

MEMORANDUM
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Serious Risks behind Loose Management of Work Hours in Japan
--- Unpaid overtime work and compensation for deaths/disorders from overwork ---

1. Introduction

In Japan, the number of lawsuits claiming unpaid overtime has been increasing and is expected to rise further in the near future. Employers should ensure their compliance with all of the work hour regulations under Japanese law, which does not have such broad exemptions from overtime as in the United States. Moreover, the risks of not tightly managing work hours are not limited to unpaid overtime. In light of an increasing responsibility to consider the physical and mental health conditions of employees, employers are required to monitor and control the actual working hours of all employees, including managerial employees who is not subject to overtime, in order to minimize the risk of liability for damages due to deaths or disorders that occur when their employees work excessively long hours.

2. Regulations and Recent Trends Concerning Overtime Work

Under the Labor Standards Act (the “LSA”), in principle, an employer may not require or approve of its employees working more than eight hours per day or forty hours per week (the “statutory work hours”), and must provide employees with at least one rest day per week (the “statutory rest day”). However, an employer may be permitted to have its employees work longer than the statutory work hours (“statutory overtime work”) or on the statutory rest day (“statutory rest-day work”) by entering into a labor-management agreement with a union organized by a majority of the employees at the workplace where such a union exists or with an employee representing a majority of such employees where no such union exists (also known as an “Article 36 Agreement”), and by filing such an agreement with the relevant labor standards inspection office.

Also, an employer must pay an employee a premium rate of at least 25% over his or her normal salary for such statutory overtime work and a premium rate of at least 35% over his or her normal salary for statutory rest-day work regardless of whether such work is performed in fulfilling the above-mentioned requirement of an Article 36 Agreement. When such work is performed between 10:00 p.m. and 5:00 a.m. (“late-night work”), an additional 25% premium must be paid. Furthermore, it should be noted that, under the amended LSA, which came into force on April 1, 2010, the compensation for overtime work exceeding sixty hours per month has been raised. That is, when an employee works over sixty hours of overtime per month, an employer must, with respect to the part of the overtime exceeding sixty hours per month, pay him or her a premium rate of at least 50% over his or her normal salary, in principle. While there is an interim measure whereby small or medium sized enterprises are treated tolerantly under the amended LSA; namely, an employer that satisfies certain prescribed criteria may be permitted, for the time being, to not pay an employee this newly introduced additional 25% premium for overtime work above sixty hours per month, this allowance is planned to be reconsidered after April 2013.

Some employers discourage their employees from reporting the actual overtime hours they work. However, such a practice is definitely illegal under the LSA. Any employer that violates the above regulations would be subject to imprisonment not to exceed six months or a fine not to exceed JPY 300,000. In addition, when a civil lawsuit is filed, a court may order the employer to pay the plaintiff worker twice the amount of unpaid overtime work for the past two years.

The regulations under the LSA regarding work hours and rest days are not applicable to “persons occupying supervisory or management positions” (“Supervisors and Managers”). Whether a person falls within this category is determined by taking into consideration his or her duties and responsibilities, discretion to manage his or her own work hours, and the level of remuneration; it is not simply based on his or her title. It is said that this exemption for “Supervisors and Managers” is narrower in scope than the so-called “White-Collar Exemption” in the United States. Lower level managers often do not qualify as Supervisors and Managers under the LSA.

Recently, the number of cases holding an employer liable to pay an increased salary for overtime by reason of an improper Supervisors and Managers designation has drastically increased. This trend was triggered by a judgment of the

Tokyo District Court in January 2008, which held a widely known fast-food restaurant chain liable for paying an increased salary for the overtime work of a store manager.

Under the LSA, there are also some other quasi-exemption categories for employees working outside the office (fieldwork) or employees working in a discretionary manner from the standpoint of what work they do and how they do it. Under these categories, the prescribed number of hours may be treated as the hours worked regardless of the actual working hours. However, there are strict requirements for each category and there are quite a few cases where the courts have found that such requirements were not fulfilled.

If an employer fails to pay for the overtime work of an employee who does not fall under any of the exemption categories, a current employee or a retired employee who is dissatisfied with having not been paid for overtime work and/or has any other complaint against the employer may report such failure to the labor standards inspection office. If the labor standards inspection office suspects the existence of such a failure, that office will inspect the workplace (the inspection office may investigate electrical records of the workplace, such as office security systems, computer servers or personal computers) and, if additional incriminating evidence is discovered, it will admonish or virtually order the employer to pay for the unpaid overtime. Such admonishment would cover unpaid overtime pay during the past two years for all employees that do not qualify for any exemption category. Therefore, the employer may be forced to pay an enormous amount at one time. In certain instances, such an office will refer the case to the prosecutors' office (Should the inspection office find destruction of evidence, it may further tighten investigation and likely send the case to the prosecutor's office).

Moreover, since several years ago, the number of lawyers in Japan has been increasing drastically, and competition among them has been getting fierce. Many lawyers have begun to represent employees in order to focus on lawsuits claiming unpaid overtime because such claims would surely be collectable. You can easily find quite a lot of attorneys' websites soliciting their representation of unpaid overtime claim without retainer fee. Under these circumstances, the number of lawsuits claiming unpaid overtime is increasing dramatically.

In this connection, there is increasing trend that employers regard certain fixed amount out of monthly salary as payment of overtime. However, a series of

court judgments taking a stern approach toward such fixed overtime payment are taking place.

3. Damage Compensation for Work-Related Deaths/Disorders

Long work hours may cause an employee's physical or mental health to deteriorate. The worst examples are "*karoshi*," which means death from an illness such as heart disease, cerebral hemorrhage and other forms of stroke, and "*karojisatsu*," which means suicide due to depression resulting from excessive work for a continuous period of time. There are several cases where the courts have ordered employers to pay more than JPY 100 million as compensation for damages. Among such cases, in 2010, an employer engaging in the restaurant industry was ordered by a district court to pay approximately JPY 187 million as compensation for damages to an employee who became bedridden as a result of overwork in addition to the increased salary for the unpaid overtime.

Claims of damage compensation are not limited to such severe cases. Recently, worker's attorneys often notify employers of their filing a petition for recognition and benefits under the workers' accidents compensation insurance with the labor standards inspection office. The workers' accident compensation insurance is the government-run compensation insurance which employers must participate in to cover their no-fault compensation liability for accidents and illnesses related to work under the LSA. In recent years, the Ministry of Health, Labor and Welfare has relaxed the criteria for determining whether a mental disorder of an employee is related to work, and the number of cases making claims for the benefits under such insurance has increased to a large extent (The number over past three years have continued to surpass the figures from each previous year, and 2012's is likely to be the same). Under the latest criteria, there is growing emphasis on constant overtime work of a hundred hours or more per month in recognizing work-related accident of mental disorder.

It should be noted, however, that the above insurance does not completely absolve employers from their civil liability for damages, and the benefits under such insurance are often insufficient to compensate for the employee's damages. As such, there have been an increasing number of civil lawsuits filed by employees claiming that the employers are responsible for compensating them to cover this deficiency, which would be sometimes amount to more than a few dozen millions yen. Originally,

Japanese courts have a tendency to recognize that mental disorders are related to work more easily and flexibly than the Ministry of Health, Labor and Welfare. Once the labor inspection office recognizes that a mental disorder has been caused related to work, the courts reviewing employer's civil liability for such deficiency compensation tend to actually presume negligence of employer.

4. Recommendation

As such, these days, employers in Japan have to protect themselves against the considerable risks of unpaid overtime as well as compensation liability for an employee's death or disorder caused by long work hours.

Needles to say, when you face an investigation by the labor standards inspection office, receive any claim from current or former employees for unpaid overtime or damage compensation, or are notified of filing of a petition for workers' accident compensation insurance; you should not hesitate to consult with experienced attorney.

Furthermore, it is recommended that you should, proactively and with professional help, enhance your company's work rules, contractual clauses and work hour management systems as suitable to your business models and review reclassification of managerial employees without overtime in compliance with the LSA.

Also, in order to maintain the health and safety of employees, it is strongly advisable that you should precisely record and monitor the work hours (including actual overtime work hours) of all employees, including managerial employees, and make an effort to reduce the employees' work hours as well as taking other necessary measures such as doctor's interviews and guidance to employees working long hours or suffering from accumulated fatigue. (Note: If you have fifty employees or more at one workplace, the company's industrial doctor is mandatory to appoint under the Industrial Safety and Health Act.)

If you have any questions or requests regarding the above, please do not hesitate to contact us.

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