

Overview of the Freelance Transactions Optimization Bill and Other Partnership-Related Policy Developments and Their Impact on Practice

Competition Law / International Trade Newsletter

March 24, 2023

Author:

[E-mail✉ Tatsuya Tsunoda](mailto:tsunoda@nishimura-asahi.com)[E-mail✉ Taisuke Ueno](mailto:ueno@nishimura-asahi.com)[E-mail✉ Miyu Harada](mailto:harada@nishimura-asahi.com)

On February 24, 2023, in light of the increasing diversification of work styles, the "Freelance Transactions Optimization Bill" (the Act on Optimization, etc., of Transactions concerning Specified Consignees; hereinafter referred to as the "**FTO Bill**")¹ was approved by the Cabinet and submitted to the House of Representatives.² The purpose of the bill is to provide transparency and protection in transactions where "freelancers"³ act as service providers. Such protection is necessary because, in most cases, the consigners who entrusts business to the freelancer is a business or organization and, as such, there is a disparity between the consigners and freelancer in terms of information and bargaining power. If the bill is enacted by the Diet, it will require consigners to clearly indicate the terms and conditions of transactions by providing accurate information and prohibit them from taking certain actions that may disadvantage so-called freelancers, such as engineers and programmers, professional players in games, e-sports, etc., fashion designers, delivery persons, writers, music and video content creators, consultants, etc. While these regulations will expand compliance considerations, they are expected to provide a baseline for the new but immature partnership transaction environment and promote its sound development. The effective date of the Act will be prescribed by Cabinet Order within a period not exceeding one year and six months from the date of promulgation (Article 1 of the Supplementary Provisions).

The following is an overview of the FTO Bill with focus on certain noteworthy points. In addition, many other policies affecting the partnership environment with freelancers (and the like) have been developed in recent years, and we will introduce an overview of these related policies as well, considering that it will be necessary to respond to them concurrently in the future.

1. Outline of the Freelance Transactions Optimization Bill and Points to be Noted

The following is an outline of the FTO Bill, the details of which will be fleshed out through government ordinances and rules established by the Fair Trade Commission and the Ministry of Health, Labor and Welfare.

¹ <https://www.cas.go.jp/jp/houan/230224/siryous3.pdf>

² <https://www.sangiin.go.jp/japanese/joho1/kousei/gian/211/meisai/m211080211023.htm>

³ The term "freelance" is not a legal term and definitions vary. Generally, "freelance" means a self-employed person or a sole proprietor who does not have an employer, and who uses his/her own experience, knowledge and skills to earn an income.

Freelance Transactions Optimization Bill		Regulatory authority	Similar/Reference Regulations
Optimization of transactions (Chapter 2)	Article 3: Obligation to clearly state and provide details of consignment, etc.	Japan Fair Trade Commission, Small and Medium	Article 3 of the Act against Delay in Payment of Subcontract Proceeds, Etc. to Subcontractors ("Subcontract Act")
	Article 4: Obligation to set payment due dates (including in the case of re-consignment)		Article 2-2 of the Subcontract Act
	Article 5: Prohibited acts	Enterprise Agency	Article 4 of the Subcontract Act
Work Environment (Chapter 3)	Article 12: Obligation to accurately display recruitment information	Ministry of Health, Labour and Welfare ("MHLW")	Article 5-4 of the Employment Security Act
	Article 13: Obligation to care for pregnancy, childbirth/child care and nursing care		Chapter 6-2 of the Labor Standards Act Child Care and Family Care Leave Act
	Article 14: Obligation to establish a system for consultation and response to work environment problems		Articles 11 and 11-3 of the Act on Securing of Equal Opportunity between Men and Women Article 30-2 of the Act on Comprehensive Promotion of Labor Policies and Measures
	Article 16: Obligation to give notice of termination/non-renewal and to disclose reasons		Article 20 and 22 of the Labor Standards Act Article 14(2) of the Labor Standards Act ("Standards Concerning Conclusion, Renewal and Termination of Fixed Term Labor Contracts")

As will be explained in more detail below, the FTO Bill seems to be an attempt to optimize transactions through regulations similar to those of the Subcontract Act as well as an effort to improve the working environment for freelancers through regulations similar to labor-related laws. In practice, it is reasonable to first check and refer to the contents of such similar regulations when analyzing related matters.

(1) Target

The FTO Bill defines "specified consignee" and "specified consigned person" as concepts equivalent to "freelance" as follows (Article 2, Paragraph 1).

Specified Consignee	(i) The counterparty of the outsourcing business.
----------------------------	---

	(ii) One of the following applies: For individuals - not using employees. For corporations - no other officers other than one representative and no employees.
Specified Consigned Person⁴	Individuals who are specified consignees
	A representative of a corporation that is a specified consignee

In addition, the FTO Bill definition of “Business Consignment” includes manufacturing consignment, consignment for the creation of information products, or service consignment (including outsourcing to a business operator) (Article 2, Paras. 3 and 4). As such, if a company has even one employee, it does not fall under the category of a "specified consignee" and is not subject to FTO Bill obligations. As such, unlike the Subcontract Act, a company’s utilization of outsourcing for its own services is included in "Business Consignment," so delivery services, etc., the ownership of which is passed to the recipient⁵ could be subject to the FTO Bill.⁶ Additionally, for both Specified Consignees and Outsourcing Service Providers (defined below), there are no capital requirements, unlike in the Subcontract Act, nor is there a requirement for a “command and order relationship,” unlike in the Labor Standards Act. Therefore, even transactions that are not covered by the Subcontract Act or the Labor Standards Act may be covered by the FTO Bill.

With the above scope of "freelancers," the FTO Bill sets forth two types of obligations: (1) obligations to be imposed on all "Outsourcing Service Providers" (i.e., those who entrust business to "Specified Consignees"), and (2) obligations only applicable to "Specified Outsourcing Service Providers" who engage specific employees among such "Outsourcing Service Providers."⁷ However, as shown in the table below, most obligations are imposed on Specified Outsourcing Service Providers as, in practice, it is considered that consigners usually fall under this category.

Obligations imposed on Outsourcing Service Providers	Article 3: Obligation to clearly state and provide details of consignment, etc.
Obligations imposed only on Specified Outsourcing Service Providers	Article 4: Obligation to set payment due dates (including in the case of re-consignment) Article 5: Prohibited acts Article 12: Obligation to accurately display recruitment information Article 13: Obligation to care for pregnancy, childbirth/child care and nursing care Article 14: Obligation to establish a system for consultation and response to work environment problems Article 16: Obligation to give notice of termination/non-renewal and to disclose reasons

⁴ This definition is used in Articles 14 and 21 of the FTO Bill regarding the development of a system for consultation and response to operating environment problems.

⁵ Ownership of goods in transit is held by the consigner and transferred to the receiver at the time of delivery.

⁶ Unlike the Subcontract Act, "repair outsourcing" is not clearly defined in the definition of "outsourcing."

⁷ Of which certain obligations are imposed only on "Specified Outsourcing Service Providers" engaged in ongoing transactions for a certain period.

(2) Obligation to clearly state and provide details of consignment, etc.

When an Outsourcing Service Provider engages in Business Consignment with a Specified Consignee, the Outsourcing Service Provider is required, in principle, to immediately and clearly indicate in writing or by electromagnetic means⁸ the (1) contents of consignment, (2) amount of remuneration, (3) payment date, and (4) other matters specified by the Rules of the Fair Trade Commission. However, with respect to those matters for which there is a justifiable reason that they cannot clearly indicate such things at the time of consignment, it is necessary to clearly indicate them immediately after the content of such matters is determined (Article 3, Paragraph 1). In addition, even if an Outsourcing Service Provider clearly indicates such matters by electromagnetic means, the Outsourcing Service Provider is required, in principle, to provide the document containing such indications without delay when requested to do so by a Specified Consignee. However, the document need not be provided in cases prescribed by the Rules of the Fair Trade Commission where the protection of Specified Consignees is not hindered (Article 3, Paragraph 2).

While the above may indicate that there are cases where procedures for information provision can be completed online,⁹ in practice, it will be necessary to arrange and indicate the specific point of any such "Business Consignment" (e.g., at the time of planning and event coordination, at the conclusion of a basic contract, or when individual work orders are placed) and what items/services should be treated as having been consigned, etc., to match the actual conditions of the industry and the transaction. For example, "remuneration" here is defined as the price to be paid for the provision of work or services by the Specified Consignee (Article 2, Paragraph 7), but an Outsourcing Service Provider needs to confirm to what exactly the "amount" shown to the Specified Consignee corresponds (scheduled or fixed, payment separately from the work, etc.).

(3) Obligation to fix the date of payment (including in the case of re-entrustment)

A Specified Outsourcing Service Provider is required to fix the date of payment to a Specified Consignee within 60 days (calculated by counting the date of receipt), and moreover, within as short a period as possible, from the day on which the Specified Outsourcing Service Provider receives the work from the Specified Consignee (or the day on which the Specified Consignee provides the service) (Article 4(1)). The date of payment is to be deemed (i) the date of receipt of the work when the date of payment is not fixed, or (ii) the 60th day from the date of receipt when the fixed date of payment is longer than 60 days from the date of receipt (Article 4(2)).

Furthermore, if a business operator (original consignor) entrusts business to a Specified Outsourcing Service Provider and the Specified Outsourcing Service Provider re-entrusts the business to a Specified

⁸ According to the results of the solicitation of opinions on the "Direction of the Legal System to Ensure Optimization on Transactions with Freelancers," at least e-mail is recognized as an electromagnetic method, but the details of what other methods, including methods other than those currently recognized by the Subcontract Act (such as display in an application), are acceptable, will be determined in the future (p. 5).

⁹ These regulations are based on the Subcontract Act, which states that, in principle, the large procuring enterprise should deliver to the subcontractor a document stating the details of the subcontractor's performance, the amount of subcontract proceeds, the due date and method of payment, and other matters, and only in exceptional cases where the subcontractor has given prior consent after the large procuring enterprise indicates the method and details of such delivery to the subcontractor (Article 3 of the Subcontract Act). Compared to this Subcontract Act, the regulations of the FTO Bill seem to allow room for the use of electromagnetic means with regard to the scope and method of items to be clearly indicated.

Consignee,¹⁰ the date of remuneration payment for the re-entrustment must be fixed, within as short a period as possible under 30 days from the day of the remuneration payment for the original entrustment, to ensure that the payment from the original consignor to the re-entrusted consignee is processed timely (Article 4(3)). Article 4(4) is also provided as a presumptive provision regarding the date of payment, which is applicable in cases where the date of remuneration payment for the re-entrustment has not been fixed in accordance with Article 4(3).¹¹ In addition, if a Specified Outsourcing Service Provider receives an advance payment from the original consignor, the Specified Outsourcing Service Provider is obligated to give appropriate consideration to paying the Specified Consignee an advance payment for the expenses necessary to start the work (Article 4(6)).

Based on the above, the Specified Outsourcing Service Provider is in principal obligated to pay the remuneration by the due date. However, if the Specified Consignee is responsible for delay of the provider's payment, the Specified Outsourcing Service Provider may pay within a certain period once the delay-causing reason has been resolved (Article 4(5)). It should be noted that there is no provision for payment of statutory interest in this case.¹²

(4) Prohibited acts

No Specified Outsourcing Service Providers may conduct any one of the following acts if the entrustment is performed for a period longer than that specified by Cabinet Order (including cases of renewal) (Article 5(1) and (2)).

- (i) Refusal to receive the work without reasons attributable to the Specified Consignee
- (ii) Reduction of remuneration without reasons attributable to the Specified Consignee
- (iii) Return of the goods in cases without reasons attributable to the Specified Consignee
- (iv) Unjust setting of the remuneration at a level conspicuously lower
- (v) Coercing the Specified Consignee to purchase or to use designated goods or services without justifiable reason
- (vi) Causing the Specified Consignee to provide economic gains that unjustly injure the interests of the Specified Consignee
- (vii) Causing the Specified Consignee to change the content of the work or to re-work without reasons attributable to the Specified Consignee that unjustly injure the interests of the Specified Consignee

¹⁰ However, this applies only to the cases where the Specified Outsourcing Service Provider clearly indicates to the Specified Consignee that the entrustment is a re-entrustment, and also indicates the name or title of the original consignor, the date of payment of the consideration for the original entrustment, and other matters specified in the Rules of the Fair Trade Commission. Therefore, if the Specified Outsourcing Service Provider acting as an intermediary fails to take measures pertaining to such clarification, this provision may not be formally applied.

¹¹ Specifically, if the due date for payment of the remuneration has not been fixed, the due date for the original commission payment shall be the due date for payment of the remuneration.

¹² According to the results of the public comments towards the "Direction of the Legal System for Proper Transactions with Freelancers," it was confirmed that interest for delay in payment is not statutory (page. 9). These regulations appear to allow for flexible treatment, compared to the fact that under the Subcontract Act, the large procuring enterprise is obligated to fix the date of payment of subcontract proceeds within sixty days, and moreover within as short a period as possible, from the date of receipt, late payment is prohibited (regardless of reasons attributable to the subcontractor), and interest for late payment is statutory (Article 4(1)(ii), Article 4-2).

It appears that the only criterion for determining whether a business entrustment is subject to the above regulations on prohibited acts is based solely on the length of the period. Therefore, in practice, it would be necessary to consider whether "business entrustment" is based on a one-time request or order or a basic contract for a certain period. As for the applicability of the prohibited acts to individual transactions, it would seem that the transaction contents would not be considered in violation of this proposed Act if the contents of the transaction do not violate the Subcontract Act. However, there will be many cases where it is impossible to make a clear judgement due to the requisite evaluation of certain factors, such as whether a particular aspect is "unjust".¹³

(5) Obligation to accurately display offering information

When providing information regarding a Specified Consignee (specified by Cabinet Order) offer in advertisements, etc., Specified Outsourcing Service Providers are obligated not to present any false representation, etc. (Article 12(1)) and to keep such information accurate and up-to-date (Article 12(2)).¹⁴

(6) Obligation of care for pregnancy, childbirth/child care, and nursing care

In continuous outsourcing (i.e., outsourcing for a period longer than that specified by Cabinet Order), a specified outsourcing business operator is obligated not only to give necessary consideration to balancing pregnancy, childbirth, childcare, or nursing care with such continuous outsourcing, in response to a request from the other specified outsourcing business operator and the situation of said specified outsourcing business operator (Article 13, Paragraph 1), but also obligated to make efforts to give the same consideration in relation to the specified entrusted business operator of the counterparty of such continuous outsourcing (Article 13, Paragraph 2).¹⁵

In practice, in determining the continuity period, it first will be necessary to consider whether the period of outsourcing of one-off requests and orders should be based on an individual basis or on the period during which the basic contract was concluded, etc.

¹³ These regulations appear to provide mostly common content with the Subcontract Act, which prohibits refusal of receipt of work without reasons attributable to the subcontractor, delay in payment, reduction of subcontract proceeds without reasons attributable to the subcontractor, delay in payment, reduction of subcontract proceeds without reasons attributable to the subcontractor, return of goods without reasons attributable to the subcontractor, unjust setting of the remuneration at a level conspicuously lower, forcing to purchase or use without justifiable reason, provision of economic gains that unjustly injure the interests of the Specified Consignee and causing to change the content of the work or to re-work without reasons attributable to the Specified Consignee that unjustly injure the interests of the Specified Consignee (Article 4(1) and (2) of the Subcontract Act).

¹⁴ In considering specific measures to comply with these regulations, the Employment Security Act, amended on October 1, 2022, can be taken as a practical reference. The amended Employment Security Act obliges recruitment information providers to accurately display information on job offers, job seeker information, information on the company conducting the job offer, information on the recruitment information provider, and business performance (Article 5-4(1) of the Employment Security Act and Article 4-3(2) of the Ordinance for Enforcement of the Employment Security Act).

¹⁵ In examining the background of these disciplines, it may be helpful to note that in relation to workers, labor-related laws and regulations (e.g., Article 65 of the Labor Standards Law, which provides for maternity leave before and after childbirth, and the Child Care and Family Care Leave Law, which provides for childcare leave and family care leave) help them to balance their professional and family lives.

(7) Obligation to establish a system for consultation and response to work environment problems

Specified Outsourcing Service Providers are obligated to take necessary measures to consult with and respond appropriately to specified consigned persons to ensure that their words and actions do not lead to situations of sexual harassment, power harassment, etc. (Article 14, Paragraph 1). In addition, since the Specified Outsourcing Service Provider is prohibited from disadvantageous treatment on the basis of such consultation, etc. (Article 14, Paragraph 2), it may be necessary to incorporate consultation from the specified consigned persons into the existing internal system.¹⁶

(8) Obligation to give prior-notice of termination/non-renewal and to disclose reasons for termination/non-renewal

When a Specified Outsourcing Service Provider intends to terminate a contract pertaining to continuous outsourcing (outsourcing performed for a period longer than that specified by Cabinet Order) or not to renew a contract after the expiration of the contract period, the Specified Outsourcing Service Provider is obliged to give at least 30 days' prior-notice to the Specified Outsourcing Service Provider in principle, but this shall not apply in the case of a disaster or other unavoidable circumstances specified by an Ordinance of the MHLW (Article 16, paragraph 1).¹⁷

In practice, it will be necessary to consider whether the period of continuity should be based on the period of one-time outsourcing of requests and orders or the period during which the basic contract was concluded in determining whether a contract constitutes a continuous outsourcing service in the first place. The application of this regulation is limited to situations where a "contract" is "cancelled" or not "renewed" after the expiration of its term, and may not include, for example, a temporary suspension of service use. The Specified Outsourcing Service Provider also is obligated, in principle, to disclose the reason for termination without delay if the Specified Outsourcing Service Provider requests disclosure of the reason for termination during the period from the date of giving said notice to the day before the date on which the contract expires; however, in cases where there is a risk of harm to the interests of a third party or other cases

¹⁶ The regulations equivalent to the provision that "the employer shall take necessary measures for employment management, including the establishment of a system necessary to respond appropriately to the worker's requests for consultation, so that the worker's working environment will not be affected by the worker's behavior regarding the use of childcare leave, family care leave, or other systems or measures provided by Ordinance of the Ministry of Health, Labour and Welfare for child care or family care") are not established. In examining this background, it may be helpful to note that the Article presupposes the use of legally stipulated systems such as childcare leave and family care leave.

¹⁷ Under the Labor Standards Law, when an employer intends to dismiss a worker, the employer is obliged to give at least 30 days' notice (the same rule applies to the termination of employment without renewal of a certain fixed-term labor contract. (The same rule applies to the termination of employment without renewal of certain fixed-term labor contracts. Article 14, paragraph 2 of the Labor Standards Law and Notice No. 357 of the Ministry of Health, Labor and Welfare, "Standards Concerning Conclusion, Renewal and Termination of Fixed-Term Labor Contracts"). In addition, given that the number of days of notice can be shortened if the average wage is paid per day (Article 20 of the Labor Standards Law), it will be interesting to see if the exception will be designed to be flexible enough to include not only disasters but also default on the part of freelancers.

specified by an Ordinance of the MHLW in which the Specified Outsourcing Service Provider is not obligated to disclose this information, this obligation shall not apply (Article 16, paragraph 2).¹⁸

(9) Enforcement

The Fair Trade Commission or the Small and Medium Business Administration have the authority to conduct on-site inspections, etc., as well as to issue guidance, recommendations, orders, and public announcements to the effect that they have conducted such inspections (Articles 6-11, Article 22). The MHLW has the authority to conduct on-site inspections, etc., and to issue guidance, recommendations, or orders and public announcements to the effect that it has conducted such inspections (Articles 17-20, Article 22). In addition, a fine of up to 500,000 yen may be imposed for violation of these orders, and both penalties are provided for (Articles 24 and 25). On the other hand, regardless of these measures, there is no provision for the authority to publicize suspected violations. Nor do we find any provisions regarding the civil validity of outsourcing contracts that violate the FTO Bill.

2. Payment transaction relationship with freelancers, etc.

(1) Introduction of Qualified Invoice System

Effective October 1, 2023, with the aim of accurately ascertaining the amount of Japanese consumption tax and Japanese consumption tax rate for transactions, the method of storing invoices necessary for receiving Japanese consumption tax credit for purchases will be changed from the conventional method of storing separately stated invoices, etc., to the method of storing qualified invoices (Article 30, Paragraph 1, 7 of the Consumption Tax Act and Paragraph 7 of Article 30 of the Consumption Tax Act). Prior to this, the application process for freelancers, etc., to register as a Qualified Invoice Issuing Business Operator began in October 2021, and in order to be able to issue invoices as of October 1, 2023, they must in principle apply by March 31, 2023. Freelancers, etc. (who choose to become a taxable business entity and register after undergoing a certain level of examination) are required to change the information on the invoice (e.g., add the name and registration number of the qualified invoice issuing business entity, applicable tax rate, and the amount of consumption tax classified by applicable tax rate) and review their workflow to accommodate the issuance of electronic invoices, etc. On the other hand, for the ordering party, it is necessary to have freelancers, etc., issue invoices and store these invoices in order to meet the requirements for tax credits for purchases.

In light of this situation, freelancers, etc., who were previously tax-exempt businesses, need to consider whether to continue to be tax-exempt businesses without using the invoice system or to register as qualified invoicing businesses. In addition, the ordering party also needs to consider the cost of transactions with freelancers, etc., for which the previously applicable credit for taxable purchases may no longer be available, and whether or not to continue such transactions. In particular, as a transitional measure, even for

¹⁸ The Labor Standards Law stipulates that if a worker requests a certificate regarding the reason for dismissal between the date on which notice of dismissal is given and the date of resignation, the employer must deliver it without delay (Article 22, paragraph 2 of the Labor Standards Law; the same rule applies to the termination of employment without renewal of a fixed-term labor contract (Paragraph 2 of Article 14 of the Labor Standards Law and Notice No. 357 of the Ministry of Health, Labor and Welfare, "Standards Concerning Conclusion, Renewal and Suspension of Employment of Fixed-Term Labor Contracts"). On the other hand, in light of recent cases in which the obligation to disclose the reason is exempted in cases where disclosure of the reason may harm the interests of general consumers (Article 5, Paragraph 4, Item 2 of the Act on Improvement of Transparency and Fairness of Specified Digital Platforms, Article 11, Paragraph 2 of the Enforcement Rules), it will be interesting to see whether such a flexible design will be adopted in the future.

transactions with tax-exempt businesses, (1) 80% of the amount equivalent to consumption tax for three years from October 1, 2023 to September 30, 2026, and (2) 50% of the amount equivalent to consumption tax for three years from October 1, 2026 to September 30, 2029, it is possible to deduct the purchase tax, so (3) if a review of transactions with freelancers, etc., is to be conducted, it will be necessary to consider the timing of such a review as well.

However, according to the Q&A published by the Japan Fair Trade Commission,¹⁹ this transitional measure is not intended to allow the full amount equivalent to consumption tax that cannot be deducted from the purchase tax credit allowed under the transitional measure (20% of the amount equivalent to consumption tax from October 1, 2023 to September 30, 2026, and 50% of the amount equivalent to consumption tax from October 1, 2026 to September 30, 2029) to be naturally reduced from the consideration payable to freelancers, etc. In other words, it has been confirmed that a request for a reduction in the transaction price on the grounds that the tax credit for purchases cannot be deducted, followed by renegotiation, only to the extent that the price could be set with mutual consent, does not constitute abuse of a superior bargaining position, and that it could still be a problem as a reduction of subcontract proceeds when the Subcontract Law is applicable (Q7-1). If the FTO Bill were to operate in the same way as the Subcontract Act in this regard, it would be possible that reducing compensation in transactions with freelancers solely because the freelancer is a tax-exempt business would be problematic as a violation of the prohibited acts regulations.

In addition, although a request by an ordering party to a freelancer, etc., to become a qualified invoicing business operator (taxable business operator) does not by itself constitute an abuse of a superior bargaining position, it is considered that a one-sided notice, such as a reduction in the transaction price if the request is refused or a decision to terminate the transaction if the request is not complied with, etc., may be problematic under the Antimonopoly Law or the Subcontracting Law. Moreover, unilateral notification may cause problems under the Antimonopoly Law or the Subcontract Law.²⁰ In response to this, the following is considered not to be a "one-sided notification" but rather a response that takes into consideration the opinions of individual suppliers through repeated consultations in order to change the transaction price after appropriate consultations have taken place; however, it also is necessary to consider the condition of the wider industry when making such appraisals.

(2) Progress unlocking digital payment of salaries

In principle, under the Subcontract Law, payments to subcontractors must be made in cash. The Labor Standards Law also requires that salaries be paid in cash. In contrast, there is no direct regulation on the method of payment of remuneration itself under the FTO Bill. In this regard, as a method of payment of wages to workers, from April 2023, employers will be able to pay wages by transferring funds to the account of a fund transfer agent designated by the MHLW as meeting certain requirements (so-called digital payment of wages) if the worker gives his/her consent.²¹ It will be interesting to see if this method of payment for freelance compensation will become an acceptable method of payment in the future.

¹⁹ https://www.jftc.go.jp/dk/guideline/unyoukijun/invoice_ganda.html

²⁰ For example, a tax-exempt business operator reduces the transaction price without responding to the tax-exempt business operator in writing or by e-mail, etc., with the reason for the price reduction, despite the fact that the tax-exempt business operator requested to maintain the transaction price. In addition, when a tax-exempt business operator becomes a taxable business operator in response to such a request, there is a risk of similar problems if, for example, the transaction price remains unchanged without explicitly discussing the necessity of reflecting the appropriate consumption tax shift in the transaction price at the price negotiation stage (Q7-6).

²¹ https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/koyou_roudou/roudoukijun/zigyonushi/shienjigyou/03_00028.html

3. Status of Operation of Regulations on Abuse of Superior Bargaining Position Concerning Passing on the Burden of Cost Increases, etc.

According to the "Operational Standards on the Act against Delay in Payment of Subcontract Proceeds, etc., to Subcontractors" published by the Japan Fair Trade Commission²² and the related FAQ,²³ the following acts (1) or (2) by a main subcontracting entrepreneur²⁴ or an entrepreneur whose bargaining position is superior to that of the counterparty, may be considered as "bidding" under the Subcontract Act or abuse of a superior bargaining position under the Antimonopoly Act (the said Standards 4-5-(2)-(c)-(c), Q20).

- (i) To leave transaction prices unchanged without explicitly discussing the need to reflect increases in labor, raw material, energy, and other costs in transaction prices at the price negotiation stage.
- (ii) Keeping the transaction price unchanged without responding to the subcontractor/other party to the transaction in writing, by e-mail, etc., the reason for not passing on the price, even though the subcontractor/other party has requested an increase in the transaction price due to increased costs such as labor costs, raw material prices, energy costs, etc.

In addition, guidelines have been published indicating that the same approach applies to not allowing price pass-through of costs necessary to ensure cybersecurity in the supply chain.²⁵

With regard to the recent application of competition law in shifting the burden of cost increases, on March 30, 2022, the Fair Trade Commission, based on the "Package of Measures to Facilitate Price Shift for Value Creation through Partnership" (Cabinet Secretariat, Consumer Affairs Agency, Ministry of Health, Labor and Welfare, Ministry of Economy, Trade and Industry, Ministry of Land, Infrastructure, Transport and Tourism, Fair Trade Commission)²⁶ selected main target industries for emergency survey. During the survey, a written survey was distributed to approximately 80,000 order takers, and to approximately 30,000 orderers. On December 27 of the same year, the Japan Fair Trade Commission announced the results of the surveys.²⁷ Subsequently, on March 1, 2023, based on the results of an emergency investigation and self-inspection, the Japan Fair Trade Commission formulated the "2023 Action Plan for Promoting Fair Trade by Small and Medium-Sized Businesses, etc." to further promote fair trade in order to realize appropriate price pass-on of increased costs such as labor, raw material, and energy costs.²⁸ It is considered necessary for companies that place orders to take actions related to price pass-on in light of these trends.

²² <https://www.jftc.go.jp/shitauke/legislation/unyou.html>

²³ https://www.jftc.go.jp/dk/dk_qa.html

²⁴ Defined in Article 2.7 of the Act against Delay in Payment of Subcontract Proceeds to Subcontractors.

²⁵ https://www.meti.go.jp/policy/netsecurity/hontai_1028.pdf

²⁶ <https://www.jftc.go.jp/houdou/pressrelease/2021/dec/211227.html>

²⁷ https://www.jftc.go.jp/houdou/pressrelease/2022/dec/221227_kinkyuchosakekka.html

²⁸ https://www.jftc.go.jp/houdou/pressrelease/2023/mar/230301_r5actionplan.html

4. Future Prospects

Given the fact that the FTO Bill was just submitted to the Diet, and that it was submitted later than originally planned, it is necessary for the time being to keep a close watch on its success or failure, as well as on whether or not amendments or supplementary resolutions will be made as a result of future deliberations.

In addition, labor issues, including non-compete clauses, continue to be a high priority policy issue in the U.S.,²⁹ and in the EU, guidelines have been adopted to allow joint negotiations by freelancers and others under EU competition law,³⁰ while a special regulation has been proposed for platform workers.³¹ Policy issues surrounding the improvement of the environment for business with freelancers are expected to continue to be an important theme both domestically and internationally.³² Therefore, it is expected that the industry will be required to continue its efforts to establish appropriate partnerships with freelancers, etc., while keeping an eye on the trends of the FTO Bill and other trends.³³

In order to respond to the business needs of our clients, we publish newsletters on a variety of timely topics. Back numbers can be found [here](#). If you would like to subscribe to the N&A Newsletter, please fill out [the N&A Newsletter subscription form](#).

This newsletter is the product of its authors and does not reflect the views or opinion of Nishimura & Asahi. In addition, this newsletter is not intended to create an attorney-client relationship or to be legal advice and should not be considered to be a substitute for legal advice. Individual legal and factual circumstances should be taken into consideration in consultation with professional counsel prior to taking any action related to the subject matter of this newsletter.

Public Relations Section, Nishimura & Asahi [E-mail](#) 

²⁹ <https://www.ftc.gov/news-events/news/press-releases/2023/01/ftc-proposes-rule-ban-noncompete-clauses-which-hurt-workers-harm-competition>

³⁰ https://ec.europa.eu/commission/presscorner/detail/en/ip_22_5796

³¹ https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6605

³² It may be helpful to note that consultation cases have emerged under Japan's Antimonopoly Law as well, in which reforms in work styles and ensuring worker safety are considered as one of the justifications for concerted action.

³³ The Notice and the Operation Standards are scheduled to be revised to add "stealth marketing" (i.e., representations made by a business regarding transactions of goods or services that it supplies and which are deemed difficult for ordinary consumers to identify as such) to the category of misrepresentations under the Act against Unjustifiable Premiums and Misleading Representations. Naturally, there will also be a ripple effect on taxation, social security, and other matters. Examination of these trends will also be important as part of the "optimization" of transactions with freelancers, etc.