

## **Whose Flexibility? Flexibility for Whom? Thoughts on Flexible Working Hours**

By Sun Yu-lien

Over the past few months, unpaid leave has quietly crept into the life of many Taiwanese workers again. In the face of the fluctuating global economy, many large corporations, in spite of profits made in over one year, are transferring all risks to employees. Having developed a taste for this sort of risk transfer, the corporations began to ask employees to take unpaid leave and even said shamelessly: “Unpaid leave is the best arrangement and a necessary contingency plan under the current economic structure.” When President Ma Ying-jeou attended the “2011 Seminar: Seeking Economic Advice from Industry” held at Hsinchu Science Park recently, some business leaders went as far as suggesting the concept of “the distribution of annualized working hours” that allows working hours to be calculated on a yearly basis and flexibility to arrange [the annual 2,184 working hours] in accordance with the manpower demands in the slack season and the peak season of the year. The suggestion triggered widespread protests by labor unions, which considered the proposal is doubtlessly greedy big corporations’ “veiled extortion.” Unions called on the government to “turn back from the edge of the cliff” and urged it not to listen to the ill logic of corporations and be led astray.

No doubt the practice of unpaid leave is against the law, because according to regulations in the Labor Standards Act (LSA), all kinds of leave should be paid and there is no so-called “unpaid leave.” However, backed by Premier Wu Den-yih’s comment that “the man who came out with this idea of unpaid leave should be awarded the Nobel Prize,” this illegal practice by employers seems to have become an accepted norm. It is out of concern for taking care of employers’ interests and meeting their needs flexibly that business leaders proposed “working time accounts,” “distribution of annualized working hours,” and even “flexible working hours” that require no clocking at a time when the practice of unpaid leave is spreading fast and wide. Therefore, this article will analyze how flexible working hours affect workers’ rights from several perspectives.

The device of “distributing working hours” in the LSA provides employers with the basis for arranging workers’ working hours flexibly. According to Article 30 of the LSA, a worker’s regular working time is eight hours a day and his or her regular working time shall not exceed eighty-four hours every two weeks. However, with the consent of a labor union, or if there is no labor union existing in a business entity,

with the approval of a labor-management conference, an employer may distribute the regular working hours in every two weeks or every eight weeks. The principle of changing working hours in Article 30-1 also allows the distribution of regular working hours to other work days in four weeks. This employer-centered approach to the distribution of working hours sacrifices employees' overtime pay and is considered as a very unfavorable arrangement for workers.

Article 84-1 of the LSA, an article most decried by labor unions, is a “backdoor provision” through and through. In actual practice, it has turned workers into victims of overwork. According to the article, workers doing monitoring or intermittent jobs or authorized specialists recognized by the Council of Labor Affairs (CLA) are almost entirely outside all restrictions on working hours imposed by the Act. The article allows these workers and their employers to arrange the former's working hours through agreements based on regulations on working hours in the Act. These agreements shall be submitted to the local competent authorities for approval and registration. However, although this article is only applicable to 38 types of workers listed out by the CLA, the term “authorized specialists” has been seriously misused, especially in the high-tech manufacturing sector that Taiwan is proud of. Cases of illegal abuse of authorized specialists that causes death by overwork are often reported in that sector. Labor standards inspection reports by Taipei City Government, New Taipei City Government, and the CLA show that the practice of illegal working hours is most prevalent in the high-tech industry. In recent years, cases of security guards, social workers, doctors, and employees in the technology sector who died from overwork have drawn the society's attention to death by overwork. Apart from modifying regulations related to the classification of work, the CLA, under pressure from legislators and labor unions, has also reviewed to whom Article 84-1 shall be applicable. Regrettably, the result of the CLA's review has fallen far short of the expectations of labor unions that have called for the complete abolition of the article.

From the discussion above we can understand that there is no so-called “flexible working hours” in existing law. The concept of “distributing working hours” in the LSA mainly serves the managerial purpose of employers so that companies can have more flexibility to arrange workers' working hours in order to save overtime pay. Furthermore, Article 84-1 is a backdoor provision that directly gives employers the absolute power to deprive employees of the right to rest. In the present controversy, high-tech tycoons even criticized the CLA for treating corporations as ATM machines. They viewed the following regulation in the LSA as lacking flexibility and proposed to abolish this outdated rule: “The employer shall keep worker sign-in books or time

cards to record worker attendance on a day-to-day basis. These books and cards are to be kept on file for at least one year.” However, when labor-management disputes take place, whether the disputes are over overtime pay or over identifying the cause of vocational disease, workers’ clocking records often become the most important evidence. Therefore, although it is understandable why employers regard the regulation of compulsory clocking as lacking flexibility, their standpoint also proves the fact that many of them have treated their workers’ health as ATM machines from which they can draw money.

In theory, the concept of flexible working hours allows more creative thinking. As far as workers are concerned, the benefits and shortcomings of such a system will be determined by how the system meets their needs flexibly and how much sovereignty they may have under the working time regulations. For example, many employees hope they can start and finish work within flexible bands at the beginning and end of each day so that they can avoid pay cut due to late attendance or that they may send children to school and pick them up after school. Such flexibility has been implemented in Taiwan’s civil service system for many years, so obviously it is a kind of flexibility that serves the interests of workers. Besides, many countries also adjust their labor market through the design of flexible working hours in order to solve unemployment problems. Some models of flexible working time, whether they are part-time work, extended working hours, working on call, job-related traveling time, extended leave, or the “working time accounts” (Arbeitszeitkonto) mentioned in the current controversy, are proposed only to meet employers’ needs unilaterally so that employers can save personnel costs. In European experience, some of the models have through labor-management negotiations established flexibility that serves the interests of both employers and employees. However, in Taiwan, with the reality of employers’ dominance in the power structure, labor unions’ capacity is no match for that of corporations, so we cannot refer to the models and try to directly transplant them here.

For example, according to the analysis of Lin Jia-he, National Chengchi University’s assistant professor of law, the German “working time accounts” scheme is an agreed way of distributing working hours commonly seen in collective agreements and individual labor contracts in Germany. This arrangement is particularly for workers whose working hours are irregular (such as shift workers). These workers have their own working time accounts. To handle the situation where a worker’s working time exceeds the originally agreed maximum working hours, collective agreements or individual contracts usually prescribe a certain period of time—usually between six

months and one year—within which the working time account has to be balanced. Therefore, the scheme of working time accounts is a German personnel management practice, a model of flexible working hours jointly developed by employers and labor unions in order to meet companies' and workers' changing needs of working time. Parallel to the considerable development of working time reduction and the changes in industrial structure and production technology that took place particularly in the 1970s, Germany started at the time to flexibly and deftly adjust working hours to meet the actual manufacturing demands of companies and especially to respond to the market's varying situations in different periods. In the hope of saving costs and extra payments for extended work, German employers and employees have gradually formulated models of working time accounts to create win-win situations for both sides.

Therefore, in European countries, most schemes of working time accounts are agreed upon between professional trade unions and employers under the condition of “reductions in overall working time but not in wages.” The models are established through voluntary labor-management negotiations and finalized in collective agreements so that workers' rights are fully protected. There is no one-size-fits-all model universally applicable to all types of workers. Taiwan lacks the objective condition of a system of checks and balances kept up by trade unions. In the face of corporate dominance, the government's laissez-faire attitude, and workers' feelings of powerlessness in Taiwan, an abrupt introduction of working time accounts to this country may irredeemably plunge Taiwanese workers into an abyss of pain.

Whose flexibility? Flexibility for whom? In light of the currently out-of-balance relationship between labor and management in Taiwan, we can easily judge and know that most models of flexible working hours do not meet the interests of workers. The models at most only give employers more sovereignty to control the distribution of employees' working hours. Therefore, Taiwan should be more cautious when considering or promoting flexible working hours and related plans.