

Working Hour Schemes for White-Collar Employees in Japan

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1. Introduction

Currently in Japan, regulations concerning the working hours of white-collar employees have come under scrutiny. As the performance-based wage system is being more widely applied to white-collar workers, there are increasing calls to revise the linkage between working hours and wage determination, a policy that is prevalent under conventional human resource management. One typical example is the request to adopt a “white-collar exemption scheme” whereby white-collar workers would be exempt from coverage offered by regulations on working hours under the Labour Standards Law.

However, there are certain factors which should cause one to hesitate before moving towards such an exclusion. Although official statistics show that total annual working hours have decreased — to 1,837 hours in 2002 — unpaid overtime (the infamous so-called “service overtime”) has again become a focus of attention, mostly due to the spread of the self-declaration system in the management of working hour and the management scheme known as total labor expenses.¹

To deal with this state of affairs, the Ministry of Health, Labour and Welfare in 2001 published “criteria for measures that employers should take to gain a proper grasp of working hours (Labour Standards Bureau Notification [*kihatsu*] No. 339, April 6, 2001),” and put supervision and guidance concerning unpaid overtime at the top of their priority list. As a result, in 2002, the number of cases heard by Labour Standards Inspection Bureaus in which they called for unpaid overtime to be paid more than doubled in a 10 year period, marking a record high of approximately 17,000 cases. At the same time, similar cases sent to the Public

¹ According to the Japan Productivity Center for Socio-Economic Development (2002), for example, 63.3% of the heads of personnel departments who were queried, and 51.1% of managers in departments responsible for production lines answered, “I feel that our workers do ‘service overtime’.”

Prosecutor's Office reportedly totaled 49 (an increase of 15 over the previous year).²

According to the Ministry of Health, Labour and Welfare, between October 2002 and March 2003, firms where the amount of unpaid overtime exceeded ¥1 million numbered 403, the total amount of unpaid overtime standing at ¥7.23899 billion.³ Accordingly, on May 23, 2003, the ministry issued an "Outline for Comprehensive Measures against Unpaid Overtime," in which it drew up guidelines for measures to be taken to eliminate unpaid overtime.

Hesitation to exclude white-collar workers from regulations on working hours does not entirely stem from the issue of unpaid wages. It is also attributable to the claim that white-collar employees work excessively long hours. Labor economist Yuji Genda notes that with the prolonged recession, cutbacks in new hiring and an increase in the amount of everyday work tend to increase the proportion of workers who work 60 hours or more per week, particularly young workers in large firms.⁴ Meanwhile, a survey by the Ministry of Health, Labour and Welfare indicates that the rate of taking paid-holidays has been decreasing since 1997, falling as low as 48.4 percent in 2002.⁵ The rate is lower than that marked in 1988, which was 50 percent, when regulations on working hours were drastically revised. These facts undoubtedly convey the severe working conditions affecting today's white-collar workers. Kazuo Sugeno, a leading expert on labor law, has said that this situation "Appears to give the impression that in regard to working hours, we are facing a new problem that is once again rooted in the long-term employment system."⁶

Taking the situation as described above, it seems that the current system concerning working hours is inappropriate when applied to white-collar workers, and thus certainly needs revision. At the same time, however, one cannot simply conclude that it is sensible to exclude such workers from regulations on working hours. The question is, what is the ideal form that regulations on working hours should take when applied to white-collar

² *Nihon Keizai Shimbun*, July 28, 2003.

³ An announcement on November 28, 2003, by the Ministry of Health, Labour and Welfare. (<http://www.mhlw.go.jp/houdou/2003/11/h1128-2.html>)

⁴ See Genda (2001), pp.132-138.

⁵ http://wwwdbtk.mhlw.go.jp/toukei/youran/indexyr_d.html

⁶ See Sugeno (2002), p. 201

workers.

This article surveys how white-collar workers have been treated within the framework of working hour regulations, taking into consideration whether legal controls on working hours are necessary for white-collar workers in the 21st century, and, if so, what kind of legal framework is required. Bearing these questions in mind, Section 2 reviews previous regulations on working hours, and how they were applied to white-collar workers, while Section 3 discusses the special characteristics of white-collar workers and suitable forms of regulations on working hours. Finally, Section 4 makes some suggestions for the ideal forms that regulations on working hours for white-collar workers should take.

Incidentally, there is no legally defined term for “white-collar.” This article, therefore, relies on the occupational classification used in the 2000 Population Census in Japan, and tentatively considers “professional and technical workers” (13.5%), “managers and officials” (2.9%), “clerical and related workers” (19.2%), and “sales workers” as white-collar workers (15.1%).⁷ Using this definition, white-collar workers account for 50.7 percent of all employed people.

2. Previous Legal Structures concerning Working Hours and Treatment of White-collar Workers

2.1 Enactment of the Labour Standards Law

Japan adopted Continental methods of regulations on working hours, as seen in ILO Conventions. The current Labour Standards Law, enacted in 1947, defines legal working hours and obliges employers to observe them, with punitive provisions. However, in Japan the working hours scheme also embodies a mechanism that substantially eases the strictness of the law; a relatively simple procedure makes it possible for employers to resort to extra-legal working hours. An employer is lawfully allowed to take advantage of overtime work if he/she has a written agreement with the representative of a majority of the employees⁸ (the so-called “36

⁷ This definition is adopted by a leading expert on the study on white-collar labor, Atsushi Sato (2001), p. 19.

⁸ If there is a labor union consisting of more than an absolute majority of employees as a whole, it serves as a representative of the employees; otherwise, people who represent more than an absolute

Agreement”), and reports this to the responsible administrative authority (Clause 1, Article 36 of the Labour Standards Laws). The pay rate for extra-legal working hours was set at 25 percent of legal working hours, lower than international standards due to the economic situation in Japan at the time.⁹ In addition, since there was no legal ceiling on overtime hours, as long as the “36 Agreement” was concluded, it was possible for employers to flexibly take advantage of overtime hours. The temporary, provisional aspect of overtime work was not highly respected, either institutionally or in practice.¹⁰

In legislating legal working hours under the Labour Standards Law, a flexible concept of overtime work was embodied from the beginning. According to Hirosaku Teramoto — who was then, as a bureaucrat, involved in the enactment of the law — it was understood that the eight-hour work system, the international labor standard at the time, was not only intended to protect the life and health of workers but also incorporated aspects to secure leisure time and cultural welfare. But at that time Japan had not reached the point where Japanese workers consciously expected leisure in their lives, so it seemed reasonable to adopt a “soft” working hour system” which flexibly allowed for overtime, rather than adopting ILO Convention No. 1 (1919) or other strict systems (“hard” working hour systems).¹¹

How were white-collar workers treated at the time the Labour Standards Law was enacted? While factory workers and other typical workers conformed to this legally defined system which emphasized regulations on actual working hours, there were some who called for the exclusion of or for different treatment for white-collar workers with regard to working hours. Apparently bureaucrats involved in the enactment of the Labour Standards Law intended that white-collar workers be subject to the

majority of employees do so (Article 36 of the Labour Standards Law).

⁹ The current Labour Standards Law was revised slightly in this respect in 1993, stipulating that extra payment for non-legally defined working hours should be set within the range of 25% to 50% of payment for legally-defined working hours. However, Government Ordinance No. 5 (January 4, 1994) set the rate of overtime pay at no more than 25%, and the rate for work done on days-off at no more than 35%.

¹⁰ See Shimada (1999), pp. 42-44.

¹¹ See Teramoto (1952), pp. 297-298.

regulations laid down in the law, but that they should be exempt from the scope of the regulations concerning working hours.¹² Also, initially civil servants engaged in clerical work were to be excluded from coverage offered the Labour Standards Law. The reason behind these moves was the commonly held belief that before the war white-collar workers were treated better than blue-collar workers, and that the working style of the former was not compatible with regulations on working hours designed for the latter. But this was opposed by the workers, and eventually the Labour Standards Law was enacted with the following provisions concerning white-collar workers.

Civil servants, who accounted for a majority of white-collar workers at the time, would not be excluded from coverage under the Labour Standards Law but would be required to work overtime without a “36 Agreement” (Clause 3 of Article 33),¹³ and that senior white-collar workers would be excluded from application of the regulation on working hours (Clause 2 of Article 41).¹⁴ At the same time, in implementing sections of the law it was decided that hours worked outside the workplace would be considered scheduled working hours (Article 22 of the old version of the Enforcement Regulations of the Law).¹⁵ This made it possible to partially exempt sales activities and other work conducted outside the workplace from the regulation on actual working hours. Other than this, ordinary salaried employees were fully subject to the regulation.

2.2 Major Reforms to the Legal Structure of Working Hours and White-collar Workers

Subsequently, during the period of the high economic growth starting in the 1960s and ending in the mid-1970s, the pattern of working hours of white-collar workers remained outside serious discussion. This seems to be

¹² In a draft of the Labour Standards Law, workers engaged in office work were excluded from coverage offered by regulations on working hours (Article 39 of the draft). For details, see Yamamoto (1992), pp. 83-88 and Yamamoto (1994), pp. 221-.

¹³ However, national civil servants are exempt from application of the Labour Standards Law under Article 16 of the supplementary provision of the National Civil Service Law.

¹⁴ Article 41 of the Labour Standards Law excludes application of the regulations on working hours and holidays law, but does not exclude application of the regulations on annual paid holidays and night work.

¹⁵ For this, see Yamamoto (1994), p. 217 and in particular p. 221 ff.

attributable to the fact that such workers were privileged compared to other types of workers during a period of affluence. At the same time, since overtime was not strictly regulated, there was not much room to voice critical opinions concerning the working hours of either factory and other standard workers or of non-standard, including white-collar, workers. This also prevented the issue from coming to the surface.

In the 1980s, when tertiary industry became the dominant force in the economy, the number of white-collar workers increased, and debates over their productivity heated up. Around the same time, in response to international criticism,¹⁶ there was an attempt to reduce the number of hours worked. This pushed the issue of the number of hours white-collar employees worked to the fore. To heighten the productivity of these workers while promoting shorter working hours, it was decided that ordinary schemes for working hours would no longer be applied to white collar workers. This required a break in the link between working hours and wage level. In the series of major reforms to the legal structure of working hours starting in 1987, legally defined weekly working hours were reduced from 48 to 40 hours, but various adjustment schemes were introduced, such as varied working hours calculated on an annual basis (Article 32-4), a flex-time scheme (Article 32-3), a discretionary work scheme (Article 38-3 and 38-4); and others. Regulations on working hours conducted outside the workplace were brought into the Labour Standards Law (Article 38-2). To some extent these revisions provided answers to the issue of the working hours of white-collar workers.

2.3 Current Legal Structures concerning Working Hours and Management of White-collar Working Hours

This section outlines the functions of the current scheme for working hours which is institutionalized in response to the special nature of white-collar workers; and their limitations.

¹⁶ The Japanese economy quickly absorbed the damage arising from the first oil shock and from the latter half of the 1970s began to strengthen its global competitiveness, in response to which criticism heightened in the U.S. and European countries, claiming that longer working hours in Japan represented unfair competition. In fact, an individual's total annual actual working hours in the first half of the 1980s in Japan exceeded 2,100 hours, 200 to 600 hours more than the figure for workers in other advanced countries.

1) Managers and supervisors are excluded from coverage of the legal structure of working hours

No. 2 of Article 41 of the Labour Standards Law, which has existed since the law was enacted, is an exact reproduction of Article 2-(a) of ILO Convention No. 1 which stipulates that the eight-hour workday is standard. However, it does not contain regulations requiring special procedures, whereas No. 3 of the same article states that administrative permission is needed to exclude workers from the legal restrictions on working hours if they are engaged in supervising, intermittent work. Even so, the regulation simply refers to “those who are in a position to supervise or manage,” and does not clearly define what this means. The equating of those who “supervise or manage” with workers in managerial posts at ordinary firms together with the prevalent view that those in managerial posts should not be paid overtime are to a large extent responsible for this oversimplified regulation.¹⁷

According to administrative notices (Minister’s Notification [*hatsuki*] No. 17, September 13, 1947, Labour Standards Bureau Notification [*kihatsu*] No. 150, March 14, 1988, among others),¹⁸ “those who supervise or manage” are defined in general as directors-general, department directors, factory directors and other workers who are the equivalent of management executives in terms of decision-making on labor conditions and other aspects of human resource management. On the other hand, the scope of workers who are allowed to be excluded from this regulation is confined to those who have important duties and responsibilities which essentially require work engagement exceeding the regulation on working hours, and thus whose actual working conditions are not in agreement with the regulation on working hours. In addition, the treatment of such workers is taken into account. Specifically, consideration is given to whether regular remuneration, executive allowance, and other treatment is appropriate to the position; whether there should be preferential treatment in the rate of bonus payments and other factors; and so on. However, the

¹⁷ For an analysis of court cases related to “those who supervise or manage” see Yamamoto (1992) pp. 90-93. Since problems related to this issue arise frequently in financial institutions where there are quite a few white-collar workers, a special administrative notice was released (Labour Standards Bureau Notification [*kihatsu*] No. 105, February 28, 1977).

¹⁸ For a detailed analysis on administrative notices, see Yamamoto (1992), pp. 88-90 of.

administrative notices do not necessarily make clear whether these criteria for treatment are required when judging if the workers in question fall in the category of supervising or managing.¹⁹

The term “those who supervise or manage” originally referred to managers on production lines. Currently, however, there is an increasing number of back-office staff whose job did not exist when the Labour Standards Law was enacted. These workers are equivalent to supervisors and managers in terms of professional qualification rank in their firms, but do not possess a job title suggesting managerial work for line production. An administrative notice (Labour Standards Bureau Notification [*kihatsu*] No. 150, March 14, 1988) indicates that these back-office workers are also, like supervisors or managers, eligible to be exempt from coverage of regulations on working hours. But here, too, the difference between back-office workers and white-collar workers who are subject to the planning-type discretionary work system, is not necessarily clear.

2) Flexible working hour scheme and white-collar workers

This section views the functions, within management of working hours for white-collar workers, of the flexible working-hour scheme established after 1987 in the course of other reforms concerning the legal structure of work hours, and the limitations of the scheme.

(i) Flex-time

Flex-time is a “scheme which does not rigidly fix the starting and ending times of the business day, but defines a certain number of hours to be worked (total hours of work) within a certain period — a period shorter than one accounting month — by which workers themselves are authorized to decide their own starting and ending times for the business day (Article 32-3 of the Labour Standards Law).²⁰ The scheme is similar to the varied (flexible) working hours scheme introduced in 1987, when the Labour Standards Law was revised, for the purpose of enabling workers to engage in their duties efficiently while appropriately allocating their time between work and personal life. It is the larger firms that tend to adopt this with as

¹⁹ Among discussions theoretically in agreement with this point is Nishitani (1994), p. 549.

²⁰ See Asakura, Shimada and Mori (2002), p. 200.

many as 32.8 percent of firms with 1,000 or more employees doing so. (2002 *General Survey of Working Conditions*, Ministry of Health, Labour and Welfare)

Since the flex-time scheme places management of starting and ending times of the business day in the workers' hands, it makes it possible for white-collar workers, whose duties proceed depending on their discretion, to work flexibly. In particular, a flex-time scheme with no "core-time" has a high elasticity.²¹

However, total working hours in this scheme are confined to one accounting period, and hours exceeding the upper limit of the legally defined number of working hours in one period are considered as overtime. Hence, working hours still need to be managed. In this sense, the scheme embodies the linkage between wages and working hours referred to in Article 37 of the Labour Standards Law (overtime allowance).²²

(ii) Discretionary work scheme

Discretionary work is a "scheme whereby working hours are calculated based on the sum regarded as working hours, since the time required for the execution of certain duties, by their nature, is substantially up to the individual worker."²³ The scheme was introduced under the 1987 revised Labour Standards Law. Revised three times since then, it currently consists of two schemes: the discretionary work scheme for professional workers which has existed since the introduction of the scheme and is applicable to workers engaged in research and development, and other professional occupations (Article 38-3 of the Labour Standards Law); and the scheme for workers engaged in planning and other duties which was newly established under the 1998 revision of the law and is applicable to a wider range of white-collar workers²⁴ (Article 38-4 of the Labour Standards Law). A series of revisions to the discretionary work scheme were

²¹ See Atsushi Sato (2002), p. 120.

²² In practice, this problem is reportedly avoided by adopting the flex-time scheme and paying fixed amounts of overtime pay based on the declared number of hours worked. The intent is to create the same effects as the discretionary work scheme within the framework of the flex-time scheme; Asakura, Shimada and Mori (2002), on page 206, criticize it as a pseudo-discretionary work scheme.

²³ See Mori (1997a), p. 28.

²⁴ For details of trends in the discretionary work scheme, see Araki (1999) and Mori (1998). For the latest revision made in 2003, see Shimada (2003) and Mori (2003).

introduced during a dispute between those who consider it applicable to white-collar workers and want to apply it to other types of workers, and those who object to the scheme on the ground that it confirms and aggravates prevalent long working hours and “service overtime.” After a tug-of-war between the two sides, it was decided to incorporate complicated procedures, particularly when introducing the scheme for workers engaged in planning and other duties. To avoid hasty adoption of the scheme, the new regulation required that the newly established “labor-management committee” must pass a resolution introducing the scheme rather than a labor-management agreement that is necessary when adopting other flexible working hour schemes.

Discretionary work schemes tend to break the linkage between working hours and wage levels, which the flex-time scheme does not do. The Labour Standards Law does not insist on that wage systems should link wages and working hours, whereas those two elements are associated with each other when it comes to overtime payments. However, because the “wage ledger,” which the Labour Standards Law requires employers to keep, must contain information on working hours (Article 108 of the Labour Standards Law, and Article 54 of the Enforcement Regulations of the Law),²⁵ it is understood that in practice the law insists on a linkage between working hours and wages. Under discretionary work schemes, unlike the hours regarded as working hours applicable to work outside the workplace, hours that are determined to be working hours are not explicitly required to be considered as “normally required hours.” Thus, labor and management are free to regard overtime exceeding legally defined working hours regarded as working hours for which overtime is paid, and regard scheduled working hours or legally defined working hours regarded as working hours. In the latter case, even if the actual number of hours worked exceeds the legally defined number of hours worked, there is no need to pay extra wages. Thus the connection between working hours and wages is broken, enabling the performance-based wage system to function at its fullest, allowing employers to get out from under the obligation to find out exactly how many hours their employees work. Thus, although the discretionary work scheme was designed to deal with exceptional working

²⁵ This rule is applicable to the discretionary work scheme. For this, see Kojima (1998), pp. 32-33.

hours, in practice it is widely accepted as a scheme whereby wage levels are determined in accordance with the employee performance.²⁶ Thus, this is viewed, in terms of its functions, as similar to a scheme to be exempt from regulations on working hours laid out in Article 41 of the Labour Standards Law.

However, initially the discretionary work scheme was not intended to be a positive scheme for white-collar working hours, but a regulation to calculate working hours within exceptional working styles. Thus Araki (1999) thinks the current discretionary work scheme is “a half-baked scheme lying somewhere between regulations concerning the actual number of hours worked and being exempt from legal application” (p. 5).²⁷

Let us now examine to what extent the discretionary work scheme is used. According to a Ministry of Health, Labour and Welfare survey, the percentage of firms which have adopted the scheme remains quite low: 1.2 percent use the scheme for professional workers, and 0.9 percent for workers engaged in planning and other duties (*2002 General Survey of Working Conditions*, Ministry of Health, Labour and Welfare). On the other hand, a survey by the Japan Productivity Center for Socio-Economic Development (JPC-SED) (2002), which covers firms with 500 or more employees, shows that 10.1 percent of all the firms surveyed have adopted the discretionary work scheme, with a majority, 9.6 percent, using the scheme for professional workers, whereas a mere 2.4 percent have adopted the scheme for workers engaged in planning and other duties.

According to the survey by JPC-SED, the main reason given for not adopting the scheme targeting workers engaged in planning and other duties was that, “It would be complicated and cumbersome to manage a workplace that has both workers who are subject to the scheme and those who are not” (52.3% of firms that replied) This was followed by “It would be difficult to specify which workers should be subject to the scheme” (47.9%); “The legal procedures are complicated and cumbersome” (36.4%)²⁸; and “The adoption of flex-time is sufficient” (20.9%).

Sugeno (2002) concludes that the low number of companies that use the

²⁶ See Mori (1997a), pp. 28-29.

²⁷ Yamakawa (1995) also calls the discretionary work scheme a “transitional scheme” (p. 197).

²⁸ The revisions in 2003 to some extent simplified the procedures needed to introduce this scheme, and regulations concerning the scope of business establishments were also abolished. For these revisions, see Shimada (2003) and Mori (2003).

scheme is an indication that the system does not meet actual needs, and calls for a fundamental revision of the scheme (p. 202).

He also suggests that, “In the mid- to long-term, after a comprehensive change has been made concerning coverage of professional and managerial work — which is self-directive and thus is not compatible with the scheme — the discretionary work scheme should be reorganized so that it is exempt from regulations dealing with working hours” (p. 202).

As seen above, since the discretionary work scheme is institutionalized as being exempt from other regulations dealing with the actual number of hours worked, it is not adequate to manage the working hours of white-collar workers and thus is not fully utilized.

3. Special Characteristics of White-collar Employees and Regulations on Working Hours

This section investigates the special features characterizing white-collar workers and clarifies the basic viewpoints about schemes of working hours applicable to such workers.

3.1 Characteristics of White-collar Employees and Regulations on Working Hours

There is a common opinion among those calling for the relaxation of regulations concerning the actual number of hours worked by white-collar employees — that such workers should be paid according to their performance and achievement, not on the basis of the number of hours worked. According to this view, the problem is that existing regulations make it impossible to sever the relationship between working hours and wages.^{29/30}

How to interpret this view will be important when considering issues surrounding working hour regulations. But first, let us look at a well-

²⁹ Examples include “On Revisions of the Discretionary Work Scheme (Opinions)” (1994) by a Nikkeiren (Japan Federation of Employers’ Associations) study group.

³⁰ Regulations on actual working hours in the current Labour Standards Law are linked to wages in one limited aspect, that is, as shown later, when payment of overtime allowances is concerned. Attention should be paid to the inaccuracy of this assertion from the legal point of view. See Mori (1997b), p. 29.

organized definition of working hours in relation to personnel management supplied by Imano (2001).

Imano notes that the number of hours worked has functioned as an index to measure both “labor” and “achievement” within the framework of personnel management. Working hours comprise these two aspects, and when the level of “achievement” increases in proportion to the amount of “labor” expended in terms of the number of hours worked, the dependence of personnel management based on working hours becomes more convincing for labor and management. However, for duties that are completed at the discretion of individual workers, such as those of white-collar workers, the level of “achievement,” even if it is the same number of hours worked, varies substantially in accordance with the way the individual handles his/her work. Moreover, if wages are paid in accordance with the number of hours worked, less efficient workers are likely to receive higher wages. Thus, working hours cannot be used as the basis for personnel management of those who work at their own discretion.

Those involved in personnel management believe it is not appropriate to legally link working hours done at the discretion of the individual and wages.

Imano classifies “discretion” into two groups. The first is “discretion in work procedures” which allows individuals to decide what kind of work they will do, and the second is “discretion in the amount of work” which leaves the decision concerning the amount of work to the individual. Imano believes that most workers are suited to personnel management based on working hours because such workers enjoy little of these two “discretions.” At the same time, senior managers are allowed to exercise a substantial amount of discretion, and their working hours thus can be left to them. This, however, leads to a problem in that white-collar workers may have substantial discretion in terms of work procedures, but have little discretion concerning the amount of work they must complete. Obviously, personnel management based on the number of hours worked is not suitable for these employees, yet if they are exempt from coverage under regulations dealing with working hours, they will not be able to gauge their “achievement” using working hours as a guide. This could allow their superiors to increase their workload indefinitely, raising the possibility that they might

be asked to work for infinitely long hours. To avoid this, Imano emphasizes the need, first, to develop an alternative measure of determining achievement and to establish a personnel management system based on this measure. Secondly, Imano argues for the establishment of a mechanism which will guarantee an appropriate workload. At the same time, he says it is necessary to consider some mechanism to manage working hours, together with revisions of organizations and work systems, which would stipulate the workload, and thereby avoid excessive work.

The classification presented in Imano (2001) is highly suggestive in considering, from a legal point of view, issues related to regulations on the number of hours worked by white-collar workers. Imano categorizes white-collar workers into three groups depending on the amount of discretion, in terms of working hours, they have.

The first group covers highly-placed white-collar employees who have the freedom to select their work procedures and workload. Workers in this group are actually empowered to manage their own working hours, so that they are likely to protect themselves even if they fall outside those covered by regulations on actual working hours.

The second group concerns white-collar workers who have a certain degree of freedom in work procedures but little concerning workload. Although their situation does not perfectly match those covered by regulations on actual working hours which synchronize the level of remuneration, neither are they covered by simple regulations on their actual working hours. If they are excluded from coverage under the regulations that link working hours to wage levels, it is necessary to combine a personnel evaluation system and a management mechanism which will prevent overtime. Atsushi Sato (2001a) holds that “discretionary work is not a type of work where an individual engages in a freewheeling style” but “work, in many cases, which is controlled by a particular entity at a managerial post. Such work can hardly be executed without supervision, and in this sense, the manager plays a vital role in work management” (p. 142). His analysis suggests that there is a certain group of workers who have a high degree of freedom when it comes to work procedures but their superiors control their workload.

The third group concerns workers who have little freedom, though they

are white-collar employees, in either work procedures or workload.³¹ It is not necessary to exempt workers in this group from coverage offered by regulations concerning actual working hours.

3.2 White-collar Workers and the Flexible Working Hour Scheme

What conditions are necessary for the flexible working hour scheme to function appropriately when applied to white-collar workers? It is imperative to research this question when designing a new scheme of working hours for white-collar workers.

For the different schemes concerning flexible working hours to function well and meet various needs, Atsushi Sato (2003) claims it is necessary to meet four elements: (1) apportioning the right amount of labor to the correct number of hours worked; (2) appropriately balancing the workforce with the workload; (3) ensuring appropriate targets for work management; and (4) establishing a scheme to handle complaints (p. 73). Moreover, Atsushi Sato (2001) states that, “A mechanism attaching great importance to work achievement is required” (p. 142),³² whereas Hiroki Sato (1997) notes that, “In order for flexible working hour schemes to function, in addition to schemes that manage working hours, other schemes are also necessary, such as those covering work management, evaluation systems, and changing the consciousness of those in managerial posts” (p. 52).

As shown above, to achieve smooth operation of the flex-time scheme, students of personnel management emphasize the importance of achieving proper workloads and proper evaluation systems. It has been noted that the absence of appropriate workload management does not necessarily lead to a malfunctioning of the flexible working hour scheme, but is highly likely to generate some bad effects stemming from excessively long working hours. Such debates suggest that any scheme concerning working hours for white-collar workers should be designed, not so much as a scheme focusing on working hours, but rather as a multidimensional system equipped with

³¹ Some workers do not necessarily have a lot of freedom, although they are engaged in duties subject to the discretionary work scheme for professional workers. For this, see Atsushi Sato (2001a), pp. 243-244.

³² Atsushi Sato (2001a) states that the role of managers in actual workplaces is essential in work management and in evaluating targets and achievements from the viewpoint of personnel management (p. 142 and pp. 244-245). Also see Atsushi Sato (2001b), p. 120.

other appropriate functions and guarding against negative effects.

The question is how to pursue such a scheme — whether the discretionary work system by itself is sufficient, or whether exempting some workers from application of regulations on working hours should be considered. Before reaching a conclusion, let us look at various measures that have been taken when introducing the planning-type discretionary work scheme, since this is not just a scheme for working hours in the narrow sense, but contains embryo elements that are required for a multidimensional scheme.

3.3 Various Measures Taken when the Planning-type Discretionary Work Scheme Was Introduced

The discretionary work scheme for planning and project-type work, introduced in 1998 when the Labour Standards Law was revised, requires that firms obtain unanimous agreement from their labor-management committees on various issues, including (i) the scope of work to be covered; (ii) which workers will be covered; (iii) working hours; (iv) measures to secure the health and welfare of the workers under the scheme; (v) measures to handle complaints from workers under the scheme; (vi) consent of the workers who will work under the scheme; and (vii) resolutions prohibiting the dismissal or other unfair treatment of the workers who do not agree to work under the scheme as shown in the previous requirement.³³

Of particular importance is the fact that the discretionary work scheme for planning and project-type work, unlike the scheme for professional workers available before revision of the law in 1993, requires the labor-management committees to issue resolutions. This will be of a great significance where future management of working hours by white-collar employees is concerned, in that it suggests that employers must take measures to ensure that the scheme operates properly, even though the scheme itself frees them from managing the working hours of white-collar workers.

A summary of measures to be taken to secure the health and welfare of

³³ Due to the 2003 revision, the issues in (iv) and (v) were incorporated in the items that labor and management had to agree on when the discretionary work scheme for planning and project-type work are introduced (Nos. 4 and 5, Clause 1, Article 38-3 of the Labour Standards Law).

workers under the scheme and to handle complaints from such workers is presented in a guideline concerning the discretionary work scheme for planning and project-type work (announcement by the Ministry of Labour, December 27, 1999).

One important measure to ensure the health and welfare of workers is the requirement that the working schedule of such workers must be monitored by keeping records of the time of arrival and departure at workplaces. The guideline explicitly states as a “point of concern” that the discretionary work scheme for planning and project-type work does not “exempt employers from the obligation to protect employees’ lives and health from danger” (the so-called obligation to consider safety). Therefore, providing compensatory days-off or special holidays, providing health check-ups, encouraging workers to take paid holidays, setting-up health counseling desks, and so on are assumed to be concrete measures.

Also, the discretionary work scheme for planning and project-type work implies that this scheme is not just a simple way to calculate working hours, but in fact is closely linked to wage systems. This is also underlined by the fact that the labor-management committees, those who decide on the introduction of the scheme, must consider and discuss wages, working hours, and other working conditions, and present opinions to employers. It is also true that this type of the discretionary work scheme is more than a simple scheme to manage working hours. There are two points which are implicitly premised on the close linkage between this type of discretionary work scheme and annual salaries and other performance-based wage systems: one is that the foregoing guideline requires that labor and management clarify the nature of evaluations and wage systems before workers agree to work under this scheme. The second point is that appropriate coverage of complaints includes “not only complaints concerning implementation of the discretionary work scheme for planning and project-type work, but also those concerning the evaluation system applied to the workers under the scheme, and problems related to the corresponding wage system and other issues contingent to the scheme.”

4. Future Ideal Schemes for White-collar Working Hours

Finally, let us address issues which need to be discussed when considering schemes regulating the working hours of white-collar workers in the future.

The first is that discussion, including wage systems, of the number of hours worked by white-collar employees who have substantial freedom should begin with recognition of the limitations that any regulation has on the number of actual hours worked. This does not necessarily mean that the discretionary work scheme should be seen as something absolute, even if it is accepted as a special case to calculate working hours. Nevertheless, it does not seem reasonable to exclude simple regulations on working hours as presented in Article 41-2 of the Labour Standards Law. Even if the scheme to not apply the regulations on working hours is taken into consideration, the actual procedures taken should be related to the current discretionary work scheme.

Second, a new regulation on the number of hours white-collar employees work should be based on factors that will enable it to function properly. The White-collar Exemption Regulations in the U.S.³⁴ make it possible to introduce exemptions for certain workers, but stipulate that it is still essential to consider regulations which will prevent likely contingent problems.

Third, various schemes should be designed and implemented in accordance with the various degrees of freedom that white-collar workers have. While workers who have a substantial degree of freedom in deciding their workload are eligible to be exempt from regulations on actual working hours, those who have little freedom, although they may be free to decide work procedures, should be protected by a mechanism to bring their workload under control so they also can be exempt from such regulations. In this case, it should be noted that currently in Japan people do not have a rigid concept of working hours.

Fourth, even if they are not mandated to manage actual working hours, employers do have the responsibility to manage working hours arising from “safety obligations.” In this sense, too, it is necessary to set up a

³⁴ For the regulations, see Kajikawa (2002)

mechanism to ensure a proper workload.

Fifth, with appropriate management of workloads being a prerequisite in all cases, alternative methods to manage working hours to ensure they comply with regulations on actual working hours may include: — (i) regulations on hours spent at the workplace³⁵; (ii) securing holidays, including compensatory days-off; (iii) use of all annual paid holidays; and (iv) granting of paid holidays for education and training. At the same time, health and welfare, and complaint-handling measures under the discretionary work scheme should be revised to be more specific and adopted as explicit requirements when the scheme is introduced. In addition, the current scheme concerning holidays and days-off should also be reconsidered.

Concerning statutory days-off as defined in Article 35 of the Labour Standards Law, unlike schemes strongly affected by religions such as Christianity where Sundays are fixed holidays, in Japan days-off are neither fixed, nor it is necessary that they be specified. The regulation is fairly flexible, merely calling for the granting of four days off within four weeks (Clause 2 of Article 35). This is a reflection that the holiday scheme in Japan does not take into consideration the idea of securing freedom in one's private life or pursuing a harmonized lifestyle with family members, although in theory holidays are intended to maintain workers' health.³⁶ As a result, occasionally employees work on days which have been scheduled as days-off, and the missed day-off is treated as an ordinary working day under the provision that reallocates days-off to any other working day. In this case, the missed day-off is not even counted as “work on a day-off” under the “36 Agreement.”

Next, it hardly needs to be stated that the annual paid holiday scheme does not play a sufficient role as a systematic long-term holiday scheme — which is supposed to be its keystone. This system (Clause 3 of Article 39 of the Labour Standards Law) was introduced for the purpose of raising the number of paid holidays that workers actually take, but has not been

³⁵ In France, workers must take a continuous rest of 11 hours between periods of work (L. 220-1). However, it should be noted that future development of IT equipment enables white-collar workers to engage in work during their free time and outside their workplaces.

³⁶ For example, having days-off on either weekends or on weekdays is an issue of great concern for parents responsible for school-aged children. However, this is not taken into account in the current scheme.

accepted widely enough and therefore it has not lived up to expectations. In fact, as stated above, the number tends to decrease conversely. In debates concerning white-collar workers, the demand to relax regulations on the actual number of hours worked in many cases is connected to proposals for securing holidays and days-off; but it is difficult to realize this under the current system.

Sixth, the procedures for introducing the discretionary work scheme certainly need to be revised,³⁷ but even the current method based on labor-management agreement does not seem to reflect employees' opinions satisfactorily. Thus it is necessary to devise a mechanism whereby adequate time will be spent debating various relevant issues, such as the system of working hours, the coverage of workers, the mechanism to decide appropriate workloads, compensation schemes, wage schemes, evaluation systems, and so on. Opinions emerging from such debates can be incorporated as feedback when devising procedures. It is also important that workers can hear the opinions of experts, so that concrete discussion can take place.

It is possible to legalize procedures that define which workers will be covered by the scheme and appropriate workloads, but workers should have a guarantee that these issues will be carefully considered, since in practice decisions inevitably devolved on particular labor-management groupings. Particular attention should be paid when the labor union does not represent more than half of the employees.

Finally, when regulations on actual working hours are applied to white-collar workers who do not have substantial freedom to decide their workload, and have little freedom in deciding time allocation, the consent of workers should be required, as it is in the current discretionary work scheme for planning and project-type work. It is appropriate to do this considering the difficult question of determining the right workload is left to collective decision making by labor and management.

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³⁷ There are a number of points to consider, such as whether the labor-management committee should be set up when the labor union represents an absolute majority of workers.

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