



PRC Labor and Employment Law Newsflash

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Legal Framework of Special Working Hour Systems and Application of Specific Regulations

How to practically apply special working hour systems has been all along important and difficult in the terms of working time management, and news came that the central government intends to issue more specific laws and regulations concerning the management of special working hours. Here are my brief comments as below made based on relevant articles of applicable laws and regulations, which are open to discussion:

1. Applicable Laws

It is specified by Article 39 of *the Labor Law of the People's Republic of China* (the "Labor Law") that an enterprise may adopt other work and rest systems upon approval of the labor administration authority where it cannot practice the provisions of Article 36¹ and 38² of *the Labor Law*. In a word, an employer failing to enforce the standard working hour system may adopt a special working hour system, with the prior administrative examination and approval.

Furthermore, "other work and rest systems" are not indicated as special working hour systems in *the Labor Law*, but it is found during practices that only special working hour systems are the "other work and rest systems" applying the prior administrative examination and approval. To this end, more express interpretation was made for law enforcement in Article 3 of *the Measures for Examining and Approving Enterprises' Non-fixed Working Hour System and Comprehensive Working Hour System* promulgated by the Ministry of Labor that an enterprise may adopt the non-fixed working hour system, the comprehensive working hour system or other work and rest systems where the provisions of Article 36 and 38 of *the Labor Law of the People's Republic of China* cannot be put into practice due to its production features.

2. Administrative Examination and Approval Procedure

As mentioned above, "special working hour systems" are marked most obviously and directly with the necessary prior administrative examination and approval for them, different from the "flexible working hour system" (under which employees can arrange their daily fixed number of working hours in no consistency with the employer's attendance policy and for which no prior administrative examination and approval is necessary). Generally, no special working

¹ Article 36 The State practices a system of working hours under which employees shall work for no more than 8 hours one day and no more than 44 hours one week on average. However, please be noticed that "44 hours" in this article was amended to read as "40 hours" in *the Provisions of the State Council on the Working Hours of Employees*.

² Article 38 An employer shall ensure that its employees take at least one day off every week.

hour system shall be applied without examination and approval³.

It is specified in Article 7 of *the Measures for Examining and Approving Enterprises' Non-fixed Working Hour System and Comprehensive Working Hour System* promulgated by the Ministry of Labor in 1994 that where any enterprise directly under central management adopts the non-fixed working hour system, the comprehensive working hour system or other work and rest systems the enterprise shall report the same to the labor administrative department of the State Council for approval after it is reviewed by the competent trade department of the State Council. The measures for examination and approval of local enterprises' adoption of the non-fixed working hour system, the comprehensive working hour system or other work and rest systems shall be formulated by the labor administrative department of its provincial, autonomous region or municipality people's government and filed to the labor administrative department of the State Council for the record. Some local governments promulgated more detailed provisions with respect to application materials and examination and approval procedure⁴.

3. Democratic Procedures and Publicity

Compared with the standard working hour system, more disturbance will be caused by a special working hour system to the normal work and rest schedule of employees, so the labor administration authorities has always emphasized that employees should have the right to participate in the application issues on working hours and some local authorities even require that the consent of employees should be obtained to a certain extent.

As we know, it is expressly stipulated in applicable regulations promulgated by many local governments such as Beijing and Guangdong, other than Shanghai, that a document from employees or the trade union is required as a part of application materials, so that the independence and "at will" nature of the employer in the application for special working hour system are limited. In practice, the employer in some district of Shanghai is also required to submit the consent with the signatures of the employee involved or relevant resolution of the workers' congress, so the application for special working hour system is also challenging in Shanghai.

3. Work and Rest Schedule

In applicable laws the provisions on the protection of the rest right of the employees applying a special working hour system are so abstract that employers may have wide discretion in such issue. For the comprehensive working hour system, employees' right of rest is guaranteed considering overtime costs. However, for the non-fixed working hour system, it does not look good enough: besides the basic rule of "resting one day in seven", it is very difficult to effectively restrain employers from imposing high-intensity overtime work on

³ However there are exceptions of this rule in some cities such as Beijing and Shenzhen. Non-fixed working hours may automatically apply to senior management personnel without registration.

It is specified in Article 16 (2) of the *Circular on Issuing the Measures for Beijing Enterprises' Adoption of Comprehensive Working Hour System and Non-fixed Working Hour System* that no formalities of examination and approval shall be gone through in case that an enterprise intends to adopt the non-fixed working hour system for its senior management personnel.

It is specified in Article 15 of the *Trial Measures of Shenzhen for Examining and Approving Non-fixed Working Hour System and Comprehensive Working Hour System* that no formalities of examination and approval shall be gone through in case that an employer intends to adopt the non-fixed working hour system for its senior management personnel defined by *the Company Law*.

⁴ Beijing and Shenzhen governments have done relatively detailed work and considered the issues on dispatched employees' application of special working hours

employees under the non-fixed working hour system since basically no overtime cost needs to be considered.

Practically employees find some ways to fight against the high-intensity overtime under the non-fixed working hour system, mainly “arriving at work late and leaving early” or “being absent without any reason”, causing an argument on whether the attendance policy may apply or not under the non-fixed working hour system⁵. Given that there is no express stipulation or judicial interpretation on such issue, arbitrator or judge’s power of discretion will play a leading role in relevant cases.

Comparison Table		
	Comprehensive Working Hour System	Non-fixed Working Hour System
Definition	Comprehensive working hour system means the working hour system practiced by the employer who needs to arrange a continuous working schedule and cannot implement the standard working hour system due to the special nature of work or subject to seasonal and natural conditions, which is comprehensively calculated on weekly, monthly, quarterly or yearly basis.	Non-fixed working hour system means the working hour system adopted for employees who need to work flexibly and cannot apply the standard working hour system due to the special nature of work.
Applicable Posts	The comprehensive working hour system is a working hour system comprehensively calculated on weekly, monthly, quarterly or yearly basis and adopted for some employees of the enterprise who needs to arrange a continuous working schedule due to the special nature of work or subject to seasonal and natural conditions, while the number of its average daily working hours and average weekly working hours shall basically the same as the number of statutory standard working hours, mainly applicable for the employees of traffic, railway, post and telecommunications, water transport, aviation, fishery and other industries who need to work continuously due to the special nature of work, some employees of geology, petroleum and resource exploration, construction, salt producing, sugar producing, tourism and other industries which are subject to seasonal and natural conditions, and the employees of the township enterprises which are engaged in both agricultural and industrial production or difficult to balance production due to energy, raw material supply or any other restriction. In addition, the enterprises of which the production tasks are uneven in market competition due to the influence of external factors may apply some of their employees to the comprehensive working hour system.	The non-fixed working hour system is a working hour system adopted for employees who cannot be measured by standard working hours or need to work flexibly due to production characteristics, special needs of work or scope of duty, for example, the employees engaged in senior management, promotion, freight, handling, long-distance driving and escorting, non-productive employees on duty, employees in special posts, and taxi driver. On a case-by-case basis, an enterprise may make its own research based on its actual situation according to the above principle and submit its working hour system for approval pursuant to relevant regulations.
Overtime Pay	For an employee applying the comprehensive working hour system, after he/she actually works	General no overtime pay shall be paid, except for specified by local

⁵ Main opinion of employees: any employer who checks attendance violates the “non-fixed” nature of the non-fixed working hour system and it turns into a means of the employer to avoid overtime pay, which means the employer performs under the guise of legitimate acts for concealing illegitimate purposes of avoiding overtime pay; and main counter-argument of employers: “non-fixed” does not mean that employees can be absent from their posts without leave, otherwise any one can be absent from work without punishment under the non-fixed working hour system, so the purpose of the employment contract will fail, resulting in serious damage to employers’ employment freedom.

	<p>for standard working hours in a cycle of the comprehensive working hour system, he/she shall be deemed working overtime if the employer arranges him/her additional work, and no less than 150% of the employee's standard salary or piecework wage shall be paid as overtime pay.</p> <p>Where the employer arranges an employee applying the comprehensive working hour system to work on statutory holidays, no less than 300% of the employee's standard salary or piecework wage shall be paid as overtime pay.</p>	regulations in some provinces.
Work and Rest Schedule	An enterprise that adopts the systems of special working hours such as the non-fixed working hour system or the comprehensive working hour system for its employees due to work nature or production characteristics shall according to <i>the Employment Law of the Peoples' Republic of China</i> and <i>the Provisions of the State Council on the Working Hours of Employees</i> take appropriate methods such as concentrated work and rest, alternating work schedules, rest adjustment and flexible working hours provided that employees' health is protected and employees' opinions are solicited fully, so as to ensure the rights of its employees to have rest and days off and the fulfillment of production and working tasks.	The employees applying the non-fixed working hour system upon approval are not subject to the daily overtime standard and monthly overtime standard set forth in Article 41 of <i>the Employment Law</i> , but the employer shall take appropriate work and rest schedule such as flexible working hours, so as to ensure the rights of its employees to have rest and days off and the fulfillment of production and working tasks.

If you have any inquiries regarding the PRC employment law matters, please contact us at hrlaw@dachenglaw.com.

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中国劳动法资讯速递 二零一五年五月刊

特殊工时法律框架及具体规则适用评论

特殊工时的适用在实践中一直是工作时间管理方面的重点及难点。同时，亦有消息称，中央层面有意于将来进一步强化特殊工时管理方面的法律法规。就此，笔者特结合相关条文规定，梳理并简评如下，供大家商榷。

一、法律渊源

依据《劳动法》第三十九条之规定，企业因生产特点不能实行本法第三十六条¹、第三十八条²规定的，经劳动行政部门批准，可以实行其他工作和休息办法。一言以蔽之，不能实行标准工时制度的用人单位可以适用特殊工时，但前提为行政审批前置。

另外，在《劳动法》当中，所谓“其他工作和休息办法”并没有明文指明为特殊工时，但结合现有实践操作，需要行政审批前置的“其他工作和休息办法”只有特殊工时。就此，原劳动部所颁布之《关于企业实行不定时工作制和综合计算工时工作制的审批办法》第三条的相关规定给出了更为明晰的执法解读：企业因生产特点不能实行《中华人民共和国劳动法》第三十六条、第三十八条规定的，可以实行不定时工作制或综合计算工时工作制等其他工作和休息办法。

二、行政审批程序

如前所述，相较于“弹性工时”，特殊工时最为明显且直接的标识为其前置行政审批程序。大体上可以说没有审批就没有特殊工时的适用空间³。

依原劳动部于 1994 年所颁布之《关于企业实行不定时工作制和综合计算工时工作制的审批办法》第七条的相关规定，中央直属企业实行不定时工作制和综合计算工时工作制等其他工作和休息办法的，经国务院行业主管部门审核，报国务院劳动行政部门批准。

¹ 第三十六条 国家实行劳动者每日工作时间不超过八小时、平均每周工作时间不超过四十四小时的工时制度。但提请读者注意，依据《国务院关于职工工作时间的规定》，原有《劳动法》条文中的四十四小时现在已被变更为四十小时。

² 第三十八条 用人单位应当保证劳动者每周至少休息一日。

³ 但是，在某些地方，例如北京及深圳，这一规则存在例外。根据当地的规定，对于高级管理人员，不定时工时可以无需登记自动适用。

《关于印发北京市企业实行综合计算工时工作制和不定时工作制办法的通知》第十六条第二款规定，企业中的高级管理人员实行不定时工作制，不办理审批手续。

《深圳市实行不定时工作制和综合计算工时工作制审批管理工作试行办法》第十五条的相关规定，用人单位中符合《公司法》规定的高级管理人员实行不定时工作制的，不需办理审批手续。

地方企业实行不定时工作制和综合计算工时工作制等其他工作和休息办法的审批办法，由各省、自治区、直辖市人民政府劳动行政部门制定，报国务院劳动行政部门备案。就具体申请材料及审批流程，有关地方出台了更为细致的审批规定⁴。

三、民主程序及公示

相较于标准工时制度而言，有鉴于特殊工时制度会在相当程度上打乱劳动者的正常作息安排，故有关劳动行政部门历来是强调劳动者在有关特殊工时适用问题上必要的参与权，而某些地方甚至要求在一定程度上取得劳动者的同意。

从目前已有的相关规定可知，除上海以外，北京、广东等地均明文要求有来自于劳动者或工会方面的文件作为申请材料的组成部分，使得用人单位申请特殊工时的自主性或随意性受到一定程度的限制。在实践操作中，上海的部分区域也是要求用人单位必须提交所涉职位劳动者的签字认可或职代会的相关决议的，故上海地区的特殊工时申请工作也具有相当挑战性。

四、作息安排

现有法律规定对于特殊工时员工休息权的保障往往过于抽象，这使得用人单位在此问题上享有较大的自主权。就综合计算工时而言，基于对加班成本的顾虑，劳动者的休息权还是得到了相当程度的保障；但对于不定时工时而言，情况则不太乐观。除了“做六休一”的基本线，由于基本没有加班成本的顾虑，很难有效地制约用人单位对不定时工时的劳动者施加高强度的加班安排。

实践中，劳动者对抗不定时工时制度下高强度加班的主要措施为“迟到早退”或“旷工”，由此引发了不定时工时制度下是否可以考勤的争论⁵。有鉴于此问题并无明文规定，亦无司法解释可以参照，就此，有关仲裁员或法官的自由裁量权将在案件当中起主导作用。

不定时工作制和综合计算工时制异同比较表格		
	综合计算工时	不定时工时
定义	综合计算工时工作制是指企业因工作情况特殊或受季节和自然条件限制，需要安排职工连续作业，无法实行标准工时制度，采用以周、月、季、年等为周期综合计算工作时间的工时制度。	不定时工作制是指企业因工作情况特殊，需要安排职工机动作业，无法实行标准工时制度，采用不确定工作时间的工时制度。
适用岗位范围	综合计算工时工作制是针对因工作性质特殊，需连续作业或受季节及自然条件限制的企业的部分职工，采用的以周、月、季、年等为周期综合计算工作时间的一种工时制度，但其平均日工作时间和平均周工作时间应与法定标准工作时间基本相同。主要是指：交通、铁路、邮电、水运、航空、渔业等行业中因工作性质	不定时工作制是针对因生产特点、工作特殊需要或职责范围的关系，无法按标准工作时间衡量或需要机动作业的职工所采用的一种工时制度。例如：企业中从事高级管理、推销、货运、装卸、长途运输驾驶、押运、非生产性值班和特殊工作形式的个体工作岗位的职工，出

⁴ 相对而言，北京及深圳的工作较为细致，已经考虑到了劳务派遣员工的特殊工时适用问题。

⁵ 来自于员工方面的主要观点为，如果用人单位进行考勤就违背了不定时工时的“不定时”实质，变成了用人单位规避加班费的手段，用人单位是在以合法形式掩盖非法目的以逃避加班费；而用人单位方面的主要抗辩则为，不定时的“不定时”内涵并不意味着员工可以擅离职守，否则在不定时制度下人人皆可旷工而无处罚措施，将使得劳动合同目的落空，由此将严重损害用人单位的用工自主权。

	特殊，需要连续作业的职工；地质、石油及资源勘探、建筑、制盐、制糖、旅游等受季节和自然条件限制的行业的部分职工；亦工亦农或由于受能源、原材料供应等条件限制难以均衡生产的乡镇企业的职工等。另外，对于那些在市场竞争中，由于外界因素影响，生产任务不均衡的企业部分职工也可以参照综合计算工时工作制的办法实施。	租车驾驶员等，可实行不定时工作制。鉴于每个企业的情况不同，企业可依据上述原则结合企业的实际情况进行研究，并按有关规定报批。
加班费适用情况	<p>实行综合计算工时工作制的员工，在综合计算工时周期内，员工实际工作时间达到正常工作时间后，用人单位安排员工工作的，视为延长工作时间，按照不低于员工本人标准工资或者计件工资的百分之一百五十支付员工加班工资。</p> <p>用人单位安排实行综合计算工时工作制的员工在法定休假节日工作的，按照不低于员工本人标准工资或者计件工资的百分之三百支付员工加班工资。</p>	除某些地方存有特别规定外，一般不会产生加班费。
作息安排制度	对于因工作性质或生产特点的限制，实行不定时工作制或综合计算工时工作制等其他工作和休息办法的职工，企业都应根据《中华人民共和国劳动法》和《国务院关于职工工作时间的规定》的有关条款，在保障职工身体健康并充分听取职工意见的基础上，采取集中工作、集中休息、轮休调休、弹性工作时间等适当的工作和休息方式，确保职工的休息休假权利和生产、工作任务的完成。	经批准实行不定时工作制的职工，不受劳动法第四十一条规定的日延长工作时间标准和月延长工作时间标准的限制，但用人单位应采用弹性工作时间等适当的工作和休息方式，确保职工的休息休假权利和生产、工作任务的完成。

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