

A SPECIALIST OFFERS ADVICE

Overtime Rates Go Up with the White Collar Exemption Dumped

By Thomas J. Nevins, President, TMT Inc. (Part One)

As unions could not protect jobs, nor win pay increases in the last decade, and as restructuring, and sometimes over-subscribed voluntary staff reductions led to too few people having to work hours that are too long, unions were successful in pressuring the Labor Ministry to crack down on unpaid overtime — so-called 'service overtime'. Especially, between 2002 and 2005 there were campaigns of surprise inspections by local Labor Standards Offices (LSO) — and unlike in the past, thousands of such inspections. Companies, including many of Japan's biggest, were coerced, and settled by agreeing to pay sometimes even tens of millions of dollars of unpaid back overtime that the authorities maintained should be paid. Even the Japan Chamber of Commerce had to pay millions of yen of 'unpaid overtime' that their staff had never expected to be paid. So you can imagine that businesses were not happy.

Employers, and their employer associations such as Keidanren, fought back. The surprise inspections and penalties finally caused employers to address something that I and others always recognized as strange. In many countries, if you are a university graduate with or without a tie, but in 'white collar', non-assembly line jobs, you are considered white collar, and exempt from the payment of overtime. This can be the case directly out of school, or even if at a salary level less than ¥3 million. Contrary to this, in Japan, you became exempt only if you had a management title of at least *kacho-hosa*, or Assistant Section Manager (generally 35 to 40 years old) and a cash allowance for this title of commonly ¥30,000 (US \$250) per month or a bit more. At the point you received this

management allowance, the person was no longer able to submit a calculation of the overtime hours he or she worked. And most white collar people, before reaching this level, expected to make five to as much as twenty percent or sometimes more of their monthly pay as overtime. A common joke was: "I told my wife I got promoted today, and I'll bring home about \$400 less next month."

In reality, long hours were often worked, or at least spent. Much of this 'overtime work' was not paid for at many companies. Over the years, if this 'overtime' had had to be paid, many companies would have gone bankrupt. Before bankruptcy, if such 'overtime' had to be payable, the companies would have had to force some employees to go home each day, even when these employees preferred to be in the office reading newspapers, socializing, surfing the internet, and maybe getting a little work done too. Of course, some were pressured to work very hard, and very long hours, without overtime pay.

Keidanren, and business in general, lobbied and gave publicity to the need to have a white collar exemption. Employer associations suggested that if someone made over ¥4 million (US \$33,000) that such an employee should be considered exempt from overtime, especially if it was difficult to measure their productivity and effectiveness. Their feeling was that such people should be paid for their performance and results, not the their length of hours. Organized labor and the opposition parties felt the cut-off point should be more than twice the above salary level, or ¥8-10 million. However, unions and their related political parties were basically

against the whole concept of exempt labor.

Without much credibility, management argued that the white collar exemption would allow workers to have more control on their time, and be able to work shorter hours. The understandable reaction of the Japanese man or woman on the street was, "Hah!?" What business should have said is that much of the overtime worked is not even something that management wants or asks for. Rather, the problem is that when overtime is payable, many employees want to and sometimes need to inflate their monthly income by charging their companies overtime. Over the years, for example, our firm's clients that pay overtime (and many smaller foreign-capitalized firms rarely, or never, did), experienced that there are a significant portion of employees who work inefficiently during the day, and are expected by their spouse and family to increase income with overtime. As detailed above, there also are more than a few who like to hang around after hours rather than go home. This gets worse if even a portion of those hours become payable as overtime. (Of course, there are plenty of hard-working contributors who would rather have more time for themselves and their families than overtime.)

Management or business lost the argument. It backfired. The ruling Liberal Democratic Party (LDP) wants to do well in the upper house election, so the 'white collar exemption' part of the bill recommended by the ministry was dropped. The LDP feared white collar wrath at the poles. Instead, the proposed bill provides that the traditional overtime premium of 25 percent (time and a quarter), become 'time and a

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half, or the fifty percent that is prevalent in some other countries. This would kick in when over eighty hours of overtime is worked per month. I hope it is not an incentive to work longer hours for people who have always tried to make extra money through overtime. These people might purposely try and go over the eighty hour threshold in order to make more money when the 150 percent overtime rate kicks in after eighty hours of monthly overtime. In Japan, I can picture this happening.

Unions argue that this higher overtime rate will reduce overtime worked because it becomes more expensive for companies — maybe. However, it will also have the effect of providing more of an incentive for overtime abusers. Some reports say that the sponsors of the LDP bill hoped that the step of first providing a higher overtime percentage would help placate workers' anger over eventual LDP-driven moves to exclude white-collar workers from overtime payments. Unfortunately it will not work like that. With the more attractive overtime rate, employees, and their unions, and opposition parties will fight even harder to maintain payable overtime, rather than an exemption. It will also be more difficult to get employees to be happy about shifting over to exempt status at a future time in their career. (Note that it is also proposed that firms with fewer than 300 employees essentially have a three-year grace period.)

MOVES YOU CAN MAKE

You can mitigate your company's overtime pay pain by introducing *henkei rodoo jikan*, the possibility to average out working hours over a month, as long as on average, not more than 160 hours are worked in total. It is even possible to work

more than 160 hours some months, if a company sets such a policy and gets it approved by the LSO, as long as on average not more than 160 per month are worked over a one-year period.

Your firm can also introduce overtime not payable over certain qualification grades, even if there is no management allowance or title. In Japan, although there is talk of a salary-based threshold, as of yet nothing is in the law. There is also nothing clearly stipulated about exemption from overtime if over certain salary grades, and every company will have different salary systems and nomenclature/systems when it comes to paying their people. Nevertheless, it will help if a firm stipulates that, over a certain salary grade at that firm, overtime is not payable.

There are further moves, too. Implement a sizeable allowance in lieu of overtime. It's not foolproof, and inspectors at the LSO will often say that the amount of this allowance should be comparable to the hourly overtime rate for that employee, and the number of overtime hours actually worked by that employee. Nonetheless, an allowance of perhaps ¥40,000 will help.

Or employment contracts including a certain number of overtime hours. Many firms have traditionally done this. Obviously if the offer letter or employment letter states that this monthly pay includes and covers a rather large number of overtime hours, say 30 or 40 as is common, it can be helpful if no more than 30 or 40 hours of overtime are worked, or if an employer is clearly telling employees to go home if the level is reached. In this case the salary level should be fairly high, say over ¥4 million. However, once again this is not foolproof, and there is nothing in the law about the ¥4 million level, or the 30 or

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40 hour level. And a possible downside of stipulating 30 or 40 hours also might be that if overtime is not managed properly and firmly, people would expect to get paid for the hours exceeding the 30 or 40 hours.

Another option companies can try is simply not allowing employees to submit a report of the overtime they worked. Instead, they have to get a manager's approval by, say, 2PM, to be able to work overtime. For my part, I can tell you that I used to be in and out of some government ministries before I started our firm in 1978, and I know that at the old MITI, and even at the Ministry of Labor itself, even if the top-tier bureaucrats worked 100 hours of overtime per month, they only got paid for 30 hours. That was the probably unwritten rule. It probably was unwritten because it is not technically, or legally precise. But if those bureaucrats wanted to get ahead, they lived with the system.

I have often gotten the authorities to back off by telling them stories like this. "Don't expect my clients to follow the letter of the law that is not even followed by the Ministry that drafted and enforces the law!" I remember from many years ago an Italian manager who ran a foreign pharmaceutical company in Japan. When I asked him how they were doing in the overtime area, he took a deep breath. "Well, let me put it this way. They know requests for overtime have to be on my desk by 4PM each day. How many do you think I get?" Obviously none; even though his people did often work until quite late. Yeah!—just like at the Ministry of Labor itself. Another Swiss manager used to always tell people he would not pay for overtime, and on every Wednesday, he would personally make everyone leave

the office, as he locked the door.

It is also possible to make people take a, say, thirty-minute break (although there again is nothing in the statutes about it having to be thirty minutes — maybe it could be more!) until after eight working hours have passed — 6PM if you start at 9AM. Neither overtime, nor even regular time, would be payable between 5 and 6:30, even if it were worked — another gray area. At one major Japanese company where I worked as a part-time advisor years ago, the head of the labor union at that facility would walk around at about 5:30PM and announce on Monday, Tuesday, and Friday, that "no overtime can be charged today". Many people would just go on working for a couple hours, knowing that overtime could not be charged.

If the work day is 9AM to 5PM, and if people work straight through and there is no system of breaks, then straight time, not overtime, is all that needs be paid between 5PM and 6PM. I think you get the picture about the complexity of the overtime situation. The combination of all of the above, and a few more tricks and communication messages I will not get into, will see you through quite well, but overtime does remain quite a troublesome gray zone.

By way of anecdotal information, I can think of six or seven foreign-capitalized clients of our firm that came to me in the last couple years because they were hit with such sudden overtime inspections. My clients would not take the fines and back payments sitting down, and indeed, they did not. We helped them defend their turf, and not pay the fines. Their employees had been content with the situation of not being paid overtime, and

did not need such interference from Big Brother. A couple of these firms made it clear to the authorities that the unpleasant interference would trigger an increase in that firm's scheduled working hours, and an introduction of some of the protective measures in the preceding paragraphs. We implemented those changes. We were able to explain it all to those firms' employees. They understood the need to do it, in the face of the rather high-handed inspections and proposed penalties.

I will conclude with a true story. By a combination of the above, most notably by defining a salary/qualification grade over which overtime was no longer payable, and by giving virtually all the people not directly on the moving assembly line, a TMT-style allowance of generally ¥40,000, we reduced the monthly overtime payments out at a factory operation from ¥8 million to ¥2 million. There were only about fifty people at this operation and they continued to make the same 11 million widgets. The Japanese president I implemented this with just scratched his head, and said, "What was all that overtime all about over all those years?" When staffers were no longer able to pad their pay checks, they were generally going home much earlier. Of course some who did not want particularly to go home, and perhaps a few with a real sense of duty, still hung around. But they did so without payment for hourly-calculated overtime.

In Part Two, we will discuss trends in retirement ages, and firing policies.

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