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Charles Wynn-Evans

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Japan

Masahiro Nakatsukasa & Yusaku Akasaki
Chuo Sogo Law Office, P.C.

Work-Style Reform Promotion Act

Introduction

Despite certain notable achievements during the five years of Abenomics, ranging from a JPY47 trillion increase in the nominal GDP and 9% economic growth in Japan's economy to across-the-board pay scale hikes, private demand, including personal consumption and capital investments, remain generally stagnant. Key factors impeding Japan's economic growth include a declining population attributable to a decreasing birth rate, differences in working conditions between full-time and indefinite-term employees ("regular employees") and part-time and other fixed-term employees ("non-regular employees").

On June 29, 2018, the Japanese Diet passed work-style reform legislation (the "Work-Style Reform Promotion Act") which has been a high-priority item for Prime Minister Shinzo Abe. This legislation is actually a package of amendments to eight statutes aimed at realising a society where all workers can choose from among diverse work options so as to achieve a work-life balance. The current laws affected by the Work-Style Reform Promotion Act include the Labour Standards Act, the Worker Dispatching Act, the Act on Special Measures for Improvement of Working Hours Arrangements, the Act on Improvement of Employment Management for Part-Time Workers, and the Labour Contract Act.

Noteworthy features of the Work-Style Reform Promotion Act include (i) comprehensive and continuous promotion of work-style reform, (ii) amelioration of work-life balance, and (iii) ensuring fair treatment regardless of form of employment.

Discussion

Comprehensive and continuous promotion of the work-style reform

The overarching principle of the Work-Style Reform Promotion Act is the requirement that employees be made aware of their job responsibilities, the abilities and experience necessary for performing their duties as well as other prerequisites. Equally important related principles are: that efforts must be made to ensure employment stability by fairly evaluating employees' abilities using methods that reflect, among other things, their job descriptions, abilities and experience necessary for performing their duties and prerequisites; that employees must be treated based on these evaluation results; and that measures to ensure effective and appropriate treatment must be implemented.

In particular, the Work-Style Reform Promotion Act introduces a legal cap on overtime hours, work-hour restriction exemptions for high-level professionals, and rules based on an "equal work, equal pay" principle to address disparity in working conditions between regular employees and non-regular employees. Further, employers are required to strive to

improve working conditions, such as shortening working hours for employees and creating an environment in which employees can work in accordance with their motivation and abilities while maintaining a work-life balance.

Amelioration of work-life balance

The Work-Style Reform Promotion Act contains the following measures to promote the amelioration of employees' work-life balance:

a. **Cap on overtime hours**

Currently, an employer can have employees work beyond the statutory working hours if a specific labour management agreement has been concluded in accordance with Article 36 of the Labour Standards Act (an "Article 36 Agreement"). In principle, and subject to certain exceptions, the maximum hours of overtime under an Article 36 Agreement is capped at 45 hours per month and 360 hours per year for each employee (or 42 hours per month and 320 hours per year in the case of the variable working hours system for which the applicable period exceeds three months). In this respect, the Work-Style Reform Promotion Act provides that any Article 36 Agreement with overtime work in excess of the limits would be illegal.

The Work-Style Reform Promotion Act creates a new statutory cap on overtime work of 720 hours per year, less than 100 hours per month, and 80 hours per month on average during each period of two, three, four, five and six consecutive months. Violations are subject to imprisonment of up to six months or fines of JPY300,000.

The application of the rules above may be subject to deferment or exemption as discussed below.

- Automobile driving and construction business: The cap on overtime work will apply from April 1, 2024, five years after the Work-Style Reform Promotion Act takes effect on April 1, 2019. The cap on overtime work will be 960 hours per year.
- Doctors: The cap on overtime for doctors will apply from April 1, 2024, five years after the Work-Style Reform Promotion Act takes effect on April 1, 2019. Details about the maximum hours will be determined by an Ordinance of the Ministry of Health, Labour and Welfare. The timing of the implementation has not yet been determined. Concrete regulations, including to reduce working hours, will be discussed in a forum that allows input from the medical community.
- Sugar manufacturing industry in Kagoshima Prefecture and Okinawa Prefecture: From April 1, 2024, five years after the Work-Style Reform Promotion Act takes effect on April 1, 2019, the overtime work limitation of less than 100 hours per month, and 80 hours per month on average during each period of two, three, four, five and six consecutive months will no longer be applicable.
- The research and development of new technologies and products is exempt from the cap on overtime work. However, health insurance measures to ensure the health of employees, such as face-to-face guidance by physicians and the provision of substitute leave, will apply.

b. **Revision of additional pay for overtime work in excess of 60 hours per month at SMEs**

The current moratorium on the premium wage rate (50% or more) for overtime work in excess of 60 hours per month for SMEs¹ will be abolished, and the general rules which are applied to employers other than SMEs will apply (effective from April 1, 2023).

c. **Amendment of the annual paid leave system**

Traditionally, the employer has had no legal obligation to give employees annual paid leave. However, the Work-Style Reform Promotion Act requires employers to give

employees who are granted annual paid leave of 10 days or more, at least five days of annual paid leave each year during the period requested by the employer. However, it is not necessary to designate the number of days of annual paid leave taken as a result of the designation of the time of the employee and the planned grant.

d. **Revision of the flexible working hours system**

Under the conventional flextime system, the settlement period (which is a period during which average working hours per week must not exceed 50 hours) must be one month or less. However, it may be up to three months, enabling a more flexible working style.

e. **Establishment of an advanced professional system**

When employees with a clear scope of work, such as employees who are in charge of R&D, finance and consulting, and a certain annual income (at least 10 million yen) are engaged in work that requires a high level of expertise, they are required to take 104 days off a year without fail, and the provisions on working hours, holidays, late-night extra wages, etc. are excluded from the application of the provisions, such as the consent of the employee. In addition, employees may withdraw their consent to exclusion from the application of such provisions.

f. **Obligation to understand the status of working hours under the Industrial Safety and Health Act**

In order to ensure the effectiveness of measures to ensure the health of employees, working hours will be ascertained by methods prescribed by the Ordinance of the Ministry of Health, Labour and Welfare.

g. **Time of implementation**

The act will come into force on April 1, 2019. However, the maximum overtime work at SMEs will come into effect on April 1, 2020, and the revision of extra pay by SMEs will come into effect in April 2023.

Ensuring fair treatment regardless of form of employment (also known as “Equal Pay for Equal Work”)

a. Establishment of provisions to eliminate unreasonable treatment

- **Balanced treatment**

The Work-Style Reform Promotion Act stipulates that the reasonableness of part-time and fixed-term employees with respect to regular employees must be determined in light of (i) the job content (the content of work and the degree of responsibility), (ii) the scope of the job and changes in assignment (otherwise known as the “mechanism of utilisation of human resources”), and (iii) other circumstances, and in light of the nature and purpose of the treatment of each part-time employee and fixed-term employee, taking into consideration the circumstances considered appropriate in light of the nature and purpose of the treatment.

Accordingly, the title of the Part-Time Work Act (the “Act on Improvement, etc. of Employment Management for Part-Time Workers”) has been revised to the “Act on Improvement, etc. of Employment Management for Part-Time Workers and Term Employment Workers”.

As a result, Article 20 of the existing Labour Contract Act² will be deleted.

- **Equal treatment**

With regard to fixed-term employees, it will be obligatory to ensure equal treatment compared to regular employees when (i) job descriptions, and (ii) the scope of changes to job descriptions and obligations, are the same.

- **Dispatched workers**
Dispatched workers are required either: (i) to be treated on an equal and balanced basis with the regular employees of the dispatched employer; or (ii) to be treated in accordance with a labour management agreement that meets certain requirements (such as being paid equal or higher wages than the average wages of the dispatched employees' employees who perform the same type of work).

b. **Strengthening the obligation to explain the treatment of employees**

For part-time workers, fixed-term workers, and dispatched workers, explanations about the details and reasons for differing treatment from regular employees have been made obligatory.

The current status of implementation of the accountability obligation for the category of workers mentioned above is described in the table below.

	Accountability obligation when hiring	Accountability obligation after hiring
Part-time workers	Stipulated under the current law	Newly stipulated
Fixed-term workers	Newly stipulated	Newly stipulated
Dispatched workers	Newly stipulated	Newly stipulated

c. **Time of implementation**

This will come into force on April 1, 2020, but only applies to SMEs from April 1, 2021.

Supreme Court decisions

Introduction

On June 1, 2018, the Supreme Court handed down two cases: the Hamakyorex case; and the Nagasawa Transport case. These are the first Supreme Court rulings on the issue of discrimination between regular employees and non-regular employees. Article 20 of the current Labour Contract Act prohibits treatment deemed unreasonable in light of (a) the content of duties, (b) the scope of changes in job descriptions and assignments, and (c) other circumstances. The Supreme Court's view on Article 20 was presented in these decisions. These Supreme Court decisions will continue to have significance even after the implementation of the Work-Style Reform Promotion Act as they will have a material impact on the interpretation of the various provisions of the this law as well as its practical implementation in Japanese companies.

Hamakyorex case

The Hamakyorex case involved different treatment between a full-time employee and a contract employee engaged in a delivery service as a truck driver. The Supreme Court held that such different treatment violated Article 20 of the Labour Contract Act when such treatment arises because of the fixed or indefinite nature of the employment. The Supreme Court also concluded that different working conditions of a full-time employee and a contract employee that violate Article 20 are invalid.

The alleged differing treatment involved six allowances: housing allowance; full-time allowance; no-accident allowance; work allowance; meal allowance; and commutation allowance. The procedure used by the Supreme Court was to first determine the nature of the allowances, and then take into account that it was the same in (a), but different in (b), and (c) the unreasonableness of other circumstances in the light of the purpose of the respective wages. Considering such facts above, the Supreme Court found the employer's treatment, with the exception of housing allowances, to be unreasonable, because the requirement to

pay the above allowances other than housing allowance do not differ based on whether the employee is a full-time employee and a contract employee. On the other hand, the Court held that it was not unreasonable to pay housing allowance only to full-time employees as such employees are subject to relocations involving moving house, which may increase the employee's housing cost.

Nagasawa Transport case

This is a case in which the disparity in treatment between regular employees and non-regular employees who are re-employed on a new contract after their retirement became an issue. In this regard, the disparity between regular employees and such non-regular employees differed in character from the general problem of non-regular employees, and it was a special case that takes into account the employment of re-employed employees. Like the Hamakyorex case, this involved a delivery driver. The Supreme Court held that, although factors (a) (the content of duties) and (b) (the scope of changes in job descriptions and assignments) were the same, the special nature of post-retirement re-employment was taken into account. The decision procedure is similar to that of the Hamakyorex case. In other words, the court first determined what the purpose of the wage is and then examined (a) and (b), then (c) the special nature of post-retirement re-employment in light of the purpose of each wage and whether the different working conditions are unreasonable.

The distinction between the Hamakyorex case is that post-retirement re-employment situations are taken into account, and it is concluded that efficiency allowance, job allowance, bonuses, housing allowances, and family allowances are not unreasonable. On the other hand, the Court held that, with regard to the allowance for diligence, since (a) the contents of the duties are the same, the necessity of full-time service incentives is the same, and it was determined that it was unreasonable not to pay it to non-regular employees.

Practical points

The Supreme Court's rulings in these cases concern the issue of allowances.

Employers need to reconfirm their intentions for each allowance and verify that they are not evaluated as unreasonable. It is considered possible to reconcile that the work allowance and the full-time work allowance are unreasonable because the same job contents are the grounds for unreasonability, and if the job contents differ, they are not unreasonable. Housing allowances can be explained by relocation with or without relocation. Commutation allowances should basically be considered in the same manner as permanent employees. It should be kept in mind that the difference between post-retirement re-employment and permanent employees is not permissible without limit. If it is desired to make further differences in the treatment of permanent employees and post-retirement re-employment, it will be possible to reduce the likelihood that (a) a clear difference in job descriptions, and (b) a clear difference in job descriptions and the scope of changes, will be considered unreasonable.

Conversion of fixed-term employment agreements to employment agreements without a fixed term

Gist of the Labour Standard Act's amended Article 18

Certain amendments in August, 2012 to Japan's Labour Contract, in particular Article 18, gave certain employees the right to convert fixed-term employment contracts to employment contracts without a fixed term, thereby effectively placing such employees on equal footing and with equal legal protects as "regular full-time employees".

Prior to the amendment of Article 18, Japan's Labour Contract Act and other major employment-related acts were based on the concept that employment agreements should, in

theory, have no fixed term, and that employment agreements with fixed terms should only be an exception. Although there is no required minimum length for fixed-term employment, the maximum length of fixed-term employment cannot, subject to certain exceptions, exceed three years.

In practice, Japanese companies hire “regular employees” on a full-time basis without a fixed term. Typically, these “regular employees” continue to work until reaching the age for retirement as prescribed in the company’s employment rule, usually until the age of 60, after which companies offer “re-employment” until age 65 on a separate employment arrangement and with a lower salary. Following the demise of the boom economy in the 1980s and 1990s, the vast majority of Japanese companies started exploring the option of fixed-term employees as a way of containing human resource costs. This trend toward increasing hiring on a fixed-term basis increased the overall percentage of fixed-term workers in the labour market which gave rise to the need to provide legal protection for fixed-term workers, hence an amended Article 18.

Conversion to employment agreement without a fixed term

Section 1, Article 18 essentially gives a fixed-term employee the right to convert his or her employment into employment without a fixed term if the fixed-term employment with the same employer has lasted for more than a total of five years. The fixed-term employee must apply for an employment agreement without a fixed term before the expiration date of the fixed-term employment contract then in effect. Since the amendment to Article 18 came into effect in 2013, April 1, 2018 was the first date on which conversions thereunder became possible.

The new employment agreement without a fixed term will come into effect on the date immediately following the expiration of the then-in-effect employment agreement with a fixed term, and the work conditions will be the same as those under the employment agreement with a fixed term, but without the fixed term. In essence, the employer will be obligated to continue their employment until they leave voluntarily or reach retirement age.

How companies responded

Since the conversion right is expected to have a major long-term impact on employers’ human resources and financial resources, employers should explore legally viable options to handle conversion applications from employees. This could have a significant long-term effect on the employer’s human resources policy and/or system.

One avenue initially explored by employers was establishing internal working rules that essentially contained different terms of employment than those in the employment with a fixed term. This option was based on Article 18 that allows employers to vary the employment conditions applicable to converted employees without fixed terms. If established, these internal employment rules would be applicable to employees after conversion. Absent these rules, the employment conditions post-conversion will be the same as those pre-conversion (except for the absence of the fixed term).

Based on the assumption the post-conversion employees may work long-term for the employee, companies should make rules that allow the employer maximum flexibility for things such as job description, work locations, etc. This is in contrast to employment agreements with fixed terms whose work conditions are generally fairly rigid with respect to the job description, work location, etc. This type of approach offers companies maximum flexibility necessary for an adaptable management environment. Employers should be sure to include a retirement age in these rules for converted employees to avoid having too many employees close to retirement age.

Due to the potentially negative impact on employers' practices and finance, some employers urge employees with fixed term contracts to waive their conversion rights in even sometimes by including them in the employment contract. Employers should exercise caution since advance waivers are void as a violation of public order and morality.

Employers should also exercise caution with respect to negative consequences for the exercise of the conversion right in the form of lower wages, etc. Since lowering wages cannot be done without a reasonable ground, this type of practice would be deemed invalid and not legally binding on the employees who wish to exercise their conversion right.

Exemptions from the conversion rule

There are three categories that are exempt from this five-year rule of conversion. First is the category that includes professors and lecturers involved in research or academic activities at a university. The second category is for researchers or engineers involved in science and technology who are employed at a research and development agency or university, etc. with a fixed term. The third category protects elderly employees who should retire at the age of 65, who are often rehired with fixed terms after initial retirement. This continuous hiring obligation was initially created to ameliorate the public pension fund deficit. A special law allows employers to avoid conversion rights for this category if the employer files an application with the government and receives approval from the Ministry of Health, Labour and Welfare.

* * *

Endnotes

1. Under article 138 of the Labour Standard Act, SMEs means:
 - Business operators whose amount of stated capital or whose sum of contributions is not more than 300 million yen (or 50 million yen for business operators whose main business is retail or service business, or 100 million yen for business operators whose main business is wholesale business; or
 - Business operators who continuously employ not more than 300 workers (or 50 workers for business operators whose main business is retail, or 100 workers for business operators whose main business is wholesale or service business).
2. Article 20 of the existing Labour Contract Act states: "If a labour condition of a fixed-term labour contract for a Worker is different from the counterpart labour condition of another labour contract without a fixed term for another Worker with the same Employer due to the existence of a fixed term, it is not to be found unreasonable, considering the content of the duties of the Workers and the extent of responsibility accompanying the said duties (hereinafter referred to as the "content of duties" in this Article), the extent of changes in the content of duties and work locations, and other circumstances."

**Masahiro Nakatsukasa****Tel: +81 6 6365 8111 / Email: nakatsukasa_m@clo.gr.jp**

Masahiro Nakatsukasa is a bilingual international attorney admitted in Japan and New York, with more than 25 years' experience representing Japanese and foreign clients in a wide variety of transactions and litigations. He is well-known as one of the leading counsels in the areas of cross-border M&A and financial transactions in the Kansai area in Japan (comprised of Osaka, Kobe, and Kyoto). Mr. Nakatsukasa was selected for inclusion in the 5th to 9th editions of *Best Lawyers in Japan* in Banking and Finance Law (2014 to 2018) and Insolvency and Reorganization Law (2017 and 2018). He served as a Vice-President of the Osaka Bar Association from 2015 to 2016. Mr. Nakatsukasa received an LL.B. from Kyoto University in 1994 and an LL.M. from the Northwestern University School of Law in 2005.

**Yusaku Akasaki****Tel: +81 6 6365 8111 / Email: akasaki_y@clo.gr.jp**

Mr. Yusaku Akasaki has a broad range of experience working on labour matters. His experience includes representing a subsidiary of a foreign entity in the labour tribunal proceedings disputing the validity of unilateral dismissal of an employee, assisting a subsidiary of a foreign entity in the drafting of work-related regulations, and advising on the establishment of a Japanese subsidiary and employment-related matters for a number of foreign companies. Mr. Akasaki was admitted to practise in Japan in 2008 and joined Chuo Sogo Law Office in the same year. He graduated from the University of Tokyo (LL.B.) in 2005, Kyoto University (J.D.) in 2007, and the University of California, Los Angeles (LL.M.) in 2015. As of 2018, he is also admitted to practise in the state of New York.

Chuo Sogo Law Office, P.C.

Kohda Building 11th Floor, 2-10-2 Nishi-Tenma, Kita-ku, Osaka 530-0047, JapanTel: +81 6 6365 8111 / URL: www.clo.jp

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