

Client Alert

February 5, 2024

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Japan: Effective 1 April 2024 - Changes to the deemed working time system for discretionary work

The Labor Standards Act (the "LSA") includes a deemed working time system for discretionary work (the "Discretionary Work System") under which the working hours of employees engaged in certain duties can be predetermined rather than calculated on the basis of their actual working time. The Ordinance for Enforcement of the Labor Standards Act (the "LSA Ordinance") and a government notification detail the scope of the duties to which the Discretionary Work System can be applied and the relevant procedures.

However, an amendment to the LSA Ordinance and the government notification which becomes effective on April 1, 2024 makes the following major changes:

- The scope of the duties to which the Discretionary Work System applies will slightly increase.
- Employee consent to the use of the Discretionary Work System for Specified Duties (one of the two Discretionary Work System types as further explained below) will be required.
- Some changes will be made to the procedural requirements.

Accordingly, employers can consider implementing or expanding their use of the Discretionary Work System if they have any employees whose duties will fall under the Discretionary Work System as amended. Employers who already apply the Discretionary Work System for Specified Duties to any of their employees will need to consider obtaining individual employee consent in order to continue using the system.

Please see the below for further details on changes employers should ready themselves for by April 1, 2024.

1. Summary of the Discretionary Work System


The LSA sets out two types of the Discretionary Work System which can be applied for:

- Specialized Duties
- Planning Duties

1.1 Discretionary Work System for Specialized Duties

Article 38-3 of the LSA establishes a deemed working time system for employees whose duties require that they be given significant discretion with regard to the means, methods and time allocation for services they provide ("Discretionary Work System for Specialized Duties"). Duties to which the Discretionary Work System for Specialized Duties can be applied ("Scope of Duties") are defined under the LSA Ordinance and the government notification.

To implement the Discretionary Work System for Specialized Duties, employers need to conclude a labor management agreement with a labor



union or employee representative representing a majority of the employees setting forth certain matters (including predetermined, deemed working hours) and submit the labor management agreement to the Labor Standards Inspection Office. Employers are also required to include provisions related to the application of the system to eligible employees in the company's rules of employment and/or individual employment agreements.

1.2 Discretionary Work System for Planning Duties

Article 38-4 of the LSA establishes a deemed working time system for employees whose duties consist of planning, drafting, researching and analyzing matters related to the operation of a company's business ("Discretionary Work System for Planning Duties"). Unlike Specialized Duties, Planning Duties are not defined under the LSA Ordinance or the government notification. However, the procedures and requirements related to the Discretionary Work System for Planning Duties are stricter than those related to the Discretionary Work System for Specialized Duties to prevent unlimited expansion of the scope of the planning duties.

To implement the Discretionary Work System for Planning Duties, employers need to establish a labor management committee. Certain matters (including those related to predetermined, deemed working hours) need to be decided by a resolution passed by a four-fifths majority of the members of the labor management committee. Employers must then submit the resolution to the Labor Standards Inspection Office and they are also required to include provisions related to the application of the system to eligible employees in the company's rules of employment and/or individual employment agreements.

2. Amendments to the Discretionary Work System

2.1 Amendments to the Discretionary Work System for Specialized Duties

The Scope of Duties of the Discretionary Work System for Specialized Duties under the LSA Ordinance and the government notification currently includes 19 specific duties. However, the amendments will add, "duties related to researching and analyzing mergers and acquisitions for clients, as well as devising and advising on such mergers and acquisitions for banks and securities companies (so-called M&A advisory duties)," to the Scope of Duties.

As mentioned above, current law permits the Discretionary Work System for Specialized Duties to be applied to an employee without consent, but after the amendment, employee consent will be required. It is worth noting that the Discretionary Work System for Planning Duties already requires employee consent.

With the new requirement to obtain employee consent for the application of the system after the amendment, the following matters will need to be included in labor management agreements:

- The employer will obtain the consent of the employee to the application of the system.
- The employer must not treat the employee disadvantageously where the employee does not consent to the application of the system.
- Procedures for withdrawing consent for the application of the system
- The employer will keep records of employee consent and withdrawal of consent during the period of the labor management agreement and for five years (three years for the time being) after its expiration.

**For further information,
please contact:**



Tomohisa Muranushi
Partner
+81 3 6271 9532
tomohisa.muranushi@bakermckenzie.com



Kento Tanei
Associate
+81 3 6271 9704
kento.tanei@bakermckenzie.com

In addition to the above amendments, employers will need to keep records of employee consent and withdrawal of consent during the period of the labor management agreement and for five years (three years for the time being) after its expiration.

2.2 Amendments to the Discretionary Work System for Planning Duties

As mentioned in 2.1 above, employee consent to the application of the Discretionary Work System for Planning Duties is currently required. After the amendment, the following matters will need to be passed by a resolution of the labor management committee:

- Procedures for withdrawing consent for the application of the system
- An employer will keep records of an employee's withdrawal of consent during the period of the resolution of the labor management committee and for five years (three years for the time being) after its expiration.¹
- When changing the wage and evaluation system applicable to covered employees, the employer shall explain the changes to the labor management committee.

In addition to the above amendments, employers will need to keep records of an employee's withdrawal of consent during the period of the resolution of the labor management committee and for five years (three years for the time being) after its expiration, and certain matters that must be included in the operating rules of the labor management committee will change, as will the frequency at which periodic reports must be submitted to the Labor Standards Inspection Office.

www.bakermckenzie.co.jp/en

Baker & McKenzie
(Gaikokuho Joint Enterprise)

Ark Hills Sengokuyama
Mori Tower 28F
1-9-10, Roppongi, Minato-ku
Tokyo 106-0032, Japan
Tel + 81 3 6271 9900
Fax +81 3 5549 7720

¹ Records of employee consent are required to be retained under current law.