



## Japanese Employment Law Update



December 27, 2024

### **1. Notable Supreme Court Decisions**

In Japan, the sources of law are statutes enacted by the Diet and ordinances promulgated by the Government, and judgments of the Supreme Court are not an independent source of law. Nevertheless, Supreme Court judgments are important, as they bind lower courts and as a practical matter serve as interpretative guidelines of statutes and ordinances. In April this year, the Supreme Court issued two employment-related judgments, one about the transfer of position of an employee, and the other about the working hour system called the deemed working hour system outside the workplace. In this Update, we will discuss these judgments along with providing a brief explanation of the related concepts under Japanese law.

### **2. Transfer of Position of an Employee**

#### **A. What is a Transfer of Position?**

A transfer of position of an employee is a change to the subject matter of work performed or to the place where the work is performed, except for a temporary change to either. It is customary to set forth in the work rules or the employment agreement that an employer may transfer an employee to perform other work or to another work location due to business reasons, and if such provisions exist, an employer may transfer an employee to another position or another workplace. However, if there is a special agreement between an employer and an employee (express or implied) limiting the job content or the place of work, the employer's right to order a transfer of position for employee is restricted within the scope of such agreement (Proviso of Article 7 of the Labor Contract Act). In the absence of an express agreement limiting the subject matter of work, courts tend to find the existence of an implied agreement limiting changes to the

work being performed only if the position requires special qualifications or skills, such as medical doctors or leading radio announcers.

## **B. Supreme Court Judgment of April 26, 2024 ("Judgment 1")**

### Overview of Key Facts

- (i) The employer was entrusted by the prefecture with management of a social welfare center, and as one of its duties, the employer produced welfare equipment and other items;
- (ii) The employee had several technical qualifications and was recruited by the employer because the employee was capable of welding;
- (iii) The employee served as a technician engaged in the production of welfare equipment, among other duties, for 18 years since commencement of employment, and was the only technician capable of welding at the employer;
- (iv) It was not anticipated that the employer would outsource the production of welfare equipment and related tasks to a third party;
- (v) The employer ordered a transfer of position for the employee, to a general affairs section which was completely different from the employee's previous work, without prior consultation with or consent from the employee;
- (vi) At the time of the transfer of position, there was a vacancy in the general affairs section, and it was necessary to find an additional employee to fill that vacancy.

The lower court found there was an implied agreement limiting the employee's work content based on the facts in items (ii) through (iv) above, but determined that the order of transfer of position was not an abuse of rights and therefore was lawful, despite the lack of consent from the employee. The Supreme Court affirmed in part and reversed in part in issuing Judgment 1. The Supreme Court agreed with the lower court's holding that there had been an implied agreement to limit the work content of the employee, but held that when there is such an agreement limiting work content, the employer does not have the authority to transfer the employee's position without first obtaining the consent of the employee.

## **C. Significance of Judgment 1**

As a general matter, Judgment 1 follows prior court precedents, but the following points should be noted.

As noted earlier, courts rarely find the existence of implied agreements limiting contents of work. However, the possibility of recognizing such an implied agreement is enhanced if the employee is retained because they possess special skills essential for performing their work for the employer. If there is an agreement to limit the content of work, employers should carefully communicate with their employees and obtain individual consent for a transfer of position.

To be sure, there is an interplay here with other obligations placed on employers. For example, employers are limited in dismissing employees, and when facing declining

economic conditions a transfer of position may be utilized by an employer so as to fulfill their obligation to avoid dismissals. However, even in these circumstances and a transfer of position is considered as a means of avoiding a dismissal, it would be advisable for the employer to carefully communicate with the employee and obtain their consent to that transfer of position.

### **3. Deemed Working Hour System Outside the Workplace - Supreme Court Judgment of April 16, 2024 ("Judgment 2")**

Under the Deemed Working Hour System Outside the Workplace (the "System"), an employer may deem that the employee has worked for the prescribed working hours if an employee performs work entirely or in part outside the workplace and it is difficult to calculate the working hours associated with those tasks (Article 38-2 of the Labor Standards Act). Regarding the requirement that to apply the System it must be "difficult to calculate the working hours," past Supreme Court precedent assessed whether it was possible to determine the working hours based on (i) the nature and content of the work, and how performance of the work was conducted and (ii) the methods for the employer supervising work performance and for the employee reporting on their work performance. Because many ways were found to be able to track work hours through these alternative means in lieu of clocking in/clocking out, "difficulty in calculating working hours" was rarely found.

Moreover, these days it is common that an employer provides their employees with mobile devices. When an employer can monitor the progress of the employee's work through such devices, it is considered that the requirement to apply the System that it be "difficult to calculate the working hours" is not satisfied.

Judgment 2 is a case concerning an employee who is an instructor of foreign technical interns engaged by the employer. The lower court determined that there was "difficulty in calculating working hours" and the System could not be relied upon. However, the Supreme Court in Judgment 2 set aside the lower court ruling and remanded back to the lower court to conduct further scrutiny on the analysis of "difficult to calculate the working hours." Specifically, Judgment 2 instructed that the lower court should consider the Supreme Court's past precedent described in items (i) and (ii) above and, at the same time, also take into account the following facts:

- (a) The employee's work subject matter was diverse; and
- (b) The employee managed their schedule independently, was allowed to take breaks at times other than specified break times and to directly commute without returning to the office at their discretion, and the employee received no specific instructions or reports on a regular basis.

Judgment 2 demonstrates that "difficulty in calculating working hours" can be found in specific situations even though as a general matter it had been thought to be extremely limited. It seems that Judgment 2 focused on the fact that the employee determined their daily schedule flexibly rather than having it predetermined by the employer. This implies

that affording employees a broad remit with such flexibility is an important factor in ensuring that the System may be utilized.

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