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## Changes to the Rules for the Discretionary Working Hour System

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### Introduction

On March 30, 2023, the “Ministerial Ordinance Partially Amending the Ordinance for Enforcement of the Labor Standards Act and the Act on Special Measures for Improvement of Working Hours Arrangements” (Ordinance of the Ministry of Health, Labor and Welfare No. 39 of 2023; “**Amended Ministerial Ordinance**”) and “Notice Partially Amending the Guidelines to Ensure Appropriate Working Conditions for Workers Engaged in the Work Specified in Article 38-4, Paragraph 1, Item 1 of the Labor Standards Act Pursuant to the Same Article and Paragraph and the Work Designated by the Minister of Health, Labor and Welfare Pursuant to Article 24-2-2, Paragraph 2, Item 6 of the Ordinance for Enforcement of the Labor Standards Act” (Notice of the Ministry of Health, Labor and Welfare No. 115 of 2023; “**Amended Notice**”, and collectively

with the Amended Ministerial Ordinance, “**Amendment**”) were announced. By this Amendment, the changes to the rules for the discretionary working hour system included in the Ordinance for Enforcement of the Labor Standards Act (Ordinance of the Ministry of Health and Welfare No. 23 of 1947; the amended ordinance shall be hereinafter referred to as “**Amended Labor Standards Ordinance**”), “Work Designated by the Minister of Health, Labor and Welfare Pursuant to Article 24-2-2, Paragraph 2, Item 6 of the Ordinance for Enforcement of the Labor Standards Act” (Notice of the Ministry of Labor No. 7 of 1997; “**Notice of Covered Work**”) and “Guidelines to Ensure Appropriate Working Conditions for Workers Engaged in the Work Specified in Article 38-4, Paragraph 1, Item 1 of the Labor Standards Act Pursuant to the Same Article and Paragraph” (Notice of the Ministry of Labor No. 149 of 1999; the amended guidelines shall be hereinafter referred to as “**Amended Guidelines**”) will come into effect as of April 1, 2024. This Amendment requires new procedures to be taken for introducing and continuing the discretionary working hour system. In addition, in relation to this Amendment, the “Enforcement of the Ministerial Ordinance Partially Amending the Ordinance for Enforcement of the Labor Standards Act and the Act on Special Measures for Improvement of Working Hours Arrangements (Discretionary Working Hour System, etc.)” providing for the interpretation guidelines for the amended laws (Announcement of the Director-General of the Labor Standards Bureau of the Ministry of Health, Labor and Welfare 0802 No. 7 of August 2, 2023; “**Enforcement Announcement**”) and “Q&A on the Discretionary Working Hour System concerning the 2023 Revisions of the Ordinance for Enforcement of the Labor Standards Act” by the Labor Standards Bureau of the Ministry of Health, Labor and Welfare (“**Q&A**”) were published<sup>1 2</sup>. The following is the commentary on the Amendment taking these documents into account.

## I. Basic Matters concerning the Discretionary Working Hour System

Before explaining the Amendment, we will provide an overview of some basic matters concerning the discretionary working hour system.

### 1. Types and Covered Work of the Discretionary Working Hour System

The discretionary working hour system is one of the systems that offer flexible working arrangements under the Labor Standards Act (“**LSA**”). It is a system in which working hours are calculated based on the hours determined by a labor-management agreement or by a resolution of a labor-management committee, rather than actual working hours, when the nature of work requires that the method of its performance be left largely to the discretion of the employees. There are two types of discretionary working hour systems: the discretionary working hour system for professional work and discretionary working hour system for planning work.

The discretionary working hour system for professional work is a system that is applicable to

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<sup>1</sup> <https://www.mhlw.go.jp/content/001164350.pdf> (Only available in Japanese)

<sup>2</sup> A supplementary version of the Q&A was published in November 2023. This newsletter provides explanations based on the supplementary version.

forms of work set out under laws such as those forms that, owing to the nature of the work, the means and methods in which it is carried out, and the allocation of time needed for the work, are to be left largely to the discretion of the employees who are engaged in such work (Article 38-3 of the LSA, Article 24-2-2, Paragraph 2 of the Amended Labor Standards Ordinance, and the Notice of Covered Work).

On the other hand, the discretionary working hour system for planning work is a system that is applicable to work in the planning, drafting, researching, and analyzing of matters relating to business operations for which the nature of the work is such that, in order for it to be carried out properly, the methods in which it is carried out needs to be left largely to the discretion of the employees (Article 38-4 of the LSA). Unlike the discretionary working hour system for professional work, the scope of this second type of system is not clearly defined, but procedures and requirements are stricter than those applied to the discretionary working hour system for professional work in order to prevent an unlimited expansion of eligible persons.

## **2. Introduction Procedures**

The procedures for introducing the discretionary working hour system vary for each type<sup>3</sup>.

### **(1) Discretionary Working Hour System for Professional Work**

In order to apply the discretionary working hour system for professional work to employees, the employer is required to stipulate certain matters in a labor-management agreement with a labor union organized by a majority of employees in the workplace or, if no such labor union exists, with a person representing a majority of such employees and to submit the same to the competent labor standards inspection office (Article 38-3, Paragraphs 1 and 2, and Article 38-2, Paragraph 3 of the LSA). As stated below, the Amendment provides for additional matters to be stipulated in a labor-management agreement (please see II 1. (2)).

### **(2) Discretionary Working Hour System for Planning Work**

On the other hand, in order to apply the discretionary working hour system for planning work to employees, the employer is required to establish a labor-management committee consisting of representatives of the employer and those of employees at the workplace, and certain matters must be decided by a resolution passed by a four-fifths majority or more of the labor-management committee members (Article 38-4, Paragraph 1 of the LSA). The employer is also required to submit the said resolution to the competent labor standards inspection office (the same Paragraph).

## **3. Effects**

For both types of the professional work and planning work, if an employee engages in the

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<sup>3</sup> The forms of notification of agreement and of notification of resolution referred to in this section are available on the website of the Ministry of Health, Labor and Welfare ([https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/koyou\\_roudou/roudoukijun/roudouzikan/sairyo.html](https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/koyou_roudou/roudoukijun/roudouzikan/sairyo.html)) (Only available in Japanese).

covered work in compliance with the requirements established by law, the employee is deemed to have worked the number of hours determined by a labor-management agreement or by a resolution of a labor-management committee, regardless of actual working hours (Article 38-3, Paragraph 1, and Article 38-4, Paragraph 1 of the LSA). However, since the application of the regulations on breaks (Article 34 of the LSA), days off (Article 35 of the LSA), overtime work, work on holidays, and late-night work (which means work between 10 p.m. and 5 a.m.; Articles 36 and 37 of the LSA) is not exempted, if the deemed working hours exceed the statutory working hours (eight (8) hours per day or 40 hours per week (Article 32 of the LSA)), the employer is required to conclude an “agreement on overtime work and work on holidays” (which is commonly called a “36 Agreement”). In addition, in the case of overtime work, holiday work, and late-night work, premium wages must be paid for the hours of such work (Article 37, Paragraphs 1 and 4 of the LSA).

It should be noted that neither a labor-management agreement nor a resolution of the labor-management committee as mentioned above may contain an automatic renewal clause. It is recommended that the effective term of a labor-management agreement or a labor-management committee’s resolution should not exceed three (3) years (Q&A 8-3).

**II. Important Points of the Amendment**

In the following section, we will focus on the points that require special attention when introducing and continuing the discretionary working hour system for professional work and that for planning work, respectively.

**1. Discretionary Working Hour System for Professional Work**

**(1) Addition of Covered Work**

Under the current law, 19 types of work are covered by the discretionary working hour system for professional work. Under this Amendment, a new type of work, which is “research or analysis on mergers and acquisitions and devising and advising on mergers and acquisitions based on such research or analysis that are performed for clients at banks or securities companies” (“**M&A Advisory Services**”), was added (Item 8 of the Notice of Covered Work).

The following table shows the details of the wording in relation to M&A Advisory Services (Section 2.3 of the Enforcement Announcement, and Q&A)

“banks or securities companies”	Refers to banks as defined in Article 2, Paragraph 1 of the Banking Act (Act No. 59 of 1981) and financial instruments business operators as defined in Article 2, Paragraph 9 of the Financial Instruments and Exchange Act (Act No. 25 of 1948) that are also securities companies engaged in a Type-I financial instruments business as defined in Article 28, Paragraph 1 of the same Act, and does not include <i>shinkin</i> banks, etc. M&A intermediary service
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	providers are not included either <sup>4</sup> .
“clients”	Refers to clients (either individuals or corporations) of a bank or securities company that employs employees engaged in the covered work.
“mergers and acquisitions”	Refers to M&A (Mergers and Acquisitions), which means the taking over (transferring and acquiring) of a business through various methods (reorganization (merger, demerger, etc.), share transfer, business transfer, and the like under the Companies Act) including business succession.
“research or analysis”	Refers to an act of conducting research or analysis necessary for the realization of an M&A, and includes, for example, research and analysis of the impact of an M&A on business revenue and due diligence on the target company (i.e., research conducted to scrutinize various types of risks, etc. of the transferor which is the target company).
“devising and advising based on such research or analysis”	Refers to devising and advising necessary for the consummation of an M&A based on the above research or analysis (which does not include work that requires the allocation of time exclusively to be left to the convenience of clients).

In order for an employee to be considered to be engaged in the above M&A Advisory Services, the employee is required to perform both “research or analysis” and “devising and advising”, and if an employee performs only one of these tasks, the discretionary working hour system for professional work cannot be applied to the employee. For example, if an employee performs only either “research or analysis” or “devising and advising”, as in the case where these tasks are allocated to multiple project team members, the employee is not considered to perform M&A Advisory Services as defined above. Furthermore, even if an employee performs both tasks, the discretionary working hour system may not be applied if the employee has no discretion in the performance of work or the allocation of time, such as, if the employee performs work or allocates time under the control of a chief (leader) (please see Section 2.4(1) of the Enforcement Announcement, and Q&A 4-1). Similarly, belonging to a department in charge of M&A Advisory Services does not necessarily mean that all the works performed in that department are considered to be covered by the discretionary working hour system for professional work. It should be noted that only those tasks falling under the categories of “research or analysis” and “devising and advising” are considered to be covered by the discretionary working hour system for professional work (Q&A 4-2).

Furthermore, in the case where an employee is engaged in M&A Advisory Services while also

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<sup>4</sup> Q&A 4-3.

performing other work, even if the time spent on other work is only a short time, as long as it is “scheduled”, the discretionary working hour system for professional work is not applicable (Q&A 4-4). On the other hand, if an employee is engaged in other work “on an ad hoc basis”, the application of the discretionary working hour system for professional work is not denied for the portion of time spent on M&A Advisory Services. In such case, the total of the deemed working hours spent on M&A Advisory Services and of the actual working hours spent on other work is the working hours for the day (Q&A 4-4).

**(2) Addition of Matters to Be Agreed in Labor-Management Agreement**

As a result of this Amendment, the matters underlined in (vi) through (viii) and (x) below have been added to matters to be agreed in a labor-management agreement. This means the number of matters that the employer needs to implement based on a labor-management agreement will increase.

Matters that must Be Agreed in a Labor-Management Agreement for Implementing a Discretionary Working Hour System for Professional Work
(i) Types of work covered by the system;
(ii) Time for which an employee is deemed to have worked (deemed working hours);
(iii) That the employer will not give specific instructions concerning determination of the method of performing the covered work or the allocation of time;
(iv) Measures taken to ensure health and welfare based on the working hours of covered employees;
(v) Measures taken to handle complaints from covered employees;
(vi) <b><u>To obtain the consent of employees before applying the system;</u></b>
(vii) <b><u>To not treat disadvantageously employees who do not consent to the application of the system;</u></b>
(viii) <b><u>Procedures for withdrawing consent to the application of the system;</u></b>
(ix) Effective term of a labor-management agreement; and
(x) To keep records of each employee’s working

hours, implementation of measures to ensure health and welfare, implementation of grievance measures, **consent and withdrawal of consent** during, and for five (5) years (three (3) years for the time being) after the expiration of, the effective term of the labor-management agreement.

(Source: Leaflet of the Ministry of Health, Labor and Welfare, “New procedures will be necessary to introduce and continue the discretionary working hour system”<sup>5</sup>)

## **A Matters regarding Consent of Employees**

While it was originally necessary to obtain the consent of employees to apply the discretionary working hour system for planning work, it was previously not necessary to obtain the consent of employees to apply the discretionary working hour system for professional work. However, in order for employees to utilize their knowledge and skills and to demonstrate their creative abilities under the discretionary working hour system, it is important that the system is applied after they have fully understood and accepted the system. It is also important to prevent the system from being abused. Therefore, the Amendment stipulates that the consent of employees is also required for the discretionary working hour system for professional work. In this regard, it is required to stipulate in a labor-management agreement that the consent of employees be obtained before applying the system ((vi) above), not to treat disadvantageously employees who do not consent to the application of the system ((vii) above), and to establish procedures for withdrawing consent to the application of the system ((viii) above) (Article 24-2-2, Paragraph 3, Items 1, 2, and 4 (c) of the Amended Labor Standards Ordinance, and Article 71 of the supplementary provisions of the said Ordinance)<sup>6</sup>.

As for the consent listed at (vi) above, it is recommended that the employer provide in a labor-management agreement that the employer must “indicate and explain” to employees about details of the labor-management agreement including details of the covered work, an outline of the discretionary working hour system for professional work at the workplace, details of the appraisal system and the corresponding wage system to be applied if an employee consents to be subject to the discretionary working hour system for professional work, and the assignment and treatment if an employee does not consent. The method of “indicating and explaining” for the purpose of this section is not necessarily limited to a written method. That being said, in order to ensure the employees’ understanding, it is recommended that the system be indicated to the employees by delivering written documents or by delivering electronic records via e-mail or the

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<sup>5</sup> <https://www.mhlw.go.jp/content/001080850.pdf> (Only available in Japanese)

<sup>6</sup> For examples of the forms of consent and withdrawal of consent, please refer to page 21 of “Explanation of the Discretionary Working Hour System for Professional Work” by the Ministry of Health, Labor and Welfare (<https://www.mhlw.go.jp/content/001166653.pdf>) (Only available in Japanese).

company intranet (Q&A 1-5)<sup>7</sup>. Specifically, explanatory materials and FAQs could be sent to employees as e-mail attachments or published on the company intranet<sup>8</sup>.

Consent can also be obtained not only by receiving written documents, but also by receiving electronic records via e-mail or the company intranet (Q&A 1-4). It should be noted, however, that oral consent is not sufficient because it is necessary for an employer to keep a record of an employee's consent to satisfy the record retention obligation described in B. below<sup>9</sup>.

Furthermore, in the case where an employee's consent is not deemed to have been given based on his/her free will for reasons such as because the employee has not received any sufficient explanation about his/her treatment after the introduction of the discretionary working hour system for professional work, the deemed working hours will not be effective (Section 2.1 of the Enforcement Announcement). Thus, it should be noted that informed consent is required when obtaining consent. This is in line with the trend in recent court decisions (e.g., the Supreme Court judgment of February 19, 2016, *Minshu* Vol. 70, No. 2, page 123, etc.) that carefully scrutinized whether an employee's consent was given based on his/her free will.

As for (viii) above, specific details must be indicated, such as by specifying the department and the person in charge to whom the withdrawal is to be submitted, and the method of submission of the withdrawal. In addition, it is recommended to determine in advance in a labor-management agreement either the assignment and treatment of employees or the method of determining such assignment and treatment after the employees withdraw their consent. Furthermore, the employer must not treat an employee disadvantageously regarding the assignment and treatment of such employee on the grounds of their withdrawing consent (Section 2.1 of the Enforcement Announcement).

**B Obligation to Prepare and Keep Records**

The obligation to keep records of certain matters was originally provided as a condition of labor-management agreement. Under the Amendment, however, employers are now required to obtain their employees' consent to the application of the discretionary working hour system for professional work, therefore, the retention of records on consent and withdrawal of consent ((x) above) was added as an additional condition of labor-management agreement (Article 24-2-2, Paragraph 3, Item 4 (c) of the Amended Labor Standards Ordinance).

In this context, it was stipulated that the employer is required to keep records of these conditions of labor-management agreement for each employee and keep such records during, and for five (5) years (three (3) years for the time being) after the expiration of, the effective term of the labor-management agreement (Article 24-2-2-2 of the Amended Labor Standards Ordinance, and Article 71 of the supplementary provisions of the said Ordinance). The obligation to keep records will be applied to records created on or after April 1, 2024, the effective date of this Amendment (Article 2 of the supplementary provisions of the Amended Ministerial

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<sup>7</sup> The same applies to the discretionary working hour system for planning work.  
<sup>8</sup> For an example of the document to be indicated to employees when obtaining consent, please refer to page 20 of "Explanation of the Discretionary Working Hour System for Professional Work" by the Ministry of Health, Labor and Welfare mentioned above.  
<sup>9</sup> The same applies to the discretionary working hour system for planning work.



Ordinance).

## 2. Discretionary Working Hour System for Planning Work

### (1) Addition of Matters for Resolutions of Labor-Management Committee

Under this Amendment, the matters underlined in (viii), (ix) and (xi) below were added as those to be resolved in a labor-management committee. Following is the respective commentary.

Matters that must Be Resolved in a Labor-Management Committee for Implementing Discretionary Working Hour System for Planning Work
(i) Types of work covered by the system;
(ii) Scope of covered employees;
(iii) Time for which an employee is deemed to have worked (deemed working hours);
(iv) Measures taken to ensure health and welfare based on the working hours of covered employees;
(v) Measures taken to handle complaints from covered employees;
(vi) To obtain the consent of employees before applying the system;
(vii) To not treat disadvantageously employees who do not consent to the application of the system;
(viii) <b><u>Procedures for withdrawing consent to the application of the system;</u></b>
(ix) <b><u>If the wage and appraisal systems applied to covered employees are to be changed, to explain to the labor-management committee about the said changes;</u></b>
(x) Effective term of the labor-management committee's resolution; and
(xi) To keep records of each employee's working hours, implementation of measures to ensure health and welfare, implementation of grievance measures, consent and <b><u>withdrawal of consent</u></b> during, and for five (5) years (three (3) years for the time being) after the expiration of, the effective term of the resolution.

(Source: Leaflet of the Ministry of Health, Labor and Welfare “New procedures will be necessary to introduce and continue the discretionary working hour system”, as mentioned above)

### **A Addition of Procedures for Withdrawing Consent to the Matters for Resolutions of the Labor-Management Committee**

In order to apply the discretionary working hour system for planning work, an employee’s consent has been required, and under this Amendment, procedures for withdrawing consent are included in the matters for resolution by the labor-management committee ((viii) above; Article 24-2-3, Paragraph 3, Item 1 of the Amended Labor Standards Ordinance)<sup>10</sup>. The details of the procedures for withdrawing consent are the same as those for the discretionary working hour system for professional work (please see II 1. (2) A). In other words, it is required to indicate specific details such as by specifying the department and the person in charge to whom the withdrawal is to be submitted, and the method of submission of the withdrawal (Section 3.7 (1) A (a) of the Amended Guidelines, Section 3.1 of the Enforcement Announcement). In addition, it is recommended to determine in advance in a resolution either the assignment and treatment or the method of determining such assignment and treatment after employees withdraw their consent. Furthermore, the employer must not treat an employee disadvantageously regarding the assignment and treatment of such employee on the grounds of their withdrawing consent (Section 3, 7 (1) A (b) of the Amended Guidelines, and Section 3, 1 of the Enforcement Announcement).

In addition, the Amended Guidelines make it clear that the employer must obtain the consent of employees by “indicating and explaining” to employees about the outline of the discretionary working hour system for planning work at the workplace (please see II 1 (2) A above for the method)<sup>11</sup>. Furthermore, the Amended Guidelines clearly state that, in the case where an employee’s consent is not deemed to have been given based on the free will of the employee for reasons such as because the employee has not received any sufficient explanation, the deemed working hours will not be effective (Section 3, 6 (2) A of the Amended Guidelines). Thus, in relation to the discretionary working hour system for planning work, it is considered that an emphasis is placed on informed consent regarding the nature of the consent to be given.

### **B Explanation of the Wage and Appraisal Systems to the Labor-Management Committee**

Under the Amendment, it was added to the matters for resolution that, if the wage and appraisal systems are to be changed with respect to the employees who are covered by the discretionary working hour system for planning work (“**Covered Employees of Planning Work**”), an explanation of such change must be provided to the labor-management committee (Article 24-2-

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<sup>10</sup> For examples of the forms of consent and withdrawal of consent, please refer to page 24 of “Explanation of the Discretionary Working Hour System for Planning Work” by the Ministry of Health, Labor and Welfare (<https://www.mhlw.go.jp/content/001166657.pdf>) (Only available in Japanese).

<sup>11</sup> For an example of the document to be indicated to employees when obtaining consent, please refer to page 23 of “Explanation of the Discretionary Working Hour System for Planning Work” by the Ministry of Health, Labor and Welfare mentioned above (Only available in Japanese).

3, Paragraph 3, Item 2 of the Amended Labor Standards Ordinance). Although it is recommended to provide this explanation in advance, if it is difficult to provide such an advance explanation, it is sufficient to provide the explanation without delay after the change has been made (please see Section 3, 7 (2) B of the Amended Guidelines, and Section 3, 1 of the Enforcement Announcement).

**C Obligation to Prepare and Keep Records**

Under the Amendment, recording of the withdrawal of consent was also added as a matter for resolution (Article 24-2-3, Paragraph 3, Item 4 (c) of the Amended Labor Standards Ordinance). In this context, it was stipulated that, with respect to the matter for resolution provided in (xi) above, the employer is required to keep records for each employee and to keep such records during, and for five (5) years (three (3) years for the time being) after the expiration of, the effective term of the resolution (Article 24-2-3-2 of the Amended Labor Standards Ordinance, and Article 71 of the supplementary provisions of the said Ordinance). The obligation to keep records will be applied to records created on or after April 1, 2024, the effective date of this Amendment (Article 2 of the supplementary provisions of the Amended Ministerial Ordinance).

**(2) Matters to Be Included in the Rules of Operation of the Labor-Management Committee**

As a result of this Amendment, the following items have been added to those that must be provided in the rules of operation of the labor-management committee:

(i) Matters on explanations from the employer to the labor-management committee regarding the details of the wage and appraisal systems applicable to the Covered Employees of Planning Work;
(ii) Matters on ensuring the proper operation of the system in accordance with the purposes thereof; and
(iii) The committee shall meet at least once every six (6) months.

**A Matters on Explanations from the Employer to the Labor-Management Committee regarding the Details of the Wage and Appraisal Systems**

This Amendment newly stipulates that matters on explanations from the employer to the labor-management committee regarding the details of the wage and appraisal systems applicable to the Covered Employees of Planning Work must be specified in the rules of operation of the labor-management committee (Article 24-2-4, Paragraph 4 (b) of the Amended Labor Standards Ordinance).

**B Matters on Ensuring the Proper Operation of the System in Accordance with the Purposes thereof**

Under the Amendment, matters on ensuring the proper operation of the system in accordance with the purposes thereof have been added to the matters to be specified in the rules of operation

(Article 24-2-4, Paragraph 4 (c) of the Amended Labor Standards Ordinance). Specifically, the employer and committee members are required to ensure that the labor-management committee grasps the implementation of the discretionary working hour system for planning work, investigates and examines whether the working style and treatment of the Covered Employees of Planning Work are in accordance with the purposes of the system, makes improvements in the implementation, conducts necessary reviews of the content of resolutions, and investigates and examines the implementation of the resolutions and of the system (Section 4, 1 of the Amended Guidelines, Section 3, 3 (2) of the Enforcement Announcement).

### **C The Committee must Meet at least Once Every Six (6) Months**

It is required to stipulate in the rules of operation of the labor-management committee that the committee must meet at least once every six (6) months (Article 24-2-4, Paragraph 4 (d) of the Amended Labor Standards Ordinance).

### **(3) Revision of the Frequency of Periodic Reports**

The employer who implements a discretionary working hour system for planning work is required to report the working hours and the implementation of measures to ensure health and welfare to the competent labor standards inspection office on a periodic basis (Article 38-4, Paragraph 4 of the LSA). Previously, the frequency of periodic reports was at least once every six (6) months from “the date when a resolution is adopted” by the labor-management committee. However, since the date of resolution and the start date of application of the system do not necessarily coincide with each other, the start date of a reporting period has been revised by the Amendment to “the start date of the effective term of the resolution” (i.e., the start date of application of the system) (Article 24-2-5, Paragraph 1 of the Amended Labor Standards Ordinance)<sup>12</sup>.

In addition, the frequency of reporting, which was at least once every six (6) months, has been revised by the Amendment to within six (6) months for the first time and at least once every year thereafter (the same Paragraph)<sup>13</sup>.

## **3. Other Major Changes (Applicable to Both Discretionary Working Hour System for Professional Work and that for Planning Work)**

In order to implement the discretionary working hour system, the employer is required to take measures to ensure the health and welfare of employees (Article 38-4, Paragraph 1, Item 4 of the LSA). The measures underlined in (i), (ii), (iii), and (v) below have been added by the Amended Guidelines as appropriate measures to ensure health and welfare (Section 3, 4 (1) B (a), (b), (c), (e) of the Amended Guidelines).

Furthermore, it is recommended under the Amended Guidelines to take measures to ensure

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<sup>12</sup> The form of the report is available on the website of the Ministry of Health, Labor and Welfare ([https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/koyou\\_roudou/roudoukijun/roudouzikan/sairyo.html](https://www.mhlw.go.jp/stf/seisakunitsuite/bunya/koyou_roudou/roudoukijun/roudouzikan/sairyo.html)) (Only available in Japanese).

<sup>13</sup> As a result of this Amendment, Article 66-2 of the supplementary provisions has been deleted from the Amended Labor Standards Ordinance.

the employees' health and welfare by choosing at least one option from each of the following two categories: (A) measures for all employees subject to the discretionary working hour system (simply, "**Covered Employees**") at the workplace; and (B) measures taken in accordance with the conditions of individual Covered Employees (Section 3, 4 (2) C of the Amended Guidelines).

<b>(A) Measures for All Covered Employees at the Workplace</b>
<b><u>(i) Ensuring intervals between work;</u></b>
<b><u>(ii) Limitation on the number of late-night work;</u></b>
<b><u>(iii) Setting of limits on working hours (lifting of application of the system in the case where a Covered Employee has worked in excess of a certain number of working hours);</u></b>
or
(iv) Encouragement of the use of annual paid leave, including the use of a large number of consecutive days of annual paid leave.

<b>(B) Measures Taken in Accordance with the Conditions of Individual Covered Employees</b>
<b><u>(v) Face-to-face guidance by a physician for Covered Employees who have worked more than a certain number of working hours;</u></b>
(vi) Granting of compensatory days off or special days off;
(vii) Implementation of health checkups;
(viii) Establishment of a consultation service for mental and physical health issues;
(ix) Reassignment to an appropriate position; or
(x) Provision of advice and guidance by an industrial physician, etc. or having the Covered Employees receive health guidance from the industrial physician, etc.

### **III. Effective Date and Necessary Practical Action**

This Amendment will come into effect on April 1, 2024 (Article 1 of the supplementary provisions of the Amended Ministerial Ordinance). Any labor-management agreement for the discretionary working hour system for professional work, and any labor-management committee's resolution for the discretionary working hour system for planning work, whose effective term includes the aforementioned effective date, will be void on and after the effective date if they do not conform to the Amendment (Section 4, 1 of the Enforcement Announcement). Thus, not only companies planning to newly implement the discretionary working hour system, but also those currently implementing the discretionary working hour system will be required to take the above measures in order to newly or continuously implement the discretionary working hour system after the aforementioned effective date, which may have a significant impact in practice. Therefore, companies will need to consider taking timely action prior to the effective date.

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