Korean labor law: Foreign Companies with Fewer than 5 Employees at their Korean Branch Offices: Application of Korean Labor Law & Related Cases

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I. Introduction

The Labor Standards Act (LSA) applies to all workplaces in which five or more employees are ordinarily employed, while for workplaces which ordinarily employ fewer than five employees only some provisions of the LSA apply. In particular, those provisions that directly affect employee working conditions such as unfair dismissal, eligibility for severance pay (for the period before December 2012), additional allowances for overtime / night work / holiday work, annual leave and others do not apply.

For companies with headquarters located overseas, there has been confusion in determining the number of ordinarily-employed workers, as questions arise about whether to include the employees working at headquarters. Recent administrative interpretations and Labor Commission judgments in cases where unfair dismissal has been claimed show that the number of employees working at the foreign company headquarters will be considered unless the Korean office has independence in their operations. These decisions have greatly impacted the labor market. These decisions have greatly impacted the labor market, because up until recently, only the number of employees working for the foreign company's sales office or liaison office were counted, based upon the principle of "territorial privilege for jurisdiction" that is applicable to the number of employees ordinarily hired in foreign company sales offices.[1]

In this article, I would like to review how the new criteria have been applied in actual practice and present related documents.

II. Related Administrative Interpretation & Labor Commission Judgments

1. Related Administrative Interpretation

Article 11 of the LSA regulates that all provisions of the LSA shall apply to all workplaces in which five or more employees are ordinarily employed, and the number of

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[1] Judgment criteria for determining businesses or workplaces by the LSA (LS-8048, Nov 29, 2007)

1) In cases where the head office, branch office, local office, plant, etc. are located in the same place, they are deemed as one business.

2) In cases where the head office, branch office, local office, plant, etc. are located in different locations, in principle, they are deemed as separate businesses. However, even though their locations are different, if the branch office, local office, plant, etc. cannot be operated independently, the office together with other higher offices shall be deemed as one business.

3) In cases where the following apply to the branch office, local office, plant, etc. separated from the head office, it is regarded as an independent business or workplace: 1) If the business is different according to the Korean Standard Industrial Classification table; 2) If separate collective agreements or rules of employment apply; and 3) If labor management, accounting, etc. are operated independently.

regular employees shall follow the calculation method stipulated by Article 7-2 of the LSA's Enforcement Decree.[2]

The Administrative Interpretation is as follows. [3]

(1) The LSA shall apply in cases where the entity whose head office is located overseas operates a branch office (sales office) that is regarded as the business or workplace, and shall follow the calculation method for the number of workers ordinarily employed according to Article 7-2 of the LSA's Enforcement Decree. This means the number of employees at the head office shall be included. 2) On the other hand, in cases where a foreign company directly hires an employee in the company's home country, and assigns him/her to a branch company and directly controls the personnel and labor management of the person, the LSA does not apply to the person in principle. However, despite this application, if the employee consistently provides labor service ordinarily in Korea, the employer cannot deprive the employee of the protections provided by Article 28 of the Act regarding the Conflict of Laws.

Accordingly, 1) in cases where a foreign company has registered their corporation in Korea, has received a business license and established a local branch, but the business has hired fewer than 5 employees and has no operational independence, all provisions of the LSA (e.g. application for remedy for unfair dismissal, severance pay) normally applying to employees of businesses and workplaces that ordinarily employ five or more workers shall also apply to all employees working for the foreign company's local sales branch.

(2) In cases where the foreign company has established a liaison office designed to support simple communication or market surveys, and used the services of fewer than five employees with whom it had made employment contracts, the LSA shall apply to those employees working in the liaison office, and they are eligible to apply for remedy for unfair dismissal against the parent company.

2. Related Judgments by the Labor Commission

(1) Appeal by SS Global regarding decision of unfair dismissal[4]

"All decisions regarding the employee's employment and dismissal and related processes have been implemented not by SS Global's Seoul office, but by SS Global's head office. In reviewing the aforementioned processes, the Seoul office cannot be seen as an independent business or workplace. Accordingly, even though there are fewer than five employees

[2] LSA Enforcement Ordinance (Article 7-2: Method of Calculating Number of Workers Ordinarily Employed) (1) "The number of workers ordinarily employed" in Article 11 (3) of the LSA shall be calculated by dividing the annual number of workers employed over the one-month period before reasons for the application of the LSA to the business or workplace concerned arise by the total number of operating days during that period.

[3] Administrative Interpretation (Labor Improvement-438, Jan 28, 2014)

[4] National Labor Relations Commission's decision (2013 buhae 417)

working for the Seoul office on average, SS Global's employees working in its overseas head office shall be included when determining whether this business or workplace has five employees or more. Therefore, the protection provisions of the Labor Standards Act against unfair dismissal apply to the employees of the Seoul office." This decision makes it clear that even though a foreign-invested company's sales office is composed of fewer than five employees, all provisions under the LSA shall apply if the sales office is not in fact an independently-operated entity. Therefore, because this employer did not satisfy the legal procedural requirements for managerial dismissal, the dismissal was not accepted as justifiable.

(2) Appeal by Rareetan Computer regarding decision of unfair dismissal[5]

"Rareetan Computer Korea ordinarily employs fewer than five workers but cannot be deemed as an independent workplace because this Korean entity is only the foreign company's domestic liaison office. Therefore, the LSA applies to the Korean office and determination of whether the company ordinarily employs five workers or more shall include the employees at the overseas head office."

III. Application in a Related Case

1. Facts and Questions

State Government A in Australia hired a Korean resident (Person B) on July 11, 2011 and entered into a Service Agreement for the purpose of surveying Korean companies and cultivating a Korean market towards promotion of investment in the Australian state that State Government A represents. Person B has performed her duties under the supervision and direction of the regional office manager located in Japan (responsible for both Korea and Japan), with fixed working hours at a designated workplace and receiving a fixed salary of AUS$ 5,800 every month. During working hours, she was not allowed to engage in other work. On July 1, 2012, her contract was renewed for another year, but from July 1, 2013, she began working without a contract. Since a Korean branch manager was assigned to the Korean office, she reported her performance to that manager and worked under his supervision and direction. In addition, the employment contract she had worked under stated that settlement of any legal conflicts arising between employer and employee would be according to Australian law.

These days the Korean branch manager is pushing Person B to quit. Is Person B protected by the LSA from unfair dismissal? Is Person B entitled to severance pay?

2. Legal Review and Response

There are three points of dispute in the questions. First, when a service contract is entered into, is Person B considered an independent business owner or an employee? Second, is

[5] National Labor Relations Commission's decision (2007 buhae 61)

Person B entitled to apply for remedy for unfair dismissal and also to severance pay, since she was employed by a domestic workplace with fewer than five employees? Third, does the fact that both parties agreed that the law governing any legal disputes would be Australian law have any impact on whether labor disputes should be resolved according to Australian law or Korean law in actual fact?

(1) When a service contract is entered into, is Person B considered an independent business owner or an employee?

The LSA regulates the term, "employee" as "a person who offers work to a business or workplace to earn wages, regardless of the kind of job he/she is engaged in." This means the employee is a person who offers work in a subordinate relationship to an employer to earn wages.[6]

A Supreme Court ruling (Supreme Court 2008 da 27035) adds, "Whether a person is considered an employee under the LSA shall be decided by whether that person offers work to the employer as a subordinate of the employer in a business or workplace to earn wages in actual practice, regardless of whether the type of contract is an employment contract or service agreement under Civil Law." This ruling also outlines seven concrete criteria for determining employee status:

1) Whether the Rules of Employment or service regulations apply to the person in question whose duties are decided by the employer, and whether the person has been supervised or directed during his/her work performance specifically and individually by the employer;
2) Whether his/her working hours, working days and workplaces are designated and restricted by the employer;
3) Whether a third party hired by said person can be a substitute for him/her;
4) Whether said person owns the equipment, raw material, or working tools he/she uses;
5) Whether payment is remuneration for work and whether a basic wage or fixed wage is determined in advance;
6) Whether work provision is continuous and exclusive to the employer; and
7) Whether the person is registered as an employee under the Social Security Insurance Acts or other laws.

In consideration of labor laws, judicial rulings regarding employee status, and a review of the facts aforementioned, Person B should be judged as an employee providing work in a subordinate relationship to the employer to earn wages.

(2) Is Person B entitled to apply for remedy for unfair dismissal and also to severance pay, since she was employed by a domestic workplace with fewer than five employees?

According to the administrative interpretations given earlier herein, although the Korean sales office ordinarily employs fewer than five persons, the actual number of employees shall include the employees at the overseas head office, meaning the Labor Standards Act applies (Labor Standard-438, Jan 28, 2014).

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[6] Lim, Jongryul, 『Labor Law』, 11th edition page 29, Parkyoung Publishing Co.

The Labor Commission has also made the same decision in similar claims of unfair dismissal based upon the principle that calculation of the total number of employees towards determining if the protective provisions of the LSA apply to a local sales office shall also include the employees working at the overseas head office (Case numbers: 2013 buhae 417; and 2007 buhae 61). In this case, the liaison office where Person B provided labor service is a dependent entity, and the Labor Standards Act should apply, regardless of the number of local employees. Therefore, severance pay should be calculated from the date her employment began.

(3) Does the fact that both parties agreed that the law governing any legal disputes would be Australian law have any impact on whether labor disputes should be resolved according to Australian law or Korean law?

Regarding governing law, the Act regarding the Conflict of Law[7] (Article 25) stipulates that the service contract related to the claim shall be under the jurisdiction of the law that both parties clearly or implicitly decided. However, for **Employment Contracts** (Article 28) "it is not possible to ignore the employee protections endowed by compulsory rules of the resident country where the employee provides labor service ordinarily and where the business office exists that hired the employee, regardless of the agreement from both parties on governing law." Labor disputes occurring in Korea come under jurisdiction of Korean labor law due to the principle of "territorial privilege for jurisdiction". Even though both the foreign company and their employees agreed that Australian courts would have jurisdiction over disputes, the Korean Labor Standards Act employee protections are not optional and shall take precedence.

Accordingly, in Person B's case, she entered into a service agreement with an Australian state government and has regularly provided labor service under the employer's direction and supervision to earn money, so she is an employee to whom the Labor Standards Act applies according to Article 28 of the Act regarding the Conflict of Laws.[8]

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[7] In legal relations with foreign entities, this law regulates the principles of international jurisdiction and governing laws.

[8] **The Act regarding the Conflict of Laws, Article 28 (Employment Contracts)**
1) For employment contracts, regardless of the governing law that both parties agreed, it is not possible to ignore the employee protections endowed by compulsory rules of the resident country related to the governing law stipulated by Paragraph 2.
2) If neither party chose the governing law, the employment contract usually follows the law of the country where the employee provides labor service ordinarily. If the employee does n ot provide labor service in a particular country, the governing law shall be the law of the c ountry where the business office exists that hired the employee.
3) With employment contracts, the employee can take legal action against the employer in a country where the employee provides labor service ordinarily or provides labor service ordina rily at the end of employment. If the employee does not or did not provide labor service or dinarily in a particular country, the employee can take legal action against the employer in t he country where the business office that hired him is located.

Ⅳ. Conclusion

It has been thought that persons working for domestic sales or liaison offices for foreign companies who ordinarily employ fewer than five persons at such offices, are not eligible for remedy for unfair dismissal. However, in recent administrative interpretations and related labor cases heard by the Labor Commission, when calculating the number of employees working in domestic sales or liaison offices without managerial or financial independence, the number of employees working at the overseas head office should also be counted, which means that the entire Labor Standards Act will apply.

Recently, my law firm (Kangnam Labor Law Firm) represented the local sales office of a company with head offices in Hong Kong, in a labor case involving an application for remedy for unfair dismissal (Case number: Seoul 2014 buhae 3600). Due to the above-mentioned administrative interpretations and related decisions by the Labor Commission, the company had to settle the case before a judgment hearing was held, paying out a significant amount of money (severance pay for 1.1 years of service and compensation equivalent to 6 months' salary) as the company failed to observe proper dismissal procedures in the course of dismissing the related employee.