Diversification of “the Workplace” and Problems with Labor Law*

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This paper examines working hour regulations and accident compensation with particular focus on work outside the workplace (WOW) and working at home, as increasingly relevant workplace formats. In terms of working hour regulations, systems of de facto working hours for WOW under the Labor Standards Act can be applied to both of these formats. However, since these are working formats that dilute the authority of the employer, there is the reality (or fear) of a trend towards longer working hours, as well as the problems associated with this. Thus, the author states that standards for upper limits should be applied to and established for work beyond statutory hours even when applying de facto working hour systems, and that health maintenance measures by employers should be prescribed. On the other hand, the author also states that the duty of employers to manage and keep track of hours worked should be distinct from whether or not de facto working hour systems can be applied, and should be aimed at preventing long working hours and maintaining health. On the subject of accident compensation, meanwhile, working at home, in particular, is a working format not envisaged by the Industrial Accident Compensation Insurance Act, and therefore has no precedent. Accidents unique to working at home should be anticipated and studied in practical detail.

I. Issues Examined in This Paper

A workplace is a spatial location where people work. Relevant passages in the main existing legislation refer to “establishments” and “workplaces” as places where people work. Therefore, for specific matters in existing legislation, those places provide a basis for regulation under labor law. In legal terms, working means the duty to perform labor based on a labor contract; the workplace could then be seen as a certain spatial location where the duty to perform labor based on a labor contract is discharged.

The issue central to this paper is the diversification of the workplace as the natural extension of this. If we accept that workplaces are diversifying, it means that employees are discharging the duty to perform labor in locations other than the workplaces where they usually work. As such, the topics for examination by this paper are as follows.

The first will be the question of whether systems of Work outside the Workplace (WOW), or more specifically Conclusive Presumption of Hours Worked (CPHW) for WOW (Labor Standards Act: LSA Art. 38-2), can be applied as formats for discharging the duty to provide labor. Unlike traditional office work, CPHW actually has the effect of di-

* The opinions expressed in this paper are the personal views of the author, and do not represent the position of any organization to which he belongs. Due to lack of space, general discussions on civil law have been omitted and the footnotes have also been kept to a minimum.

luting the relationship of direction and command between employer and employee. As a result, the employer can no longer control employees’ dereliction of their contractual duty to perform labor. If we focus on the employer’s inability to control, other problems then emerge; namely, how to manage working hours as a matter related to labor conditions, the processes of work performance, and whether there would be liability for accident compensation if these were neglected. The same problems also pertain when the format for discharging the duty to perform labor consists of working at home by the employee.

Therefore, the working formats to be examined in this paper will be WOW and working at home; matters related to labor conditions will be working hour regulations and accident compensation pertaining to each format. In the following, issues of legal policy will be examined, while referring to actual situations regarding these problems as well as case research.

II. An Overview of Actual Situations of WOW and Working at Home

1. CPHW Schemes for WOW

The ratio of companies introducing CPHW schemes is higher than that of the Discretionary Work Scheme (DWS), which is similar to CPHW, but is still only around 10% (Table 1). These CPHW schemes apply to 7.1% of employees. Therefore, even if companies are adopting schemes, the employees covered by them are limited in number (Table 2).

In CPHW schemes, “when an employee is engaged in work outside the place of business and it is difficult to calculate the hours worked,” “the employee is deemed to have worked the normal working hours” or “the hours normally considered necessary in order to perform the work in question.” Thus, by its very nature, CPHW only applies to limited types of work (occupations). Using data from JILPT surveys, this point can be tabulated as follows (Table 3).

Comparing the data for 2003 with those for 2012, the ratio of introduction has changed little in the “Marketing, sales and services divisions.” However, while the “Administrative and management divisions” and “Engineering and R&D divisions” were both 0% in 2003, the former had risen to 4.8% and the latter to 12.9% in 2012.

2. Working at Home

According to MLITT, City Bureau, City Policy Div. (2013), the ratio of teleworkers (in the narrow sense) in the population of workers aged 15 and over was 21.3% in 2012. Of these, the number of home-based teleworkers is estimated to have been around 9.3 million. However, the definition of teleworkers used in this survey was very broad.[1] The same goes

[1] Teleworkers in the narrow sense, in short, are paid employees who use ICT (info-communication technology) to work at least 8 hours per week in an environment where ICT can be used in a location other than the department to which they belong.

Table 1. Ratios of Companies, by Introduction of CPHW and Type of Scheme (%)

Year	Total	Companies introducing CPHW schemes	Type of CPHW (multiple answer)			Companies not introducing CPHW schemes
			CPHW for WOW	DWS (professional work type)	DWS (management planning type)	
2012	100	11.9	10.4	2.3	0.7	88.1
2011	100	11.2	9.3	2.2	0.7	88.8
2010	100	11.2	9.1	2.5	0.8	88.8
2009	100	8.9	7.5	2.1	1.0	91.1
2008	100	10.5	8.8	2.2	0.9	89.5

Source: Excerpt from MHLW, Statistics Div., Employment, Wage, and Welfare Stat. Sec. (2012, table 11).

Table 2. Ratios of Employees, by Application of CPHW and Type of Scheme (%)

Year	Total	Employees covered by CPHW schemes	CPHW for WOW	DWS (professional work type)	DWS (management planning type)	Employees not covered by CPHW schemes
2012	100	8.5	7.1	1.1	0.3	91.5
2011	100	7.3	5.6	1.2	0.4	92.7
2010	100	6.9	5.3	1.3	0.3	93.1
2009	100	6.3	4.8	1.1	0.4	93.7
2008	100	7.9	6.2	1.3	0.5	92.1

Source: Excerpt from MHLW, Statistics Div., Employment, Wage, and Welfare Stat. Sec. (2012, table 12).

Table 3. Introduction of CPHW Schemes outside the Place of Business, by Division (%)

	2003 (Sample Size)	2012 (Sample Size)
Administrative and management divisions	0.0 (42)	4.8 (42)
Marketing, sales and services divisions	30.0 (40)	29.7 (37)
Engineering and R&D divisions	0.0 (31)	12.9 (31)

Source: Prepared by the author from Watanabe (2012, 54, table 1).

for home-based teleworkers.[2] Considering the rapid diffusion of various ICT equipment, many people could be classed as home-based teleworkers in reality. Given that “working at home” is the object of examination by this paper, the number of employed teleworkers would need to be calculated by subtracting self-employed teleworkers from home-based teleworkers. According to MLITT, City Bureau, City Policy Div. (2013), they are estimated to number around 7.1 million. This figure is also thought to reflect the broadness of the definition.

In this paper, therefore, “working at home” as the object of examination will be based on the assumption that the employer permits the employee to provide labor at home as the employee’s private space, outside the workplace as the location where labor is normally provided, based on a labor contract relationship. The employee is assumed to actually provide this labor at home on all or some of the days (in all or some of the hours) when there is a duty to provide labor within a calendar week or calendar month. On this basis, the issue will be discussed in terms of “full working at home” (working at home for at least three days per week) and “partial working at home” (working at home for up to two days per week), as surveyed by JILPT (2008).[3]

Full working at home was permitted by 5.3% of the responding companies. These consisted of companies that “Operate working at home as a company scheme, e.g. as stipulated in rules of employment” (scheme operation) with 2.4% and “Operate working at home not as a company scheme, but at the discretion of the supervisor or as a custom” (discretionary or customary operation) with 2.9%. For partial working at home, the corresponding figures are 2.2% for scheme operation and 3.4% for discretionary or customary operation, totaling 5.6% of the responding companies. According to this survey, a total of 10.9% of responding companies operated schemes for working at home, including both full and partial working at home. In terms of numbers, around 45–46 companies operated such schemes. As such, the diffusion level of working at home would not appear particularly significant.[4]

Nevertheless, considering the nature of work (occupations), it is hard to imagine the number of WOW employees decreasing in future. The same could be said for working at home. In some cases, companies accept it as a way of maintaining the employees’ work life balance,[5] among other reasons; as such, the problems facing legal policy on these working formats need to be presented.

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[2] Home-based teleworkers are teleworkers (in the narrow sense) who engage in telework at home for at least 1 minute per week.

[3] This survey was based on 414 responses received from 3,995 companies to which questionnaires were distributed (response rate 10.36%).

[4] According to MLITT, City Bureau, City Policy Division (2012), of 65% of people who work on weekdays, 11% work at home. This breaks down further into 2% fully working at home (working at home only) and 9% partially working at home (head office + working at home: 3%, working at home + satellite office environment, mobile environment, etc.: 6%). As these figures show, the diffusion of working at home cannot be described as particularly widespread.

[5] See JILPT (2009, 128–72).

III. Work outside the Workplace (WOW)

1. Regulations on Working Hours

(1) Actual Situation of Hours Worked under CPHW

JILPT (2009) classifies working formats into those based on the "Regular working hour system," the "Flexible working hour system," the "Irregular working hour system," the "Shift work system," the "Discretionary work system / De facto working hour system" and "No control of working hours," respectively, and compares the total hours worked per month by employees in each system. As a result, 21.2% of employees in the "Discretionary work system / De facto working hour system" were found to have worked "241–280 hours" per month, a higher proportion than in any other system. Moreover, 17.7% of employees in the "Discretionary work system / De facto working hour system" had worked "Longer than 281 hours" per month. This was a very high percentage, second only to "No control of working hours" with 21.1%.[6] The upshot of this is that the "Discretionary work system / De facto working hour system" format shows a striking tendency towards long working hours, i.e. a total of 241 hours or more worked per month (with a combined total of 38.9%).[7] It could therefore be said that employees under the de facto system (i.e. CPHW) work longer hours than employees under other working hour systems.

(2) The Feasibility of Applying CPHW and Perspectives of Legal Policy

CPHW schemes provide regulations for "calculating working hours in cases of work outside the workplace, where it is difficult to calculate working hours." These regulations were established because this kind of work is "beyond the reach of concrete direction and supervision by the employer." Specifically, the system envisages work such as sales outside the workplace by employees in sales and marketing occupations, information gathering by journalists, etc.[8] CPHW schemes are therefore considered not to apply in cases where it is not difficult to calculate working hours—that is, when "even if engaging in work outside the workplace, working hours can be calculated because the work is within the reach of concrete direction and supervision by the employer."[9]

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[6] See JILPT (2009, 29, Chart 2-8-7).

[7] However, of the CPHW suggested in the Labor Standards Act, CPHW for WOW and two types of DWS are researched together in this survey. This makes it impossible to ascertain the precise working hours of employees under the CPHW scheme for WOW, as the object of examination by this paper.

[8] See MHLW, LSB (2011, 533).

[9] See MHLW, LSB (2011, 535). According to the official interpretation, CPHW schemes are deemed not to apply (i) when groups of several people engage in WOW and one of them manages the working hours, (ii) when engaged in work outside the place of business, but in a position to receive instructions from the employer at any time by radio, pager, etc., and (iii) when engaged in work outside the place of business in accordance with specific instructions on where to go, when to return, and other details of the work on the day, received in the place of business, and subsequently returning to the place of business (Notification of LSB, Ministry of Labour (MOL), No.1, January 1, 1988).

Turning next to court decisions, it would be fair to say that there have been virtually no cases where the application of CPHW has been recognized.[10] For example, it has been deemed not to apply in cases where the employer instructs work to begin and end at times prescribed by rules of employment.[11] The bottom line is that the provisions of CPHW do not apply if the work is within the reach of some form of direction and supervision by the employer, with respect to ways of performing the work as well as managing and ascertaining working hours, and when no difficulty is deemed to be found in calculating working hours. Consequently, cases where CPHW meets these conditions and is lawfully applied have been interpreted in an extremely limited manner.[12] Moreover, given the very advanced level of various ICT equipment today, it is only to be expected that there will be increasingly narrow scope for recognizing the application of CPHW on grounds that the work is beyond the reach of direction and supervision by the employer.

Even so, if it were still considered worth applying CPHW depending on the work (occupation), then the nature of such application would need to be studied hereafter. The author’s personal thoughts on this are as follows.

Firstly, regardless of the work (occupation) an employee is engaged in, the employer is obliged to ascertain the hours actually worked.[13] On the other hand, if the principles of CPHW were rigorously applied, it might seem inappropriate to mandate that employers ascertain hours worked. A way around this might be to rethink the system as CPHW based on the discretionary nature of work performance, as the basic form of the discretionary work system.[14] Viewed in this way, it would appear consistent with DWS for professional or management planning work, as variant forms of CPHW.[15]

Secondly, as long as the conditions for applying CPHW are satisfied, the employee would be deemed to have worked the normal working hours or the hours usually required to perform the work concerned. The difficulty would lie in managing working hours (ascer-

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[10] The only exception to this is the Japan Insurance Service (Holiday Work Allowance No.1) case, Tokyo District Court, February 16, 2009, 983 Rodo Hanrei 51. However, doubts over the significance of this judgment as a precedent are indicated by Takeuchi (Okuno) (2010).

[11] Examples of recent negative judgments are the Hankyu Travel Support (Temporary Tour Conductors No.1) case, Tokyo High Court, September 14, 2011, 1036 Rodo Hanrei 14, Hankyu Travel Support (Temporary Tour Conductors No.2) case, Tokyo High Court March 7, 2012, 1048 Rodo Hanrei 6, and the Hankyu Travel Support (Temporary Tour Conductors No.3) case, Tokyo High Court March 7, 2012, 1048 Rodo Hanrei 26.

[12] See Suzuki (2011, 66).

[13] LSA Art.108, Enforcement Regulation of LAS Art.54, Standards for Employers’ Duty to Properly Ascertain Hours Worked (Notification of LSB, MHLW, No.339, April 6, 2001). These standards are supposed to apply to “everyone except management supervisors and employees under a CPHW scheme.” However, they state that “the employer also has responsibility for properly managing working hours for employees removed from the application of these standards, due to the need to protect health.” Effectively, this means that all employees come under the application of these standards.

[14] See Ishitobi (1997, 133), Suzuki (2011, 67).

[15] See Abe (2012, 131).

taining hours worked). As CPHW is a system that deems hours to have been worked, it runs counter to the concept of managing working hours. What has caused this difficulty to arise is the reality of long working hours and the resulting health problems for employees.

According to the Standards for Employers' Duty to Properly Ascertain Hours Worked, self-reporting systems are allowed on condition that the employees subject to application are made thoroughly aware in advance that they are to correctly record actual hours worked and properly self-report, etc., in addition to objectively confirming and recording hours via on-the-spot confirmation, time cards or IC cards. While some opinions oppose the self-reporting system in that it casts doubt on the worth of CPHW in theory,[16] this author sees no other way but to depend on a self-reporting system.[17] Judging from the Standards for Employers' Duty to Properly Ascertain Hours Worked, the duty to ascertain hours worked under CPHW should be grasped solely as a means of preventing long working hours and enabling the employer to take measures to ensure the health of employees. This is based on a significance quite separate from the feasibility of applying CPHW. It should not be grasped as ascertaining hours worked in line with regulations on working hours and increased wages under the Labor Standards Act, even if increased wages need to be paid for hours worked beyond statutory hours, on holidays and at night (hours worked beyond LSA regulations, etc.).[18]

2. Accident Compensation

(1) Situation of Employment Injury amongst Employees under CPHW

According to MHLW, LSB, OAI Div, OI Sec. (2012), in FY2011 there were 898 claims for industrial accident compensation related to cerebrovascular disease, ischemic heart disease and others (including '*karoshi*,' death caused by overwork). Of these, 113 claims were related to "sales employees," an occupation quite apt to come under CPHW. This was in fact the third largest source of claims. However, only 30 of these claims resulted in a payment award, a figure not larger than those for other occupations. Meanwhile, there were 1,272 claims for industrial accident compensation related to mental disorders (including suicide). Here again, "sales employees" accounted for the third largest number of claims (167). And once again, the number of payout awards was relatively low at 40. Although nothing can be said with certainty from these statistical data alone, a noteworthy fact is that the number of cases resulting in payment is higher when the claimant has worked more than 80 hours beyond statutory hours on average per month (brain and heart disease: "60–79 hours" [20 cases] → "80–99 hours" [105 cases]; mental disorders: "60–79 hours" [15 cases] → "80–99 hours" [29 cases]).

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[16] See Labour Law Study Group of University of Tokyo (1990, 547).

[17] Doko and Wada (2011, 13) (remarks by Wada), though differing in intention from this author, also state that working hours can be managed to a certain extent by a self-reporting system.

[18] See note 13.

(2) Issues in Employment Injury Affecting CPHW Employees, and Perspectives of Legal Policy

As shown above, claims for industrial accident compensation in occupations prone to come under CPHW are quite numerous, but actual payment awards are not so common. Also, cases involving employees who could come under CPHW are occasionally found in the list of principal rulings by the Occupational Accident Compensation Insurance Review Commission (OACIRC) from FY2001 to FY2010.[19] In these cases, however, it is not that the application of CPHW itself had a direct impact on the ruling. Rather, the point of contention was whether long working hours or an excessive workload could be said to have rapidly aggravated an underlying disorder. This very point should be regarded as a major problem lying behind the (potential) application of CPHW. To the knowledge of the author, moreover, there have been no court decisions on employees coming under CPHW.

When viewed in terms of long working hours and excessive workload, mental disorders do not invite generalization, as they involve personality problems inherent in the individual. Based on the fact that employees under CPHW tend to work longer hours, however, legal systems on working hours (including CPHW) should no longer focus only on the question of working hours or time bands plus overtime pay. Instead, the perspective of maintaining employees' health and preventing life-threatening hazards[20] should be rigorously incorporated in policies.

The first requirement, then, is that provisions on measures for maintaining health in the case of CPHW (regardless of whether presumed hours are specified in an agreement) should be established under the Labor Standards Act.

Secondly, although overtime pay has to be paid if presumed hours extend beyond statutory hours, the limit standards on working hours corresponding to overtime and holiday work[21] do not apply. Considering that the hours actually worked by employees under CPHW are quite long, it would be more in keeping with the basic principles of working hour regulations if overtime pay were combined with the application of limit standards. Therefore, although the problem with CPHW lies not in regulating long hours but in calculating hours, limit standards on work beyond statutory hours ought to be established for CPHW. This should be in addition to normal limit standards (Limit Standards Art.3) and limit standards applied to irregular working hour systems based on a unit of one year (Limit Standards Art.4). Even with CPHW (or DWS), these would have significance as minimum standards for working conditions as specified under the Labor Standards Act (LSA Art.1, Sec.2). Furthermore, these minimum standards would also be consistent with Japanese Constitution Art.25, Sec.1, which guarantees "minimum standards of wholesome and cul-

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[19] See http://www.mhlw.go.jp/topics/bukyoku/shinsa/roudou/04.html.

[20] See Wada (2011, 27).

[21] Standards for limits on extension of working hours specified by agreement under Labor Standards Act Art. 36 Sec.1 (Notification of MOL, No.154, December 28, 1998, Notification of MHLW, No.316, May 29, 2009).

tured living." In this case, if existing CPHW schemes were taken as the premise, an upper limit standard would probably have to be set for work beyond statutory hours on a daily basis. On the other hand, if existing limit standards were taken as the premise, the upper limit standard would be set at one week as the minimum period. As this would probably be too inconvenient in practice if the upper limit standard were set on a daily basis, it may be conceivable to introduce regulation on rest periods in units of calendar days, as an indirect regulation. Again, if the upper limit standard were set on a weekly basis, one would need to adopt the interpretation that presumed hours could be set not in daily units but in weekly units as the minimum period.[22]

IV. Working at Home

1. Regulations on Working Hours

(1) Actual Situation of Hours Worked at Home

According to JILPT (2009), the total hours worked per month by employees who work at home are 223.2 hours on average. This is longer than the total hours worked anywhere other than the usual workplace.[23] Therefore, when employees engaged in full working at home ("Almost every day" plus "About 3–4 days a week") and partial working at home ("About 1–2 days a week" plus "About 1–3 days a month") were asked their preferences for working hours, the response "Wish to make them shorter" accounted for a relatively high proportion of around 70%.[24] Some caution is required here, however, as the simple description "working at home" may be deceptive; the length of time worked at home is affected by whether the company has a system of "working at home" that is being used, or whether there is no system and work is being done at home based on the supervisor's or the employee's own discretion, or as a custom.

In the same survey, employees who work at home and say that they "Often" work beyond normal working hours account for 31.8% of those who work at home because a "System is available," 61.5% of those who "Work at home at the supervisor's discretion or as a custom," and 69.1% of those who "Work at home at own discretion." In other words, the frequency of working beyond normal working hours is higher when a system of working at home is not available than when it is available.[25] This explains why the average total hours worked per month by employees who work at home is 203.4 hours when a "System is available," 215.8 hours for those who "Work at home at the supervisor's discretion or as a custom," and 224.3 hours for those who "Work at home at own discretion."[26] Again, as for future intentions on working at home, the response "Wish to reduce it" was given by 31.8%

[22] Ishitobi (1997, 138) states that CPHW may also be permitted in monthly units.
[23] See JILPT (2009, 77, table 3-3-6).
[24] See JILPT (2009, 94, table 3-3-38).
[25] See JILPT (2009, 95, chart 3-3-40).
[26] See JILPT (2009, 96, chart 3-3-42).

of those who work at home because a "System is available," but 56.0% of those who "Work at home at the supervisor's discretion or as a custom" and 61.4% of those who "Work at home at own discretion," showing relatively high response rates for the latter two.[27]

When a system for working at home is available, the employee's personal circumstances and awareness probably help to put a brake on the length of time worked. By contrast, working at home when no system is available is the equivalent of taking home overtime work. In that case, an aspect of the employee's sense of responsibility or motivation towards the work cannot be discounted. Nevertheless, the reality appears to be that management of working hours is looser, both on the employee's part and on that of the employer.

(2) Systems of Working Hours Applied to Employees Who Work at Home

According to JILPT (2009), systems of working hours applied to employees who sometimes work at home are, in descending order of response rates, the "Discretionary work system / De facto working hour system" with 51.8%, "No control of working hours" with 45.7%, the "Flexible working hour system" with 36.5%, the "Shift work system" with 35.1%, the "Regular working hour system" with 34.8%, and the "Irregular working hour system" with 34.1%.[28] In other words, DWS and CPHW schemes account for higher response rates. Meanwhile, the relatively high response rate ascribed to "No control of working hours" suggests that working hour management tends to be loose in many cases.

An earlier survey by JILPT (2008) listed types of working hour management for employees engaged in full working at home and partial working at home (multiple answer). For those in full working at home, "Usual working hour management" and "De facto work outside the place of business" had the same high response rate of 31.8%. For those in partial working at home, "De facto work outside the place of business" had the highest response rate of 34.8%, followed by "Usual working hour management" with 30.4%.[29]

The survey also provided data by type of working hour management for employees currently working at home. In descending order of response rates (multiple answer), the most common responses by employees in full working at home were "Report by submitting a work report or similar after a set number of hours" with 54.5%, "Notify manager of start and finish times by telephone, email, etc." with 40.9%, and "Always in a position to communicate using ICT equipment" with 27.3%. For those in partial working at home, the most common responses were "Notify manager of start and finish times by telephone, email, etc." with 52.2%, "Always in a position to communicate using ICT equipment" with 43.5%, and "Report by submitting a work report or similar after a set number of hours" with 27.3%.[30]

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[27] See JILPT (2009, 97, table 3-3-43).
[28] See JILPT (2009, 78, table 3-3-7).
[29] See JILPT (2008, 11, chart 2-10).
[30] See JILPT (2008, 12, chart 2-11).

(3) Problems with Managing Working Hours When Working at Home

If usual methods of working hour management could be used to manage working hours when working at home, the daily start and finish times would be reported, or the employee would be always be in a position to communicate, and thus major problems would rarely arise. However, working hour management is thought to be looser when using CPHW, or when hours are managed by submitting work reports after a set number of hours. This in turn could invite long working hours. The same concern is evident in the surveys mentioned above.

In JILPT (2008), the response "Difficult to manage working hours" (multiple answer) was most frequently cited both for full working at home and for partial working at home, the response rate registering 50.0% in the former and 52.2% in the latter.[31] In JILPT (2009), similarly, the most commonly cited disadvantages of working at home (multiple answer) were "Difficult to separate work from private time" with 59.1% and "Working hours tend to be longer" with 55.9%. As this shows, problems with working hours received higher response rates than any other option (place of work other than the usual workplace).[32,33] In that case, how to manage working hours or prevent long working hours when providing labor at home, and how to separate work from private time, seem to be problems not only for business administration but also for the employees themselves.

(4) Problems with Applying CPHW to Employees Who Work at Home

CPHW is thought to be applicable to working at home (Guideline[34]). An interpretation on the application of CPHW to employees who work at home in the Guideline has been issued in response to the following inquiry from the Director-General of the Labour Bureau:

"Is it permissible, in principle, to interpret de facto working hour schemes related to working at home, as provided in LSA Art.38-2, as applying to working at home in a format that satisfies all of the conditions set forth below (meaning a working format whereby an employee uses ICT equipment to work at home)?

(i) That the work in question is carried out at home, where the employee also engages in aspects of private daily life such as eating and sleeping.

(ii) That the ICT equipment in question has not been instructed by the employer to be in a state whereby communication is possible at all times.

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31 See JILPT (2008, 19, chart 2-19).

32 See JILPT (2009, 90, table 3-3-29).

33 MLITT, City Bureau, City Policy Division (2012) also indicates, as disadvantages and concern over working hours when carrying out telework employment in the narrow sense, "Difficult to separate work from private time" with 47.3%, "Even when overworked or working long hours, they are not recognized" with 44.0%, and "Tend to be overworked or work long hours" with 40.8%, showing relatively high response rates.

34 Application of Art. 38-2 of LSA on working at home of employee using ICT (Notification of LSB, MHLW, No.0305001, March 5, 2004, revised by Notification of LSB, MHLW, No.0728002, July 28, 2008). See MHLW, LSB (2011, 534–35).

(iii) That the work in question is not carried out under specific instructions from the employer from time to time.”

Ministry of Health, Labour, and Welfare (MHLW) and the Labour Standards Bureau (LSB) responded to this with the following statement on the feasibility of applying CPHW to employees who work at home.

“‘ICT equipment’ is generally taken to mean a personal computer, but could sometimes include mobile telephone terminals or others in the personal possession of the employee, and is to be judged in accordance with the actual circumstances of the work.

‘Instructed by the employer … at all times’ signifies a state in which the employer does not permit the employee, of his or her own accord, to discontinue a state whereby communication is possible.

‘A state whereby communication is possible’ signifies a state in which the employer can issue specific instructions to the employee from time to time via electronic mail, electronic message boards and others using ICT equipment, and in which, whenever the employer issues a specific instruction, the employee must promptly comply with it (in other words, must be waiting on standby in readiness for specific instructions, or actually carrying out work while standing by). States other than this (such as a state in which lines are merely connected and the employee can freely disengage from ICT equipment, for example) do not correspond to ‘A state whereby communication is possible.’

‘Carried out under specific instructions’ does not include, for example, instructing basic matters such as the purpose, target and deadline of the work in question, or instructing necessary changes to these basic matters.

Moreover, if the work satisfies the conditions for applying a CPHW scheme, said scheme shall be applied whether or not a special room devoted to the work has been set up in the home.”

This official interpretation pivots on whether or not working at home can be said to be within the reach of concrete direction and supervision by the employer.

Incidentally, no court decisions in which the feasibility of applying CPHW to working at home was a point of contention have been found to date. Therefore, ways of applying CPHW to working at home will be examined in accordance with the nature of CPHW previously discussed.

Not only does working at home dilute the employer’s authority over the employee, but it is also not easy to manage and ascertain the hours actually worked. For this reason, it has significant potential to cause problems of long working hours. However, judging from the results of an interview survey with companies that have introduced (systems of) working at home,[35] while each company expressed concerns over long working hours and other issues, the reality is that they have designed their systems on the premise of existing law. Considering these corporate initiatives, the conclusion is that introducing working at home

[35] See JILPT (2009, 128–72).

on the premise of existing law is feasible. Therefore, questions have been raised over the need to establish specific new working hour regulations aimed only at working at home.[36]

When considering long working hours and health problems, however, there are also question marks over the non-application of working hour regulations to working at home and the rationale of unconditionally accepting the application of CPHW.[37] Therefore, an upper limit should be placed on work beyond statutory hours, measures for maintaining health should be devised and measures to prevent long working hours[38] should be established in CPHW.

As a method of ascertaining hours actually worked, it should suffice for the employee to carry out self-reporting through communication via PCs and other ICT equipment. By way of discharging the duty to ascertain hours actually worked, the employer need only obligate employees who work at home to carry out proper self-reporting (or familiarize them with the need to do so) in labor contracts. Using this method to ascertain working hours when employees work at home would not be considered particularly troublesome. It would be even less burdensome for the company if hours actually worked were ascertained by means of logging into and logging out of an internal network. This should be possible, technically. Meanwhile, measures to ascertain hours actually worked should mainly be used to prevent long working hours and maintain the health of employees who work at home; they should not be taken as grounds for deciding the feasibility of applying CPHW.

2. Accident Compensation[39]

The Guideline makes the following statement regarding accident compensation. "In employees' accident compensation insurance, accidents caused by work are subject to insurance benefits as employment-related accidents. Therefore, those caused by private acts in the home are not employment-related accidents." It is impossible to know, by looking at the Guideline alone, what exactly would qualify as accident compensation for employees who work at home. Also, to the knowledge of this author, no cases (court decisions, rulings) of accident compensation concerning employees who work at home can be found either. As such, there is no alternative but to assume the kind of accidents that could occur when working at home, and to proceed with the examination on this basis.

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[36] See JILPT (2009, 164). If new working hour regulations are to be studied, the scope should be extended to cover the working styles and working hour regulations of white-collar employees. See Takeuchi (Okuno) (2009, 89).

[37] See Kojima (2007, 56).

[38] See Takeuchi (Okuno) (2009, 89).

[39] The following description is basically taken from Ikezoe (2008, 23–28). There is room for further discussion of studies based on the assumptions that follow.

(1) Application of Employment Accident Compensation to Accidents Occurring While Working at Home as a Private Space

The Industrial Accident Compensation Insurance Act defines the grounds for paying insurance benefits as "employment injury," in the form of "injury, disease, disability or death of employees resulting from an employment-related cause" (Art.7, Sec.1, Subsec.1). "Employment-related" means that there is a "work cause factor," and the primary requirement for judging this is interpreted as a "work performance factor." Specifically, "employment-related" means that "it is recognized, based on empirical evidence, that "while an employee was under the control or management of the employer" (a work performance factor), "a hazard associated with "the employee being under the control of the employer based on a labor contract," including employment or acts of employment, has been realized" (a work cause factor).[40]

Applying this to working at home, a work performance factor is recognized even though the place where labor is provided is the private space of the home (not under facility management by the employer). This is because, while working at home, employees who work at home are under the direction and command (under the control) of the employer. Focusing on the home as the place of labor provision, certain cases would probably be recognized as being caused by work if it could be recognized, based on empirical evidence, that a hazard associated with working at home had been realized. These might include cases such as injury due to a fire in the home or a neighboring property, or even injury due to natural phenomena such as major earthquakes or external forces (for example, if a tree falls down and destroys the employee's home) that are not in principle recognized as being caused by work. On the other hand, certain accidents while working at home would probably be judged as lacking a work cause factor; for example, accidents occurring when the employee actively leaves his or her work duties for private reasons such as housework, childcare or nursing. These would be distinct from circumstances that would even be recognized as being caused by work in the usual workplace, when the employee leaves his or her work duties for reasons of physiological needs, etc.

(2) Distinguishing between Employment Injury and Personal Injury

What, then, is the rationale on personal injury? Could employees who work at home receive insurance benefits, for example, if they suffered a fall when on their way to answer the front doorbell while going down the stairs for private reasons, and an item related to working at home supplied by the company was delivered as a result?

If an act such as going down the stairs for private reasons (e.g. housework, childcare or nursing) is a positive act of leaving work duties, even if an item related to working at home is received as a result, it could not have been objectively judged that, at the point of occurrence of the accident, an item related to working at home would be received. There-

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[40] See MHLW, LSB, OAI Div, OI Sec. (2001, 156–57).

fore, the initial reaction might be that there is no work cause factor (in this case, there would probably not be any work performance factor either, as the employee has left his or her work duties for private reasons). On the other hand, if the intention from the beginning had been to receive the item related to working at home in conjunction with private reasons, the act in question would not be one of leaving work duties (i.e., in this case there would probably be a work performance factor), and the accident could be considered to have been caused by work.

Next, what about cases where an employee suffers an injury or similar while resting in a residential part of the home as a private space? In this case, the employee is taking a rest period and is therefore not under the control of the employer. Moreover, the employee is inside a residential part of the home as a private space, and is therefore not under the management of the employer, either. As such, there is thought to be no work cause factor. If, on the other hand, the injury or similar is caused by a PC loaned by the employer to an employee who works at home, or by an item related to the performance of the work (under the management of the employer), there is thought to be a work cause factor.

Finally, how should we interpret cases where an employee who works at home wishes to procure an item related to the performance of work, etc., as a reimbursable expense, goes out of the home as the place of labor provision during or outside working hours (including during rest periods), then after going out, has the idea of purchasing some daily requisites on the way, and is involved in an accident, for example, while in the process of doing so? In this case, irrespective of whether during or outside working hours, if there is an agreement with the employer that items necessary for performing the work are to be treated as reimbursable expenses by employees who work at home, it is naturally expected that those items will be procured by employees who work at home. Therefore, the procurement of items or others as a reimbursable expense is thought to be recognized as being caused by work, as an act necessary for or ancillary to the work. However, when purchasing items necessary for performing the work as incidental to (or secondary to) purchasing daily requisites, or when both acts of purchasing daily requisites and purchasing items necessary for performing the work are carried out together with no clear distinction between them, it is suddenly more difficult to make a judgment. This issue would probably be judged once a specific case had been filed with the relevant authority. Nevertheless, such cases pertaining to working at home will need to be anticipated, and studied from the viewpoint of legal practice.[41]

As shown above, compensation for employment injury sustained while working at home could raise problems not conventionally envisaged under the Industrial Accident Compensation Insurance Act. In future, these will need to be discussed from the viewpoint of policy practice, based on the realities of working at home. Moreover, in terms of corpo-

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[41] Morito (1999, 49) and Nagasaka (2000, 178) state that this should be judged case by case in line with individual circumstances. However, considering the guidance on corporate practice and raising attention over employees who work at home, studies anticipating specific cases ought to be carried out first of all.

rate practice, it will be necessary to anticipate situations unique to working at home, whereby labor is performed in the home as a private space, and to study and establish remedial measures before and after the event.

V. Future Challenges

In recent years, hardly any study has been devoted to legal policy on WOW and working at home, excluding research on court decisions.[42] The same is true of detailed factual surveys, as a major prerequisite for this. Looking ahead, it is to be hoped that factual situations will be ascertained through detailed and large-scale surveys as far as possible.[43]

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[42] To the author's knowledge, only Kojima (2007), Ikezoe (2008) and Takeuchi (Okuno) (2009) on working at home.

[43] On CPHW, Ishitobi (1997, 135) states that precise surveys will have to be conducted to find how many of the applicable types of work have actually been made subject to the system, and how many different de facto systems not based on legally-defined CPHW (hidden CPHW schemes) exist.

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