

Application of the Vacation Savings Account System under Current Law

I. Introduction

While providing legal advisory services on labor law, I have been asked which is the better working condition: monetary compensation or guaranteed vacation for annual leave. I always explain that the use of vacation is better than monetary compensation, as the purpose for annual leave is to protect employee mental and physical health through rest, not to simply give employees more money. Even in the ILO (International Labour Organization) Paid Leave Convention (Article 132), guaranteed annual leave is the basic principle, and monetary compensation is allowed only upon resignation, etc. Korea's revised Labor Standards Act (LSA) of 2003 introduced that leave could be given in lieu of paying wages for overtime, holiday work, and night work, upon written agreement with the workers' representative. The Government Employee Service Regulations also introduced in 2015 that a certain number of unused annual leave days for which annual leave compensation is granted can be carried over to the year following their accumulation and used then.¹

In line with this trend, a bill to expand and reorganize the compensation leave system under the Labor Standards Act into a vacation savings account system for working hours was submitted in 2016.² This bill supplements the current 'compensatory leave system' to allow workers to accumulate time equivalent to paid leave in addition to extended, night and holiday work and use it as leave if necessary, or supplement it with work after using the leave first. Unlike the existing compensatory leave system, this bill would see vacation used first and then repaying that vacation time with extended, holiday and night work, like paying off a credit card bill.³ Difficulties are expected in getting such a bill passed, as it may take on the form of a flexible working system. I would like to explain the way to convert, under the existing Labor Standards Act, the compensatory leave system for extended, night, and holiday work to the vacation savings account system for annual leave being carried over to the following year.

¹ Article 16-3 of the National Government Employee Service Regulations (Banking Up Annual Leave)

² Kim, Ki-seon, "Introduction of the Compensatory Leave System for Working Hours," *Journal of Law* No. 37, Hanyang University Law Research Institute, 2020, p. 128.

³ Kim, Seong-tae (Nat'l Assembly rep.—Liberty Korea Party), A Bill Proposed on Partial Amendment to the Labor Standards Act, May 30, 2016, Bill No.: 2000028.

II. The Compensatory Leave System and the Vacation Savings Account System for Working Hours under Current Law

1. The compensatory leave system under current law

The compensatory leave system is introduced only upon written agreement with the workers' representative, and involves vacation being granted in lieu of the wages that normally must be paid for overtime work, night work, and holiday work. The specifics of implementation must also be agreed upon in writing with the employee representative, and can be decided freely by labor and management within the scope of the existing Labor Standards Act.⁴ The details of the written agreement with the workers' representative should include ① the scope of eligible workers, ② the scope of compensatory working hours, ③ the settlement period, and ④ how compensatory leave is to be used.

(1) Scope of eligible workers: The system can apply uniformly to all workers or only to specific workers.

(2) Scope of compensatory working hours: Overtime, holiday, and night work shall be subject to the system. What needs to be decided is whether or not any additional wage will be paid for the working hours subject to the compensatory leave system.

(3) Settlement period: This is where the length of time for which compensatory leave can be banked, which shall be no more than three years, in consideration of the extinctive prescription for wages.

(4) How compensatory leave is to be used: Does accumulated compensatory leave have to be used at once or is it divisible? In addition, measures necessary for the company to guarantee long-term leave need to be described, as do details on monetary compensation for the compensatory leave not used during the settlement period.

2. Vacation savings account for working hours

In order for a workplace to change the compensatory leave system to a vacation savings account system for working hours, the accumulated vacation savings must be used within the framework of current law on the premise of a labor-management agreement. The most problematic areas are deciding how long additional wages can be saved and the company's long-term vacation guarantee

⁴ Kim, Ki-seon, "Introduction of the Vacation Savings Account System for Working Hours," *Monthly Labor Review*, June 2018, p. 24.

policy. Current law requires a settlement period be decided for vacation and monetary compensation for unused vacation. The Ministry of Employment and Labor (MOEL) considers the saving and use of overtime, holiday work and night work hours positively, and considers it legal for an employer to allow employees to use all the compensatory leave gained for working overtime, nights and holidays during a one-year period, the following year. If it is not used the following year, a written agreement must already be in place with the workers' representative that employees are to be financially compensated for the unused portion on the first regular wage payment date of the year following the year during which the leave was to be used.⁵ Otherwise, the employer must ensure that the compensatory leave accumulated in lieu of overtime, holiday and night work performed by an employee in a specific year can be properly used up to three years after it is gained. In consideration of the extinctive prescription for wage claims, employees must be compensated for leave that has not been used within 3 years, even if leave has not been used due to reasons attributable to the employee.⁶ Even if labor and management agree that the employer is not obligated to pay wages for any compensatory leave not used by the employee for causes not attributable to the employer within the settlement period for compensatory leave, such agreement has no effect.⁷

III. Annual Leave and the Vacation Savings Account System under Current Law

1. Annual paid leave system under current law

The purpose of the annual paid leave system is to guarantee sufficient leave to workers to help them recharge in the interest of protecting their mental and physical health, while at the same time guaranteeing social and cultural opportunities for workers.⁸ ILO Convention No. 132 requires that two weeks of undivided annual leave be secured for each worker. The use of consecutive annual leave is guaranteed in Korea, for civil servants as well. In addition, if an application is made at least three months in advance for the use of consecutive

⁵ Ministry of Employment and Labor Guidelines on Sept. 23, 2019: Retirement Welfare Dept.-4046.

⁶ Ministry of Employment and Labor Guidelines on Feb. 20, 2020: Wage & Working Hours Dept.-376.

⁷ Ministry of Employment and Labor Guidelines on Dec. 10, 2004: Labor Standards Dept.-6641.

⁸ Kim, Hong-Young, "Theory on Improving the System of Annual Leave for Guaranteed Rest," *Labor Law Study*, 1st half of 2016, No. 40, Seoul National University Labor Law Research Society, p. 165.

annual leave of more than 10 days, the head of an administrative agency must approve it unless there are special circumstances dictating otherwise.⁹

Under the annual paid leave system, workers with less than 1 year of employment receive 1 paid leave day every month, while workers with at least 1 year of employment receive 15 paid leave days if they attend 80% or more of their work days in 1 year. In addition, one accrued leave day is granted for every 2 years of continuous work, to a maximum of 25 leave days a year. If the vacation is not used within one year after it accrues, it is extinguished and converted into a right to claim monetary compensation (Article 60 of the Labor Standards Act, or LSA).

A system to promote the use of annual paid leave (Article 61 of the LSA) has been introduced so that all leave can be used within one year of the annual leave accruing. Promoting the use of annual paid leave in this way is designed to highlight that the purpose for annual leave is to help maintain employee mental and physical health, and that additional financial compensation is not preferable. Employees shall notify their employers of their vacation plans 6 months prior to the period in which the annual leave can be used and use it. Employers can designate the time of leave for any unused leave for which two months or less remains before expiry. The employee would then have to use his/her unused leave within that period. If the employee still does not use the leave despite these employer measures, the unused leave expires.

2. The vacation savings account system for annual leave

The current period for use of annual paid leave is one year, after which it is converted into monetary compensation. The vacation savings account system would allow unused annual leave to be carried over to the following year. In this regard, the MOEL provides guidelines that allow the use of unused annual leave during the following year. It would be a violation of the law to pay vacation allowance before the right to claim annual paid leave expires, as it would be to fail to grant the earned vacation leave. However, it is legal for two parties (employer and employee) to agree to carry over any unused annual leave instead of converting it to monetary compensation.¹⁰ In addition, the Labor Standards Act

⁹ Article 16-4 of the National Government Employee Service Regulations (Guaranteed use of at least 10 consecutive annual leave days).

¹⁰ Ministry of Employment and Labor Guidelines on Feb. 20, 2009: Labor Condition Dept. - 1047.

stipulates that unused annual leave will expire if the employee comes to work on a designated vacation day and provides work. However, even if an employer has taken measures to promote the use of annual leave, the court holds that the employer has an obligation to compensate for unused annual paid leave if the employer has received the worker's labor provision without any objection related to the unused annual paid leave.¹¹

Therefore, according to administrative interpretations and judicial rulings, the vacation savings account system for annual leave is sufficiently possible even under current law. However, in its implementation, individual consent by the employee is required, not a written agreement with the workers' representative. Carried-over unused annual leave is equivalent to an individual worker's wage claim, so the consent of the individual worker is required. At the end of the period of use of annual leave, the annual leave can be converted into wage bonds, which can be accumulated for 3 years and used as long-term leave.

A method that should be taken into consideration when introducing this system is the vacation savings account system for civil servants. In addition to the recommended number of annual leave days, unused annual leave can be deposited in a "savings account" for up to three years, allowing for long-term vacations. For example, civil servants who have been employed for 6 years or more receive 21 days of annual vacation. If they take the recommended minimum of 10 days as vacation, and then save 11 days a year for 3 years, depositing a total of 33 days over those 3 years, they can go on vacation for more than a month at a time.¹² Because of this attractive outcome, this vacation savings account system has been expanded from government organizations to public institutions and is in wide use.

IV. Applications

1. Introducing a vacation savings account system for working hours

In accordance with Article 57 (Compensatory Leave System) of the Labor Standards Act, the vacation savings account system for working hours can be introduced through a written agreement between labor and management, with the application as follows.

<Sample Labor-Management Agreement to Introduce a Vacation Savings Account

¹¹ Supreme Court ruling on Feb. 27, 2020: 2019da279283.

¹² Hwang, Soo-yeon, "Civil servants can take more than a month's leave due to 'annual leave savings,'" *Joongang Ilbo*, Sept. 30, 2015.

System for Working Hours>

Representative Director 000 of AA Co., Ltd. and Worker Representative 000 of AA Co., Ltd. agree to implement the compensatory leave system pursuant to Article 57 of the Labor Standards Act as follows.

1. Scope of eligible workers: All regular employees of the company are covered.
2. Scope of compensatory working hours: Overtime work that exceeds contractual working hours, or holiday work in which work is provided on a statutory holiday or contractual holiday. However, this does not include night work allowances for field workers.
3. Settlement period: The settlement period is from January 1 to December 31, while the period for use of the leave days to be within one year of the year following the date the leave is accumulated. Leave that remains unused after this settlement period shall be converted to financial compensation for the employee by the first month after the end of the settlement period.
4. How compensator leave is to be used: The company guarantees 10 days of summer vacation for workers to ensure a lengthy time away from work. If a request is to be made for other long-term leave, it must be made at least 3 months in advance. In return, the company guarantees the timing of the requested leave unless special circumstances exist otherwise.

April 1, 2022

AA Co., Ltd. CEO 000 / AA Co., Ltd. employee representative 000

2. The vacation savings account system for annual leave and the long-term annual leave guarantee regulations introduced by public institutions

<Introduction through the Rules of Employment>

Article 21 (Banking up annual leave) ① Employees may save a portion of their unused annual leave for later use, for up to three years as of the last day of the year it was accumulated.

② Any banked up annual leave shall expire if it is not used within two years after the three-year period in paragraph (1).

③ Annual leave allowance shall not be paid for annual leave saved pursuant to paragraph (1) and annual leave that has expired pursuant to paragraph (2).

④ In addition to the matters stipulated in Paragraphs 1 through 3, matters concerning the procedure for saving up and using annual leave, etc. shall be

determined by the company president.

Article 22 (Guaranteed Use of Annual Leave of at least 10 Consecutive Days)

If an employee applies for annual leave for 10 or more consecutive days 3 months in advance and shall use the banked up annual leave under Article 21, it shall be approved if doing so will not unduly impede the employee's performance of his or her duties. In this case, the company shall make the necessary efforts to ensure smooth operation and free use of annual leave, such as by designating a business agent to handle the employee's work during his or her use of the annual leave.

② In addition to the matters stipulated in Paragraph 1, the president shall determine any other matters necessary in regards to the application procedure for the use of annual leave for 10 consecutive days or more.

V. Conclusion

The ILO's Paid Leave Convention (No. 132) also stipulates that 3 weeks of leave must be guaranteed for a one-year working period, and that at least 2 consecutive weeks must be allowed to be used as leave (Articles 3 and 8). Through long-term leave used in return for work, workers can better maintain their mental and physical health and their dignity as human beings through social and cultural activities. Therefore, it is necessary to recognize that guaranteeing long-term leave is more desirable for workers than monetary compensation in lieu of leave. In addition, guaranteeing long-term leave is virtually impossible unless it is systematically implemented through a company's collective leave policy or introducing the employer's obligation to make such a guarantee through the rules of employment. Therefore, a long-term leave guarantee policy is very much needed, along with a vacation savings account system for working hours and annual paid leave.