

# PROMOTION OF THE EMPLOYMENT OF PERSONS WITH DISABILITIES IN JAPAN, THE UNITED STATES, AND CHINA: CARROT, STICK, OR BOTH?

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## I. INTRODUCTION

Persons with disabilities constitute a significant population in the world.<sup>1</sup> Over the years, governments in different parts of the world have attempted to protect this disadvantaged group by providing various kinds of social and medical services. The efficacy of these services at meeting their underlying objectives and ameliorating the lot of persons with disabilities has been quite controversial. However, the employment rate of persons with disabilities who are competent and willing to work is still considerably lower than that of persons without disabilities.<sup>2</sup>

In 2006, the United Nations adopted the Convention on the Rights of Persons with Disabilities (U.N. Convention).<sup>3</sup> This Convention, the first comprehensive multilateral treaty on disabilities, marks a paradigm shift in attitudes and approaches regarding disabilities. Rather than viewing them as “objects” requiring charity, medical treatment, and social protection, the Convention represents a move toward treating persons with disabilities as

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1. About ten percent of the world’s population, that is, 650 million persons, live with some kind of disability. U.N. Secretariat for the Convention on the Rights of Persons With Disabilities, *Some Facts about Persons with Disabilities* (2006) [hereinafter *Some Facts*], available at <http://www.un.org/disabilities/convention/pdfs/factsheet.pdf>.

2. “A 2004 United States survey found that only 35 per cent of working-age people with disabilities were in fact working, compared to 78 per cent of those without disabilities.” *Id.*

3. United Nations Convention on the Rights of Persons with Disabilities, A/RES/61/106 (Dec. 13, 2006) [hereinafter U.N. Convention], available at <http://www.un.org/disabilities/convention/conventionfull.shtml>. Prior to the passage of the U.N. Convention, the International Labor Organization had introduced various instruments to deal with disability-related vocational training and employment issues. For example, in 1983, at the beginning of the United Nations Decade of Disabled Persons, the International Labor Organization adopted Convention No. 159 on Vocational Rehabilitation and Employment (Disabled Persons) to urge countries to formulate, implement, and review national policies on vocational rehabilitation and employment of persons with disabilities based on the principle of equal opportunity. Int’l Labor Org., Vocational Rehabilitation and Employment (Disabled Persons) Convention, No. 159 (June 1, 1983).

“subjects” with human rights who are capable of exercising their rights and being active members of society.<sup>4</sup> Under this new paradigm, countries are to eradicate existing discriminatory laws and practices against persons with disabilities, guarantee equal opportunities and benefits to persons with disabilities, and eliminate social and environmental barriers that prevent persons with disabilities from full participation in society. As of September 2012, there were 155 signatories to, and 127 ratifications of, the U.N. Convention.<sup>5</sup>

The U.N. Convention requires signatories to prohibit discrimination against persons with disabilities in all employment-related matters, provide persons with disabilities effective access to vocational training and rehabilitation, promote the employment of persons with disabilities in both the public and private sectors, ensure that “reasonable accommodation” is provided in the workplace, and encourage persons with disabilities to engage in self-employment and entrepreneurial endeavors.<sup>6</sup> With the passage of the U.N. Convention, it is opportune to examine what governments in major economies have done to promote the employment of persons with disabilities.<sup>7</sup> Thus, this article examines the regulatory frameworks of China, Japan, and the United States, all of which are signatories to the U.N. Convention.<sup>8</sup> These countries are chosen because U.S. anti-discrimination laws are the quintessence of antidiscrimination legislation; Japan, on the other hand, has relied primarily on a quota system; and

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4. *Id.*

5. *Convention and Optional Protocol Signatures and Ratifications*, U.N. ENABLE, <http://www.un.org/disabilities/countries.asp?id=166> (last visited Jan. 21, 2013).

6. U.N. Convention, *supra* note 3, art. 27. “Persons with disabilities include those who have long-term physical, mental, intellectual, or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.” *Id.* art. 1.

Discrimination on the basis of disability means any distinction, exclusion, or restriction on the basis of disability which has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise, on an equal basis with others, of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field, including the denial of reasonable accommodation.

*Id.* art. 2. “Reasonable accommodation means necessary and appropriate modifications and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure that persons with disabilities can enjoy or exercise on an equal basis all human rights and fundamental freedoms.” *Id.* art. 2. Since the U.N. Convention consists of fundamental principles for signatories to implement through their respective regulatory systems, this article will not explore whether or not the statutory provisions of individual signatories closely follow these definitions.

7. According to the United Nations, comparative studies reveal that only forty-five countries have antidiscrimination and other disability-specific laws. *See Some Facts*, *supra* note 1.

8. China signed the U.N. Convention on March 30, 2007, and ratified the same on August 1, 2008. Japan signed the U.N. Convention on September 28, 2007. The United States signed the U.N. Convention on July 30, 2009. *Convention and Optional Protocol Signatures and Ratifications*, *supra* note 5.

China, as the most populous country in the world, has employed a hybrid model that uses both a quota system and some antidiscrimination legislation. In analyzing these regulatory schemes, both theory and practice are taken into account, and reference is made to the evolving policies and implementation measures adopted by each country.

Although this article is a comparative analysis of three regulatory systems, it is noteworthy that the definitions of “disabilities” vary among these countries, the statistics on disabilities in each country may not be compiled in the same manner,<sup>9</sup> and national circumstances have influenced the developments of each regulatory scheme.<sup>10</sup> Hence, the purpose of this article is not to evaluate which of these regulatory systems is more effective and efficient, but to ascertain the respective employment situations of persons with disabilities under these regulatory schemes. In doing so, this article unfolds similarities and differences among these regulatory systems and highlights common themes and challenges. It is hoped that this comparative analysis will reveal insights and provide lessons for policymakers, legislators, and members of the legal profession.

Accordingly, the following discussion will first provide a succinct account of the two major approaches to promoting the employment of persons with disabilities. Thereafter, three separate sections will be devoted to each country’s regulatory schemes, outlining the pertinent legal provisions and the consequential employment situations of persons with disabilities. Subsequent to an overview of these three regulatory systems, the next section will perform a comparative analysis, focusing on substantive law, procedural law, strengths, and weaknesses. At the end, this comparative study will attempt to draw sensible conclusions.

## II. THE TWO MAJOR APPROACHES

For decades, governments in various countries, whether having a market, command, or transition economy, have formulated policies and concrete measures to protect or empower persons with disabilities. These intervention policies and measures are derived from three disability models. Under the first model, disability is handled as a moral matter; thus, persons with disabilities, as objects of charity, receive basic services in segregated settings.<sup>11</sup> Under the second model, disability is treated as a medical condition; therefore, persons with disabilities are provided with health care and rehabilitation services to enable them to live a

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9. In this article, statistics are used only to illustrate the respective employment situations of persons with disabilities in these countries and not for comparisons across countries.

10. National circumstances here refer to economic conditions, cultural elements, social infrastructure, etc.

11. Barbara Murray, *Decent Work for Persons with Disabilities—International Perspectives*, in INTERNATIONAL LABOR ORGANIZATION, *EMPLOYMENT OF PERSONS WITH DISABILITIES - THE IMPACT OF LEGISLATION: ASIA AND THE PACIFIC* 5, 9 (2003).

“normal” life.<sup>12</sup> Under the third model, disability is viewed as a social construct, so it is imperative to remove social barriers and to integrate persons with disabilities into all aspects and sectors of society.<sup>13</sup>

The preceding disability models have generated two major approaches to promote the employment of persons with disabilities—the quota system and antidiscrimination legislation—although variations exist within each approach. Under the quota system,<sup>14</sup> enterprises of a certain size and entities in the public sector have a legal obligation to employ a specified percentage of persons with disabilities in their labor force. If an enterprise or a public entity does not fulfill the legally mandated quota, it will be required to pay a specified amount (levy) to a fund, which is earmarked for promoting the employment of persons with disabilities.<sup>15</sup> To a large extent, the quota system is derived from the medical model because there is the assumption that persons with disabilities have lower productive capacity than persons without disabilities, and enforcement mechanisms under the quota system often convey the impression that persons with disabilities cannot be employed on merit.<sup>16</sup> Examples of countries adopting the quota system include Germany,<sup>17</sup> Thailand,<sup>18</sup> and Japan.<sup>19</sup>

Conversely, antidiscrimination legislation makes it illegal for employers to discriminate against current and prospective employees on the basis of disability during various aspects of employment, including recruitment, training, promotion, dismissal, and so forth. In most instances, antidiscrimination legislation requires an employer to make “reasonable accommodation” or “reasonable adjustment” for workers with disabilities, unless the employer will experience “disproportionate” or “undue” hardship. The antidiscrimination approach is associated with the social model because it treats disability as a human-rights issue, tackles structural inequality, and emphasizes mainstreaming.<sup>20</sup> Australia,<sup>21</sup> Canada,<sup>22</sup> and the United States<sup>23</sup> are examples of countries that

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12. *Id.* at 10.

13. *Id.*

14. In this article, the “quota system” refers to both the “quota system” and the “quota and levy system” because, in most regulatory systems, the failure to fulfill the legally mandated quota will result in the payment of levies.

15. In some countries, to make the quota system effective in landing jobs for persons with disabilities, employers are allowed to undertake other tasks instead of paying levies. For instance, in France, “employers may enter into an agreement with the State concerning the recruitment, training or integration of workers with disabilities, or adaptation to technological change, in partial fulfilment of their quota requirement.” See Murray, *supra* note 11, at 8.

16. *Id.* at 10.

17. See *Schwerbehindertengesetz* [Severely Disabled Persons Act], Aug. 26, 1986, *Bundesgesetzblatt* [BGBl I] at 45, 1421.

18. See *The Rehabilitation of Persons with Disabilities Act* B.E. 2534 (1991).

19. See discussion *infra* Part III, the Japanese System.

20. Murray, *supra* note 11, at 10.

21. See *Disability Discrimination Act* 1992 (Cth) (Austl.).

have enacted legislation to promote equal employment opportunities for persons with disabilities.

Both the quota system and the antidiscrimination approach have co-existed for years. European countries introduced the quota system after the First World War to solve the problem of unemployed veterans with disabilities.<sup>24</sup> After the Second World War, European countries not only relied on the quota system to provide employment for disabled veterans, but also extended the coverage to civilian with disabilities.<sup>25</sup> Since then, the quota system has been the predominant means to promote the employment of persons with disabilities in many parts of the world. Additionally, in 1990, the United States enacted the Americans with Disabilities Act (ADA), a statute designed to protect persons with disabilities from discrimination in various aspects of life.<sup>26</sup> The ADA has inspired the enactment of antidiscrimination provisions in other jurisdictions worldwide. For example, the United Kingdom has abandoned the quota system and passed antidiscrimination statutes,<sup>27</sup> Germany has amended its Constitution and enacted the General Equal Treatment Act to outlaw discrimination against persons with disabilities without completely abandoning the quota system,<sup>28</sup> and the European Union has adopted a directive to forbid employment discrimination on the basis of disabilities.<sup>29</sup> In any case, the quota system and the antidiscrimination approach are not necessarily mutually exclusive.

To exemplify how these two approaches have operated in practice, the subsequent three sections will outline the regulatory frameworks of China, Japan, and the United States and highlight the employment situations of persons with

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22. See Employment Equity Act S.C. 1995, c. 44 (Can.). The enactment of a Canadians with Disabilities Act is also in progress.

23. See discussion *infra* Part IV, the U.S. System.

24. Lisa Waddington, *Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination*, 18 COMP. LAB. L.J. 62, 62–63 (1996).

25. *Id.* at 62, 64.

26. Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101–12213 (West, Westlaw 2012). The ADA mandates equal opportunity for persons with disabilities and prohibits discrimination in employment, public service offered by public entities, public accommodations and services operated by private entities, and telecommunications. *Id.*

27. In 1944, the United Kingdom enacted the Disabled Persons (Employment) Act, adopting the quota system to promote the employment of persons with disabilities. In 1995, the United Kingdom abolished the quota system by enacting the Disability Discrimination Act. In 2010, the United Kingdom passed the Equal Act to replace the Disability Discrimination Act, except in Northern Ireland, where the Disability Discrimination Act still applies.

28. See Grundgesetz [Basic Code] v.27.10.1994 (BGB1, I S. 3146), art. 3.(3) (Ger.); Allgemeines Gleichbehandlungsgesetz [General Equal Treatment Act of 2006] v.14.08.2006 (BGB1 I S. 1897, 1910) (Ger.).

29. In 2000, the European Council adopted the Equal Treatment in Employment and Occupation Directive (Directive 2000/78/EC), prohibiting direct and indirect discrimination based on religion or belief, age, disability, or sexual orientation. 2000 O.J. (L P.0016-0022).

physical,<sup>30</sup> intellectual,<sup>31</sup> or mental disabilities<sup>32</sup> in these countries.<sup>33</sup> Given that the quota system was introduced before the emergence of antidiscrimination legislation and that the hybrid model is a relatively recent phenomenon, the discussion below will begin with Japan, followed by the United States and China. Concerning the regulatory framework, each section will concentrate on the legislative background, the definition of disability, the obligations of and incentives to employers, the consequences of noncompliance, the enforcement mechanisms, and the support programs or services. Regarding the current employment situations of persons with disabilities in these countries, because persons with disabilities living in rural areas face different types of issues and obstacles in seeking employment or independent living,<sup>34</sup> the focus here is on the employment of persons with disabilities in urban areas, particularly those who work or want to work in the private sector.

### III. THE JAPANESE SYSTEM

Although the Japanese Constitution provides for equality under the law<sup>35</sup> and the Basic Law for Persons with Disabilities prohibits discrimination against persons with disabilities in general,<sup>36</sup> there are no explicit statutory provisions prohibiting employers from discriminating against persons with disabilities. However, since all persons have the right and obligation to work,<sup>37</sup> persons with disabilities are entitled to gainful employment. In Japan, persons with disabilities may be able to secure jobs in authorized sheltered workshops and welfare facilities,<sup>38</sup> small workshops established by voluntary organizations, or

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30. "Physical disabilities" here refers to impairments of the body, such as blindness, deafness, dumbness, loss of a limb, and inability to walk resulting from neurological diseases.

31. "Intellectual disabilities" here refers to impairments of the intellect, such as retardation in learning, understanding, or reasoning.

32. "Mental disabilities" here refers to problems associated with psychological or mental illness.

33. Since most persons with disabilities have physical, intellectual, or mental disabilities as defined here, this study does not deal with employment situations of persons with HIV or developmental disabilities.

34. For example, persons with disabilities living in rural areas are more likely to engage in agricultural work, and vocational training conducted by dispatched instructors will eliminate the need to travel to training centers at distant places.

35. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION] (1946), art. 14 (Japan) (also stating that there shall be no discrimination in political, economic, and social relations because of race, creed, sex, social status or family origin).

36. *Shōgaisha Kihon Hō* [Basic Law for Persons with Disabilities], Law No. 84 of 1970, art. 3(3) (last amended 2004) (Japan).

37. CONSTITUTION (Japan), *supra* note 35, art. 27.

38. Sheltered workshops, or welfare facilities, provide work opportunities to persons with disabilities who have difficulty in landing jobs in the labor market or give preparatory

private enterprises or public entities based on the Law on the Promotion of Employment, Etc. of Persons with Disabilities (Persons with Disabilities Employment Promotion Law).<sup>39</sup> Although the overall regulatory framework for promoting the employment of persons with disabilities is comprised of legal provisions from both labor and disability laws,<sup>40</sup> the centerpiece is the Persons with Disabilities Employment Promotion Law. For that reason, the following discussion will focus on the Persons with Disabilities Employment Promotion Law.

In 1960, Japan promulgated the Law on the Promotion of Employment of Persons with Physical Disabilities (PD Employment Promotion Law), requiring public entities to employ a certain percentage of persons with physical disabilities in their workforce and urging private enterprises to employ persons with physical disabilities.<sup>41</sup> Despite these actions, observers noted a negative correlation between the size of an enterprise and its employment rates of persons with physical disabilities and significant discrepancies in the employment rate of persons with physical disabilities from industry to industry.<sup>42</sup> This sense of injustice resulting from unequal financial burden, coupled with the Oil Crisis of 1973, made it necessary to amend the law.<sup>43</sup>

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training to persons with disabilities who try to seek regular employment. Sheltered workshops are established under the Law on the Welfare of Persons with Physical Disabilities [Shintai Shōgaisha Fukushi Hō], Law No. 283 of 1949, and the Law on the Welfare for Persons with Intellectual Disabilities [Chiteki Shōgaisha Fukushi Hō], Law No. 37 of 1960, while welfare facilities (factories) are set up in accordance with the Law on the Mental Health and Welfare of Persons with Mental Disabilities [Seishin Hoken Hō], Law No. 123 of 1950. *Shintai Shōgaisha Fukushi Hō* [Law on the Welfare of Persons with Physical Disabilities], Law No. 283 of 1949; *Chiteki Shōgaisha Fukushi Hō* [Law on the Welfare for Persons with Intellectual Disabilities], Law No. 37 of 1960; *Seishin Hoken Hō* [Law on the Mental Health and Welfare of Persons with Mental Disabilities], Law No. 123 of 1960.

39. *Shōgaisha no Koyō no Sokushin To ni Kansuru Hōritsu* [Law on the Promotion of Employment, Etc. of Persons with Disabilities] Law No. 123 of 1960 (last amended 2012), available at <http://law.e-gov.go.jp/htmldata/S35/S35HO123.html> [hereinafter Persons with Disabilities Employment Promotion Law].

40. For example, the Basic Law for Persons with Disabilities, *supra* note 36, arts. 15–16, provides for vocational counseling and employment promotion for persons with disabilities; and the Law on the Promotion of Human Resources Development [*Shokugyo Noryoku Kaihatsu Sokushin Hō*], Law No. 64 of 1969 (last amended 2006), art. 15-6(5), provides for the establishment of Vocational Ability Development Centers for Persons with Disabilities.

41. *Shintai Shōgaisha Koyō Sokushin Hō* [Law on the Promotion of Employment of Persons with Physical Disabilities], Law No. 123 of 1960.

42. Tamako Hasegawa, *Japan's Employment Measures for Persons with Disabilities: Centered on Quota System of "Act on Employment Promotion of Persons with Disabilities,"* JAPAN LAB. REV., Vol. 7, No. 2, Spring 2010, at 26, 29, available at [http://www.jil.go.jp/english/JLR/documents/2010/JLR26\\_hasegawa.pdf](http://www.jil.go.jp/english/JLR/documents/2010/JLR26_hasegawa.pdf).

43. *Id.* The Oil Crisis of 1973 had a negative impact on the competitiveness of Japanese enterprises and the overall Japanese economy.

As a result, the PD Employment Promotion Law was amended in 1976.<sup>44</sup> Among various revisions, the amended law changed the obligation of private enterprises to employ persons with physical disabilities from asking them to “endeavor to” employ persons with disabilities to requiring them to fulfill a legally mandated quota or pay levies; made adjustment allowances available to employers who hired workers with physical disabilities above the quota; allowed the counting of one person with a severe physical disability as two persons with physical disabilities; and commenced the disclosure of the names of enterprises that have failed to fulfill the legally mandated quota.<sup>45</sup> Thus, a regulatory system composed of an employment quota, levies, and grants was formally established.

In 1987, Japan revised its regulatory framework again,<sup>46</sup> partly due to the efforts of the United Nations and the International Labor Organization to protect persons with disabilities and to promote the employment of persons with disabilities during the early 1980s.<sup>47</sup> This revision extended the coverage of the law to all persons with disabilities, renamed the PD Employment Promotion Law as the Persons with Disabilities Employment Promotion Law, and introduced a subsidy for employers that retained employees who became disabled.<sup>48</sup> Although the obligation to employ persons with intellectual disabilities was postponed in light of the difficulty in assessing vocational capability, the limited number of fields of occupation, and other factors, persons with intellectual disabilities were included in the calculation of the actual employment rate.<sup>49</sup> Ten years later, the Persons with Disabilities Employment Promotion Law was revised to extend the mandatory employment system to persons with intellectual disabilities.<sup>50</sup>

In 2005, the Persons with Disabilities Employment Promotion Law was amended again.<sup>51</sup> As a result of this revision, employers might count persons with mental disabilities towards fulfilling their quota responsibility, even though they were not required specifically to employ persons with mental disabilities.<sup>52</sup> Moreover, enterprises were encouraged to place orders to support persons with

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44. *Shintai Shōgaisha Koyō Sokushin Hō* [Law on the Promotion of Employment of Persons with Physical Disabilities (Supp.)], Law No. 36 of 1976.

45. Hasegawa, *supra* note 42, at 30.

46. *Shintai Shōgaisha Koyō Sokushin Hō* [Law on the Promotion of Employment of Persons with Physical Disabilities (Supp.)], Law No. 41 of 1987.

47. The United Nations made a resolution in 1981 to introduce the International Year of Disabled Persons, while the International Labor Organization adopted Convention No. 159 on Vocational Rehabilitation and Employment (Disabled Persons) in 1983. Hasegawa, *supra* note 42, at 30–31.

48. *Id.* at 31.

49. *Id.* at 31 n.7.

50. *Shintai Shōgaisha Koyō Sokushin Hō* [Law on the Promotion of Employment of Persons with Physical Disabilities (Supp.)], Law No. 32 of 1997.

51. *Shintai Shōgaisha Koyō Sokushin Hō* [Law on the Promotion of Employment of Persons with Physical Disabilities (Supp.)], Law No. 81 of 2005.

52. Hasegawa, *supra* note 42, at 32.



disabilities who worked at home.<sup>53</sup> Furthermore, part-time workers with mental disabilities who worked at least twenty hours but fewer than thirty hours per week were to be counted as one half of an employee in calculating the actual employment rate of persons with disabilities.<sup>54</sup> Hence, the government began to consider the employment needs of persons with mental disabilities.

To further promote the employment of persons with disabilities, Japan revised the Persons with Disabilities Employment Promotion Law again in 2008.<sup>55</sup> The major revisions included several provisions. Starting on July 1, 2010, small- and medium-sized enterprises with 201 or more regular workers, but not exceeding 300 regular workers, must also pay levies if they fail to fulfill the legally mandated quota.<sup>56</sup> On July 1, 2015, small- and medium-sized enterprises with 101 or more regular workers, but not exceeding 200 regular workers, will also be required to pay levies.<sup>57</sup> In paying the levy or applying for an adjustment allowance, the employer may count a part-time worker with a disability who works twenty or more hours, but fewer than thirty hours per week, as half a person in calculating the employment rate of workers with disabilities and in counting the total number of employees.<sup>58</sup>

Based on the preceding legislative background, the Japanese regulatory framework for promoting the employment of persons with disabilities has improved over time. Under the current framework, national and local authorities must take measures to enable persons with disabilities to engage in appropriate occupations based on the type and severity of their disabilities and respective desires, aptitudes, and vocational experiences, as well as making employment referrals.<sup>59</sup> In Japan, persons with disabilities are those whose vocational life is subject to substantial limitations, or who obviously have difficulty in having a vocational life, over a long period of time, due to a physical, intellectual, or mental disability.<sup>60</sup> The definition of disability is quite general; however,

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53. *Id.*

54. *Id.*

55. *Shintai Shōgaisha Koyō Sokushin Hō* [Law on the Promotion of Employment of Persons with Physical Disabilities (Supp.)], Law No. 96 of 2008.

56. Hasegawa, *supra* note 42, at 34 n.9.

57. *Id.*

58. *See id.* at 34–35.

59. Basic Law for Persons with Disabilities, *supra* note 36, § 15(1).

60. Persons with Disabilities Employment Promotion Law, *supra* note 39, art. 2. Persons with physical disabilities are those who have physical disabilities as listed in the Appendix of the Persons with Disabilities Employment Promotion Law, and Tables 1 and 3 of the Implementation Regulations for the Law on the Promotion of Employment, Etc. of Persons with Disabilities. *Shōgaisha no Koyō no Sokushin To ni Kansuru Hōritsu Shikō Kisoku* [Implementation Regulations for the Persons with Disabilities Employment Promotion Law], Ministry of Labor Decree 38 of 1976 (last amended 2012) available at <http://law.e-gov.go.jp/htmldata/S51/S51F04101000038.html>. Persons with intellectual disabilities or persons with mental disabilities are those who have intellectual or mental disabilities and meet the requirements of the Ministry of Health, Labor and Welfare. Persons with Disabilities Employment Promotion Law, *supra* note 39, art. 2.

persons with disabilities are considered disabled only after they have obtained from the government or relevant institutions disability booklets (cards) or certificates of disabilities.

Under the Persons with Disabilities Employment Promotion Law, Japanese employers, both public entities and private enterprises, have a legal obligation to employ a specific percentage of persons with disabilities in their workforce.<sup>61</sup> The legally prescribed quota is calculated by using a formula, taking into account the rates of full-time employment and unemployment in the market place.<sup>62</sup> Since constant fluctuations in the employment quota cause instability, the quota is reassessed every five years.<sup>63</sup> Currently, where an enterprise has fifty-six or more regular employees, the legally mandated quota is 1.8% of its total workforce.<sup>64</sup> In the case of special legal persons or independent administrative legal persons (such as public universities and research institutes) employing at least forty-eight regular workers, the legally mandated quota is 2.1%.<sup>65</sup> The legally public entity mandated quota for government organs at the

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61. Persons with Disabilities Employment Promotion Law, *supra* note 39, arts. 38(1), 43(1).

62. INT'L LABOR ORG., *Legislation, Policy and Programs concerning the Employment of Persons with Disabilities in Selected Countries of Asia and the Pacific*, in EMPLOYMENT OF PERSONS WITH DISABILITIES – THE IMPACT OF LEGISLATION: ASIA AND THE PACIFIC Annex 2, 23 (2003).

63. Persons with Disabilities Employment Promotion Law, *supra* note 39, arts. 43(2), 54(3).

64. Press release, Ministry of Health, Labor and Welfare, *Kibishii Koyō Jyosei no Naka, Minkan Kigyo no Shōgaisha Koyō wa Shiten* [The Promotion, Etc. of Employment of Persons with Disabilities in Private Enterprises is Improving Despite Difficult Employment Situation] 9 (Nov. 20, 2009), *available at* <http://www.mhlw.go.jp/stf/houdou/2r98520000002i9x-img/2r98520000002ijw.pdf>, <http://www.mhlw.go.jp/stf/houdou/2r98520000002i9x-img/2r98520000002ilh.pdf>, and <http://www.mhlw.go.jp/stf/houdou/2r98520000002i9x-img/2r98520000002ilp.pdf>. Since the legally prescribed quota is 1.8% and the inverse of 1.8% is 55.56, the Persons with Disabilities Employment Promotion Law applies to enterprises employing fifty-six or more regular workers. Starting from April 1, 2013, the legally mandated quota will be 2.0%. *Shōgaisha no Koyō no Sokushin To ni Kansuru Hōritsu Shikōrei* [Decree for the Implementation of the Persons with Disabilities Employment Promotion Law], Ordinance No. 292 of 1960, art. 9 (last amended 2012), *available at* <http://law.e-gov.go.jp/htmldata/S35/S35SE292.html>. Since the inverse of 2% is 50, the Persons with Disabilities Employment Promotion Law will apply to enterprises employing fifty or more regular workers. Simply stated, regular workers refer to those who are employed without a fixed term, or those who are employed for a fixed term but have been continuously employed or expect to be continuously employed for at least one year.

65. Ministry of Health, Labor and Welfare, *supra* note 64, at 9; Decree for the Implementation of the Persons with Disabilities Employment Promotion Law, *supra* note 64, art. 10(2). Since the legally prescribed quota is 2.1% and the inverse of 2.1% is 47.61, the Persons with Disabilities Employment Promotion Law applies to special legal-persons or independent administrative legal-persons employing forty-eight or more regular workers. Starting from April 1, 2013, the legally mandated quota will be 2.3%. *Shōgaisha no Koyō*

national, prefectural, municipal, township, and village level having at least forty-eight employees is 2.1%, except for prefectural educational committees employing at least fifty regular workers (the quota being 2.0%).<sup>66</sup>

As previously mentioned, a part-time worker with a disability who works twenty or more hours, but fewer than thirty hours, per week is to be counted as half a person in calculating the employment rate of workers with disabilities.<sup>67</sup> Given the difficulty of persons with severe physical and intellectual disabilities in landing jobs, a person with a severe physical or intellectual disability is to be counted as two persons in calculating the employment rate of disabled employees of an enterprise.<sup>68</sup> Similarly, a part-time worker having a severe physical or intellectual disability who works twenty hours or more, but fewer than thirty hours, per week is to be counted as one person in calculating the employment rate of workers with disabilities.<sup>69</sup>

When an enterprise sets up a special subsidiary that meets certain requirements to promote and stabilize the employment of persons with disabilities, the workers with disabilities employed by that special subsidiary can be counted as those employed by the parent enterprise in calculating the employment rate.<sup>70</sup>

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*no Sokushin To ni Kansuru Hōritsu Shikōrei* [Decree for the Implementation of the Persons with Disabilities Employment Promotion Law (Supp.)], Ordinance No. 292 of 1960, (last amended 2012), available at <http://law.e-gov.go.jp/htmldata/miseko/S35SE292/H24SE165.html> [hereinafter Supplement]. Because the inverse of 2.3% is 43.5, the Persons with Disabilities Employment Promotion Law will apply to special legal-persons or independent administrative legal-persons employing 43.5 or more regular workers.

66. Ministry of Health, Labor and Welfare, *supra* note 64, at 9; Decree for the Implementation of the Persons with Disabilities Employment Promotion Law, *supra* note 64, art. 2. Since the legally prescribed quota is 2.1% and the inverse of 2.1% is 47.61, the Persons with Disabilities Employment Promotion Law applies to public entities employing forty-eight or more regular workers. Starting from April 1, 2013, the legally mandated quota will be 2.3%). Supplement, *supra* note 65. Because the inverse of 2.3% is 43.5, the Persons with Disabilities Employment Promotion Law will apply to public entities employing 43.5 or more regular workers. In the case of prefectural educational committees, the legally prescribed quota will be 2.2%. *Id.* The Persons with Disabilities Employment Promotion Law will apply to prefectural educational committees employing 45.5 regular or more workers.

67. See *supra* text accompanying notes 54, 58.

68. Ministry of Health, Labor and Welfare, *supra* note 64, at 9; Persons with Disabilities Employment Promotion Law, *supra* note 39, arts. 38(2), 43(3); Decree for the Implementation of the Persons with Disabilities Employment Promotion Law, *supra* note 64, art. 5. In calculating the legally required number of workers with disabilities, any digit after the decimal point is to be rounded off. Persons with Disabilities Employment Promotion Law, *supra* note 39, arts. 38(1), 43(1).

69. Ministry of Health, Labor and Welfare, *supra* note 64, at 9.

70. The requirements of the special subsidiary include: the subsidiary has a close personnel relationship with the parent enterprise (that is, executives dispatched from the parent enterprise); the subsidiary has five or more workers with physical or intellectual disabilities who constitute 20% or more of its total workforce; the number of workers with

Similarly, where an enterprise has control over its affiliated enterprises that support special subsidiaries to employ persons with disabilities, the disability employment rate should be calculated based on the number of disabled workers employed by the entire group.<sup>71</sup> Likewise, where a group of related subsidiaries seeks to promote the employment of persons with disabilities, the disability employment rate should be calculated based on the number of disabled workers employed by the entire group, even though the parent enterprise does not have a special subsidiary.<sup>72</sup>

If an enterprise having 301 or more regular workers fails to fulfill the legally mandated quota, it must pay a levy of ¥50,000 per month for each person it falls short of the quota.<sup>73</sup> If an enterprise having 300 or fewer regular workers fails to fulfill the legally prescribed quota, it must pay a levy of ¥40,000 per month for each person below the quota during the first five years.<sup>74</sup> Since employers who fail to fulfill the quota and pay the levy still have the obligation to employ persons with disabilities<sup>75</sup> and the quota system is based on the principle

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severe physical and intellectual disabilities in the subsidiary accounts for 30% or more of its total disabled workforce; the subsidiary has sufficient capacity for the appropriate management of workers with physical and intellectual disabilities. Persons with Disabilities Employment Promotion Law, *supra* note 39, art. 44(1).

71. In this case, the requirements include: the affiliated enterprises have a close personnel or business relationship with the special subsidiary, or finance the special subsidiary; the parent enterprise controls the assignment of the employment promotion coordinator for persons with disabilities, who is required to perform duties for the special subsidiary and affiliated enterprises; and the parent enterprise, special subsidiary, and affiliated enterprises are deemed to be sufficiently able to promote and stabilize the employment of persons with physical and intellectual disabilities. *Id.* art. 45(1).

72. In this case, the requirements include: the parent enterprise controls the assignment of the employment promotion coordinator for persons with disabilities, who is required to perform duties for the related subsidiaries; all enterprises in the group are deemed to be sufficiently capable of promoting and stabilizing the employment of persons with physical and intellectual disabilities; each subsidiary is deemed capable of performing the appropriate management of workers with physical and intellectual disabilities, or has a close personnel or business relationship with the operations of each subsidiary relating to workers with physical and intellectual disabilities. *Id.* art. 45.2(1).

73. Decree for the Implementation of the Persons with Disabilities Employment Promotion Law, *supra* note 64, art. 17.

74. Persons with Disabilities Employment Promotion Law, *supra* note 39, 2008 supp. art. 2; Implementation Regulations for the Persons with Disabilities Employment Promotion Law, *supra* note 60, 2009 supp. art. 2; Hasegawa, *supra* note 42, at 36. From April 2015 to March 2020, employers who have 101 to 200 regular workers but fail to meet the legally mandated quota will have to pay ¥40,000 per month for each person falling short of the quota. Persons with Disabilities Employment Promotion Law, *supra* note 39, 2008 supp. art. 3; Implementation Regulations for the Persons with Disabilities Employment Promotion Law, *supra* note 60, 2009 supp. arts. 1, 3.

75. Ryosuke Matsui, *Employment Measures for Persons with Disabilities in Japan*, 54 FOCUS ASIA-PACIFIC 8, 10 (2008), available at <http://www.hurights.or.jp/archives/focus/section2/2008/12/employment-measures-for-persons-with-disabilities-in-japan.html>.

of collective social responsibility—that is, the responsibility for employing persons with disabilities is to be borne equally by all employers<sup>76</sup>—the levy is not a penalty in a strict sense.

On the other hand, if an enterprise has achieved the legally mandated quota, it can obtain an adjustment allowance of ¥27,000 per month for each person above the quota.<sup>77</sup> For enterprises that are not yet required to file the levy form, if they employ a certain number of persons with disabilities, they will be eligible for a reward of ¥21,000 per month for each disabled employee.<sup>78</sup> Moreover, if an enterprise places orders with persons with disabilities who are working at home, it will be eligible for a special adjustment allowance.<sup>79</sup> Apart from allowances, the government also provides grants to cover additional costs incurred by employers in their attempts to hire persons with disabilities or retain employees who have become disabled. For instance, grants are available for upgrading the workplace environment, developing the skills of persons with disabilities, and hiring job coaches.<sup>80</sup> In addition, tax incentives, loans, and grants for promoting the employment of persons with severe disabilities are also available.<sup>81</sup>

Enterprises are required to submit an annual disability employment report ending on June 1.<sup>82</sup> Where an enterprise fails to fulfill the employment quota, it

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76. Japan Org. for Emp't of the Elderly, Persons with Disabilities, and Job Seekers (JEED), *Levy and Grant System for Employing Persons with Disabilities*, [http://www.jeed.or.jp/english/levy\\_and\\_grant\\_system.html](http://www.jeed.or.jp/english/levy_and_grant_system.html) (last visited Jan. 21, 2013).

77. Decree for the Implementation of the Persons with Disabilities Employment Promotion Law, *supra* note 64, art. 15. Starting from April 1, 2015, enterprises having 101 to 200 employees will be entitled to this adjustment allowance. Persons with Disabilities Employment Promotion Law, *supra* note 39, 2008 supp. art. 3; Implementation Regulations for the Persons with Disabilities Employment Promotion Law, *supra* note 60, 2009 supp. arts. 1, 3.

78. Persons with Disabilities Employment Promotion Law, *supra* note 39, supp. art. 4(3); Implementation Regulations for the Persons with Disabilities Employment Promotion Law, *supra* note 60, supp. art. 3(3). The required number of disabled workers is calculated by this formula: (number of employees with physical, intellectual and mental disabilities) minus (number of regular workers multiplied by four percent, or the number 72, whichever is greater). *Id.* art. 3(1)–(2).

79. Persons with Disabilities Employment Promotion Law, *supra* note 39, art. 74.2(2). The allowance is calculated by dividing the total amount paid to persons with disabilities working at home by a stipulated amount of assessment and multiplying the result by an adjustment allowance within the designated range. The employer may also be eligible for a special reward, which is calculated by dividing the total amount paid to persons with disabilities working at home by a stipulated amount of assessment and multiplying the result by a reward within the designated range. *Id.* supp. art. 4(3).

80. *Id.* art. 49(1); JEED, *supra* note 76. See *infra* text accompanying notes 99–102 for job coaches.

81. Persons with Disabilities Employment Promotion Law, *supra* note 39, art. 49(1); International Labor Organization, *supra* note 62, at 33.

82. Ministry of Health, Labor and Welfare, *supra* note 64, at 10; Persons with Disabilities Employment Promotion Law, *supra* note 39, arts. 39(1), 43(5); Decree for the

will be ordered to formulate a three-year employment plan, commencing from January of the following year, if it is willing to increase the number of disabled employees and certain conditions are met.<sup>83</sup> Where an enterprise does not properly implement or delays in implementing the employment plan, it will be advised to implement the plan appropriately by a “recommendation” in the second year.<sup>84</sup> If the enterprise still does not implement its employment plan, it will be given “special guidance.”<sup>85</sup> Thereafter, its name will be disclosed to the public.<sup>86</sup> In implementing the quota system, government officials may, if necessary, enter business premises, make inquiries, and inspect the books.<sup>87</sup> Moreover, fines will be imposed for other types of noncompliance, such as failing to file a report, filing a false report, or failing to formulate an employment plan.<sup>88</sup> Consequently, the quota system is to be enforced by the executive branch of the government, especially through administrative guidance.<sup>89</sup>

As an integral part of the quota system, placement centers, vocational rehabilitation programs, and support centers run by the government, independent, administrative, legal persons, or nonprofit organizations, are established throughout Japan. First of all, “Hello Work” offices, a national network of Public Employment Security Offices, facilitate the employment of persons with disabilities through gathering information on disabled job seekers, providing information about job candidates to employers, expanding job opportunities suited to the aptitudes and abilities of persons with disabilities, and establishing an employment team consisting of local supporters to assist persons with disabilities from the preparation for employment to settlement in the workplace.<sup>90</sup> Hence, at

Implementation of the Persons with Disabilities Employment Promotion Law, *supra* note 64, art. 6(2); Implementation Regulations for the Persons with Disabilities Employment Promotion Law, *supra* note 60, art. 8.

83. Persons with Disabilities Employment Promotion Law, *supra* note 39, art. 46(1). Examples of those enterprises that will be ordered to formulate a three-year employment plan include: an enterprise whose legally required number of disabled workers should be three or four, but which has actually employed none; an enterprise where the number of disabled employees falling short of the legally mandated quota is equal to or more than ten; or an enterprise whose actual employment rate is less than the national average and where the number of disabled employees falling short of the quota is equal to or more than five. Takao Yoda, *Japanese Support System for Competitive Employment of Persons with Disabilities*, JAPAN LAB. REV. 54, 69–70 (2010).

84. Persons with Disabilities Employment Promotion Law, *supra* note 39, art. 46(6); Ministry of Health, Labor and Welfare, *supra* note 64, at 10.

85. Ministry of Health, Labor and Welfare, *supra* note 64, at 10.

86. Persons with Disabilities Employment Promotion Law, *supra* note 39, art. 47.

87. *Id.* art. 82(1).

88. *Id.* arts. 85.2–91.

89. Simply stated, administrative guidance [*gyōsei shidō*] refers to any act, which is not a disposition, by an administrative agency to secure the performance or non-performance by an individual or entity with the view toward achieving a policy aim within its jurisdiction.

90. Hasagawa, *supra* note 42, at 39; Matsui, *supra* note 75, at 10 tbl. 5. As of 2009, there were 589 “Hello Work” offices in Japan. Yoda, *supra* note 83, at 55 n.5.

“Hello Work” offices, persons with disabilities receive vocational guidance, job placements, and post-employment assistance.

Moreover, Vocational Centers for Persons with Disabilities (Vocational Centers) are set up in various regions or prefectures to administer vocational training and rehabilitation programs. The Vocational Centers provide disabled job seekers with vocational evaluations and guidance and provide enterprises with advice on and assistance in disability management.<sup>91</sup> Likewise, Employment Support Centers are set up to give persons with disabilities preparatory vocational training in accordance with the type and degree of disability and necessary advice and assistance after employment.<sup>92</sup> In the same vein, Employment and Life Support Centers for Persons with Disabilities are established to provide persons with disabilities with comprehensive assistance in employment and related daily or social life and to serve as a liaison between persons with disabilities and such agencies as “Hello Work,” local Vocational Centers, social welfare organs, and medical facilities.<sup>93</sup> Furthermore, the National Institute of Vocational Rehabilitation conducts research and surveys on vocational rehabilitation and provides training for experts engaging in vocational rehabilitation.<sup>94</sup>

Apart from skill training in vocational centers or institutes, on-the-job training is also available for persons with disabilities. For instance, a “trial employment” system has been introduced to enable persons with disabilities to receive skill training on a temporary basis and then move onto regular employment.<sup>95</sup> Under that system, employers are given an incentive of ¥40,000 per month per worker for a maximum period of three months.<sup>96</sup> It has been noted that this “trial employment” system may trigger the employment of persons with disabilities who try to obtain employment for the first time and assist employers having little experience with employing persons with disabilities.<sup>97</sup> Similarly, the prefectural governor may commission an employer to provide persons with disabilities with on-the-job training for six months or less, or, in the case of persons with severe disabilities, for one year or less.<sup>98</sup> Indeed, the trend of vocational rehabilitation programs is to move from center-based group training to community-based individual training.<sup>99</sup>

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91. Persons with Disabilities Employment Promotion Law, *supra* note 39, arts.19–26.

92. *Id.* arts. 27–32 (as of 2009). The 2012 amendment to the Persons with Disabilities Employment Provisions Law repealed the provisions on the Employment Support Centre.

93. *Id.* arts. 27–33. As of 2009, there were 246 Employment and Life Support Centers for Persons with Disabilities nationwide. Yoda, *supra* note 83, at 60 n.11.

94. Matsui, *supra* note 75, at 10 tbl. 5.

95. Hasegawa, *supra* note 42, at 38.

96. *Id.*; Tadashi Kudo, Japan’s Employment Rate of Persons with Disabilities and Outcome of Employment Quota System, 7 JAPAN LAB. REV. 5, 21 n.8 (2010), available at [http://www.jil.go.jp/english/JLR/documents/2010/JLR26\\_all.pdf](http://www.jil.go.jp/english/JLR/documents/2010/JLR26_all.pdf).

97. Hasegawa, *supra* note 42, at 38.

98. Matsui, *supra* note 75, at 10 tbl. 5.

99. *Id.* at 11.

The key actor in all these support programs is the job coach. In Japan, three types of job coaches provide support for both employers and persons with disabilities in and outside the workplace. First, job coaches based in Vocational Centers provide support to enterprises and disabled job seekers, such as suggesting the kinds of jobs suitable for persons with disabilities and instructing prospective supervisors and co-workers on how to teach work methods to persons with disabilities.<sup>100</sup> Second, job coaches in Employment and Life Support Centers or social welfare facilities provide support to persons with disabilities and their families, such as urging families to help disabled workers maintain a normal and healthy daily rhythm and teaching disabled workers how to commute to work.<sup>101</sup> Third, job coaches appointed by enterprises provide support to workers with disabilities at the workplace.<sup>102</sup> As of March 2009, there were 304 job coaches in Vocational Centers, 614 job coaches in Employment and Life Support Centers and social welfare facilities, and fifty-two job coaches in enterprises.<sup>103</sup>

Consequently, the legislative objective of the Persons with Disabilities Employment Promotion Law is to mandate comprehensive measures, including vocational rehabilitation as well as the placement of persons with disabilities in occupations suited to their abilities, to achieve occupational stability at least for persons with physical and intellectual disabilities.<sup>104</sup> Although Japan's regulatory framework for promoting the employment of persons with disabilities has improved over the years, the current employment situation of persons with disabilities, as discussed below, casts doubt on its overall effectiveness.

As of June 1, 2009, 332,811.5 persons with disabilities were employed by enterprises having more than fifty-six employees, of whom 268,266 had physical disabilities, 56,835 had intellectual disabilities, and 7,710.5 had mental disabilities.<sup>105</sup> In the private sector, although the employment rate of persons with disabilities has steadily increased over time,<sup>106</sup> the legally mandated employment rate of 1.8% was usually not fulfilled. The percentage of enterprises that had fulfilled the employment quota was only 45.5%.<sup>107</sup> In other

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100. Yoda, *supra* note 83, at 61–62.

101. *Id.* at 61–63.

102. *Id.* at 63. In addition, enterprises having the obligation to employ at least one person with a disability (enterprises employing fifty-six or more regular workers) should try to have employment promotion coordinators for persons with disabilities, while enterprises having five or more workers with disabilities must appoint a vocational consultant for their disabled workers. Persons with Disabilities Employment Promotion Law, *supra* note 39, arts. 78, 79(1); Implementation Regulations for the Persons with Disabilities Employment Promotion Law, *supra* note 60, arts. 37, 38(1).

103. Yoda, *supra* note 83, at 63 fig. 1.

104. Persons with Disabilities Employment Promotion Law, *supra* note 39, art. 1.

105. Ministry of Health, Labor and Welfare, *supra* note 64, at 2.

106. *Id.* at 6 (1.46% in 2004, 1.49% in 2005, 1.52% in 2006, 1.55% in 2007, 1.59% in 2008, and 1.63% in 2009).

107. Specifically, the employment rate of persons with disabilities in enterprises having at least 1,000 employees was 1.83%, whereas the figure was only 1.64% in enterprises having 500 to 999 employees, 1.59% in enterprises having 300 to 499



words, only fewer than half of the enterprises had successfully fulfilled their legal obligation. It is noteworthy that only 49.2% of large enterprises having at least 1,000 regular workers had fulfilled their employment quota.<sup>108</sup>

Within industrial sectors, the employment rate of persons with disabilities varied by the type of industry.<sup>109</sup> For certain types of industry, however, an exclusion rate applies in calculating the amount of levy. That is, a number of workers corresponding to the exclusion rate are to be deducted from the total number of regular workers.<sup>110</sup> In that case, the legally required number of employees with disabilities in those industries will also be reduced, even though the exclusion rate will eventually phase out.

In the public sector, the employment rate of persons with disabilities in national government organs was 2.17%, 2.48% in prefectural government organs, 2.37% in government organs at the levels of municipality, township, and village, and 1.72% in prefectural educational committees.<sup>111</sup> For independent administrative legal-persons, the employment rate of persons with disabilities was 2.11%.<sup>112</sup> Even so, the compliance rate of government organs ranged from 87.7% to 100%, while the figure for prefectural educational committees ranged from 12.8% to 75.8%, and the figure for independent administrative legal-persons ranged from 65% to 83.9%.<sup>113</sup> Hence, even in the public sector, there was not full compliance.

As of June 1, 2009, there were 265 special subsidiaries, employing 13,306 persons with disabilities, of whom 7,470 had physical disabilities, 5,478 had intellectual disabilities, and 358 had mental disabilities.<sup>114</sup> The purported advantages of the special subsidiary system are that work environment arrangements are easier to make, that the job retention rate of persons with disabilities and productivity will be increased, and that the job opportunities for persons with disabilities will be expanded.<sup>115</sup> Although the employment

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employees, 1.35% in enterprises having 100 to 299 employees, and 1.40% in enterprises having fifty-six to ninety-nine employees. *Id.* at 2, 4, 7.

108. *Id.* at 7.

109. *Id.* at 2 (1.70% in farming, forestry, and fishing; 1.76% in manufacturing; 1.92% in electricity, gas, heat supply, and water; 1.81% in transportation and post; 1.66% in finance and insurance; 1.79% in services relating to daily living and entertainment; 1.95% in medicine and welfare; and 1.69% in multiple services).

110. Persons with Disabilities Employment Promotion Law, *supra* note 39, *supp.* art. 3(2); Decree for the Implementation of the Persons with Disabilities Employment Promotion Law, *supra* note 64, *tbl.* 4; Implementation Regulations for the Persons with Disabilities Employment Promotion Law, *supra* note 60, *supp.* art. 1.3 & *tbl.* 4. For example, the exclusion rate for the air carrier industry is 15%, while the exclusion rate for the medical industry is 40%. See Implementation Regulations for the Persons with Disabilities Employment Promotion Law, *supra* note 60, *tbl.* 4.

111. Ministry of Health, Labor and Welfare, *supra* note 64, at 3.

112. *Id.*

113. *Id.* at 4–5.

114. *Id.* at 3.

115. Hasegawa, *supra* note 42, at 37.

situation of persons with disabilities can be improved under the special subsidiary system, persons with disabilities working in these subsidiaries, like those working in sheltered workshops or welfare facilities, may still be segregated from the mainstream.<sup>116</sup>

In 2008, 373 enterprises were ordered to formulate an employment plan, 313 enterprises were given advice, and 46 enterprises received special guidance.<sup>117</sup> By the end of 2008, 2,016 enterprises pursued the employment plan.<sup>118</sup> However, the number of enterprises whose names were publicly disclosed due to noncompliance was remarkably low.<sup>119</sup> With the low percentage of enterprises actually complying with the employment quota and the large number of enterprises operating under the employment plan, either administrative guidance is effective in employer compliance with the law (even though enterprises have also been able to delay compliance for a maximum period of three years), or the disclosure system is not vigorously enforced.

Although Japan practices the minimum wage system, if a worker has “a significantly low capacity for work due to a mental or physical disability,” then the employer, upon obtaining approval from the Director of the Prefectural Labor Bureau, can reduce the minimum wage rate by a specified ratio depending on the capacity to work and other circumstances.<sup>120</sup> Consequently, persons with severe or intellectual disabilities may not be able to earn enough to live independently. Moreover, “disqualification clauses” also prevent job seekers with disabilities from being recruited or hired. This is exemplified by the fact that the All Japan Prefectural and Municipal Workers’ Union has campaigned for the removal of many “disqualification clauses” that prevent persons with disabilities from taking up particular jobs.<sup>121</sup>

According to a survey conducted by the National Institute of Vocational Rehabilitation in 2008, only 0.8% of the responding enterprises had deployed job coaches in their enterprises, 0.3% claimed that they were deploying job coaches at the time of the survey, and 25.3% had no experience of deploying job coaches at the workplace.<sup>122</sup> Regarding the availability of job coaches in Vocational Centers, 56.3% of the respondents indicated their awareness, but only 11.2% had

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116. See Matsui, *supra* note 75, at 10.

117. Ministry of Health, Labor and Welfare, *supra* note 64, at 10.

118. *Id.*

119. *Id.* (four in 1991, one in 2003, one in 2004, two in 2005, two in 2006, three in 2007, and four in 2008).

120. *Saitei Chingin Hō* [Minimum Wages Law], Law No. 137 of 1959 (last amended 2008), art. 7(1). Prior to its revision in 2007, article 8 of the Minimum Wages Law allowed exemption from paying minimum wages to persons who had a significantly low capacity to work due to mental or physical disabilities if the employer had obtained permission from the Director of the Prefectural Labor Bureau.

121. INT’L LABOR ORG., *supra* note 62, at 35.

122. Of those enterprises having no experience of deploying job coaches at the workplace, 56.9% cited “the lack of the need to provide special accommodations” and “human resources management for ordinary employees being sufficiently effective for persons with disabilities” as reasons for not deploying them. Yoda, *supra* note 83, at 64.

used the services.<sup>123</sup> Of the enterprises that had not consulted external job coaches, 57% cited the same reasons as in the case of enterprise job coach.<sup>124</sup> Nevertheless, human resources personnel have been struggling with disability management in their enterprises.<sup>125</sup> These contradictions reflect that services supporting the quota system have been underused, and that human resources personnel do not appreciate the significance of and differences in disability management.<sup>126</sup>

After fourteen years, the legally mandated employment rates have just been revised, to be effective from April 2013. This pace of revision seems to be incommensurate with the rapid social and technological changes in recent times. In this connection, one argument raised by economists against the quota system is that a uniform quota is “socially inefficient,” resulting in losses in resources and social welfare, because different firms have different capacities in employing persons with disabilities due to the nature of their business, facilities, or other factors, and the consequential difference in costs entails the difference in optimal employment across different firms.<sup>127</sup>

Despite the existence of a sophisticated network of training, rehabilitation, and welfare programs, the actual employment of persons with disabilities is still lower than wanted. One reason is that some enterprises prefer to pay levies rather than employ persons with disabilities.<sup>128</sup> For that reason, it is important to reassess whether the amount of levy should be raised. Likewise, the unsatisfactory compliance rate of enterprises casts doubt on the efficacy of administrative enforcement of the quota system and poses the question of whether judicial intervention based on antidiscrimination or other legal bases should be employed. In any event, it is imperative to further promote the employment of persons with disabilities in Japan.

#### IV. THE U.S. SYSTEM

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123. *Id.* at 65.

124. *Id.*

125. For example, in making assignments for employees with disabilities, human resources personnel do not know all the details of various jobs, and it is difficult to foretell what kinds of special accommodations are needed and the additional costs to provide those support services. *See id.* at 54–59.

126. Many employers do not have the necessary experience or expertise to tackle issues relating to employees with disabilities. In 2001, the International Labor Organization adopted the Code of Practice on Managing Disability in the Workplace, which can be a handy reference for human resources managers. *See* INT’L LABOR ORG., MANAGING DISABILITY IN THE WORKPLACE: ILO CODE OF PRACTICE (2002), available at [http://www.ilo.org/skills/pubs/WCMS\\_103324/lang--en/index.htm](http://www.ilo.org/skills/pubs/WCMS_103324/lang--en/index.htm).

127. Toshihiro Tsuchihashi & Daisuke Oyama, *Disability Employment Levy-Grant Scheme from an Economic Viewpoint*, JAPAN LAB. REV. 2 at 43, 44 (2010).

128. Kudo, *supra* note 96, at 13 (citing a report made by the National Institute of Vocational Rehabilitation in 2002).

In view of its pioneering efforts in outlawing discrimination against persons with disabilities, the United States is an apposite case study of the antidiscrimination approach. Accordingly, the following discussion will outline the disability rights movement leading to the enactment of the ADA, the non-discriminatory requirements mandated by the ADA and remedies for noncompliance, the enforcement framework and the major support programs of the ADA, the inefficacy of the ADA in promoting the employment of persons with disabilities, and the amendment of the ADA in 2008 to further improve the employment situation of persons with disabilities.<sup>129</sup>

The disability movement in the United States evinces evolving attitudes and approaches toward persons with disabilities. Before the 1970s, disability was viewed as a medical condition and persons with disabilities were considered deserving of charitable largesse.<sup>130</sup> On this basis, disability law was enacted as a subcategory of social welfare law, with provisions guaranteeing rehabilitation services, cash benefits, and medical care to persons with disabilities.<sup>131</sup> For instance, the Aid to the Permanently and Totally Disabled (APTD) program and the Social Security Disability Insurance (SSDI) program were launched in the 1950s to provide cash benefits to persons with disabilities who were unable to work.<sup>132</sup> Nonetheless, critics maintained that disability welfare programs either promoted political inactivity or nurtured a culture of dependence among persons with disabilities.<sup>133</sup> More importantly, the administration of welfare programs was paternalistic, arbitrary, and oppressive because persons with disabilities were subject to the dictates of case workers, who believed they knew what was best for their clients' lives.<sup>134</sup>

In the 1970s, disability advocates propounded the view that disability was a social condition caused by the interaction between physical or mental traits and social institutions that were structured in such a way that made them inaccessible to persons with disabilities.<sup>135</sup> Disability activists, therefore, urged a fundamental shift in disability policy—from segregation and exclusion to integration and inclusion in all aspects of political, civil, and social life.<sup>136</sup> To promote the employment of persons with disabilities, disability advocates began to press for the enactment of civil rights legislation. The efforts of disability rights activists culminated in the enactment of the ADA in 1990.<sup>137</sup> The

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129. ADA Amendments Act of 2008 (ADA Amendments Act), Pub. L. No. 110-325, 122 Stat. 3553 (2008).

130. Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L. J. 1, 12 (2004).

131. *Id.* at 10.

132. *Id.* at 11.

133. *Id.* at 15.

134. *Id.* at 13.

135. Bagenstos, *supra* note 130, at 12.

136. *Id.* at 17.

137. The Rehabilitation Act of 1973, 29 U.S.C. §§ 701 et seq. (West, Westlaw 2012), also prohibits employment discrimination by government agencies and business entities having secured government contracts or subsidies.

following will highlight what types of disabilities are covered under the statute and what kinds of obligations are required of employers.

According to the ADA, “disability” means (a) a physical or mental impairment that substantially limits one or more major life activities of an individual, (b) a record of having such an impairment, or (c) being regarded as having such an impairment.<sup>138</sup> Major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.<sup>139</sup> Moreover, a major life activity includes the operation of a major bodily function, including but not limited to, functions of the immune system; normal cell growth; and digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.<sup>140</sup> If an individual establishes that he or she has been subjected to discrimination because of an actual or perceived physical or mental impairment, he or she will meet the requirement of “being regarded as having such an impairment,” whether the impairment limits or is perceived to limit a major life activity, unless such impairment is transitory, namely, with an actual or expected duration of six months or less.<sup>141</sup> The definition of “disability” is to be construed in favor of broad coverage.<sup>142</sup>

To promote the employment of persons with disabilities, the ADA mandates that a person engaged in an industry affecting commerce and having fifteen or more workers<sup>143</sup> not discriminate against persons with disabilities and provide “reasonable accommodation” to persons with disabilities to assist them in performing the job duties of particular jobs, as long as such accommodation will not cause undue hardship. Specifically, the ADA prohibits discrimination against “a qualified individual on the basis of disability in regard to job application procedures; the hiring, advancement, or discharge of employees; employee compensation; job training; and other terms, conditions, and privileges of employment.”<sup>144</sup> As a result, the ADA prohibits direct discriminatory treatment of qualified persons with disabilities.

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138. ADA, *supra* note 26, § 12102(1)(A)–(C). The term “physical or mental impairment” is defined in 29 C.F.R. § 1630.2(h) (West, Westlaw 2012).

139. ADA, *supra* note 26, § 12102(2)(A).

140. *Id.* § 12102(2)(B).

141. *Id.* § 12102(3)(A)–(B).

142. *Id.* § 12102(4)(A).

143. The term “employer” refers to a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of subchapter 1, an employer means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year, and any agent of such person. *Id.* § 12111(5)(A).

144. *See* ADA *supra* note 26, § 12112(a). A “qualified individual” is someone who, with or without “reasonable accommodation,” can perform the essential functions of the employment position that such individual holds or desires. *Id.* § 12111(8).

Discrimination may also occur indirectly, such as limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee due to his or her disability, and using qualification standards, employment tests, or other selection criteria that screen out or tend to screen out an individual with a disability or a group of individuals with disabilities, unless it can be shown that such standards, tests, or selection criteria are job-related or for business necessity.<sup>145</sup> Thus, the ADA also prohibits employment-related measures that have a disparate impact on qualified individuals with disabilities.

Furthermore, discrimination occurs when a covered employer does not make reasonable accommodation to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such employer can demonstrate that the accommodation will impose an undue hardship on the operation of its business.<sup>146</sup> “Reasonable accommodation” may include such acts as making existing facilities used by employees readily accessible to and usable by persons with disabilities; job restructuring; part-time or modified work schedules; acquisition or modification of equipment or devices; appropriate adjustment or modification of examinations and training materials; and provision of qualified readers or interpreters.<sup>147</sup> “Undue hardship” refers to an action requiring significant difficulty or expense in light of such factors as the nature and cost of the accommodation needed; the overall financial resources of the facility or facilities involved in the provision of the accommodation; the overall size of the business of a covered entity with respect to the number of employees; the number, type, and location of the facilities; and the type of operation or operations of the covered entity.<sup>148</sup> In other words, an employer discriminates against a qualified individual with a disability if it fails to provide accommodation at reasonable cost.

Under the ADA, employers may assert such defenses as job-relatedness, business necessity, the impossibility of performance even with accommodation, direct threat to the health and safety of others in the workplace, and concerns about infectious and communicable diseases.<sup>149</sup> Nonetheless, if discrimination has indeed occurred, the relief available will depend on the nature of the discrimination and the effect it has on the victim.<sup>150</sup> The goal is to put the victim of discrimination in the same, or nearly the same, position that he or she would

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145. *Id.* § 12112(b)(1), (6). More guidance can be found in the Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.4(a) (West, Westlaw 2011).

146. ADA, *supra* note 26, § 12112(b)(5)(A).

147. *Id.* § 12111(9)(A)–(B).

148. *Id.* § 12111(10)(A)–(B).

149. *Id.* § 12113.

150. See U.S. EQUAL EMP’T OPPORTUNITY COMM’N, *Remedies for Employment Discrimination*, <http://www1.eeoc.gov/employees/remedies.cfm> (last visited Apr. 27, 2011) [hereinafter *Remedies for Employment Discrimination*].

have been if discrimination had not happened.<sup>151</sup> Remedies may include compensatory damages, punitive damages, back pay, and other remedies.<sup>152</sup> Compensatory damages may be awarded for out-of-pocket expenses and any emotional harm suffered, while punitive damages may be awarded in the case of malicious or reckless discrimination.<sup>153</sup> In either case, there are limits on the amount the victim can recover, depending on the size of the employer.<sup>154</sup> For example, the limit for employers with 15 to 100 employees is \$50,000, and the limit for employers with more than 500 employees is \$300,000.<sup>155</sup>

The Equal Employment Opportunity Commission (EEOC) is responsible for enforcing the provisions on prohibition of employment discrimination. First, the EEOC is authorized to issue regulations to provide details for the implementation of the ADA.<sup>156</sup> Second, the EEOC is authorized to investigate charges of various kinds of discrimination, to make findings of whether discrimination has occurred, to settle charges through mediation or by other means, and to file lawsuits on behalf of victims of discrimination.<sup>157</sup> Thus, where a person with a disability has experienced discrimination, he or she must first file a charge with the EEOC.<sup>158</sup> Alternatively, another individual, organization, or agency may file a charge on behalf of the aggrieved victim to protect his or her identity.<sup>159</sup>

Generally, the EEOC will first try to settle a dispute through mediation.<sup>160</sup> Mediation is voluntary and free of charge.<sup>161</sup> If mediation is successful, the parties will sign an agreement, which is enforceable in court.<sup>162</sup> If the case is not mediated, or if mediation does not resolve the dispute, the EEOC will first ask the employer to file a written answer to the victim's charge and then conduct an investigation.<sup>163</sup> If the investigation reveals discrimination, the EEOC will try to reach a voluntary settlement with the employer.<sup>164</sup> When a settlement cannot be reached, the EEOC will decide whether it should file a

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151. *Id.*

152. *Id.*

153. *Id.*

154. *Id.*

155. See *Remedies for Employment Discrimination*, *supra* note 150.

156. ADA, *supra* note 26, §§ 12116, 12205a.

157. See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *Overview*, <http://www.eeoc.gov/eeoc/index.cfm> (last visited Apr. 27, 2011).

158. See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *Filing a Charge of Discrimination*, <http://www1.eeoc.gov/employees/charge.cfm> (last visited Apr. 27, 2011).

159. *Id.*

160. *Id.*

161. See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *Mediation*, <http://www1.eeoc.gov/employees/mediation.cfm> (last visited Apr. 27 2011).

162. *Id.*

163. See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *The Charge Handling Process*, <http://www1.eeoc.gov/employees/process.cfm> (last visited Apr. 27, 2011).

164. *Id.*

lawsuit.<sup>165</sup> If the EEOC decides not to file a lawsuit or no discrimination is found after the investigation, the EEOC will issue a Notice of Right to Sue.<sup>166</sup> Thereafter, the complainant may file a lawsuit in court.

As for support programs or services, government agencies and nonprofit disability organizations, such as the Employment Training Administration<sup>167</sup> and the American Association of People with Disabilities,<sup>168</sup> constitute a network that provides vocational training and rehabilitation to persons with disabilities, serve as advocates for persons with disabilities, and render various kinds of employment assistance to persons with disabilities. Moreover, SSDI, Supplemental Security Income (SSI), Medicare, and Medicaid together cater to the financial and medical needs of persons with disabilities. Specifically, SSDI and Medicare are contributory social security programs that provide benefits to individuals who have worked for a sufficient period of time.<sup>169</sup> If an eligible individual acquires a “disability” under the Social Security Act, SSDI will pay a monetary benefit every month, and after two years on SSDI, that individual will become eligible for Medicare’s standard package of coverage.<sup>170</sup> Additionally, an individual who satisfies the definition of “disability” under the Social Security Act is eligible for SSI and Medicaid, regardless of his or her work history.<sup>171</sup> SSI will pay a monetary benefit every month if that individual’s income and assets fall below a federal means test, and while on SSI, that individual is entitled to Medicaid coverage in most of the states.<sup>172</sup>

The ADA has improved the lives of many persons with disabilities, made buildings more accessible to persons with disabilities, and accelerated the removal of stigma associated with disabilities.<sup>173</sup> Nevertheless, the effectiveness of the ADA in promoting the employment of persons with disabilities is questionable. During the 1990s, the employment rate for working-age persons with disabilities declined or remained stagnant, despite the booming U.S. economy.<sup>174</sup> The

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165. *Id.*; certain cases are referred to the Department of Justice.

166. *Id.*

167. The Employment Training Administration of the Department of Labor provides funds and administers grant programs that offer training and employment assistance to persons with disabilities. See U.S. DEP’T OF LABOR, *Training People with Disabilities*, <http://www.dol.gov/dol/topic/training/disabilitytraining.htm> (last visited Apr. 27, 2011). In addition, DisAbility Online is a website operated by the Employment Training Administration, on which information on grant programs can be found. See U.S. DEP’T OF LABOR, *DisAbility Online*, <http://www.doleta.gov/disability> (last visited Apr. 27, 2011).

168. The American Association of People with Disabilities, founded in 1995, is the largest cross-disability membership organization in the United States. For details, visit <http://www.aapd.com>.

169. Bagenstos, *supra* note 130, at 11.

170. *Id.*

171. *Id.* at 12.

172. *Id.*

173. *Id.* at 3.

174. For example, according to the Current Population Survey, if “disability” is defined as an impairment that specifically limits the life activity of working, the



employment rate for persons without disabilities increased with the economic growth of the 1990s, but the employment rate for persons with disabilities did not.<sup>175</sup> Moreover, in 2009, the unemployment rate of persons with disabilities was 14.5%, as compared to 9% of those without disabilities.<sup>176</sup> Among workers with disabilities, 32% usually worked part-time, as compared to 19% of workers without disabilities.<sup>177</sup> Although other factors could have contributed to the decline in the employment of persons with disabilities,<sup>178</sup> the passage of the ADA did not significantly improve the employment situation of persons with disabilities.<sup>179</sup>

The inefficacy of the ADA in promoting the employment of persons with disabilities may result from a combination of factors. Although the antidiscrimination provisions prohibit employers from rejecting qualified job applicants with disabilities and the accommodation requirements obligate employers to modify facilities or job contents to enable persons with disabilities to take up jobs, employers are not required to provide personal assistance or transportation to disabled employees to enable them to get to work.<sup>180</sup> It is because the accommodation must be “job-related,” and an employer is not required to provide an adjustment or modification that will “assist the individual throughout his or her daily activities, on and off the job.”<sup>181</sup> If an accommodation will provide benefits that extend beyond an individual’s employment relationship with his or her employer, such as assistive technologies that will help a disabled individual to get to work and outside the workplace, the “job-related” rule will exclude it from the ADA mandate.<sup>182</sup>

Moreover, although persons with disabilities may need personal-assistance services or assistive devices to become independent and able to participate in the workforce, these facilitative means are viewed as “medical”

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employment rate for working-age men with disabilities decreased from 42.1% in 1990 to 33.1% in 2000, and the employment rate for working-age women with disabilities decreased from 34.9% to 32.6% over the same period. Bagenstos, *supra* note 130, at 19–20.

175. The relative decline of the employment rate of persons with disabilities could be substantiated by a 2000 Harris survey, in which 32% of working-age persons with disabilities reported being employed, as compared to 81% of persons without disabilities. *Id.* at 20.

176. News Release, Bureau of Labor Statistics, U.S. Dep’t of Labor, Persons With a Disability: Labor Force Characteristics—2009 at 2 (Aug. 25, 2010), available at [www.bls.gov/news.release/archives/disabl\\_08252010.pdf](http://www.bls.gov/news.release/archives/disabl_08252010.pdf).

177. *Id.*

178. For example, ADA advocates have argued that the loosening of eligibility standards for SSDI benefits in the 1980s made leaving the workforce an attractive option for persons with disabilities during the 1990–1991 recession. Bagenstos, *supra* note 130, at 22.

179. *Id.*

180. *Id.* at 4.

181. *Id.* at 35–36 (citing 29 C.F.R. pt. 1630 app. to § 1630.9 (2004)).

182. *Id.* at 36.

services for which the health insurance system is responsible.<sup>183</sup> However, the construct of health insurance system generates barriers to the employment of persons with disabilities. On one hand, because private health insurance is generally employment-based, many small firms that employ persons with disabilities do not offer health insurance, or if they do offer insurance, some persons with disabilities are not eligible because of limited working hours.<sup>184</sup> Furthermore, even if health insurance is obtained through an employer, many persons with disabilities fail to pursue better opportunities because changing jobs can cause disruption in or loss of coverage, a situation known as “job lock.”<sup>185</sup> Significantly, private health insurance does not cover the services that persons with disabilities most need to become independent.<sup>186</sup> The acute-care orientation of private health insurance will pay for rehabilitative or ongoing therapy only when the therapy is a short-term response to an acute condition, but not when the therapy is a continuing response to a chronic condition.<sup>187</sup> In particular, private health insurance does not, or does not adequately, cover durable medical equipment and assistive technologies, such as hearing aids, prostheses, and wheelchairs.<sup>188</sup>

On the other hand, the restrictive eligibility criteria of Medicare and Medicaid serve as psychological and economic disincentives to work.<sup>189</sup> That is, to qualify for Medicare, an individual must first become eligible for SSDI by proving that he or she cannot engage in any substantial gainful work, and once eligible for SSDI the individual must wait two years to receive Medicare coverage.<sup>190</sup> Likewise, to receive Medicaid coverage, an individual must be an SSI recipient; to receive SSI benefits, the individual must establish that he or she is unable to perform substantial gainful activity and earns or owns less than the statutory threshold of income or resource; once the individual returns to work, he or she must earn less than a certain amount of income in order to remain covered.<sup>191</sup> Accordingly, for many persons with disabilities, it is not the discriminatory acts of employers, but the entrenched structural barriers, namely, lack of personal-assistance services, lack of accessible transportation, and the existing structure of the health insurance system that keep them out of the workforce.<sup>192</sup>

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183. Bagenstos, *supra* note 130, at 26.

184. DAVID STAPLETON & SU LIU, WILL HEALTH CARE REFORM INCREASE THE EMPLOYMENT OF PEOPLE WITH DISABILITIES? 2 (2009).

185. *Id.*

186. Bagenstos, *supra* note 130, at 30.

187. *Id.* at 30–31.

188. *Id.* at 31–32; *see also* STAPLETON & LIU, *supra* note 184, at 2.

189. Bagenstos, *supra* note 130, at 32; *see also* STAPLETON & LIU, *supra* note 184, at 2 (since public health programs have income and asset limits, many persons with disabilities who can work and earn more have a strong incentive to stay under those limits to maintain coverage).

190. Bagenstos, *supra* note 130, at 32.

191. *Id.* at 33–34.

192. *Id.* at 23.

At the same time, judicial interpretation and construction of the ADA has attenuated its potential to promote the employment of persons with disabilities. First, courts have held that accommodations are required only if they provide persons with disabilities “access” to the same benefit received by persons without disabilities.<sup>193</sup> Simply, an accommodation that will alter the “content” of the benefit for persons with disabilities is not prescribed, even if it can be provided at reasonable cost and without undue hardship.<sup>194</sup> This access/content distinction has enabled courts to exclude certain classes of accommodation from the scope of requirements for private employment, public employment, and places of public accommodation.<sup>195</sup> As a result, this distinction renders the ADA ineffective as a means of overcoming the private insurance limitations that impose the greatest practical burden on many persons with disabilities.<sup>196</sup>

Second, the Supreme Court’s narrow interpretation and construction of the term “disability” has effectively denied persons with disabilities protection in cases of employment discrimination. For instance, the Court in *Sutton v. United Air Lines, Inc.* held that whether an impairment “substantially limited” a major life activity was to be determined by the ameliorative effects of mitigating measures, while the Court in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams* reasoned that an individual must have an impairment that prevented or severely restricted him or her from doing activities that were of central importance to most people’s daily lives, not just those tied to a particular job.<sup>197</sup> Consequently, despite the willingness to exercise their rights, ADA plaintiffs lost more than ninety percent of the claims brought to court.<sup>198</sup>

Because the Supreme Court narrowed the broad scope of protection intended to be afforded by the ADA, which eliminated protection for many persons with disabilities whom Congress intended to protect,<sup>199</sup> and the interpretation of the term “substantially limits” by both the Supreme Court and the

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193. *Id.* at 37.

194. *Id.*

195. Bagenstos, *supra* note 130, at 24.

196. *Id.* at 54.

197. In *Sutton*, the plaintiff had severely limited eyesight without the use of glasses. The Supreme Court held that if the condition causing the disability could be controlled, the individual would not be considered “disabled” under the ADA. *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999). Similarly, in *Toyota Motor*, the Supreme Court held that an individual who suffered from a repetitive motion injury (carpal tunnel syndrome) that made it difficult to hold and grasp objects was not “disabled” under the ADA because the inquiry of whether the individual is substantially limited in a major life activity should include tasks of central importance to most people’s daily lives. *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184 (2002). Mitigating measures include medication, prosthetics, mobility devices, and use of assistive technology. ADA, *supra* note 26, § 12102(4)(E)(i).

198. Andrew M. Slobodien & Katie O’Brien, *The ADA Amendments Act of 2008 and How It Will Change the Workplace*, 34 EMP. REL. L. J. 32, at 32 (2008) (quoting BNA’s Daily Labor Report of Nov. 16, 2008).

199. ADA Amendments Act, *supra* note 129, § 2(a)(4).

EEOC required a higher degree of limitation than what Congress intended,<sup>200</sup> Congress amended the ADA in 2008 and made it clear that the definition of “disability” shall be broadly construed.<sup>201</sup> Additionally, the amended act clarified that the term “substantially limits” shall be interpreted consistently with its findings and purposes, that an impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability, and that the determination of whether an impairment “substantially limits” a major life activity shall be made without regard to the ameliorative effects of mitigation measures.<sup>202</sup> In other words, the U.S. Congress passed the ADA Amendments Act to reinstate a broad scope of protection for persons with disabilities and overrule the standards enunciated by the Supreme Court and the EEOC.<sup>203</sup>

Given the entrenched structural barriers to employment of persons with disabilities, disability rights advocates have resumed the social welfare approach to disability law, especially through increasing litigation over the Medicaid statute and efforts to expand and reform public health insurance program.<sup>204</sup> Apparently, the efforts of disability rights advocates have paid off because the Patient Protection and Affordable Care Act,<sup>205</sup> as modified by the Health Care and Education Reconciliation Act,<sup>206</sup> contains provisions improving the health care entitlements of persons with disabilities. For instance, as of 2014, health insurers will no longer be able to discriminate against people based on disabilities or pre-existing conditions by denying coverage, charging higher premiums, canceling coverage after an injury or the acquisition of a new condition, or imposing annual caps on benefits.<sup>207</sup> In this regard, “essential benefits” now consist of “rehabilitative and habilitative services and devices,” which will include, though not explicitly stated, durable medical equipment, prosthetics, orthotics, and supplies.<sup>208</sup> Moreover, as of 2014, Medicaid coverage will be expanded to non-elderly, childless adults and adults with incomes up to 133% of the Federal Poverty Level.<sup>209</sup> Furthermore, the Community Living Assistance Services and Supports (CLASS) program, a national, voluntary insurance scheme, will enable people with functional limitations, who have paid premiums through

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200. *Id.* § 2(a)(7)–(8).

201. ADA, *supra* note 26, § 12102(4)(A).

202. *Id.* § 12102(4)(A), (B), (C), (E)(i). However, courts may still consider the ameliorative use of ordinary glasses or contact lens. *Id.* § 12102(4)(E)(ii).

203. ADA Amendments Act, *supra* note 129, § 2(b)(1)–(6).

204. Bagenstos, *supra* note 130, at 55–69.

205. Patient Protection and Affordable Care Act, Pub. L. No. 111-148 (2010).

206. Health Care and Education Reconciliation Act, Pub. L. No. 111-152 (2010).

207. In 2010, health insurers were prohibited from placing lifetime caps on benefits. Peggy Hathaway, Andrew Morris & Barbara L. Kornblau, *Impact of Health Care Reform on People with Disabilities* 2 (2010), available at [http://www.unitedspinal.org/pdf/impact\\_of\\_health\\_care\\_reform.pdf](http://www.unitedspinal.org/pdf/impact_of_health_care_reform.pdf).

208. *Id.* at 3.

209. In 2009, 133% of the Federal Poverty Level for individuals was \$14,404, and the figure for a family of four was \$29,327. *Id.* at 5.

payroll deductions for at least five years, to receive benefits of at least an average of \$50 per day to pay for services and supports of their choice to assist them in daily living activities.<sup>210</sup> Similarly, the Community First Choice Option gives states the option to choose home and community-based services and support for Medicaid-eligible persons with disabilities having income up to 150% of the Federal Poverty Level.<sup>211</sup>

As a result, the recent health care reforms have expanded health care coverage for persons with disabilities, reduced the incentives for persons with disabilities to stay unemployed, enabled persons with disabilities to remain in their homes and communities, allowed persons with disabilities to obtain assistive devices paid by insurance, and given persons with disabilities some power to decide for themselves. These reforms will take place incrementally over a period of years, and regulations are to be drafted and promulgated to implement the statutory mandates. However, whether these health care reforms will remove the structural barriers to employment of persons with disabilities remains to be seen.

In the seventeen years following its passage, the ADA has not been effective in promoting the employment of persons with disabilities. The main reasons for this disappointing outcome are the entrenched structural barriers and the narrow scope of protection afforded by the courts in employment discrimination lawsuits. The U.S. Congress has reinstated the broad coverage of the ADA, while health care reforms are under way. Even so, whether these reform efforts will enable the ADA to attain its full potential is yet to be seen. Assuming that the obstacles of structural barriers and narrow judicial interpretations will be removed, there is still the question of whether the ADA will eventually enhance the employment of persons with disabilities, especially because victims of discrimination generally have limited resources to assert and prove their discrimination claims.

## V. THE CHINESE SYSTEM

Compared with the preceding countries, China is a newcomer, as substantial legal reforms were started only about thirty years ago. On one hand, the relatively short legal regime gives China an advantage because there are no entrenched legal principles or practices that would take time to be changed or abolished. On the other hand, the historical developments of China's regulatory framework for promoting the employment of persons with disabilities are quite brief.

In 1990, China passed its first statute addressing the needs of persons with disabilities—the Law on the Protection of Persons with Disabilities

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210. *Id.* at 4.

211. *Id.*

(Protection Law).<sup>212</sup> The general principles of the Protection Law were either supplemented by other statutory provisions<sup>213</sup> or implemented by accompanying regulations.<sup>214</sup> Since China adopts an incremental approach in legal reforms and revises its legal norms as it gains more experience, the Protection Law was amended in 2008, and the Regulations on the Employment of Persons with Disabilities (Employment Regulations), the most pertinent regulations for promoting the employment of persons with disabilities, were promulgated only in 2007.<sup>215</sup> Accordingly, the following discussion will focus on the Protection Law and the Employment Regulations because they are the building blocks of the overall regulatory framework.

In China, persons with disabilities are those who suffer from abnormality or loss of a certain type of organ or function of their psychological, physiological, or bodily structure and have lost completely or partially the ability to engage in some activities in a normal manner.<sup>216</sup> More specifically, persons with disabilities include those who have visual, hearing, speech, physical, intellectual, mental, multiple, or other disabilities.<sup>217</sup> To promote the employment of this disadvantaged group, China has adopted a hybrid model, which, as discussed below, consists of explicit statutory provisions prohibiting discrimination against persons with disabilities and a “multi-channel, multi-level, and multi-format” government intervention scheme.

First and foremost, China forbids discrimination based on disabilities, insulting or infringing upon persons with disabilities, and depreciating or injuring the character of persons with disabilities via mass media or other means.<sup>218</sup> In the case of employment, discrimination against persons with disabilities is outlawed in such areas as recruitment, changing from the status of a temporary worker to that of a regular employee, promotion, determination of a technical or professional title, remuneration, social security, welfare benefits, leave, and labor insurance.<sup>219</sup> Moreover, although “reasonable accommodation” is not expressly mandated, employers of persons with disabilities (hiring units) must provide

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212. *Zhonghua Renmin Gongheguo Canjiren Baozhang Fa* (中华人民共和国残疾人保障法) [Law on the Protection of Persons with Disabilities] (adopted by the 17th Session of the Standing Committee of the 7th National People’s Congress, Dec. 28, 1990) (last amended 2008) (China) [Hereinafter Protection Law].

213. *E.g.*, *Zhonghua Renmin Gongheguo Xuanju Fa* (中华人民共和国选举法) [Election Law] (adopted by the National People’s Congress on July 1, 1979) (last amended 2010), art. 38 (China).

214. *E.g.*, *Canjiren Jiaoyou Tiaoli* (残疾人教育条例) [Regulations on the Education of Persons with Disabilities] (promulgated by the State Council, Aug. 23, 1994) (China).

215. *Canjiren Jiuye Tiaoli* (残疾人就业条例) [Regulations on the Employment of Persons with Disabilities] (adopted by the State Council on Feb. 14, 2007) (China) [hereinafter Employment Regulations].

216. Protection Law, *supra* note 212, art. 2.

217. *Id.*

218. *Id.* art.3.

219. *Id.* art. 38; Employment Regulations, *supra* note 215, arts. 4, 13.

working conditions and labor protection suitable for the physical conditions or characteristics of their disabled workers, as well as remodeling the worksite, labor equipment, and living facilities according to actual needs.<sup>220</sup>

Apart from antidiscrimination legislation, the Constitution of China requires the State and society to assist in arranging the work, livelihood, and education of persons with visual, hearing, speech and other disabilities.<sup>221</sup> In this connection, the people's governments at the county level and above are to formulate plans, preferential policies, and supportive measures to create employment conditions for persons with disabilities.<sup>222</sup> Toward this mandate, China has formulated the policy of "combining concentration with dispersion," using preferential policies and supportive and protective measures to gradually popularize, stabilize, and rationalize the employment of persons with disabilities through multiple channels, levels, and formats.<sup>223</sup>

The objectives of the policy of "combining concentration with dispersion" are twofold—the "protection" and "promotion" of employment of persons with disabilities.<sup>224</sup> On one hand, the "protection" of the employment of persons with disabilities is to be realized by establishing a system to reserve posts for persons with disabilities, namely, a minimum ratio of the total workforce must be workers with disabilities.<sup>225</sup> On the other hand, the "promotion" of the employment of persons with disabilities is to be achieved primarily through preferential tax treatment, financial assistance, employment services, development of public-welfare positions, and development of community services.<sup>226</sup> Therefore, the following will highlight the respective details of "protection" and "promotion."

To protect the employment of persons with disabilities, "concentration" mandates that the government and society establish welfare enterprises, message organizations, and other welfare-oriented units to focus on the job placement of persons with disabilities.<sup>227</sup> If a hiring unit is concentrated in employing persons with disabilities, its full-time workers with disabilities must constitute twenty-five percent or more of its total workforce.<sup>228</sup> Consequently, the concentrated job

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220. Protection Law, *supra* note 212, art. 38; Employment Regulations, *supra* note 215, art. 13.

221. XIANFA art. 45 (2004) (China).

222. Employment Regulations, *supra* note 215, art. 2.

223. Protection Law, *supra* note 212, art. 31; Employment Regulations, *supra* note 215, arts. 2, 4.

224. China Federation of Persons with Disabilities, *Canjiren Jiuye Tiaoli de Lifa Zhongzhi* (残疾人就业条例)的立法宗旨 [Legislative Objectives of the Regulations on the Employment of Persons with Disabilities], May 7, 2009, available at [http://202.123.110.3/fwxx/cj/cj/content\\_1307253.htm](http://202.123.110.3/fwxx/cj/cj/content_1307253.htm) (last visited Oct. 21, 2009).

225. *Id.*

226. *Id.*

227. Protection Law, *supra* note 212, art. 32; Employment Regulations, *supra* note 215, art. 10.

228. Employment Regulations, *supra* note 215, art. 11.

placement is analogous to sheltered workshops or welfare facilities where persons with disabilities may secure employment. Where concentrated job placement is used, the people's government at the county level or above and relevant departments are to determine the products or items of production or business operations suitable for persons with disabilities; give hiring units that concentrate on employing persons with disabilities priorities to make such products or engage in such business; and let those hiring units produce such goods exclusively in accordance with their production characteristics.<sup>229</sup> Moreover, in the case of government procurement, the government should, on the same terms, first purchase products manufactured or services provided by hiring units focused on employing persons with disabilities.<sup>230</sup> Furthermore, the people's governments at various administrative levels are required to develop posts of public welfare for persons with disabilities.<sup>231</sup>

Conversely, "dispersion" entails the implementation of a system mandating hiring units to arrange employment for persons with disabilities according to a specified ratio. Specifically, government organs, social organizations, enterprises, institutions, and privately operated non-enterprise units are to arrange employment for persons with disabilities according to a specified ratio and provide the types of work and positions suitable for persons with disabilities.<sup>232</sup> Although the central government mandates that the ratio be at least 1.5% of a hiring unit's total workforce, the specific ratio is to be determined by the people's governments of provinces, autonomous regions, and municipalities directly under the central government in view of local circumstances.<sup>233</sup> For instance, the legally prescribed quota of Beijing, a municipality directly under the central government, is 1.7%<sup>234</sup> whereas that of Shanghai, another municipality directly under the central government, is 1.6%,<sup>235</sup>

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229. Protection Law, *supra* note 212, art. 36; Employment Regulations, *supra* note 215, art. 18.

230. Protection Law, *supra* note 212, art. 36; Employment Regulations, *supra* note 215, art. 18.

231. Protection Law, *supra* note 212, art. 36.

232. Protection Law, *supra* note 212, art. 33; Employment Regulations, *supra* note 215, art. 8. Simply stated, privately operated non-enterprise units are nonprofit organizations that use non-state assets to engage in social service activities.

233. Employment Regulations, *supra* note 215, art. 8.

234. *Dui Danwei Chaobili Anpai Canjiren Jiuye Geiyu Jiangli Zanxing Banfa* (对单位超比例安排残疾人就业给予奖励暂行办法) [Provisional Measures regarding Rewards to Units Exceeding the Quota in Arranging Employment for Persons with Disabilities], effective on Oct. 24, 2007, promulgated by Beijing's Finance Bureau, Personnel Bureau, Labor and Social Security Bureau, and Federation of Persons with Disabilities on Sept. 24, 2007, art. 2 [hereinafter Beijing Measures].

235. *Shanghaishi Canjiren Fensan Anpai Jiuye Banfa Shishi Xize* (上海市残疾人分散安排就业办法实施细则) [Shanghai City's Detailed Rules regarding the Measures for Dispersed Job Placement of Persons with Disabilities], effective on June 22, 2000 promulgated by the Shanghai City Labor and Social Security Bureau on June 22, 2000, art. 2.



and that of the Guangdong Province is 1.5% of the hiring unit's average total workforce in the previous year.<sup>236</sup>

If a hiring unit fails to meet the quota as prescribed by the local government, it will be required to make a payment (levy) for the employment security of persons with disabilities.<sup>237</sup> The amount of the levy is to be determined according to the number of disabled workers falling short of the quota and the local annual average wages of staff and workers in the previous year.<sup>238</sup> For example, in Guangdong, the levy is an amount equal to the number of disabled workers below the quota multiplied by eighty percent of the local annual average wages of staff and workers in the previous year.<sup>239</sup> If a hiring unit has difficulty paying the levy due to financial hardship or policy-generated loss, it may apply to the local offices of the Ministry of Finance and the Federation of Persons with Disabilities for a reduction or exemption.<sup>240</sup> The levy collected is to be used exclusively for the vocational training of persons with disabilities, rewarding hiring units that have exceeded the quota or entities that have performed remarkably in arranging employment for persons with disabilities, providing financial assistance to businesses collectively or individually run by persons with disabilities, defraying the operations expenses of labor services for persons with disabilities among other things.<sup>241</sup>

Where a hiring unit reaches or exceeds the quota in employing persons with disabilities, a hiring unit undertakes concentrated job placement for persons with disabilities, or a person with a disability is engaged in business, the government will provide preferential tax treatment and support in such areas as production, operations, technology, finance, materials, and siting.<sup>242</sup> Likewise, if a hiring unit or an individual has rendered an outstanding performance in promoting the employment of persons with disabilities, the people's government is directed to recognize and reward it.<sup>243</sup> For instance, in Beijing, the

236. In addition, a blind person or a person with level-one physical disability is to be counted as two persons with disabilities. *Guangdongsheng Shishi Zhonghua Renmin Gongheguo Canjiren Baozhang Banfa* (广东省实施《中华人民共和国残疾人保障法》办法) [Guangdong Province's Implementation Measures for the Law of the People's Republic of China on the Protection of Persons with Disabilities], effective on July 1, 2010, promulgated by the 19th Session of the Standing Committee of the 11th Guangdong People's Congress on June 2, 2010, art. 33 [hereinafter *Guangdong Measures*].

237. *Employment Regulations*, *supra* note 215, art. 9.

238. *Canjiren Jiuye Baozhengjin Guanli Zanxing Guiding* (残疾人就业保障金管理暂行规定) [Provisional Rules on the Administration of Payment for the Employment Security of Persons with Disabilities], effective on Oct. 14, 1995, promulgated by the Ministry of Finance on Oct. 14, 1995 art. 2 [hereinafter *Payment Rules*].

239. *Guangdong Measures*, *supra* note 236, art. 34.

240. *Payment Rules*, *supra* note 238, art. 5.

241. *Id.* art. 6; *Employment Regulations*, *supra* note 217, art. 16.

242. *Protection Law*, *supra* note 212, art. 36; *Employment Regulations*, *supra* note 215, art. 17.

243. *Employment Regulations*, *supra* note 215, art. 7.

government will grant a reward of RMB 3,000 per year for each person above the quota.<sup>244</sup>

If a hiring unit refuses to pay the levy, it will be given a warning and ordered to pay the amount due within a specified period of time.<sup>245</sup> If the hiring unit does not pay the amount due upon expiration of the specified time period, it will be charged a fine of 0.5% per day, in addition to paying the amount due.<sup>246</sup> As an example, in Guangdong, if a hiring unit fails to pay the levy by the deadline, any overdue amount will be charged an additional fine of 0.5% per day, up to the total amount overdue.<sup>247</sup> If the hiring unit files a false report regarding the number of disabled employees or obtains preferential tax treatment by fraud, the tax authorities will handle the case according to law.<sup>248</sup>

To promote the employment of persons with disabilities, China also encourages disabled job seekers to decide for themselves their occupations or start their own businesses.<sup>249</sup> For persons with disabilities who run a business, the government will provide preferential tax treatment and assistance in obtaining a worksite.<sup>250</sup> Persons with disabilities are also exempt from paying various administrative fees,<sup>251</sup> and the government may provide small credits to persons with disabilities.<sup>252</sup> Hence, entrepreneurial activities and self-employment of persons with disabilities, either individually or as a group, is another component of the “multi-channel, multi-level, and multi-format” approach.

Regarding enforcement, the Ministry of Labor and Human Resources is responsible for enhancing the employment prospects of job seekers with disabilities and providing support to disabled employees; however, it has delegated this responsibility to the China Disabled Persons Federation (CDPF). Accordingly, the CDPF and its local offices are responsible for the actual organization, implementation, and supervision of the employment of persons with disabilities in accordance with the law or the government’s delegation.<sup>253</sup>

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244. Beijing Measures, *supra* note 234, art. 2.

245. Employment Regulations, *supra* note 215, art. 27.

246. *Id.*; Payment Rules, *supra* note 238, art. 5.

247. Guangdong Measures, *supra* note 236, art. 67.

248. Employment Regulations, *supra* note 215, art. 28.

249. Protection Law, *supra* note 212, art. 34; Employment Regulations, *supra* note 215, art. 19. In the case of persons with disabilities living in the countryside, local people’s governments and rural grassroots organizations are to organize and support persons with disabilities to engage in farming, handicraft and other types of productive labor. Protection Law, *supra* note 212, art. 35; Employment Regulations, *supra* note 217, art. 20.

250. Employment Regulations, *supra* note 215, art. 19.

251. *Id.* (including management fee, registration fee, and license fee).

252. In the case of persons with disabilities living in rural areas, the government is to provide assistance in such areas as technical guidance, supply of agricultural materials, acquisition of agricultural by-products, and credit. *Id.* art. 20.

253. *Id.* art. 6.

Likewise, trade unions, youth leagues, and women leagues are to perform their work well regarding the employment of persons with disabilities.<sup>254</sup>

Generally, where their rights and interests have been infringed, persons with disabilities may file complaints with organizations of persons with disabilities, which are to safeguard the lawful rights of persons with disabilities and have the right to request the relevant government agencies or the hiring unit to investigate and redress the grievances.<sup>255</sup> Alternatively, persons with disabilities whose legal rights have been infringed may request that the relevant government agencies handle their cases, apply for arbitration, or file lawsuits with the people's courts.<sup>256</sup> Specifically, a victim of employment discrimination may file a lawsuit or seek redress from an administrative agency in charge of the hiring unit.<sup>257</sup> In any event, if victims of discrimination need legal aid due to financial difficulties or for other reasons, local legal aid offices or the people's courts should provide them with legal assistance.<sup>258</sup>

Concerning support programs or services, public employment agencies are to provide job placement services to persons with disabilities free of charge.<sup>259</sup> Similarly, employment agencies for persons with disabilities run by the CDPF are to perform various services without charge.<sup>260</sup> Moreover, subject to the delegation by or approval of the government, employment agencies for persons with disabilities may carry out unemployment registration for persons with disabilities, compile statistics on the employment and unemployment of persons with disabilities, and appraise the vocational capability of persons with disabilities.<sup>261</sup> In the case of vocational qualification examination or job application examination run by the government, where there are blind candidates, the examination papers should be written in the language of the blind, electronic examination papers should be provided, or assistance by special staff should be rendered.<sup>262</sup>

As a result, China's legal framework for promoting the employment of persons with disabilities is a hybrid model. First, China prohibits discrimination against persons with disabilities. Second, China espouses the policy of

254. Employment Regulations, *supra* note 215, art. 6.

255. Protection Law, *supra* note 212, art. 59.

256. *Id.* art. 60.

257. *Id.* art. 64. If a victim of employment discrimination seeks administrative remedy, the agency in charge may order the hiring unit to rectify the problem. *Id.*

258. *Id.* art. 60; Employment Regulations, *supra* note 215, art. 24.

259. Protection Law, *supra* note 212, art. 37.

260. Those services include: (1) release information on the employment of persons with disabilities; (2) organize and launch vocational training for persons with disabilities; (3) provide persons with disabilities with such services as psychological consultation, assessment of vocational suitability, vocational rehabilitation, career guidance, and job referral; (4) provide necessary assistance to persons with disabilities in choosing their own occupations; and (5) provide necessary support to hiring units in arranging employment for persons with disabilities. *Id.*; Employment Regulations, *supra* note 215, art. 22.

261. Employment Regulations, *supra* note 215, art. 23.

262. Protection Law, *supra* note 212, art. 54.

“combining concentration with dispersion.” To protect the employment of persons with disabilities China designates enterprises to employ mainly persons with disabilities and has adopted the quota system. To promote the employment of persons with disabilities—that is, to promote the optimum employment of disabled job seekers, China encourages entrepreneurial activities and self-employment. Toward these aims, China provides preferential treatment to employers who employ persons with disabilities and adopts supportive and protective measures for persons with disabilities. To ascertain whether China’s legal framework for promoting the employment of persons with disabilities is effective, it is informative to examine the current employment situation of persons with disabilities in China.

In 2009, 350,000 persons with disabilities living in urban areas were newly employed, of which 89,000 were employed under the quota system, 105,000 were employed by enterprises focused on persons with disabilities, and 156,000 undertook self-employment or other forms of employment.<sup>263</sup> In that year, a total of 4,433,969 persons with disabilities living in cities were employed, of which 1,125,722 were employed under the concentrated system, 1,165,449 were employed under the quota system, and 2,142,798 were either self-employed or employed in other forms.<sup>264</sup> The federations of persons with disabilities at various administrative levels operated 15,764 enterprises that employed 37,549 workers with disabilities.<sup>265</sup> Even so, the number of unemployed persons with disabilities in urban areas amounted to 1,360,291.<sup>266</sup> Likewise, although 17,570,349 persons with disabilities living in rural areas were employed in one form or another, 5,201,112 were unemployed.<sup>267</sup>

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263. China Disabled Persons’ Federation, 2009 Basic Information of People with Disabilities [hereinafter 2009 Basic Information], available at <http://www.cdpcf.org.cn/tjsj/ndsj/2009/indexcl.htm>. Some academics maintain that statistical information compiled in China should be taken with a grain of salt. This article relies on official statistics because more comprehensive information is not readily available elsewhere. The China Disabled Persons’ Federation main webpage is <http://www.cdpcf.org.cn/english/home.htm>.

264. China Disabled Persons’ Federation, *3-1 Employment of People with Disabilities in Urban Areas* [hereinafter *3-1 Employment*], available at <http://www.cdpcf.org.cn/tjsj/ndsj/2009/indexcl.htm>; see also the China Disabled Persons’ Federation main webpage at <http://www.cdpcf.org.cn/english/home.htm>.

265. China Disabled Persons’ Federation, *3-3 Enterprises Run by Disabled Persons’ Federations*, available at <http://www.cdpcf.org.cn/tjsj/ndsj/2009/indexcl.htm>; see also the China Disabled Persons’ Federation main webpage at <http://www.cdpcf.org.cn/english/home.htm>.

266. *3-1 Employment*, *supra* note 264. It is unclear whether this figure includes both job seekers and non-job-seekers.

267. China Disabled Persons’ Federation, *3-2 Employment of People with Disabilities in Rural Areas*, available at <http://www.cdpcf.org.cn/tjsj/ndsj/2009/indexcl.htm>. See also the China Disabled Persons’ Federation main webpage at <http://www.cdpcf.org.cn/english/home.htm>.

In 2009, there were 3,043 employment placement service facilities for job seekers with disabilities.<sup>268</sup> With respect to vocational training, the federations of persons with disabilities at various administrative levels operated 1,852 vocational education institutes for persons with disabilities.<sup>269</sup> Moreover, there were 2,132 ordinary vocational training organs that accepted persons with disabilities.<sup>270</sup> As a result, 785,000 persons with disabilities received vocational education or training, and 109,000 persons with disabilities were awarded certificates of vocational qualification.<sup>271</sup> More specifically, 12,864 persons with visual disabilities received training in keep-fit massage, 4,686 persons with visual disabilities received training in therapeutic massage, and 84,000 persons with disabilities received training in applied technologies.<sup>272</sup>

Furthermore, in 2009, there were 2,870 legal aid offices, providing legal assistance to persons with disabilities nationwide, and these legal aid offices disposed of 19,000 cases.<sup>273</sup> Meanwhile, CDPF at various administrative levels and relevant government departments investigated and disposed of 149 cases regarding the infringement of the rights of persons with disabilities.<sup>274</sup> The CDPF also accepted 374,000 letter-and-visit cases at various administrative levels nationwide.<sup>275</sup>

Nonetheless, the population of persons with disabilities has been increasing at a pace of 300,000 per year.<sup>276</sup> Moreover, the local governments and hiring units did not have a sufficiently clear understanding of their responsibility for the employment of persons with disabilities, and a small number of hiring units did not arrange employment for persons with disabilities or sign labor contracts with disabled employees or discriminated against persons with disabilities.<sup>277</sup> Furthermore, vocational training of persons with disabilities has

268. 2009 Basic Information, *supra* note 263.

269. China Disabled Persons' Federation, *2009 Nian Zhongguo Canjiren Shiye Fazhan Tongji Gongbao* (2009 年中国残疾人事业发展统计公报) [2009 Statistical Gazette on the Developments of the Disability Cause in China] [hereinafter 2009 Statistical Gazette], available at [http://www.cdpf.org.cn/sytj/content/2010-04/01/content\\_30316231.htm](http://www.cdpf.org.cn/sytj/content/2010-04/01/content_30316231.htm).

270. *Id.*

271. *Id.*

272. 2009 Basic Information, *supra* note 263.

273. 2009 Statistical Gazette, *supra* note 269.

274. *Id.*

275. *Id.* Simply stated, letter-and-visit is an administrative means of filing grievances with or seeking assistance from government agencies. A complainant may send a letter to the relevant government agency or pay a visit in person.

276. General Office of the State Council, *Jiu Canziren Jiuye Tiaoli Younguan Wenti Da Zhongguo Zhengfu Wangwen* (国务院法制办负责人就《残疾人就业条例》有关问题答中国政府网问) [The Legal Office Representative's Answers to Questions Concerning the Employment Regulations of Persons with Disabilities], March 6, 2007, [http://www.gov.cn/zwhd/2007-03/06/content\\_543015.htm](http://www.gov.cn/zwhd/2007-03/06/content_543015.htm) (last visited Feb. 3, 2013).

277. *Id.*

been sluggish, and several protective measures for the employment of persons with disabilities need to be improved.<sup>278</sup>

China has adopted a comprehensive approach to enhance the employment of persons with disabilities, including the concentrated job placement scheme, the quota system, the prohibition of discrimination, and the promotion of self-employment. Since this regulatory scheme has been implemented for a relatively short period, whether it will significantly improve the employment of persons with disabilities remains to be seen. Moreover, although discrimination against persons with disabilities is outlawed in China, the current framework may not have a sufficient deterrent effect because it is unclear what specific remedies are available to persons with disabilities who have been denied equal employment opportunities. Likewise, if remedies or penalties are to be meted out on a case-by-case basis by courts or administrative agencies, it is unclear how vigorously antidiscrimination legislation will be enforced. Furthermore, although concentrated job placement will increase the number of persons with disabilities being employed, it will continue the segregation of workers with disabilities from the mainstream, thus hindering the integration of persons with disabilities into society. Considering the sizable increase in the number of persons with disabilities each year, it is axiomatic to say that the more avenues there are to promote the employment of persons with disabilities, the better chances persons with disabilities will obtain employment.

## VI. QUOTA, ANTIDISCRIMINATION LEGISLATION, OR BOTH?

In a large measure, the respective regulatory frameworks of China, Japan, and the United States stem not only from the disability model they have each adopted, but also the subsequent evolution of their underlying disability policies. Following the German approach and based on the medical model, Japan has relied on the quota system to place job seekers with disabilities for more than fifty years. In response to international developments, the coverage of the Japanese quota system has expanded gradually, but Japan has not yet enacted a statute specifically to outlaw employment discrimination against persons with disabilities.<sup>279</sup> Originally, the United States attended to the needs of persons with disabilities as a moral obligation, so welfare law was the primary legislative means to improve the condition of persons with disabilities. However, as a result of the disability movement in the 1970s and 1980s, the United States changed its disability policies, adopted the social model, and enacted an antidiscrimination statute to promote social inclusion and integration of persons with disabilities. Although China's regulatory framework is relatively recent, China attempts to combine the strengths of both the quota system and the antidiscrimination approach by

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278. *Id.*

279. It is reported that discussions on antidiscrimination legislation have been held in the Labor Policy Council of the Ministry of Health, Labor and Welfare. Hasegawa, *supra* note 42, at 26–27.

adopting a hybrid model consisting of the “concentration and dispersion” job placement scheme, promotion of entrepreneurial activities, and prohibition of discrimination against persons with disabilities.

To a lesser extent, the approach taken by each country also has cultural or historical roots. The quota system is implemented principally by administrative agencies, and employers fulfill their legal obligations because they do not want to pay levies or to have their names disclosed to the public for noncompliance. Thus, it makes sense for Japan to adopt and continue using the quota system because administrative guidance, rather than formal legal channels, is commonly used in Japan to achieve government policies, and shame, or the risk of having a bad reputation, is still a significant deterrent in Japanese society. After the Second World War, the United States did not have a large number of veterans with disabilities, as compared to its European counterparts. Hence, it was not exigent for the United States to adopt the quota system. As mentioned above, the ADA was a product of the civil rights movement, which had changed the legal landscape regarding disadvantaged groups. In the case of China, as economic reforms intensify, the so-called iron rice bowl has also vanished.<sup>280</sup> Since China has a large population, the task of getting all working-age persons without disabilities employed is an arduous task, let alone the employment of persons with disabilities. To promote the employment of both persons with disabilities and persons without disabilities, China has resorted to a multi-channel and multi-format system, including the enthusiastic promotion of entrepreneurial activities.

To implement the chosen approach, China, Japan, and the United States have enacted specific laws or regulations aimed at enhancing the employment opportunities of persons with disabilities, and/or provisions in multi-focus statutes protecting the rights of persons with disabilities. Because the United States is a common law country, the corpus of legal rules regarding the employment of persons with disabilities also includes court decisions. One may argue that civil law countries tend to adopt the quota system and common law countries tend to adopt the antidiscrimination approach, because the former’s legislature sets forth the legal requirements and consequences of noncompliance without much room for judicial interpretation, while the latter’s legislature enunciates legal rules that the courts are to interpret and construe in determining disability on a case-by-case basis. First, this argument is too simplistic because the United Kingdom used to have a quota system. Second, even assuming that the quota system and antidiscrimination legislation also follow the civil-common law divide, the fact that civil law countries, such as Germany, have enacted antidiscrimination laws has rendered this argument no longer viable. Irrespective of what type of legislation is used, each government intervenes by explaining what kinds of disabilities and what types of employers are covered, enunciating the obligations of employers and the rights of persons with disabilities, outlining the

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280. Prior to China’s economic reforms, workers in state enterprises enjoyed lifetime employment, and dismissals were made only due to misconduct.

consequences of non-compliance or discrimination, and establishing the necessary enforcement mechanisms and support programs or services. Notwithstanding the commonality of these issues similarities and differences, as discussed below, exist among these regulatory regimes in both substantive and procedural laws.

First, although all three countries provide definitions of “disabilities,” the definition of “disabilities” under the Japanese quota system entails the classification of disabilities based on the type and degree of disability, and only those who hold disability cards or certificates of disabilities are entitled to the benefits provided under the system. Likewise, the Chinese definition of “disabilities” also involves classification and requires actual disabilities. In contrast, the U.S. Congress intends that the term “disabilities” be construed broadly. Not only are disabilities not classified according to degree of disability, but also both actual and perceived disabilities are entitled to the protection of antidiscrimination law. This reflects the underlying objective of the ADA, namely, prohibition of discrimination, even though the victim does not really have a disability. Moreover, the quota system appears to focus on job applicants with disabilities, while both the ADA and China’s Employment Regulations prohibit discrimination against disabled job applicants as well as employees with disabilities.

With regard to employers covered under the law, the Japanese quota system applies to both public and private employers. Similarly, the Chinese quota system applies to both the public and private sectors. However, the ADA targets employment discrimination in the private sector because discrimination by state actors is outlawed under the Equal Protection Clause of the U.S. Constitution. Nonetheless, all three countries provide exemption because the Japanese quota system applies to employers with at least fifty-six employees (fifty employees starting from 2013) and the ADA applies to employers with at least fifteen employees, while China exempts or reduces the levies of enterprises experiencing financial hardship or policy-generating losses. Even so, the majority of employers in these countries are subject to the quota system and/or antidiscrimination legislation.

For substantive rights and obligations, the quota system delineates the obligations of employers, but does not guarantee persons with disabilities any legal rights. That is, both China and Japan mandate that employers hire a certain number of persons with disabilities in their workforce, require them to pay levies if they fail to meet the quota, and reward them for hiring more than what is legally prescribed, but persons with disabilities under the quota system are not guaranteed any concrete rights. This employer-focused approach also provides financial incentives, such as grants, tax reduction or exemption, and subsidies, to employers to compensate them for additional costs incurred as a result of hiring persons with disabilities. Although both China and Japan have adopted the quota system, differences also exist between these two systems. Japan is a unitary country, and its national government formulates the legally prescribed quota and the amount of levy, which are to be applied nationwide, except for certain industries to which the exclusion rates apply. Conversely, in China, the central government sets forth



policies and general rules, while the local governments implement those policies and rules according to local circumstances. For example, the central government sets only a minimum employment quota and allows the local governments to determine the legally mandated employment rate. Considering the diversity in regional socio-economic conditions, the Chinese regulatory framework may be more realistic in securing compliance by employers, and thus, more conducive to improving the employment of persons with disabilities.

On the other hand, antidiscrimination legislation empowers persons with disabilities by giving them the right to equal employment opportunities and requires employers not to discriminate them by failing to provide “reasonable accommodation.” The requirements of the ADA, however, are not absolute because employers do not need to provide accommodation in the case of undue hardship, and employers are also entitled to such defenses as job-relatedness, business necessity, and direct threat to the health and safety of others. Where discrimination has occurred, victims of discrimination can seek such remedies as compensatory damages, punitive damages, and back pay. Under the quota system, the amount of levy is fixed; however, under the ADA, the amount of damages can be substantial, depending on the size of the employer.

China, Japan, and the United States all have administrative agencies that provide enforcement, but China and the United States also provide for judicial adjudication of discrimination claims. Administratively, the Japanese Ministry of Health, Labor and Welfare, the EEOC, and the CDPF are empowered not only to monitor and inspect, but also to investigate, mediate, and redress grievances. Under the quota system, employers have to file an annual report regarding the number of employees with disabilities, but the employees with disabilities are not required to do anything. Conversely, under the ADA, victims of discrimination have the burden of proof, and employers may disprove discrimination or assert statutory defenses.

Apart from legal rules, each regulatory system has established support programs or services to assist persons with disabilities in finding employment. Support programs or services, such as vocational training or rehabilitation, job placement, and job coaching, increase the employability, and decrease the turnover, of persons with disabilities. Support programs or services, organized by the government or non-profit organizations, are available in both specialized and mainstream employment or training centers and institutes. In each country, the support programs or services form an integral part of the overall regulatory system.

Because it will be more difficult to prove discrimination than to ascertain whether an employer has fulfilled the quota, the transaction costs for processing a noncompliance case under the quota system will be lower. Although the quota system enables persons with disabilities to pass the initial hurdle of employment, it provides little, if any, intervention to protect them once they are employed. In particular, since the quota system emphasizes the quantity of employment, the quality of employment, such as ergonomic friendliness, remuneration, and career development, as well as the compatibility between the ability of workers with

disabilities and the jobs offered to them, often do not receive adequate attention. Consequently, workers with disabilities may quit when experiencing frustration and obstacles at work. Moreover, the quota system sounds patronizing and conveys the message that persons with disabilities are not as competent or productive as persons without disabilities. Indeed, the quota system perpetuates the distinction between persons with disabilities and persons without disabilities. Furthermore, employers may choose to pay levies rather than hiring persons with disabilities. Therefore, it is imperative to review whether the amount of levy should be increased and to pursue vigorous enforcement of the law.

Ideologically, the antidiscrimination approach is the preferred choice because it espouses equality of rights and promotes the independence and self-determination of persons with disabilities. However, since the ADA emphasizes equal employment opportunities for qualified individuals, persons with severe, intellectual, or mental disabilities may not be qualified for many jobs, in which case there is little chance for them to secure employment. This is in stark contrast to the quota system, in which the double counting method enables some workers with severe disabilities to obtain employment. Nevertheless, antidiscrimination legislation raises the consciousness of the public about the challenges facing persons with disabilities, restores the status of persons with disabilities as equal participants in society, and avoids the marginalization of persons with disabilities. In addition, antidiscrimination statutes have a deterrent effect and prevent persons with disabilities from experiencing discrimination in all major aspects of employment, such as hiring, remuneration, promotion, and dismissal. Because the effectiveness of an antidiscrimination statute depends on whether the victims of discrimination have the necessary resources, whether physical, financial, or emotional, to enable them to seek administrative or judicial redress, it is essential to streamline the grievance procedures and to ensure that persons with disabilities have access to transportation, counseling, and legal aid.

Both the quota system and the antidiscrimination approach have merits and demerits, so one alternative is to combine the two. China has adopted the quota system and enacted antidiscrimination provisions, but whether its regulatory framework will significantly enhance the employment of persons with disabilities remains to be seen. Even so, the Chinese experience can illustrate the efficacy of a hybrid model, and countries planning to adopt a hybrid model can draw lessons from it. With the passage of the U.N. Convention, countries are either working toward a combined approach or shifting toward antidiscrimination legislation. In the former case, the crucial question is how to make the two systems complement each other and create a synergistic effect, without wasting resources or unnecessary overlap. In the latter case, the objective is to realize the normalization of persons with disabilities, namely, moving them out of peripheral employment into regular employment. This enterprise necessitates the removal of possible structural barriers because the U.S. case demonstrates that the enactment of an antidiscrimination statute by itself will not improve the employment situation of persons with disabilities in any significant measure.

## VII. CONCLUSION

In contrast to other controversial issues, most countries acknowledge the importance of either protecting or empowering persons with disabilities. One fundamental way to protect or empower persons with disabilities is to assist them in obtaining sustainable employment. To do so, governments in various parts of the world have adopted either antidiscrimination legislation or a quota system. For years, many European countries tried to promote the employment of persons with disabilities under their respective quota systems. As a result of its disability movement, the United States enacted the ADA in 1990, outlawing employment discrimination against persons with disabilities. This new paradigm of antidiscrimination has had ripple effects in other parts of the world.

Looking at the policies behind these three regulatory systems, the allocation of social responsibility plays a crucial role, that is, how much responsibility employers should share with the government in promoting the employment of persons with disabilities. Under the quota system, employers have an affirmative duty to employ a prescribed number of persons with disabilities. To alleviate their financial burden, employers are given monetary compensation or reward. Under the antidiscrimination approach, employers are not required to employ a prescribed number of persons with disabilities, but they are forbidden to discriminate against disabled job applicants and employees by not providing "reasonable accommodation." In other words, employers are to promote the employment of persons with disabilities by paying for "reasonable accommodation" with the desired result of reducing persons with disabilities on the welfare roll.

To promote the employment of persons with disabilities, both the quota system and the antidiscrimination approach have merits and demerits. Accordingly, one basic question is: Should we evaluate a regulatory system as to the realization of expected outcomes or to the achievement of the underlying ideological objective? From a utilitarian perspective, as long as the end of having persons with disabilities employed can be reached, the means to achieve it can be the quota system, an antidiscrimination statute, a hybrid model, or any other innovative measure. Conversely, deontologists will argue for the rights-based approach. That is, since persons with disabilities have the same fundamental rights as persons without disabilities, and antidiscrimination legislation espouses the equality of rights, promoting the employment of persons with disabilities should begin with antidiscrimination legislation.

Certainly, the segregation of persons with disabilities from the mainstream based on welfare services and sheltered workshops will continue to isolate and exclude this disadvantaged group. Thus, a dual system of treating persons with disabilities and persons without disabilities separately is a linear model, where two parallel lines will never converge. Fostering inclusion and integration of persons with disabilities into all sectors of society rather than isolating them as charitable objects will benefit both persons with disabilities and

society at large. Nevertheless, including and integrating persons with disabilities requires a carefully designed strategy consisting of proactive measures. The main reason is that, like women and racial minorities, persons with disabilities must be given equal opportunities, but different from women and racial minorities, persons with disabilities require special consideration. Hence, there is a paradox that persons with disabilities should be treated both equally and differently.

The passage of the U.N. Convention reinforces that disability issues are increasingly seen as human rights issues. Accordingly, it is likely that more countries will enact statutory provisions to outlaw discrimination whether or not the quota system is still retained. Given the diversity of cultures, societies, and legal systems in the world, the adoption of an antidiscrimination model based on the principle of equality of rights entails conscientious evaluation and planning. In terms of legislation, the promotion of the employment of persons with disabilities can be achieved by such means as constitutional amendments, statutes, administrative regulations, executive orders, and even local ordinances. Where statutory provisions are used, discrimination can be prohibited or the quota system can be mandated under administrative law, civil law, labor law, or a combination of different areas of law. The choice of one type of law over the other, or the use of a combination of areas of law, will lead to different procedural and remedial consequences, and ultimately, the success or failure of any program to promote the employment of persons with disabilities.

Legislation, however, can serve only as the “skeleton,” outlining policies and directions to be undertaken. The implementation details and enforcement mechanisms provide the “flesh,” and their efficacy is indispensable to the realization of equal employment opportunity. For instance, although an administrative agency coordinating the tasks of relevant governmental ministries and departments in dealing with disability issues is quite common, a separate agency providing services exclusively to persons with disabilities, performing periodic reviews of implementation progress, soliciting input from organizations for and of persons with disabilities, and providing one-stop services to disabled job seekers and employees may be necessary to materialize the legislative intent and to prevent persons with disabilities from being pushed around in a labyrinth of bureaucracy. In this respect, sufficient funds must be available, and given the current financial crisis worldwide, innovative and eclectic sources of finance should be explored. Likewise, in formulating strategies to achieve the legislative intent, the diversity of disabilities should be taken into account because persons with different types and degrees of disabilities have different aspirations and needs.

Although antidiscrimination legislation and the quota system facilitate the job placement of persons with disabilities, other life aspects of persons with disabilities must be improved simultaneously to make the regulatory scheme a success. Apart from access to transportation, persons with disabilities may need counseling services when they feel discouraged and want to quit or health care coverage that will pay for assistive devices. Consequently, it is necessary to

build or improve the physical, social, and medical infrastructures for persons with disabilities. Likewise, a comprehensive program to promote the employment of persons with disabilities consists not only of the hiring of persons with disabilities, but also career advancement of persons with disabilities who have already secured employment, vocational rehabilitation or job retention for workers who have recently become disabled, and vocational training for persons with disabilities who do not possess any employable skills.

One study finds that “there is a dearth of adequate information on the prevalence of disability, and on the service requirements of people with disabilities.”<sup>281</sup> Although these three countries have reporting requirements and compile relatively useful statistics on persons with disabilities, it would be beneficial to have detailed breakdowns to which policymakers and legislators can refer in formulating policies and measures, because diversity exists among persons with disabilities. Indeed, considering the rapid advancement of various technologies, more efforts should be made to create a positive link between technological developments and employment opportunities for persons with disabilities. For instance, although automation may eliminate some types of jobs, some tasks may be modified to such an extent that persons with disabilities can take them up with little need for accommodation. Moreover, for persons with disabilities who are entrepreneurial or would like to work at home, the government should also allocate resources to create conditions conducive to self-employment.

Furthermore, non-legal challenges make it difficult to fulfill legislative intent. For example, despite evidence that workers with disabilities have better attendance records, are many times as productive as those without disabilities, and have fewer accidents at work, some employers perceive persons with disabilities as being high-risk, unproductive workers who require many types of accommodation.<sup>282</sup> Amid the trend of globalization, employers are facing an increasingly competitive environment, both at home and from overseas. It is likely that they feel more pressure to stay competitive and less inclined to employ persons with disabilities. What is more, “[t]here is a tendency to focus on the disability rather than on the abilities of disabled persons in initiatives to promote employment opportunities.”<sup>283</sup> Hence, educational campaigns must be launched to dispel any employer misconceptions about persons with disabilities.

The right of persons with disabilities to obtain sustainable employment is an economic right, which will, in turn, affect their political and social rights. For that reason, it is imperative that persons with disabilities be given equal employment opportunities. In addition, employment not only provides a means of livelihood for persons with disabilities, but more importantly, also enables them to have a sense of self-worth and dignity. Moreover, from the perspective of economics, it will be a win-win situation where persons with disabilities are self-

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281. INT’L LABOUR ORG., *EMPLOYMENT OF PERSONS WITH DISABILITIES—THE IMPACT OF LEGISLATION: ASIA AND THE PACIFIC* 21 (2003).

282. *Id.*

283. *Id.*

sufficient and productive, employers have a diversified and reliable supply of labor, and society can direct its limited resources to other pressing causes. Hence, the corollaries of any success in promoting the employment of persons with disabilities will be economic efficiency and the realization of distributive justice.<sup>284</sup> All of the parties concerned, whether government, employers and employer associations, worker organizations, or organizations of and for persons with disabilities, should collaborate in formulating policies and concrete measures to promote the employment of persons with disabilities.

To promote the employment of persons with disabilities, the adoption of one model over the other depends on the economic, political, and social circumstances of a particular country. Regardless of what approach is used to promote the employment of persons with disabilities, empowerment and social integration of persons with disabilities should be the cornerstone. Toward these aims, efforts must be made not only to procure employment opportunities for persons with disabilities, but also to educate employers, workers without disabilities, and the general public regarding unfounded prejudices against this disadvantaged group. In this connection, corporate or industrial codes of conduct or codes of practice for the furtherance of ethical behavior and social responsibility may also contain explicit provisions to facilitate the integration of workers with disabilities. Trade unions can be more proactive in advocating the rights of workers with disabilities and increasing the awareness of obstacles facing persons with disabilities. As a result, legislative efforts to promote the employment of persons with disabilities are only the beginning—meticulous implementation strategies, effectual enforcement mechanisms, regular evaluations of progress, and the fostering of new societal attitudes toward disabilities must follow to effect success.



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284. Distributive justice here refers to the fair distribution of wealth and income in society.