

Korean labor law: Labor Inspection over Unpaid Wages for Temporary Workers

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I. Introduction

I would like to introduce a recent case regarding claims for unpaid wages against a local council and how it was handled. Since 2016, the local council has been hiring 30 audit assistants for 40 days each year to assist with administrative audits. These assistants worked for KRW 100,000 per day, 5 days a week and 8 hours a day.

An audit assistant sought to claim the weekly holiday allowance and annual paid leave, neither of which had been given, but the local council explained that the assistant would not be regarded as a worker because he was hired for a commissioned position only during the administrative audit period. In response, the audit assistant filed a complaint with the Labor Office on December 9, 2022, stating that the local council owed him unpaid wages. During investigation by the Labor Office on December 28, the local council argued that audit assistants were not workers because they were used for commissioned work only during the administrative audit period in accordance with local ordinances. However, the Labor Office ordered the local council to pay KRW 800,000 in unpaid weekly holiday allowance and unused annual paid leave allowance since the complainant *was* a worker. The local council paid the amount ordered by the Labor Office. However, the complainant requested criminal punishment whether the delayed wages were paid or not. On February 17, 2023, the labor inspector visited the local council and conducted a labor inspection. The labor inspector pointed out 6 violations of the Labor Standards Act during the inspection, and ordered the payment of unpaid wages amounting to KRW 96 million, by March 7, 2023.

Herein, I would like to review the six violations pointed out by the labor inspectors during the inspection, and look carefully into three major disputed issues that came up: (1) the details on unpaid wages, (2) the retroactive scope of unpaid wages, and (3) criminal penalties against the local council.

II. Details of the Corrective Orders from the Labor Inspection

On February 17, 2023, the labor inspector visited the local council and conducted a labor inspection on the tasks of administrative assistants, and issued corrective orders for six items.

1. Violation of the Labor Standards Act, Article 17, Paragraph 2 (Duty to Create a Written Employment Contract)

(1) Corrective order: Labor contracts shall be issued to workers and include specifications on major working conditions such as wages, contractual working hours, weekly holidays, and annual paid leave. However, since the working conditions of 133 audit assistants, including the complainant, were not specified in writing and issued to the assistants, evidence (copies of employment contracts, etc.) that this has been done must be submitted.

(2) Follow-up actions and basis: The local council acknowledged its failure to create and issue appropriate labor contracts and agreed to do so in the future. The assistants were, in fact, temporary workers to assist during specific periods of administrative audit, but, notwithstanding this, the employer shall preserve a register of workers and important documents concerning labor contracts for three years, as prescribed by Presidential Decree. These important documents related to labor contracts are: 1. Labor contracts, 2. Wage ledgers, 3. Documents on wage determination, payment method and basis for wage calculation, 4. Documents on employment, dismissal and termination of employment relations, 6. Documents about leaves, etc. The three-year retention period for these important documents begins with the date of termination of the employment relationship. If the labor contract is not made in writing, the employer is subject to a fine of up to KRW 5 million.¹ In addition, if an employee requests a certificate verifying the period of employment, type of work, position and wages, and other necessary matters even after the worker resigns, the employer shall immediately provide such certificate with the actual facts thereon. Persons who can claim a certificate of employment shall be workers who have continuously worked for 30 days or more. Requests for such certificates can be made by the worker up to 3 years after resignation.²

¹ *Labor Standards Act*, Article 42 (Retention of Contract Documents) and the Enforcement Decree, Article 22 (Subsidized Documents, etc.) and Article 114 (Penalty)

² *Labor Standards Act*, Article 39 (Certificate of Use) and the Enforcement Decree, Article 19 (Requests for Certificate of Employment)

2. Violation of the Labor Standards Act, Article 36 (Settlement of Payment)

(1) Corrective order: The employer shall pay all money and valuables including wages within 14 days from the date of the termination of employment relations, unless there is an agreement otherwise between the parties regarding an extension of the payment period. However, the local council failed to pay a total of KRW 96.1 million to its audit assistants: weekly holiday allowances of KRW 82.2 million (132 persons) and annual paid leave allowance of KRW 10.9 million (109 persons). Proof of payment must be submitted to the Labor Office (e.g. receipt of deposit or payment confirmation).

(2) Follow-up actions and basis: Considering the statute of limitations for overdue wages, the local council paid weekly holiday allowances and annual paid leave allowances to audit assistants who had worked during the past five years. If a worker dies or employment relations are terminated, the employer shall pay wages, compensation, and all other money and goods within 14 days from the occurrence of the reason for payment. However, it is specified that in special circumstances, the period may be extended by agreement between the parties. If money and other valuables are not paid within 14 days after the termination of employment relations, the employer will be subject to imprisonment for up to 3 years or a fine of up to KRW 30 million.³

3. Violation of the Labor Standards Act, Article 48, Paragraph 2 (Pay Slips)

(1) Corrective order: When paying wages, the employer shall issue to the worker a wage statement in writing with matters as prescribed by Presidential Decree, such as the composition of wages, method of calculation, details of deductions, etc. and submit proof (copy of pay slips) to the Labor Office.

(2) Follow-up actions and basis: The local council acknowledged that it had failed to issue pay slips and agreed to correct the situation. The employer must issue wage statements to workers when paying them. This regulation applies even to workplaces with fewer than 5 employees, even if only one part-time worker is employed. In addition to a statement of the total amount, information related to the method of calculating wages must be written so that workers can confirm that they have been paid fairly in accordance with the amount of time they worked

³ *Labor Standards Act*, Article 36 of the (Settlement of Payment) and Article 109 (Punishment)

and the conditions given in the initial contract with the employer. If the employer fails to issue such a wage statement, an administrative fine of up to KRW 5 million won shall be imposed.⁴

4. Violation of the Labor Standards Act, Article 60, Paragraph 2 (Annual Paid Leave)

(1) Corrective order: The employer did not grant annual paid leave to 109 audit assistants, despite the requirement that it grant one day of paid leave for every one month of work to workers who have worked continuously for less than one year. Verification materials must be submitted to the Labor Office.

(2) Follow-up actions and basis: The local council paid annual paid leave allowances to audit assistants who had worked during the past five years in accordance with the statute of limitations for unpaid wages. An employer shall grant one day of paid leave for every month of work to a worker who has worked continuously for less than one year. If such annual paid leave is not granted, the unused leave shall be compensated in money. If the annual paid leave allowance is not paid, the employer shall be subject to imprisonment for up to two years or a fine of up to KRW 20 million.⁵

5. Violation of the Labor Standards Act, Article 70, Paragraph 1 (Restrictions on Night Work and Holiday Work)

(1) Corrective order: When a female worker aged 18 or older is required to work at night or on holidays, worker consent shall be obtained, but this was not done. Evidence needs to be submitted to the Labor Office that such consent was obtained.

(2) Follow-up actions and basis: The local council promised to thoroughly implement this requirement with employment of new workers. Female workers aged 18 or older may be allowed to work at night and on holidays with their prior consent. Violation of this is punishable with imprisonment for up to two years or a fine of up to KRW 20 million.⁶

⁴ *Labor Standards Act*, Article 48, paragraph 2 (Pay Slips) and Article 116 (Administrative Fines)

⁵ *Labor Standards Act*, Article 2 and 5 (Annual Paid Leave) and Article 110 (Punishment)

⁶ *Labor Standards Act*, Article 70 (Restrictions on Night and Holiday Work) and Article 110 (Punishment)

6. Violation of the Minimum Wage Act, Article 11 (Duty to Inform)

(1) Corrective order: The employer shall post the minimum wage in a place where the workers of the business can easily see it, or widely publicize it to workers in other appropriate ways, as prescribed by Presidential Decree. Since the minimum wage notice obligation has been violated, correct the matter and submit verification evidence (posted photos, etc.).

(2) Follow-up actions and basis: The local council posted the required information in a notice on its website. Employers have a duty to notify workers of the minimum wage by posting it in a place where workers can easily see it or by other appropriate means. Matters to be posted include ① the minimum wage of workers subject to application, ② wages that are not included in the minimum wage, ③ scope of workers excluded from application of the minimum wage in the business in accordance with the law, ④ the effective period of the minimum wage. Violation of this duty to inform is punishable with a fine of not more than KRW 1 million.⁷

III. Major Issues Disputed on during the Labor Inspection

1. Details on unpaid wages

(1) Related details: An audit assistant who worked from October 11, 2022 to December 2 (39 days) submitted a claim to the Labor Office for unpaid weekly holiday allowance and annual paid leave allowance. The local council attended an investigation hearing of the Labor Office on December 28, 2022 and submitted to an investigation, and agreed the day after the investigation to pay KRW 800,000 for weekly holiday and annual paid leave allowances. On February 17, 2023, the labor inspector visited the local council and conducted a labor inspection on the employment relationship with audit assistants. The labor inspector found that the local council had not paid weekly holiday allowance or unused annual paid leave allowance during employment of its audit assistants. The Labor Office directed the local council to retroactively pay unpaid wages to all audit assistants employed during the last five years.

(2) Judgment: If a worker hired for hourly or daily wage continues to work, an additional weekly holiday allowance shall be paid. If wages are calculated on a monthly basis, the weekly holiday allowance shall be included in the monthly wage. A related precedent states that the hourly or daily wage system does not

⁷ *Minimum Wage Act*, Article 11 (Duty to Inform) and Article 31 (Administrative Fine)

include weekly holiday pay, which is a statutory allowance under Article 55 of the Labor Standards Act (LSA), paid even if the employees do not actually work on such paid holidays. Therefore, if a worker on the hourly or daily wage system receives a fixed allowance paid for a certain period of time exceeding one month, he or she can claim the difference between the weekly holiday pay calculated based on the newly calculated hourly wage and the previously paid fixed allowance, and this is not a duplicated pay for the weekly holiday pay."⁸

2. Retroactive payment of unpaid wages

(1) Related details: The labor inspector conducted an on-site audit on February 17, and on February 21, 2023, directed the local council to pay an amount equivalent to KRW 96.1 million, calculated as unpaid weekly holiday allowances of KRW 85.2 million (for 132 persons) and unused annual paid leave allowances of KRW 10.9 million (for 109 persons over the past 5 years between 2018 and 2022).

(2) Judgment: “Extinctive prescription” refers to expiration of the period during which an employee with the right to receive compensation may exercise a claim against the employer in the event of a delay in the payment of wages or severance pay. The extinctive prescription for prosecution refers to expiration of the period when prosecution can occur for violating labor law, such as delaying the payment of wages, and begins either on the date the violation occurred or the date a continuing violation ends.

The period before the extinctive prescription kicks in for prosecution of violation of labor-related acts in terms of delayed payment of wages was extended from 3 years to 5 years in 2007. The period before the extinctive prescription for prosecution kicks in shall be deemed to have started 14 days from the date the wages should have been paid or the date the violations terminate.⁹ According to Article 49 of the LSA, the extinctive prescription for a wage bond kicks in after 3 years. However, since the extinctive prescription for prosecution is now 5 years, prosecution for delayed payment of wages will continue to be possible.¹⁰ Thus, an employee may file a claim for unpaid wages for a period of 5 years.

⁸ Supreme Court ruling on Jan. 28, 2010, 2009da74144; see also Supreme Court ruling on Aug. 20, 2014, 2014da6275

⁹ *Criminal Procedure Act*, Article 249, Paragraph 1, Item 5 (Duration of Criminal Prescription) and Article 252 (Starting Time for Statute of Limitations)

¹⁰ Ministry of Employment and Labor Guide, “Guide on Handling Unpaid Wages,” 2016, pp. 31–32.

3. Criminal punishment for late payment of wages

(1) Related content: On December 9, 2022, one audit assistant filed a complaint with the Labor Office that wages were overdue. On December 28, the local council was investigated by the Labor Office, and the next day, it paid KRW 800,000 in unpaid weekly holiday pay and unused annual paid leave. However, the petitioner requested criminal punishment for violation of the LSA, regardless of whether the unpaid wages were paid.

(2) Judgment: Late payment of wages is subject to criminal punishment. Workers who have received unpaid wage want their employer to be punished. However, prosecutors did not prosecute the local council as the employer responsible for the late payment of wages. The reason for this is that the local council's violation of the obligation to pay weekly holiday allowance and unused annual leave allowance was not intentional. A related precedent states, If there are grounds to dispute the existence of the obligation to pay wages and severance pay, it should be seen that there is a considerable reason why the employer did not pay the wages and severance pay. It is difficult to reason that the employer intentionally committed the crime of violating Article 36 of the Labor Standards Act (Settlement of Payment). Whether there are grounds for dispute regarding the existence and scope of the obligation to pay wages and severance pay depends on the reason for the employer's refusal to pay and the basis for the payment obligation, and the organization and scale of the company operated by the employer. Also, all matters such as business purpose, and the existence and scope of payment obligations, such as other wages, should be judged in light of the general circumstances at the time of the dispute. Even if the employer's civil liability for payment is recognized retroactively, it should not be immediately concluded that the employer's violation of Article 36 of the Labor Standards Act is recognized intentionally.¹¹

IV. Conclusion

This case is a good example of the characteristics of labor law. Labor law violations do not end with correction of a single person's violation. Through this example of unpaid wages for daily wage workers, the following characteristics of labor law can be understood. First, even if an administrative agency temporarily

¹¹ Supreme Court ruling on June 28, 2007, 2007do1539.

hires a commissioned worker, if that worker provides work under the management supervision of the employer and receives wages, employee status is recognized. Second, a notice of violation of the LSA is applied to all workers in the same category, and unpaid wages can be claimed retroactively for 5 years, which is the statute of limitations for criminal punishment. Thirdly, even if a violation regarding wages occurs, if there was no intentional violation of the law and there exists a legitimate reason for not paying the wages in question, criminal punishment may be avoided.