

Labor & Employment Law Newsletter

Lessons learned from “*karoshi*” suicide at leading Japanese advertising agency

INTRODUCTION

A 24-year-old employee at a top Japanese advertising agency killed herself on Christmas Day 2015 after having worked more than 105 hours of overtime a month shortly before her death. The labor authorities ruled that her death was directly related to excessive overtime, or *karoshi* in Japanese. This tragedy resulted in an unprecedented level of discussion of *karoshi* in Japan, with a significant amount of criticism reserved for the advertising agency, Japan’s largest. Almost two years later in October 2017, a Tokyo summary court criminally fined the agency 500,000 yen for violating the applicable labor regulations. Although the small fine would be a slap on the wrist in some countries (it was the equivalent of about \$4,500 USD at the time of this writing), it shocked many in Japan. Past courts avoided assigning criminal liability to employers for *karoshi*-related deaths, especially those involving major corporations.

Amazingly, this was not the company’s first incidence of *karoshi*. Or even its second. In a remarkably similar case, Japan’s Supreme Court ruled in 2000 that the same ad agency was responsible for the 1991 suicide of a newly-hired 24-year-old employee. Just as with the 2015 incident, this employee worked extremely long hours prior to committing suicide. The court ruled that his punishing schedule was partially to blame for the suicide. This landmark decision was the first time Japan’s highest court recognized a company’s legal responsibility for a suicide caused by *karoshi*. Despite the ruling, yet another young employee at the same agency fell ill and died in 2013 due to *karoshi*.

In spite of these tragedies, the company was still unable or unwilling to change its corporate culture enough to prevent the young female employee’s Christmas Day suicide. Although it may be tempting to single out this particular company, it would be a mistake to ignore Japan’s widespread overtime work culture, which cuts across many industries and organizations. In fact, rather than going down, the number of *karoshi* cases actually rose from 189 to 191 in Japan’s most recent fiscal year, highlighting the difficulty of eliminating the deeply-entrenched culture of excessive overtime in Japan.



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This dire picture seems to fly in the face of international statistics. For instance, in its most recent Employment Outlook, the OECD ranked Japan just 19th in “annual hours actually worked”, well below such countries as Mexico, Russia, and even the United States. Why so low? Part of the reason is undoubtedly the deep-rooted practice in Japan of expecting employees to work unreported (and therefore unpaid) overtime. In many cases, employees tacitly understand that their employers expect them perform unpaid overtime and the employees dutifully comply. In more egregious cases, the boss will specifically order the employee to underreport their actual working hours to stay within the maximum allowable limit.

KAROSHI - BAD FOR EMPLOYEES, BAD FOR BUSINESS

More than monetary fines, a Japanese company most fears tarnishing its carefully cultivated reputation, and for good reason. A bad reputation makes it hard to attract top talent and image-conscious clients. In fact, the Christmas Day suicide led the government to restrict the ad agency's eligibility to bid on government contracts. In this way, allowing excessive overtime to continue hurts not only the employees themselves, but can also damage the company's bottom line.

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These risks are not limited to Japanese companies. Foreign companies operating in Japan also need to ensure that their employees don't exceed the maximum number of working hours. This article covers *karoshi*-related risks that companies and their executives face. It also details steps that companies can take to keep their employees happy and healthy, and to protect the company's all-important brand reputation.

KAROSHI-RELATED RISKS

Apart from the small fines and the reputational damage described above, companies also face other *karoshi*-related risks.

- **Civil liability** - Employers are legally responsible for maintaining their employees' physical and mental health. Failing to do so and causing a *karoshi*-related

death exposes the company to the risk of a civil suit from the deceased employee's bereaved family or from others. Despite Japan's typically low civil damage awards, companies have in some cases paid well over JPY 100,000,000 to settle *karoshi* lawsuits. And it's not just the company itself that's at risk. Under certain circumstances, the deceased employee's superiors or other company executives may also be liable.

- **Unpaid overtime** - Japanese labor law generally limits an employee's work schedule to 8 hours a day, 40 hours a week. In order to have its employees legally work longer, an employer would need to enter into an agreement with the employee, either through their union or through a person representing a majority of the employees. If the employee works longer than 8 hours a day, 40 hours a week, the employer is legally required to provide them with overtime pay. If the employer fails to pay the employee overtime and the employee sues, the court has the discretion to penalize the company by ordering it to pay the employee up to double the overtime amount.

Companies sometimes mistakenly believe that their employees' annual salary already includes overtime pay. This is especially true with foreign companies' Japanese subsidiaries, which may not be as familiar with Japanese labor law as domestic companies. In reality, an employee's annual salary includes overtime pay only if their employment contract says so, and only for the hours of overtime work that the contract specifies. If the employee works more hours of overtime than their contract permits, the company will need to pay overtime over and above the employee's annual salary.

- **Administrative and criminal liability** - Japanese labor authorities have the right to inspect employers by entering their premises, requesting labor-related documents, and interviewing both the employees and the employer. If the authorities uncover any labor law violations, they may order the employer to take corrective action. Failure to comply can lead the government to publicly label the company a labor law violator, a form of public shaming that's anathema to Japanese companies. In the worst case, employers that repeatedly ignore the authorities' corrective orders may face criminal prosecution. As with civil liability, it is not just the company itself that's at risk for criminal punishment. The company's officers and executives may also face criminal fines or even imprisonment.

STEPS EMPLOYERS CAN TAKE

Companies can take the following steps to avoid *karoshi*.

• **Knowing employees' actual working hours** - It should go without saying that every company needs to understand how many hours each employee is actually working. Although this may sound simple in theory, in practice employees sometimes underreport the hours they work. In especially egregious cases, employers will explicitly order employees to underreport their hours, either to stay within the agreed-on overtime limits and/or to avoid having to pay the employee overtime. Underreporting is far easier when companies allow employees to self-report their hours. To keep both employers and their employees "honest", employers should avoid allowing employees to self-report their hours and should instead consider implementing a more automated system that records when employees are actually in the office, or when they are actually logged-on to their computers.

• **Mental health** - The Supreme Court in 2000 held that employers are required to ensure that each of their employees has an appropriate workload. What is "appropriate" involves not only the employee's work schedule, but also their stress level. As such, employers cannot simply breathe easy after ensuring that their employees aren't exceeding their maximum work hours. They also need to be mindful of any mental health issues. For this reason, Japanese labor law now requires employers with at least 50 regular staff to offer their employees an annual stress check (workplaces with fewer than 50 staff are merely encouraged to offer these checks).

• **Flextime** - Japanese labor law allows employees to work flexible hours. However, many employees don't take full advantage of flextime, in part because the company's labor-management agreement and rules

of employment first need to be amended to allow employees to work flexible hours. Moreover, flex-time is still rather uncommon in conformist Japan, where employees often hesitate to go home early when others are still working. Regardless of these obstacles, employers should consider adopting flextime so that employees can tailor their schedules to maximize their efficiency and achieve a healthy work-life balance.

• **Dissuading overtime** - Employers can take concrete steps to discourage excessive overtime. Some companies require employees to obtain prior approval for overtime. Others have adopted a "no overtime" policy one day a week, or turn the lights off at a certain time. In 2013, leading trading company Itochu adopted a morning-centric work schedule to improve efficiency. In addition, Itochu began requiring prior approval for overtime work after 8:00 pm, and generally prohibited any overtime after 10:00 pm. To discourage late-night work, Itochu pays their employees an extra 50% to start work early in the morning, and even offers them free breakfast. These steps have allowed Itochu to meaningfully reduce overtime. In addition to being the right thing to do, Itochu's financial results show that these proactive measures have boosted its productivity.

• **Change from the top and communication** - Japanese employees accustomed to sacrificing for their companies need to know that management truly supports reducing excessive overtime and improving working conditions. In addition, employees need to feel that they can freely communicate any problems or concerns to their superiors so that the company will have a solid grasp of their employees' workload and mental health.

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