# Legal Issues Concerning Nominal Supervisors and Managers

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Under Japan's Labor Standards Act, a person who falls under the category of a supervisor or manager is excluded from application of that Act's provisions concerning working hours. There are some Japanese businesses which, on the basis of these, do not apply the provisions of law that are related to working hours to persons who have been appointed to management, and do not pay such managers increased wages no matter how many hours they are made to work. The scope of supervisors and managers is limited, however, both by case law and by administrative notification, and most such handling is likely to be in violation of the Labor Standards Act. Since one of the things at the root of these breaches of law is the defectiveness of such legislation, it is only reasonable that such laws be revised.

## I. What Has Made "Supervisors and Managers" an Issue

The January 28, 2008, judgment rendered by the Tokyo District Court was widely reported by the mass media; the court had decided that a manager at a McDonald's Japan location did not fall under the category of a supervisor or manager (*McDonald's Japan* case, Tokyo District Court, Jan. 28, 2008, 953 *Rodohanrei* 10). Supervisors and managers in legal term (hereinafter "supervisors and managers"), according to Article 41 of the Labor Standards Act, are not subject to the regulations on working hours under the same Act. However, as a legal concept, the term is not the same as the conventionally-used words "manager" and "supervisor." A person does not necessarily come to fall under the category of a supervisor or manager as defined in the Labor Standards Act as soon as he/she becomes a low-level section manager.

Japan's Labor Standards Act has fairly meticulous regulations on working hours; specifically, they prescribe a maximum of 40 working hours a week, with an 8-hour-a-day upper limit (Article 32). Businesses that have their employees work in excess of these limits (meaning those that have their employees work overtime) must enter into an agreement (below, a "labor-management agreement") with a labor union which has been organized by a majority of the workers at the workplace, or with a person who represents the majority of the workers if there is no such labor union, and then must notify the Director of a Labor Standards Inspection Office of this agreement (Article 36, Paragraph 1). Additionally, businesses must pay their employees' wages for overtime work at the rate of at least 25% over and above their base wages, and from April of 2010, this increased to a minimum rate of time-and-a-half if the employee's overtime work exceeds 60 hours in one month. If a labor-management agreement is in place, however, payment under this new increased rate can be substituted for vacation time (Article 37).

Businesses are subject to penalties for having their employees work overtime if labor-

management agreement are not in place, nor has been reported to the Director of a Labor Standards Inspection Office, or if increased wages are not being paid (Article 119, Item [i]). Further, when an employer has failed to pay these increased wages, the court can, at the worker's request, order the employer to pay additional monies over and above the amount owed to the worker, up to the value of the amount it failed to pay (Article 114).

This summarizes the provisions related to working hours. Further, employers are under obligation to provide their employees with rest periods during working hours: a 45-minute rest period for each period of work in excess of 6 hours and a 60-minute rest period for 8 or more working hours (Article 34). Regulations on days off also oblige the employer to give their employees one day off a week or 4 days off out of each 4-week period (Article 35).

Conversely, Article 41 of the Labor Standards Act stipulates that these regulations on working hours do not extend to the categories set forth in the items under that Article. Namely, Item (i) provides for the exclusion of persons engaged in farming, livestock business, and fishing from the scope of such regulations. This is because these industries are heavily impacted by natural influences, such as the weather and the season. Item (iii) excludes "Persons engaged in monitoring or in intermittent labor, with respect to which the employer has obtained permission from the relevant government agency." According to administrative notification,[1] "persons engaged in monitoring" refers to "those for whom monitoring from a defined location constitutes their essential duties, and who ordinarily undergo little physical or mental strain" (Sep. 13, 1947, *Hatsuki* No. 17; Mar. 14, 1988, *Kihatsu* No. 150), and "persons engaged in intermittent labor" refers to "persons who do not have many periods of rest, but who do spend long periods of time idle." People engaged in monitoring and intermittent work are acknowledged as being outside the scope of application of the legal provisions on working hours because they either undergo little physical or mental strain or because even though they are at work for a continuous period of time, they have long idle periods.

Item (ii) of Article 41 prescribes "persons in positions of supervision or management or persons handling confidential matters, regardless of the type of enterprise" as those excluded from application of the provisions on working hours. To be accurate, the term "supervisors and managers," as we discuss it here means, in the words of the law, "persons in positions of supervision or management." According to administrative notification, the phrase "persons handling confidential matters," included alongside "supervisors and managers," indicates "secretarial or other duties which are an integral part of the activities of the proprietor or a person in a position of management or supervision who does not fit in with strictly regulated working hours" (Sep. 13, 1947, *Hatsuki* No. 17).

The real meaning of the failure of these regulations on working hours to extend to

[1] Internal administrative guidelines on interpretation which are issued in order to ensure the smooth and unified progress of regulatory administration at Labor Standards Inspection Offices, the administrative organs that monitor the enforcement of the Labor Standards Act.

such persons is that since no legal working hours are specified for them (Labor Standards Act, Article 32), even if they work in excess of legal working hours (8 hours a day, 40 hours a week), they will not be working overtime. The particular material effect of the fact that such persons do not work overtime is that it puts their employers under no obligation to pay them increased wages (Labor Standards Act, Article 37). Night work is not exempt from the regulations that oblige the payment of increased wages (*Kotobuki* case, Second Petty Bench, Supreme Court Judgment, Dec. 18, 2009, 1000 *Rodohanrei* 5); however, administrative notification states that "when a fixed wage that includes increased wages for night work has clearly been provided for in a collective labor agreement, work rules, or otherwise, increased wages need not be paid separately for night work" (Mar. 31, 1999, *Kihatsu* No. 168), which effectively waters down these regulations.

Be this as it may, under the Labor Standards Act (Article 9), "supervisors and managers" are still workers, and protection under that Act should be extended to them as such by law. Even if this is limited to regulations on working hours, it should be an exceedingly exceptional case in which these are not applied. From the viewpoint of keeping down labor costs, a system that makes use of "supervisors and managers" may be an attractive one to a company, but the conditions under which such a system is applied must be strictly assessed.

This having been said, no definition for the term "supervisors and managers" has been provided in the letter of the law, and it is not clear exactly who falls under this category. In an average business firm, once a person becomes a low-level section manager, he/she takes on a managerial role. It might even be natural for some businesses to treat an employee who has been promoted to section manager as a supervisor or manager in legal term. However, anyone with a little bit of legal knowledge on personnel and labor should know that a cautious examination is necessary before treating an employee as such a supervisor or manager. Instead, some companies have begun to use the fact that the term has no clear definition under law as an opportunity to pad the rolls of their managerial staff, making employees into section managers in title alone and having them go about their normal duties. This is what has created the societal issue of the "nominal supervisor or manager"—the manager who is such in title alone.

## II. Evaluation Criteria for "Supervisors and Managers"

First of all, administrative notifications provide fairly concrete evaluation criteria for "supervisors and managers" (Sep. 13, 1947, *Hatsuki* No. 17; Mar. 14, 1988, *Kihatsu* No. 150). These notifications say, regarding the general criteria for "supervisors and managers," that the terms "mean a department head, foreman, or other such person, who works in an integrated position with that of the proprietor regarding decisions on working conditions and other aspects of labor management, and whether a person falls under the category should be judged according to actual conditions, irrespective of his title." If we consider that "supervisors and managers" are people who work "in an integrated position with that of the

proprietor," the scope of these titles becomes a rather limited one. These general criteria are further embodied as follows.

First, "supervisors and managers" are recognized as being limited to, "from among the persons in the organizational structure who are in positions of responsibility, those persons who hold positions which carry essential job duties and responsibilities, in which the actual working terms do not fit with the regulations on working hours, etc., and for which there is no other choice but to request operation outside the scope of the regulations on working hours, breaks, and days off." Further, decisions on this scope are not made based on qualifications or job title, but instead "it is necessary to focus on the details of the person's job duties, his/her responsibilities and authority, and the actual working terms."

Moreover, wages are treated as an aspect that is not to be ignored, "in such a case, it is important to bear in mind whether the regular salary that makes up the base wages and the perquisites for roles with responsibility are being treated as befits the position, and whether there is favorable treatment in comparison to ordinary employees who are not in positions of responsibility in regard to the rate of bonuses and other lump-sum payments and the basis for calculation of such wages."

Recently, at a time when this issue of people who are managers in title alone is being frequently reported, a new notification entitled "On the Proper Scope of 'Supervisors and Managers'" was released, with the purport of making these previous notifications more familiar to all (April 1, 2008, *Kikanhatsu* No. 0401001).

The court has also indicated evaluation criteria that are essentially the same as that of the notifications. While there is as yet no Supreme Court precedent, the initial McDonald's Japan judgment followed existing judicial precedent in indicating the following evaluation criteria for "supervisors and managers."

First, as a generality, "the provisions of the Labor Standards Act concerning working hours do not apply to "supervisors and managers" (Article 41, Item [ii] of that Act); however, in terms of their integrated position with the proprietor, "supervisors and managers" are given essential duties and authority such as will leave no choice other than requesting that they carry out business operations outside the scope of the provisions on working hours, etc. under the same Act, as business management necessitates. Since "supervisors and managers" are treated preferentially in comparison to ordinary employees in the handling of their wages, etc. and in their actual working terms, even though they are exempt from application of the provisions on working hours, etc., such treatment prevents violations to the basic principles mentioned above, and the lack of application of such provisions is understood to be based on the purport that there is no lack of protection for the worker."

The McDonald's Japan case was as follows.

Worker X, the plaintiff, was recruited by Company Y, a stock corporation which has as its purpose the sale, etc. of hamburgers, etc., in February of 1987. In ascending degree of authority, Company Y's management was made up of the ranks of manager in training, second assistant manager, first assistant manager, restaurant manager, operations consultant

(OC), operations manager, sales manager, and general manager of sales promotion (who was also the representative director). At this time, the person who directed the overall manufacture and sale of products during each shift at a shop was called the "shift manager," and Company Y made it necessary for there to be a shift manager at the restaurant during each shift. The people who were able to work as the shift manager were the swing manager (a part-time employee), the restaurant manager, and the first and second assistant managers.

Worker X was first hired as a manager in training, became a second assistant manager in July of 1987, a first assistant manager in November of 1990, and then was promoted to restaurant manager in October of 1999. At the end of 2007, Company Y had 277 employees working in positions above that of restaurant manager, 1715 people working as restaurant managers, 2555 employees working as managers in training or assistant managers, and also had part-time employees.

Under Company Y's employment regulations, restaurant managers and others were considered to be "persons in positions of supervision or management," (see the Labor Standards Act Article 41, Item [ii]), and were exempted from application of legal provisions regarding working hours, rest periods, days off, and increased wages for overtime work and work on days off. Worker X filed suit, as a restaurant manager who did not come under the category of a supervisor or manager in legal term, demanding to be paid two years' worth of unpaid increased wages. The judicial decision, which applies the previously-mentioned general evaluation criteria to the matter at hand in this case, reads as follows.

"In order to say that a person is a supervisor or manager in legal term, it must be determined that not only his/her title as a restaurant manager, but also his/her position, is one that substantially fulfills the purport of the previously-mentioned Act, and an evaluation must be made of the concrete features of (i) how he/she is involved in important matters regarding the business management of the enterprise as a whole, including labor management, in light of the contents of his/her duties, authority, and responsibility; (ii) whether the actual terms under which he/she works truly do not fit in with the regulations on working hours, etc.; and (iii) whether he/she is being treated as befits the supervisor or manager in terms of salary (base wages, perquisites for roles with responsibilities, etc.) and bonuses."

Further, in regard to each of these features it was found that (i) though it could be said that a McDonald's Japan's restaurant manager assumes great responsibility in the operations of the restaurant, his duties and authority are limited to matters within the relevant restaurant, and it cannot be acknowledged that he is involved in essential duties or that he holds authority in an integrated position with that of the proprietor; that (ii) the duties undertaken by a restaurant manager are carried out based on no more than policies which are provided for informational purposes at any number of meetings and in the manual distributed by the company, and these duties cannot be said to have the quality or the content of failing to fit in with the regulations on working hours, etc.; and that (iii) there is no considerable disparity between a restaurant manager's yearly salary and that of a senior assistant manager, who is not a supervisor or manager and in regard to the actual working terms of a restaurant

manager as well, this is not sufficient as treatment toward a supervisor or manager in legal term. It was upon these grounds that, as its conclusion, the court disavowed Worker X as having the qualities of a supervisor or manager.

The court acknowledged only half of the unpaid additional monies. This may have been due to the court's assessment of circumstances which indicated that the fault did not lie solely with the company in this case.

As can be seen from this decision, as well as from judicial precedent, just as it is stated in administrative notification, the scope of supervisors and managers is a limited one. A review of past judicial precedents also reveals that there are very few examples of a person having been acknowledged as a supervisor or manager in legal term. One such example is the recent judicial precedent set in the Feb. 8, 2008, Kobe District Court Himeji Branch judgment in the *Banshu Shinyo Kinko* Case (958 *Rodohanrei* 12), in which the court disavowed that the bank's branch manager had the quality of the supervisor or manager.

In a different judicial precedent by a regional court, the assistant sales manager of a taxi company was acknowledged as having the quality of the supervisor or manager. In this case, circumstances were such as that (i) through roll calls at the end of the shift and upon dispatch, he was in a position to directly manage and oversee a large number of crew members; (ii) in terms of recruitment, he was involved in interviewing crew members and played an important role in deciding whether or not to hire them; (iii) although it was acknowledged that he had little free time because of his busy workday, conditions were such as allowed him to return home from his destination simply by contacting the company without receiving any kind of direction from the managing director, his only boss, and no particular restrictions were put on his working hours; (iv) in comparison to other employees he was receiving a large amount of compensation, at over 7 million yen [approx. US$61,000 at the time] including his base salary and service benefits, and this was the highest amount among employees of the company; (v) he was a member of the management council, whose meetings were attended by company officers and other key employees; and (iv) he would attend meetings and appear in place of the managing director as the company's representative (*Meinohama Takushi* case, Fukuoka District Court Judgment, Apr. 26, 2007, 948 *Rodohanrei* 41). When conditions such as these converge, a person may fall under the category of a supervisor or manager in legal term (another example of this is the affirmation of a branch manager of a securities company as a supervisor or manager, the *Nippon Fasuto Shoken* case, Osaka District Court Judgment, Feb. 8, 2008, 959 *Rodohanrei* 168).

In other evaluations of whether a person falls under the category of a supervisor or manager in legal term the most difficult criterion to satisfy is that such a person works in "an integrated position with that of the proprietor," and as in the case involving the taxi company, when the company size is not so large, if an employee is being materially entrusted with important authority in the area of management, this means that he/she could be found to be the supervisor or manager.

## III. Regulations on Working Hours for White Collar Workers

Even if there are some such exceptions, it bears repeating that an employee falls under the category of a supervisor or manager in legal term only in the most circumscribed cases. A person being promoted to management in the company where he/she works does not mean that it automatically becomes legally permissible to deviate from working hour regulations under the Labor Standards Act. To begin with, when any person from among the employees is to be promoted to management and how many of them are to be promoted are decisions that can be made at a company's discretion. The fact that the application of the provisions on working hours under the Labor Standards Act fully depends on a company's discretion goes against the principle of that Act, which applies irrespective of any of the parties' intentions. The true significance of the compulsory provisions of the Labor Standards Act is that conditions which are more disadvantageous to the employee than the standards prescribed in the Labor Standards Act cannot be taken up for decision within a company through its employment regulations, nor can they be decided between a company and an employee through an agreement reached in an employment contract. As stated at from the beginning, from the perspective that the supervisor or manager is also a worker, working hour regulations under the Labor Standards Act must be applied as a rule, and exclusion of application must, by law, be limited to persons who are objectively found to be "supervisors and managers".

There is simply no justification for companies to prototypically have their employees promoted to manager in title alone, merely with the objective of keeping down their labor costs. There is also a sufficient possibility that even if a worker is actually promoted to management, he/she still will not coincide at all with the category of "supervisor and manager" under the Labor Standards Act.

A company's use of a management staff that does not sufficiently fulfill the legal requirements for "supervisors and managers" and its failure to apply the provisions related to working hours are materially the same as that company making its staff work free overtime, and from the standpoint of compliance, this cannot be permitted.

This is not, however, to say that there are no points on which we may sympathize with such a company.

No one is likely to deny that there do exist groups of workers to whom working hour regulations are not suited. Discretionary work systems have been established within existing laws for such groups of workers; namely, one for professional work and one for management-related work (provided under Article 38-3 and Article 38-4 of the Labor Standards Act, respectively). Both types of discretionary work system allow for regulations for a way of regarding working hours under a fixed set of requirements in cases where it is necessary, due to the nature of a worker's duties, to leave the manner in which those duties are carried out largely to the discretion of the worker engaged therein. These hours a worker is deemed to have worked are not connected to his/her actual working hours, but are treated by law as

a fixed period of hours that he/she has worked. Hours that workers are deemed to have worked are provided for in labor-management agreements with a person representing the majority of the workers under the discretionary work system for professional work, and by resolution of the labor-management committee under the discretionary work system for management-related work. If these hours are provided for so that an employee will be deemed to have worked within the scope of 8 hours a day and 40 hours a week, it will avoid giving rise to overtime work and the employer will bear no obligation to pay the employee increased wages, regardless of how many hours that employee works.

Discretionary work systems are particularly adaptable for working hours for workers for whom performance-based wages have been introduced. Although increased wages for overtime work are paid in proportion to the hours worked, where the base salary being paid is dependent on performance, due to the mixture of hourly wages and performance wages, there is no conformity within the wage system, and in this point is less than desirable. In the system for increased wages, one of the aims is to curtail overtime work. However, workers who have discretion in the performance of their duties and to whom performance-based wages apply may decide on their own judgment to work longer hours in order to produce results, and being compelled to curtail their overtime hours could become rather an annoyance.

Although such a discretionary work system may be necessary as a system of working hours for a fixed set of workers, the requirements for its application under the law are exceedingly rigid. The discretionary work system for professional work only admits professional work set forth in the Ordinance for Enforcement of the Labor Standards Act (Article 24-2-2)—such as that of attorneys, CPAs, university professors, architects, real-estate appraisers, and certified tax accountants—and as previously stated, an agreement must be concluded with the representative of the majority of the workers to adopt this system. The discretionary work system for management-related work accepts "work in planning, drafting, investigating, and analyzing matters related to the operation of the business," and as the process for this system to be accepted, a resolution by a four-fifths or greater majority of the labor-management committee is necessary. In particular, the numerical requirements of the latter are exceedingly strict, and in actuality, the discretionary work system for management-related work has hardly been introduced at all (according to the Ministry of Health, Labour and Welfare's General Survey on Working Conditions 2009, the percentage of businesses that have introduced this system has come to a halt at 1.0%, and the rate of introduction is also low for the discretionary work system for professional work, at 2.1%).

This is one reason why recently the introduction of a white collar exemption is being so actively advocated in financial circles.

In politics, as well, the introduction of a "self-managed labor system," which could also be thought of as Japan's version of a white collar exemption, was conceived in the Outline of the Bill for the Act for Partial Revision of the Labor Standards Act, which was deliberated on by the Labour Policy Council on January 25, 2007. Naturally, just as in the dis-

cretionary work system for management-related work, there were strict requirements for the introduction of the self-managed labor system, such as the necessity of a resolution by at least a four-fifths majority of the members of the labor-management committee. Further, this system was rather limited in regard to the workers who would have been subject to its application; namely, (i) persons engaged in work whose results could not be adequately appraised in working hours; (ii) persons who were in positions which were appropriately commensurate with the significant authority and responsibilities of their duties; (iii) persons who did not receive concrete direction from their employers on decisions regarding the means by which they were to perform their duties and the distribution of their hours; and (iv) persons with appropriately high yearly incomes (it was envisaged that the workers to whom this would apply would be persons in positions just under that of "supervisors and managers"). Additionally, although the scope of work that would have been excluded from application under this system covered everything subject to working hour regulations, including night work, days off would have had to be strictly observed at the rate of at least four or more days off in a four-week period and the number of days equivalent to at least one year's worth of two-day weekends (104 days), and failure to observe these would have been subject to penalty.

In the end, this system was withdrawn, but it is the opinion of this author that it is necessary to introduce into Japan a white collar exemption in which workers are fully excluded from application of working hour regulations under fixed requirements, and that also, it is necessary to make the requirements for introducing such an exemption more lenient than those conceived under the self-managed labor system.

From its inception, the Labor Standards Act was the offspring of the Factories Act, and the provisions related to working hours, as well, were envisaged as being hours worked by blue collar workers in factories, where labor was bound under the control and supervision of superiors. However, the number of white collar workers has increased, and as such, the number of people who are working differently from blue collar workers is also increasing. It is because of this that today we are starting to see these working hour regulations—which have factory labor as their premise—come apart at the seams. In actuality, revisions to the Labor Standards Act in recent years have one after another progressively allowed more flexibility in working hour regulations. For instance, the variable working time system (Labor Standards Act, Article 32-2, Article 32-4, and Article 32-5), the flextime system (Labor Standards Act, Article 32-3), a system for work outside the workplace (Labor Standards Act, Article 38-2), and introduction of discretionary work systems (Labor Standards Act, Article 38-3 and Article 38-4) are examples of this. This is also evidence that the fundamental framework of regulations on working hours no longer fits the actual conditions of a society in which the majority of people are employed workers. The introduction of flexible regulations on working hours that are more compatible with actual white collar working conditions has become a pressing issue.

However, it goes without saying that it would not do for companies to arbitrarily in-

troduce new standards on flexible working hours to suit themselves; it is necessary to constantly consider the fact that regulations on working hours have the essential role of ensuring the worker's health. Although the system of supervisors and managers is, in actuality, a system with the same results as a white collar exemption, this is with the unbending precondition that the supervisor or manager be in a management position, and it is not permitted to treat employees who are not in such positions as "supervisors and managers," no matter how much they do not fit in with the regulations on working hours. Even less needless to say is how impermissible it is to treat an employee who does fit in with regulations on working hours as a supervisor or manager with the sole aim of circumventing the burden of increased wages.

In a country governed by the law, as long as the law contains certain rules and regulations, they must be upheld. It is only natural for society to denounce those companies that fail to comply.

## IV. Companies Are Not the Only Ones at Fault

This having been said, this author feels hesitant, in looking at the actual conditions in which violations of the Labor Standards Act have proliferated in the form of these nominal "supervisors and managers," to place the blame on the companies alone. When the law is universally not being upheld, it is not only because there is weakened awareness of compliance; we also need to consider whether perhaps there is some deficiency in the law that is not being upheld. Attaining awareness on this kind of issue can also be what gives rise to constructive legislative policy.

So, is it that there is some problem in existing laws and regulations concerning "supervisors and managers"? In regard to this point, the following factors are particularly noteworthy.

Apart from the case under Article 41, Item (iii) of the Labor Standards Act, exclusion of "supervisors and managers" from application of the provisions related to working hours does not necessitate advance permission from the Director of a Labor Standards Inspection Office. In regard to what kind of worker falls under the category of a supervisor or manager, although, as already mentioned, judicial precedents and notifications indicate criteria for this, in the end there is no other recourse but to judge each case on an individual basis in accordance with actual conditions, and this is problematic in terms of clarity. A business enterprise may often have difficulty in judging which type of employees it is legally permissible to treat as "supervisors and managers."

Such vagueness seems to be the principle cause that has produced the nominal "supervisors and managers." Let us examine this point in comparison to the discretionary work system, to use an example. In this system, at the very least, it is made clear before the fact which employees are subject to its application. In the discretionary work system for professional work, as previously mentioned, the types of profession to which the system applies

are specified in laws and regulations (Ordinance for Enforcement of the Labor Standards Act, Article 24-2-2), the concrete duties that are subject to its application are to be decided in a labor-management agreement (Labor Standards Act, Article 38-3, Paragraph 1, Item [i]), and a notification of that labor-management agreement is to be submitted to the Director of a Labor Standards Inspection Office (Labor Standards Act, Article 38, Paragraph 2 and Article 38-2, Paragraph 3).

Guidelines are also set forth for the work to which the discretionary work system for management-related work applies, the specific jobs to which the system applies are to be decided by a resolution of the labor-management committee (Labor Standards Act, Article 38-4, Paragraph 1, Item [ii]), and a notification of that resolution is to be sent to the Director of a Labor Standards Inspection Office (main paragraph of the same Article).

In this way, the legal system has made it so that companies are unable to arbitrarily decide what work is subject to application of the discretionary work system. No such ex-ante regulation exists, however, in regard to "supervisors and managers." The lack of regulations under the law may have caused companies to establish individual, loose sets of standards for themselves, setting off the institution of workers who are "supervisors and managers" in title alone.

## V. A Desirable Legal System

Well, then, what kind of legal system would be more desirable? The truth is that it is exceedingly difficult to define a supervisor or manager under the law, and it may prove to be a challenge to ask for criteria that are more concrete than what we have from existing judicial precedent and notifications.

One concept similar to "supervisors and managers" is that of the representative of a company's interests. Article 2 of the Labor Union Act sets forth that "[a group] which admits to membership officers; workers in supervisory positions having direct authority with respect to hiring, firing, promotions, or transfers; workers in supervisory positions having access to confidential information relating to the employer's labor relations plans and policies so that their official duties and responsibilities directly conflict with their sincerity and responsibilities as members of the labor union; and other persons who represent the interests of the employer" shall not be acknowledged as a labor union under that Act (Labor Union Act, Article 2, Item [i]). If it does not fall under the category of a labor union under the Labor Union Act, a group cannot make use of the protections and remedies against unfair labor practices under that Act (see Article 5, Paragraph 1).

The scope of representatives of a company's interests is not concretely set forth in the law. However, the scope of union members is often decided in a collective labor agreement between a business and a labor union, and usually, in terms of actual duties, people in and above the level of a low-ranking section manager are made nonunion workers. The scope of the treatment of nonunion workers in a collective labor agreement and the scope of repre-

sentatives of a company's interests under the Labor Union Act are not, strictly speaking, in conformity on all points, but in substance, there is the aspect that the scope of the representatives of a company's interests are defined in the labor agreement.

As a legal policy, it is sufficiently worth considering that employer-employee autonomy determines the scope of "supervisors and managers," just as it does for representatives of a company's interests. As previously mentioned, in the current systems for discretionary working hours, although the method is different from a collective labor agreement, the scope of persons subject to application of the system is determined beforehand in a labor-management agreement or by the resolution of a labor-management committee, and a notification is sent to the Director of a Labor Standards Inspection Office. It is sufficiently possible to also make the system for "supervisors and managers" one in which the concrete scope of this category is decided in a labor-management agreement, and where a Labor Standards Inspection Office is notified of the agreement and the agreement undergoes a series of checks. Companies may find this to be a bit of an annoying process in comparison to the provisions of existing laws and regulations, but this kind of ex-ante regulation is vital in the dramatic results it would bring about in exclusions from application of provisions on working hours. Further, this would bring balance to the current system where permission from the Director of a Labor Standards Inspection Office is to be obtained so as to exclude persons engaged in monitoring or intermittent labor from the application of the provisions on working hours under Article 41, Item (iii) of the Labor Standards Act. This would also have the merit of making it easy to avoid any ex-post facto conflict concerning "supervisors and managers."

In its essence, the point at issue is that, in comparison to other similar legal systems, the system for "supervisors and managers" has not been sufficiently endowed with the necessary procedural requirements for its adequate operation. It is reasonable to argue that those using the loophole in the law are at fault. One might also argue, however, that the government has an obligation to ensure that there are as few loopholes as possible. As it exists, the current system for "supervisors and managers" is much too vulnerable, and this is highly likely to have triggered violations of the Labor Standards Act.