

Increasing Labor Pains (Part II): Increasing Overtime Rates

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This is the 2nd part of a series on the current state of affairs in the Japanese labor market by Thomas J. Nevins. Thomas J. Nevins is a long-term member of the BLCCJ. He pioneered labor consulting for foreign-capitalized firms in Japan, and his firm TMT is the only company that also offers recruitment services. For more details, visit www.tmt-aba.com.



Overtime Rates Go Up with the White Collar Exemption Dumped

As unions could not protect jobs, nor win pay increases the last decade or more, and as restructuring, and sometimes over-subscribed voluntary staff reductions led to too few people having to work hours that are too long, unions were successful in pressuring the ministry with the labor portfolio to crack down on unpaid overtime—the so-called ‘service overtime’. Especially, between 2002 and 2005 there were campaigns of surprise inspections by local Labor Standards Offices—unlike in the past, thousands of these inspections. Companies, including most of the biggest names in Japan, were coerced, and settled by agreeing to pay sometimes even tens of millions of dollars of unpaid back overtime that the authorities maintained should be paid. Even the Japan Chamber of Commerce central office in Tokyo had to pay millions of yen of “unpaid overtime” that their staff had never even expected to be paid. So you can imagine that business interests were not happy.

Employers, and their employer associations, such as Keidanren fought back. The surprise

inspections and penalties finally caused employers to address something that I and others always recognized as strange. In many countries, if you are a university graduate, with or without a tie, but in ‘white collar’, non-assembly line, or not serving a retail station, or an operational process, you are considered white collar, and exempt from the payment of overtime. This can be the case directly out of school, or even if at a salary level over, say, \$20,000 US, and certainly less than 3,000,000 yen. Contrary to this, in Japan, you became exempt only if you had a management title of at least Kacho-hosa, or Assistant Section Manager, (generally 35 to 40 years old) and a cash allowance for this title of commonly 30,000 yen (US\$260) per month or a bit more. At the point you received this management allowance, the person was no longer able to submit a calculation of the overtime hours he or she worked. And most white collar people before they got this allowance, expected to make 5% to as much as 20% or sometimes more of their monthly pay as extra overtime payments. A common joke was, “I told my wife I got promoted today, and I’ll bring home about \$400 less next month.”

In reality, long hours were often worked, or

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

Keidanren, and business in general, lobbied and gave publicity to the need to have a white collar exemption. Employer associations suggested that if someone made over 4,000,000 yen (US\$34, 783 at 115 yen/US\$) that such an employee should be considered exempt from overtime, especially if it was difficult to measure their productivity and effectiveness. The position was that such people should be paid for their performance and results, not the length of hours they were in the office. Organized labor and the opposition parties felt the cut off point should be more than twice the above salary level or 8,000,000 yen, or even 10,000,000 yen. However, unions and their related political parties were basically against the whole concept of exempt labor.

Without much credibility, management argued that the white collar exemption would allow workers to have more control on their time, and be able to work shorter hours. The understandable reaction of the Japanese man or woman on the street was, "Hah!?" What business should have said is that much of the overtime worked is not even something that management wants or asks for. Rather, the problem is that when overtime is payable, many employees want to and some-

times need to inflate their monthly income by charging their companies overtime. Over the years, my clients that pay overtime, (and many smaller foreign capitalized firms, never, or rarely did pay overtime), experienced that there are a significant portion of employees who work inefficiently during the day, and are expected by their spouse and family to increase income with overtime. As detailed above, there also are not a few employees who like to hang around the company rather than go home. This gets worse if even a portion of those hours become payable as overtime. (Of course there are hard working contributors who would rather have more time for themselves and their families than the extra overtime earnings.)

Management or business lost the argument. It backfired. The ruling Liberal Democratic Party (LDP) political party wants to do well in the upper house election, so the 'white collar exemption' part of the bill recommended by the ministry was dropped. The LDP feared white collar wrath at the polls. Instead, the bill forwarded provides that the traditional overtime premium of 25% (time and a quarter), become 'time and a half' or the 50% that is prevalent in some other countries. This would kick in when over 80 hours of overtime is worked per month. I hope it is not an incentive to work longer hours for some people who have always tried to make extra money through extra overtime payments. These people might purposely try and go over the 80 hour threshold in order to make more money when the 150% overtime rate kicks in after 80 hours of overtime are worked each month! In Japan, I can picture this happening.

Unions argue that this higher overtime rate will reduce overtime worked because it becomes more expensive for companies—maybe. However, it will also have this effect of providing more of an incentive for overtime abusers—those who from their

side, 'work' longer hours than their employer wishes. Some reports say that the LDP forwarders of the bill hoped that the step of first providing a higher overtime percentage would help placate workers' anger over eventual LDP driven moves to exclude white-collar workers from overtime payments. Unfortunately it will not work like that. With the more attractive overtime rate, employees, and their unions, and opposition parties will fight even harder to maintain payable overtime, rather than an exemption. It will also be more difficult to get employees to be happy about shifting over to exempt status at a future time in their career. (Note that it is also proposed that firms with fewer than 300 employees essentially have a three year grace period.)

You can mitigate your overtime pay induced labor pain by introducing:

1) '*Henkei rodoo jikan*' (the possibility to average out working hours over a month, as long as on average, not more than 160 hours are worked per month. Actually if a company so stipulates and gets it approved by the Labor Standards Office, it is even possible to work more than 160 hours some months, as long as on average not more than 160 hours per month are worked over a one year period)

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

3) A sizeable allowance in lieu of overtime (—again, not fool proof, and no more than 'one of them', as the Japanese actually say in *katakana*/

their phonetic symbols. Inspectors at the Labor Standards Office will often say that the amount of this allowance should be comparable to the hourly overtime rate for that employee, and the number of overtime hours actually worked by that employee. However, nonetheless, such an allowance of perhaps 40,000 yen or about \$350 will help.)

4). employment contracts including a certain number of overtime hours. (Many firms have traditionally done this. Obviously if the offer letter or employment letter states that this monthly pay includes and covers a rather large number of overtime hours, say 30 or 40 as is common, it can be helpful if no more that 30 or 40 hours of overtime are worked, or if an employer is clearly telling employees they had better go home if the 30 or 40 hours of overtime is worked. In this case the salary level should be fairly high, say over 4,000,000 yen/\$35,000. However, once again this is not foolproof, and there is nothing in the law about the 4,000,000 yen, or the 30 or 40 hours. A possible downside of stipulating 30 or 40 hours also might be that if overtime is not managed properly and firmly, people would expect to get paid for the hours exceeding the 30 or 40 hours.)

5) Another thing companies can try is simply not allowing employees to submit a report of the overtime they worked. Instead they have to get specific permission by, say 2 pm, to be able to work overtime, and this request requires the manager's approval. I can tell you this. I used to be in and out of some government ministries before I started this consulting company in 1978. I know that at the old MITI, and even at the Ministry of Labor itself, even if the A class/top tier bureaucrats worked 100 hours of overtime per month, they only got paid for 30 hours of overtime per month. That was the probably unwritten rule. It probably was unwritten because it is not technically, or legally precise. But if those bureaucrats wanted to get ahead, they lived with the system. I have often gotten the authorities to back off by telling them stories like this. "Don't

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

6) It is also possible to make people take a say 30 minute break (although there again is nothing in the statutes and nothing sacred about 30 minutes—maybe could be more!) until after 8 working hours have passed—6 pm if you start at 9 am. Overtime, nor even straight time (the hourly wage without the overtime premium), would be payable between 6 and 6:30 or possibly later, even if it were worked—another gray area. At one very famous major Japanese company, where I worked as a part-time advisor before I started TMT, the head of the labor union at that facility would walk around at about 5:30 pm and announce on Monday, Tuesday, and Friday, that "no overtime can be charged today". Many people would just go on working for a couple hours, knowing that overtime could not be charged.

7) If the work day is 9 to 5, until after 6 pm, if people work straight through, and there is no system of breaks, straight time, not overtime, is all that need be paid between 5 and 6 pm. I think you get the picture about the complexity of the overtime situation. The combination of all of the above, and a few more tricks and communication messages I will not get into, will see you through quite well, but overtime does remain quite a trou-

blesome gray zone.

By way of anecdotal information, I can think of 6 or 7 foreign capitalized clients that came to me in the last couple years because they were hit with such sudden overtime inspections. My clients would not take the fines/back payment of overtime sitting down, and indeed, they did not. We helped them defend their turf, and not pay the fines. Their employees had been content with the situation of not being paid overtime, and did not need such interference from Big Brother. A couple of these firms made it clear to the authorities that the unpleasant interference would trigger an increase in that firm's scheduled working hours, and an introduction of some of the protective measures in the preceding paragraphs. We implemented those changes. We were able to explain it all to those firms' employees. They understood the need to do it, in the face of the rather high-handed inspections, and proposed penalties.

I will conclude with a true story that is also in a client unnamed case study in my Japan True or False book. By a combination of the above, most notably by defining a salary/qualification grade over which overtime was no longer payable, and by giving virtually all the people not directly on the moving assembly line, a TMT style Sales/Professional and Technical allowance of generally 40,000 yen/US\$350, we reduced the monthly overtime payments out at a factory operation from 8,000,000/US\$70,000 yen to 2,000,000 yen/US\$17,500. There were only about 50 people at this operation and they continued to make the same 11,000,000 widgets. The Japanese President I implemented this with just scratched his head, and said, "What was all that overtime all about over all those years?" When the people were no longer able to pad their pay checks, they were generally going home much earlier. Of course some who did not want to particularly go home, and perhaps a few with a real sense of duty still hung around but without payment of hourly calculated overtime.