

  A request for collective bargaining (note: collective bargaining at the stage of the establishment of the new hospital) was, in its appearance, to request Y to employ all the persons willing to be employed. However, as shown above, its substantial nature was to request a collective bargaining session to challenge Y's refusal to employ, which should be considered to be the same as dismissal in essence. Therefore, Y should be treated as the employer under the relevant labor contracts, in relation to the subject matters of the above collective bargaining requested, and fell under the category of "employee" provided for in item (ii) of Article 7 of the Labor Union Act.

○ Public Notice No. 318 of the Ministry of Health, Labour and Welfare

Guidelines Concerning Matters to Be Taken into Account by Companies, etc. in Assignment of Business and Mergers are set forth as follows, and shall apply from September 1, 2016. However, prior laws shall continue to govern in relation to assignment of business, the assignment of business contracts of which have been executed prior to the day of application of this public notice.

August 17, 2016

Yasuhisa Shiozaki, the Minister of Health, Labour and Welfare

Section 1 Purpose

These Guidelines stipulate matters that companies, etc. (meaning companies falling within item (i) of Article 2 of the Companies Act (Act No. 86 of 2005) and other business operators, which use workers; the same applies hereinafter) should take account of, when they embark on assignment of business or mergers prescribed in the provisions of Chapters II and V, Part V of the Companies Act (meaning absorption-type mergers or consolidation-type mergers; the same applies hereinafter). These Guidelines seek to assure companies, etc. of the substantiality of workers' consent required for their labor contracts to be succeeded to by another company in the case of assignment of business, and to enhance the mutual understanding between workers and their employers, thereby contributing to smooth implementation of assignment of business and mergers and worker protection.

Section 2 Matters to Consider in Assignment of Business

1. Matters Concerning Procedures, etc. to be Implemented with Workers

(1) Fundamental principle concerning the succession to labor contracts

The nature of succession to rights and obligations in assignment of business is so-called specified succession where the consent of each obligee is required. For this reason, where a company, etc. that is to transfer its business (hereinafter referred to as, " assignor company, etc.") to another company, etc. (hereinafter referred to as, "assignee company, etc.") is to have the assignee company, etc. succeed to the labor contracts executed between the assignor company, etc. and workers whose labor contracts are subject to succession (hereinafter referred to as, "worker subject to succession"), it is necessary for the assignor company, etc. to obtain consent of the workers subject to succession on an individual basis (consent under the provision of paragraph 1 of Article 625 of the Civil Code [Act No. 89 of 1896]; the same applies hereinafter).

(2) Matters to consider when obtaining the consent of workers subject to succession

It is important to note the following matters when obtaining consent of workers subject to succession with regard to the assignee company, etc. succession to their labor contracts.

a. Prior consultation, etc. with workers subject to succession

In obtaining consent of workers subject to succession, it is appropriate for the assignor company, etc. to provide these workers with sufficient explanations on such matters as the following and hold consultations with them in working toward obtaining their consent based on their true intention: the overall situation relating to the assignment of business concerned (including matters concerning the prospect of the assignor company, etc. and the assignee company, etc. performance of obligations); and the overview of the assignee company, etc. for which the workers subject to succession will work, and their working conditions (including the operations they are scheduled to engage in, their workplaces, and

other employment details).

Particularly in a case where the assignor company, etc. is to have the assignee company, etc. succeed to a labor contract executed between the assignor company, etc. and a worker subject to succession with some change in the working conditions set forth in the contract, it is necessary to obtain the consent of that worker to such change.

b. Consultation agent selection

Where individual workers select their labor union as an agent for all or part of the prior consultation in a. pursuant to the provisions of the Civil Code, the assignor company, etc. is required to consult with the labor union in good faith.

c. Relationship with the right to collective bargaining under the Labor Union Act

With regard to the subject matters of the collective bargaining prescribed in Article 6 of the Labor Union Act (Act No. 174 of 1949) in the case of assignment of business, which include the working conditions, etc. of workers, the assignor company, etc. may not refuse a lawful request for collective bargaining made by a labor union in relation to such assignment of business, on the ground that the consultation in a. has already been held.

In addition, where a request for collective bargaining is made pertaining to such subject matters, the assignor company, etc. is required to negotiate with the relevant labor union in good faith.

d. Time of consultation commencement

When holding consultations stated in a. with workers subject to succession, it is appropriate for the assignor company, etc. to leave plenty of time to ensure sufficient consultation for the purpose of obtaining the consent of such workers based on their true intentions.

e. Matters to consider with regard to the provision of information to workers

If the assignor company, etc. has obtained consent of workers subject to succession by intentionally providing false information to such workers, the workers may rescind their manifestation of intention pursuant to the provision of paragraph 1 of Article 96 of the Civil Code.

(3) Matters consider in the case of dismissal

It is important to bear in mind that if a dismissal lacks objectively reasonable grounds (e.g. where a worker subject to succession is dismissed only on the basis that the worker does not consent to the assignee company, etc. succession to his/her labor contract) and is not considered to be appropriate in general societal terms, it is treated as an abuse of rights and is invalid pursuant to the provision of Article 16 of the Labor Contracts Act (Act No. 128 of 2007).

Further, the legal principle of precedent concerning dismissal for the reason of reorganization applies to cases of dismissal based on assignment of business. For this reason, it is important to note that if a dismissal lacks objectively reasonable grounds (e.g. where the dismissal of a worker subject to succession is only based on a transfer of the business the worker has engaged in) and is not considered to be appropriate in general societal terms, it is treated as an abuse of rights and is invalid pursuant to the provision of Article 16 of the Labor Contracts Act.

In this type of case, it is important to note that the assignor company, etc. is required to take measures sufficient to maintain the employment relationship with the relevant worker subject to succession, such as reassigning the worker to a business division other than the division

subject to the assignment of business.

(4) Other matters to consider

In the selection of workers subject to succession, the assignor company, etc. or assignee company, etc. must not commit any unfair labor practices such as treating a member of the labor union in a disadvantageous manner, or any other illegal act.

Further, it should be noted that in court precedents concerning the presence or absence of succession to labor contracts and the changing of working conditions in assignment of business, relief has been granted according to the individual cases; for example, the handover of workers who had once been excluded from succession was allowed by finding an implied agreement on succession to their labor contracts, or by employing the doctrine of so-called piercing the corporate veil, or the doctrine of so-called contravention of public policy and morality.

2. Matters Concerning Procedures, etc. to be Implemented with the Labor Union, etc.

The assignor company, etc. should bear in mind the following matters in endeavoring to obtain the understanding and cooperation of its employees.

(1) Matters to consider with regard to consultations, etc. with the labor union, etc.

a. Prior consultation with the labor unions, etc.

In assignment of business, the assignor company, etc. should endeavor to obtain the understanding and cooperation of its employees, through consultations with the labor union organized by the majority of workers where such union exists, or with the person representing the majority of workers where such union does not exist, and/or by using other equivalent means.

"Other equivalent means" should include consultations, irrespective of the names thereof, which are held on occasions where it is possible to secure faithful consultation on equal footing between labor and management in order to obtain the understanding and cooperation of workers.

b. Subject matters of consultation

The assignor company, etc. should endeavor to obtain the understanding and cooperation of its employees with regard to such matters as the following: the background of and reasons for the assignment of business concerned; matters concerning the prospect of the assignor company, etc. and the assignee company, etc. performance of obligations; the scope of workers subject to succession; and matters on the assignee company, etc. succession to any collective agreement.

c. Relationship with the right to collective bargaining under the Labor Union Act

With regard to the subject matters of the collective bargaining prescribed in Article 6 of the Labor Union Act in the case of assignment of business, which include the working conditions, etc. of workers, the assignor company, etc. may not refuse a lawful request for collective bargaining from a labor union in relation to such assignment of business on the ground that the consultation, etc. in a. has already been held.

In addition, where a request for collective bargaining is made pertaining to such subject matters, the assignor company, etc. is required to negotiate with the relevant labor union in good faith.

d. Time of commencement, etc.

The consultation, etc. in a. should commence before the start of consultations with

workers subject to succession as prescribed in 1(2)a. at the latest, and should be arbitrarily implemented thereafter as required.

(2) Matters to consider with regard to collective bargaining

Labor unions have the right to hold collective bargaining with the employer. In determining which party is the employer that should deal with such collective bargaining, it is important to note that although precedents of the Supreme Court hold, "Generally, the employer is the person employing the worker concerned on the basis of his/her employment contract," there are accumulated precedents holding that a business operator other than the person employing the worker concerned potentially falls within the category of employer "if, and to the extent that, the business operator is in the position in which it is able to realistically and specifically control and decide the basic working conditions, etc. of the worker concerned to an extent equivalent, albeit partially, to the person employing the worker concerned."

In addition, where "it is realistically and specifically possible that the assignee company, etc. will continue employing labor union members" of the assignor company, etc. "in the near future" after the time of a request for collective bargaining, it is important to take account of past orders that treated the assignee company, etc. as the employer under the Labor Union Act even before the assignment of business concerned.

Section 3 Matters to Consider in Mergers

The nature of the succession to rights and obligations in a merger is so-called comprehensive succession, in which the surviving company after the merger or the new company incorporated by the merger comprehensively takes over labor contracts executed between the company disappearing due to the merger and its workers. For this reason, the working conditions stipulated in such labor contracts are required to be maintained as are.