SO & SATO
INNOVATIVE LAWYERS

19th March, 2019

Impacts upon enforcement of the Act concerning Work Style Reform

Attorney at Law, Yuki Sato

Attorney at Law, Kenta Koyama

1. Upper Limit on Overtime Working Hours (Article 36 of the Labor Standards Act (as amended, the "New Act")

Currently, employment laws remain silent as to the upper limit of overtime working hours that can be set forth in the Article 36 Agreement (one of the employer-employee agreements entered into between the employer and a representative of its employees, *36 kyotei*) leaving it up to the Notification under the Standards on the Limit of Overtime Work (Ministry of Labor Notification No. 154 of 1998) that is not legally binding. However, the New Act specifies the upper limit on the overtime working hours that can be provided in the Article 36 Agreement as 45 hours per month and 360 hours per year (Article 36(4) of the amended Labor Standards Act).

The New Act also imposes that the overtime working hours must not be more than 720 hours per year and 100 hours per month (including working hours on statutory holidays), where the average overtime working hours (including working hours on statutory holidays) for each period of two (2), three (3), four (4), five (5) and six (6) months must be less than eighty (80) hours, even in the cases where the special clauses in the Article 36 Agreement require employees to work under special circumstances (e.g. peak season) in excess of the upper limits agreed. Furthermore, the overtime working hours of 45 hours per month may be exceeded in not more than six (6) months during one year (Article 36 (4)).

The New Act will be effective on 1st April 2019, but it will not apply to all employees from that date. Small and medium-sized business operators will be granted a moratorium until 31st March, 2020. Small and medium-sized business operators are defined as the owners of the business with the capital or investment in the amount of JPY 300 million or less (JPY 50 million for retail or service businesses, JPY 100 million for wholesale businesses) and whose number of regularly working personnel is not more than 300 (not more than 50 for retail businesses, not more than 100 for wholesale or service businesses).

In addition, an exemption from the application of the above rules is granted for business related to research and development of new technology, goods, or services (Article 36 (11) of the New

Act), and a moratorium as long as up to 31st March, 2024 is set for the business of constructing structures, etc., the business of operating automobiles, and doctors engaged in medical practice (Article 139 of the New Act).

Lastly, please note that the Article 36 Agreement covering the period including the day before the date of enforcement (for small and medium-sized business operators, 1st April, 2020 due to the above one-year moratorium), will remain in force even after the enforcement of the New Act until the date that is one year from the effective date stipulated in the Article 36 Agreement (Article 2 in the Supplementary Provisions of the New Act).

Employers who have violated the above regulations may be subject to inspection, correction recommendations, and guidance for improvement by the Labor Standards Inspector, and fines of not more than JPY 300,000 per employee who has violated the regulations (Article 120 of the New Act).

2. Extension of the Settlement Period under the Flexible time System (Article 32-3 of the said law)

Under the current Labor Standards Act, when setting up a flexible time system, an employer is required to set in advance the total working hours for a period of up to one month as the settlement period, and in the event the actual working hours during the period exceed the above fixed total working hours, an employer must pay extra overtime wages for such exceeding hours.

In this amendment, the upper limit of the settlement period will be extended from one month to three months (Article 32-3 (1) (ii) of the New Act). Such amendment may be favorable to employers whose working hours vary within the period longer than one month. On the other hand, it may be possible for employees rearing children to shorten their working hours in their children's school holidays and increase and adjust their working hours in the preceding and following periods.

In principle, an employer-employee agreement on the introduction of a flexible time system is not required to be filed with the Labor Standards Inspection Office or any government authority. However, if a settlement period exceeding one month is being provided in an employer-employee agreement, such notification of the agreement becomes mandatory. Furthermore, the Company shall set the upper limit for monthly working hours (within the limit of 50 hours per week on

average for each one-month period divided) and pay extra wages for overtime work exceeding the upper limit before termination of the settlement period(Article 32-3 (4)).

We hereby illustrate how the working hours may be adjusted as follows (in order to keep calculation simple enough, the statutory working hours are assumed as 160 hours for every month on 28 days of 4 weeks and the settlement period is three months).

(1) When each upper limit of working hours per month and working hours per three months is not exceeded

Month	January	February	March
Actual total working hours	200 hours	80 hours	200 hours

If the flexible time period is set at three months, the total working hours for the three months are 480 hours, which does not exceed the statutory working hours, and therefore, there is no need to pay extra wages for overtime.

(2) When the upper limit of working hours per month is exceeded

Month	January	February	March
Actual total working hours	210 hours	210 hours	80 hours

Since overtime in excess of 50 hours per week is worked in January and February, an employer is required to pay extra wages for 10 hours in January and in February.

(3) When the upper limit of working hours per three months is exceeded

Month	January	February	March
Actual total working hours	200 hours	200 hours	150 hours

In the above example, an employer is not required to pay overtime wages in January and February because the overtime hours are within the 50 hours of limit per week. However, the total working hours in the settlement period are 550 hours, so the employer is required to pay extra wages for 70 hours in excess of 480 hours.

3. Obligation to Allow Employees to Take Annual Leave (Article 39 of the New Act)

Under the New Act, an employer must allow employees who are entitled to annual paid leave of not less than 10 days per year to take such annual leave of five days or more per year by designating the period of time (Article 39 (7)). Provided, however, that the number of days taken as such paid leave (i) by the employee's designation and (ii) by an employer-employee management agreement as planned paid leave (for example, when the employer and the employees agree that a day between consecutive holidays will be a holiday) may be deducted from the five days (Article 39(4) of the New Act).[1]

Under the current act, it is not illegal not to grant annual leave unless the employee asks for the leave. Once the New Act is put into effect, employers are obliged to have employees take annual leave. Employers who fail to have the employees take annual paid leave of five days or more per year may be subject to a fine of not more than JPY 300,000 per employee in addition to inspection, corrective recommendation and guidance for reform by the Labor Standards Inspector (Article 120 of the New Act).

4. Establishment of the High-level Professional System (Article 41-2 of the said law)

The New Act introduces a high-level professional system with the aim of evaluating an employee based upon an achievement rather than working hours. The high-level professional system means a system that excludes employees who engage in a specified high-level professional work requiring advanced vocational abilities from the scope of regulations on working hours. These employees will not be subject to the regulations relating to working hours, and they will not be paid allowances for hours worked as overtime, holiday work, or late-night work.

In the scope of work covered by the high-level professional systems are: (1) development of financial products, (2) dealings such as those engaged in by the dealers in securities companies, (3) analyst services in respect of markets and stocks, (4) consulting services, and (5) research and development of pharmaceuticals. It should be noted, however, that not all those who engaged in the above-mentioned work are subject to this system. The work that requires a high degree of

1 For employees whom a prescribed working hours per week is set as 30 hours or more and employees whom a prescribed working days per week is set as 5 days or more, to the extent such workers have worked for a consecutive 0.5 years or more (Article 39(2) of the New Act), an annual paid leave of 10 days or more per year shall be granted to the employee (Article 39(2) of the New Act). Such annual paid leave of 10 days or more per year shall be granted for employees whom a prescribed working days per week is set as 4 days or more if such employees have worked for a consecutive 3.5 years or more, for workers whom a prescribed working days per week is set as 3 days or more if such workers have worked for a consecutive 5.5 years or more (Article 39 (3) of the New Act).

expertise, etc., and the co-relation between the hours worked and the results achieved is not generally deemed high due to its nature (Draft Guidelines for Securing Appropriate Working Conditions for Employees Engaged in the Work Set Forth in Article 41-2 (1), item 1 of the Labor Standards Act (see https://www.mhlw.go.jp/content/12602000/000456690.pdf))).

The annual salary of a person subject to this system shall be JPY 10.75 million or more. The annual salary includes fixed salary as well as fixed allowances, but does not include performance-based remuneration or bonuses that vary according to performance.

In order to introduce high-level professional systems, employer has to take the following procedures.

1.Establishment of a Labor-Management Committee (comprising half of committee members appointed by a majority labor union or, if no such union exists, a representative determined by the majority vote of employees for a prescribed term of office);

2. Resolution of the following items by a majority of four-fifths or more of the members of the Labor-Management Committee;

(1) Applicable jobs/ services;

(2) Applicable employees (specifying the minimum number of years of employment and the lower limit of expected wages but not identifying each individual);

(3) Measures to grasp the aggregate of the total time that the employee has spent in the workplace and the total working hours he/she has engaged outside the workplace (the "Hours to be Monitored for Employee's Healthcare");

(4) Employees shall be granted 104 days off or more throughout the year and 4 days off or more throughout the four weeks;

(5) Employer takes one of the following measures. a. promotion of interval periods of 11 hours between the consecutive two working days and limitation on the number of late-night work (within 4 times per month); b. upper limit imposed on the hours to be monitored for Hours to be Monitored for Employee's Healthcare in one-month or three-month (not to exceed the aggregate 100 hours per month and 240 hours per three months, respectively, if the Hours to be Monitored for Employee's Healthcare per week exceed 40 hours); c. granting at least one consecutive two-week holidays (two consecutive one-week holidays, if the employee prefers); or (4) granting ad-hoc health check;

(6) Among the items provided for by the ministerial ordinances, such as the granting of paid leave and the implementation of health checks, the items to be implemented as measures for securing employees' health and welfare in accordance with the health care hours marked;

(7) Procedures for withdrawal of consent of the employees;

(8) Measures concerning the processing of complaints from the employees;

(9) Prohibition against disadvantageous treatment in the event that the employee does not give consent; and

(10) Valid period of resolutions, etc.

3. Notification of resolutions to the Labor Standards Inspection Office; and

4. Obtaining the consent of the employee in writing or by Electromagnetic Means

5. Obligation to Make Efforts to impose Interval periods between Working time (Article 2 of the Act on Special Measures for Improvement of Working Hours Arrangements)

In view of the health damage caused by long working hours, employers are obliged to make efforts to ensure a certain period of interval between the ending time of the previous work day and the starting time of the next work day. For example, in a company with the working hours from 9:00 p.m. to 18:00 p.m., if overtime is worked up till 0:00 a.m. on the previous work day, the start time of the next work day for the employee is deferred to 11:00 a.m. However, the introduction of this system is only an obligation to make efforts, and thus employers are not obliged to introduce this system.

6. Equal Wages for Equal Work (Article 9 of the Act on Improvement, etc. of Employment Management for Part-Time Workers, Article 30-3 of the Act on Securing Proper Operation of Worker Dispatching Undertakings and Protection of Dispatched Workers)

Under the revised labor laws, the same salary and wages must be paid if the same contribution is made by employees regardless of the employment status. The revised law will be enforced for large enterprises on April 1, 2020 and for small and medium-sized business operators on April 1, 2021 (Act on the Arrangement of Related Acts to Promote Work Style Reform, Article 1, item2 and Article 11).

Under this system, for example, the following items will be taken into account (see notification of the Ministry of Health, Labor, and Welfare No. 430).

(1) Whether employer pay the same base salary if there is no difference between employees in terms of the state of work, and the employer pay the different amount if there are some differences in terms of the state of work.

(2) Whether employer raises a salary in the same amount/calculation if there is no difference in terms of improvement of ability, but in the different amount/calculation if there is some differences in terms of improvement of ability.

(3) Whether employer pay the same amount of bonus for the same contribution, but the different amount of bonus is paid for the different contribution.

(4) For part-time employees and fixed-term employees, whether there are no differences in the use of welfare facilities, the use of housing for transferees when the requirements for transfer of branches/offices are the same, congratulatory or condolence leave, the exemption from work for taking health checks, and the guarantee of annual paid leave.

7. Premium Wages for Overtime Work Exceeding 60 Hours Per Month (abolishment of Article 138 of the Labor Standards Act)

Under the current act, the premium wages for overtime work is, in principle, 25%, but the premium wages for overtime work in excess of 60 hours per month is set at 50%, whereas small and medium business owners have been exempted from paying such extra wages.

Article 138 of the Labor Standards Act, which stipulates the moratorium for the New Act, is repealed, and from April 1, 2023, the rate of extra wages for small and medium-sized businesses will be applied.

- This article has not been confirmed by the relevant authorities, but merely describes information and interpretation that may be reasonably considered in accordance with applicable laws and regulations.

- The opinions expressed in this article are our current views only, and they may be subject to changes in the future.

- This article is provided for your convenience and does not constitute legal advice. It is prepared for the general information of our clients and other interested persons.

- The author's contact information for this article is as follows.
Attorney at Law Yuki Sato (y.sato@innovationlaw.jp)
Attorney at Law Koyama Kenta (k.koyama@innovationlaw.jp)