

Fixed overtime payment arrangements

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- 🕒 **Legal background**
- 🕒 **Requirements**
- 🕒 **Failure to satisfy requirements**
- 🕒 **Adopting arrangements for existing employees**
- 🕒 **Comment**

The requirements that must be satisfied for a fixed overtime payment arrangement to be valid are a hot topic in Japanese legal practice. This article provides an overview of the main issues in this regard.

Legal background

Under Japanese law, employers must – in principle – pay an allowance to employees who work more than eight hours per day or 40 hours per week. However, there are some exceptions to this rule – for example, managers (ie, employees in a managerial or supervisory position) are exempt. In view of this, the Japanese courts and authorities tend to make strict determinations concerning the requirements that must be satisfied for employees to be considered managers.

Requirements

Given the above, from an employer's perspective, it is practical to include an employee's overtime allowance in their base salary where possible. However, for an employee's overtime allowance to be validly included in their base salary, certain requirements must be satisfied. Although Japanese judicial precedents are not wholly consistent with regard to these requirements, the courts require employers to clearly separate the fixed overtime allowance from the employee's base salary and any other allowances. **(1)**

It is not entirely clear when such separation will be satisfied; however, it is likely that an overtime allowance will be deemed to be included in an employee's base salary if the employer clearly communicates to the employee:

- the monetary amount of the overtime allowance; and
- the number of hours of overtime per month that corresponds to such monetary amount.

However, an overtime allowance may be deemed to be included in an employee's base salary if only one of the above criteria is clearly communicated thereto.

In addition, the number of hours of overtime that corresponds to the monetary amount should not be unreasonable. While it is unclear how many hours are considered unreasonable, on 4 October 2018 the Tokyo High Court held that, in principle, the number of overtime hours to be included should not exceed 80 hours per month, as an employee's health may be adversely affected if they consistently exceed this threshold.

Further, even if the above requirements are satisfied, if the number of hours actually worked by an employee exceeds the number of overtime hours included in their fixed overtime allowance, an additional overtime allowance must be paid for the excess hours.

Failure to satisfy requirements

If an employer fails to comply with the above requirements, the overtime allowance will be deemed to have not been included in the employee's base salary. In such cases, the portion of the base salary that the employer thought covered an employee's overtime payment will instead be considered to be their simply base salary. As such, the employer will have to retrospectively pay the overtime allowance in addition to the base salary.

Adopting arrangements for existing employees

Employers that are contemplating adopting a fixed overtime payment arrangement for an existing employee must generally obtain the employee's consent. This is because the adoption of a fixed overtime payment arrangement will require amendments to their employment terms and conditions which may be unfavourable, especially if the new total salary (which includes the overtime allowance) is the same as the current salary (which does not include the allowance).

Comment

Although there is some judicial guidance on the requirements which must be met in order to successfully adopt a fixed overtime payment arrangement, the matter remains somewhat ambiguous. If an employer plans to adopt a fixed overtime payment arrangement, it would be prudent for it to follow the abovementioned steps – including clearly communicating to the employee both the monetary amount of the overtime allowance and the number of hours of overtime per month to which such amount corresponds – in order to minimise any risks.

For further information on this topic please contact Satoshi Hosokawa at Nagashima Ohno & Tsunematsu by telephone (+81 3 6889 7000) or email (satoshi_hosokawa@noandt.com). The Nagashima Ohno & Tsunematsu website can be accessed at www.noandt.com.

Endnotes

(1) According to a 19 July 2018 Supreme Court decision, when determining whether a particular allowance constitutes a fixed overtime allowance, the courts should consider certain factors, including:

- the wording of the relevant employment contract;
- the employer's communications to the employee regarding the allowance; and
- the employee's actual working circumstances, such as their working hours.

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Satoshi Hosokawa